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IN THE SUPREME COURT OF FLORIDA

JASON ANDREW SIMPSON,

Appellant,

v.

Case No.: SC18-1238
L.T. No.: 16-2002-CF-11026

STATE OF FLORIDA,

Appellee.

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

APPENDIX TO INITIAL BRIEF OF APPELLANT JASON SIMPSON

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I certify that a copy hereof has been furnished by email on April 29, 2019, to the following:

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

CASE NO.: 16-2002-CF-11026-AXXX-MA

DIVISION: CR-H

STATE OF FLORIDA

v.

JASON ANDREW SIMPSON,
Defendant.
_____/

ORDER ON DEFENDANT'S MOTIONS FOR POSTCONVICTION RELIEF FILED PURSUANT TO RULE 3.851

This cause came before this Court upon "Defendant's Rule 3.851 Motion for Collateral Relief After Death Sentence," filed on October 1, 2010; "Defendant's Amended Initial Rule 3.851 Motion for Collateral Review and Memorandum of Law," filed on November 21, 2011; "Defendant's Second Amended Initial Rule 3.851 Motion for Collateral Review and Memorandum of Law," filed on March 14, 2017; and "Amendments to Defendant's Second Amended Initial Rule 3.851 Motion for Collateral Review," filed on October 30, 2017. Defendant filed all of the above-mentioned Motions pursuant to Florida Rule of Criminal Procedure 3.851.

The State filed its initial "Response Opposing Defendant's Motion for Postconviction Relief" on December 1, 2010; "State's Response Opposing Defendant's Amended Postconviction Motion," on January 20, 2012; "State's Amended Response Opposing Defendant's Amended Postconviction Motion," on January 25, 2012; and on May 19, 2017, the State filed "State's Response to Simpson's Second Amended Motion for Post-Conviction

Relief." Based upon a review of the record, as well as the evidence presented, and after hearing arguments, considering the authorities cited, and being otherwise fully advised, this Court makes the following findings of fact and conclusions of law.

I. Procedural History

On January 29, 2007, a jury found Defendant guilty of two counts of First Degree Murder; one count for the death of Archie Crook, Sr. (hereinafter referred to as "Crook, Sr." or "Big Archie"),[1] and one count for the death of Kimberly Kimbler (hereinafter referred to as "Ms. Kimbler" or "Kimbler"). (R. Vol. V at 791, 792.) This Court excerpted the following factual summary from the opinion of the Supreme Court of Florida:

> In the late evening hours of July 15, 1999, or the early morning hours of July 16, 1999, [Defendant] went to the home of Archie Crook, Sr., and Kimberly Kimbler in Jacksonville, Florida, armed with an ax. [Defendant] entered the home, went into the master bedroom where Crook and Kimbler were sleeping, and proceeded to use the ax to hack Crook and Kimbler to death. [Defendant] inflicted several blows on Crook's face and neck, breaking his jawbone and severing his carotid artery. [Defendant] struck Kimbler, who was between seven and seven and a half months pregnant, in the back of her arm, shattering the bone. [Defendant] then inflicted numerous blows on Kimbler's head and neck, ultimately breaking her neck bone. Defensive wounds found on both victims showed that they attempted to fend off [Defendant].
>
> Detectives located an ax containing Crook and Kimbler's DNA in the backyard of the Crook and Kimbler home. They also located a sweatshirt, a pair of sweatpants, shoes, and a hat in a pile behind an air-conditioning unit on the property of a church located directly behind the home. Kimbler's DNA was found on the sweatshirt, sweatpants, and shoes. Crook's DNA was found on the sweatpants. [Defendant]'s DNA was found on the sweatshirt and sweatpants,[2] and two of [Defendant]'s hairs were collected from the debris sweep of the sweatshirt, sweatpants, and hat. Fibers matching the sweatshirt and sweatpants were found on a barbed-wire fence located right behind the back door of the Crook and Kimbler home. Additionally, [Defendant] confessed to an acquaintance, [George Michael Durrance], that he murdered Crook and Kimbler.
> . . .

[1] Mr. Crook is often referred to as "Big Archie" in the trial transcripts and the instant Motions.
[2] At times in this Order, this Court refers to the sweatshirt and sweatpants collectively as sweat clothes.

The penalty phase commenced on February 6, 2007, at which time both the State and [Defendant] presented evidence. The State presented evidence that [Defendant] was previously arrested for armed robbery, which he admitted committing, and that during the robbery [Defendant] told the victim, "I'll blow your brains out" and not to look at him again or he would "blow his Mother-Fing head off." [Defendant] pleaded guilty in that case to the lesser-included offense of grand theft in exchange for cooperation with law enforcement in other cases.

[Defendant] presented evidence from a psychiatrist who testified that violence was a constant feature in [Defendant]'s home during his developmental period, that he had a genetic predisposition to alcohol and substance abuse, and that he started using alcohol and drugs at age ten. [Defendant]'s alcohol and drug abuse continued until his arrest in this case, at which point he was using $1,000 a week worth of cocaine, plus other drugs and alcohol. The psychiatrist opined that both the inheritance pattern and observation of violence as a youth resulted in a twenty percent increase in the possibility of [Defendant] having a behavior problem or dissocial personality or becoming a criminal. [Defendant] attempted suicide numerous times, beginning when he was young, and several times during his hospitalization for drug abuse, depression, and psychiatric disorders, and during his incarceration.

[Defendant]'s sister testified that she was terribly afraid of [Defendant] as a child because his moods would change, he often ran away from home, and he was threatening. His sister acted as a surrogate mother because his parents were largely absent from his life. Other witnesses presented by [Defendant] testified that he cooperated with law enforcement in other cases despite death threats to himself and his mother, that he was a good worker who was respectful, and that he was knowledgeable of the Bible and very religious.

. . .

We conclude that the record contains competent, substantial evidence to support [Defendant's] convictions for the first-degree murders of Crook and Kimbler. The State presented evidence that [Defendant] confessed to [George Michael Durrance]. This constituted direct evidence of [Defendant's] guilt. Moreover, there was evidence that [Defendant's] DNA was on the sweatshirt and sweatpants that were linked to the murders in that they contained the victims' blood, were found on the church property directly behind Crook's house, and matched material found on the barbed wire fence right outside the back door to the house. [Defendant's] hairs were found among the sweatshirt, sweatpants, and hat. Finally, other circumstantial evidence suggested [Defendant's] guilt, such as: [Defendant's] initial denial of knowing the victims and his immediate departure from the police interview after being asked whether he knew Archie Crook, Sr.; his denial that the clothing, hat, and shoes were his; his freshly injured hand and conflicting story about how he got the injury; and the telephone number of his mother's home, where he stayed, as the last number on the victims' pager.

Simpson v. State, 3 So. 3d 1135, 1138-40, 1147-48 (Fla. 2009).

On February 6, 2007, the jury recommended the death penalty by an 8-4 vote for the death of Archie Crook, Sr., and by a 9-3 vote for the death of Kimberly Kimbler. (R. Vol. V at 820, 821.) The trial court held a separate Spencer[3] hearing on March 8, 2007. (R. Vol. X at 1752-90.) On March 29, 2007, the trial court sentenced Defendant to death for each Count of the Indictment, finding the aggravating circumstances far outweighed the mitigating circumstances. (R. Vol. V at 901-06.) In sentencing Defendant to death for both murders, the trial court found the following aggravating circumstances as to both victims: (1) the murders were committed while Defendant was on felony probation (great weight); (2) Defendant was previously convicted of a violent felony (great weight); (3) the murders were committed while Defendant was engaged in the commission of a burglary (some weight); (4) the murders were especially heinous, atrocious, or cruel ("HAC") (great weight); and (5) the murders were committed in a cold, calculated, and premeditated manner ("CCP") (great weight). (R. Vol. V at 911-20.)

The trial court found no statutory mitigating circumstances, but found sixteen nonstatutory mitigating circumstances.[4] (R. Vol. V at 921-30.) The nonstatutory mitigating circumstances included: (1) cooperation with law enforcement in a drug case (considerable weight); (2) cooperation with law enforcement in 1998 (considerable weight); (3) abused and deprived childhood/exposed to violence in the home (slight weight); (4) exposed to alcoholism in the family (slight weight); (5) unstable home environment (slight weight); (6) addiction to drugs and drug abuse (little weight); (7) completed substance abuse classes (little weight); (8) charitable and humanitarian deeds (little weight); (9) personal accomplishments-schooling (slight weight); (10) artistic talent (little weight); (11) good and respectful son to his parents and

[3] Spencer v. State, 615 So. 2d 688 (Fla. 1993).
[4] Defendant presented eighteen nonstatutory mitigating circumstances, but the trial court only found sixteen proven during the penalty phase. (R. Vol. V at 922-30.)

grandparents (little weight); (12) has family and friends that love him (slight weight); (13) society can be protected by a sentence of life imprisonment (no weight); (14) religious faith (slight weight); (15) appropriate courtroom behavior (slight weight); and (16) suicide attempts (slight weight). (R. Vol. V at 922-30.)

In a decision rendered on February 12, 2009, the Florida Supreme Court, on direct appeal, affirmed Defendant's convictions and sentences. Simpson, 3 So. 3d at 1149. On October 5, 2009, Defendant's convictions and sentences became final through the denial of certiorari by the United States Supreme Court, reported at Simpson v. Florida, 558 U.S. 839 (2009). The instant Motions followed. Defendant raises seven overarching claims, (A)-(G), each comprised of numerous subclaims, thirty-one in total. As detailed above, the State filed numerous responses.

This Court held a case management conference on July 12, 2017, at which time it heard legal argument. On July 14, 2017, after reviewing the pleadings and hearing argument, this Court entered an Order granting Defendant an evidentiary hearing. This Court held an evidentiary hearing on November 6-17, 2017, January 8-12, 2018, and February 5-6, 2018, during which Assistant State Attorneys Mitch Bishop and Rosemary Calhoun represented the State.[5] Sonya Rudenstine, John Mills, Jackie Fulford, and Kevin Robertson appeared as counsel on behalf of Defendant. A transcript of the evidentiary hearing is located in the court file.[6] ("P.C. EH").[7]

[5] The Office of the State Attorney for the Fourth Judicial Circuit recused itself through a letter to the Governor. (P.C. State Ex. 1.) The Governor appointed the Office of the State Attorney for the Seventh Circuit on May 15, 2017.

[6] This Court takes judicial notice of the Record on Appeal ("R. Vol.").

[7] Due to Defendant's request for correction of pagination and minor errors, multiple versions of the evidentiary hearing transcripts appear on CORE. This Court cites to the final, corrected version, filed on June 6, 2018, in this Order.

Defendant's trial counsel, Mr. Refik Eler and Mr. Charles Fletcher testified at the evidentiary hearing. In addition to trial counsel, Defendant called thirty-seven witnesses to testify on his behalf: (1) Mr. Michael Hurst, Defendant's trial investigator; (2) Ms. Melissa Nelson, State Attorney for the Fourth Judicial Circuit; (3) Ms. Monica Jordan, Defendant's postconviction investigator; (4) Mr. Stephen Weinbaum, George Michael Durrance's former attorney; (5) Chief Francis Mackesy, retired Chief of Detectives for the Jacksonville Sheriff's Office ("JSO"); (6) Mr. Mark Caliel, Assistant State Attorney; (7) Agent Mark Brutnell, Florida Department of Law Enforcement ("FDLE"); (8) Ms. Misty McNeish, former girlfriend of Archie Crook, Jr.; (9) Ms. Shannon Elliott; friend of Ms. Kimbler; (10) Ms. Sandy Smith, Crook family friend; (11) Mr. Daniel Ashton, Defendant's postconviction investigator; (12) Mr. Richard Graham, retired Chief of Investigations at JSO; (13) Mr. Terry Thompson, nephew of Big Archie; (14) Mr. Archie Crook, Jr., Big Archie's son; (15) Mr. David Chase, retired JSO Detective; (16) Mr. James McMillian, forensic artist; (17) Ms. Buffy Stagg, senior manager of the felony department at the Duval County Clerk's office; (18) Ms. Rose Devoe; Deputy Chief Administrative Officer with the Duval County Clerk of Court; (19) Lieutenant Lisa Spencer, JSO; (20) Ms. Janice Johnson, expert; (21) Mr. Charles Badger, FDLE analyst; (22) Ms. Karen Martin, Chief of Forensic Services with FDLE in the Tallahassee Regional Crime Laboratory; (23) Dr. Charlotte Word, expert; (24) Ms. Lynne Burley, expert; (25) Ms. Laura Starrett, former Assistant State Attorney; (26) Detective Robert Hinson, JSO; (27) Officer Vic Barker, JSO; (28) Mr. Gary Stucki, retired JSO Detective; (29) Mr. Mark Bialkoski, retired JSO Detective; (30) Mr. Dale Gilbreath, retired JSO Detective and current Office of the State Attorney investigator; (31) Mr. Dwayne Darnell, retired JSO Detective; (32) Mr. Dwain Senterfitt, retired Undersheriff for JSO; (33) Mr. James Williams, JSO; (34) Lieutenant Hugh Eason, JSO;

(35) Agent Charles Bates, former JSO Detective and current FDLE agent; (36) Mr. Alan Chipperfield, Defendant's original trial counsel; and (37) Mr. Gonzalo Andux, Defendant's original trial counsel. In addition to the live witnesses presented, Defendant submitted 197 exhibits.[8] The parties also entered a stipulation on February 6, 2018.[9]

Following the evidentiary hearing, and after Defendant received multiple extensions,[10] the parties filed closing memoranda on May 15, 2018.[11] Defendant filed a closing memorandum that did not follow the numbering of his Rule 3.851 Motion. Instead, Defendant provided a chart, tasking this Court with determining what arguments supported which ground in Defendant's Motion. To the extent this Court did not attribute certain arguments to certain grounds as Defendant may have intended, it is worth noting that Defendant, not this Court, bears the burden to make a clear and coherent closing argument relating back to his postconviction motion.[12]

Further, Defendant's closing memorandum is riddled with new allegations and claims that Defendant did not raise in his underlying Motion, in contravention of Rule 3.851. This Court discusses these new allegations within the appropriate subclaims and *infra* Ground H.

II. Discussion

In the instant Motions, Defendant alleges seven grounds for relief, containing thirty-one subclaims. Many of the grounds are premised upon allegations of ineffective assistance of

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[8] Cited as ("P.C. Def. Ex."). Notably, Defendant numbered all of his exhibits prior to the evidentiary hearing. Defendant did not enter all of the exhibits at the hearing and, thus, the exhibits are not numbered in sequential order. While the Clerk's Exhibit Memorandum of the evidentiary hearing ends with Exhibit 230, there are only 197 exhibits before this Court.

[9] Cited as (Stip.).

[10] Despite Defendant's representations in paragraph 4 of his "Second Motion to Extend Deadline for Closing Argument," filed on May 7, 2018, the defense had access to the corrected transcripts of the evidentiary hearing since February 23, 2018. In fact, defense counsel e-mailed all parties with the corrected version of the transcripts on said date.

[11] This Court cites to the closing memoranda as follows: (Def. Closing Mem.), (State Closing Mem.).

[12] For example, Defendant put in the chart that subclaim 22 is discussed in section X of his closing memorandum. However, this Court found no reference to the cheek swabs discussed in subclaim 22 within section X.

counsel. To prevail on a claim of ineffective assistance of counsel, the defendant must show: (1) counsel's performance was outside the wide range of reasonable professional assistance, and (2) counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995). To make out a claim for relief, a defendant must demonstrate both ineffectiveness and prejudice. Strickland, 466 U.S. at 687; Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

GUILT PHASE

A. Defendant's Conviction Rests on the Demonstrably False and Now Recanted Testimony of George Michael Durrance

In Ground A, Defendant contends his conviction rests on the recanted testimony of George Michael Durrance (hereinafter referred to as "Durrance") and, as a result, he is entitled to relief. Defendant maintains that without the testimony of Durrance, who testified that during a conversation Defendant confessed to committing the homicide, the State's case would have been entirely circumstantial. Defendant asserts the only circumstantial evidence in this case that could be described as inculpatory were the sweat clothes, on which another person's DNA was also deposited. Thus, without the confession, Defendant maintains the clothes were no more probative of Defendant committing the murders than the other DNA contributor. To support this Ground, Defendant presents four separate allegations that this Court addresses below.

1. The State Knew Durrance's Testimony was False- Giglio[13]/Brady[14]

Defendant maintains the State knew Durrance's testimony regarding Defendant's confession was false but still presented him as a witness during Defendant's trial. To support this contention, Defendant cites to a June 25, 2006 letter, written by Assistant State Attorney Laura Starrett (hereinafter referred to as "Starrett") to State Attorney Harry Shorstein (hereinafter

[13] Giglio v. United States, 405 U.S. 150 (1972).
[14] Brady v. Maryland, 373 U.S. 83 (1963).

referred to as "Shorstein"), and a draft letter written by Sheriff Nathaniel Glover (hereinafter referred to as "Glover") to Circuit Court Judge Greg McCaulie (hereinafter referred to as "Judge McCaulie" or "sentencing court"), dated November 2001. (P.C. Def. Exs. 136; 137.) In the alternative, Defendant argues the State withheld Brady material by failing to disclose the letters from Starrett and Glover. In his closing memorandum, Defendant adds a flurry of allegations not raised in the underlying motion, which this Court discusses in the relevant claims below. (Def. Closing Mem. at 14, 20, 21-23, 24-28.)

Giglio (Raised in the instant Motion)

Defendant maintains the State knew Durrance lied based on the factual problems in Defendant's confession. Specifically, Defendant cites to several issues with Durrance's alleged testimony: (1) it is impossible for one person to have committed this crime without more blood on the clothing; (2) it was unlikely that Defendant would just happen to find an axe in the backyard; and (3) the manner in which Defendant entered the home (through the kitchen window).

To support Defendant's theory that the State knew Durrance was lying, he cites to the letters written by Starrett and Glover. In Starrett's letter, she urged Shorstein to forbid the Assistant State Attorney prosecuting Defendant, Mark Caliel (hereinafter referred to as "Caliel"), from using Durrance as a witness at Defendant's trial. (P.C. Def. Ex. 136.) To support her request, Starrett stated Caliel admitted he did not believe Durrance's claim that he did not have a role in the murders and that Caliel felt Durrance was actually behind the homicide. (P.C. Def. Ex. 136.) Further, in a draft letter to Judge McCaulie, Glover addressed Durrance's assistance to law enforcement as a means to reduce Durrance's sentence for his drug trafficking conviction, and indicated Durrance lacked credibility. (P.C. Def. Ex. 137.) Defendant also contends

Durrance's testimony that the State did not promise any benefit or exchange for his testimony was false, as Defendant maintains letters discovered in the postconviction stage reveal Caliel's assurances to Durrance.

To succeed on a Giglio claim, the defendant must establish: (1) the prosecutor or witness gave false testimony; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Marshall v. State, 854 So. 2d 1235, 1251-52 (Fla. 2003). False testimony is material if there is a reasonable likelihood that it could have affected the jury's verdict. Ventura v. State, 794 So. 2d 553, 563 (Fla. 2001). To demonstrate willfully offered perjury, a defendant must show more than mere inconsistencies due to memory lapse, unintentional error, or oversight. Maharaj v. State, 778 So. 2d 944, 956 (Fla. 2000). "In the Giglio context, the suggestion that a statement may have been false is simply insufficient; the defendant must conclusively show that the statement was actually false." Maharaj v. Sec'y for Dep't of Corr., 432 F.3d 1292, 1313 (11th Cir. 2005).

Durrance's Trial Testimony: Details of Confession

Law enforcement interviewed Durrance on October 1, 2001, to obtain his account of Defendant's confession. (P.C. Def. Ex. 56.) This interview was not recorded or officially transcribed; instead, an officer took handwritten notes. (P.C. Def. Ex. 56.) According to the notes of Durrance's interview, Defendant stood in the victims' backyard on the night of the murders and smoked cigarettes prior to entering the residence. (P.C. Def. Ex. 56 at 2, 3.) Durrance further stated Defendant found the axe in the backyard and entered through the kitchen window. (P.C. Def. Ex. 56 at 2, 3.) According to Durrance's disclosure, the house was dark and Defendant found the victims asleep. (P.C. Def. Ex. 56 at 2, 3.) Defendant struck Big Archie first and, as Kimbler tried to flee, struck her multiple times in the face and neck

area. (P.C. Def. Ex. 56 at 2, 3.) Defendant later told Durrance that Big Archie was going to pay to have Durrance killed. (P.C. Def. Ex. 56 at 2.) In an interview with Caliel in October of 2002, nearly a year after his first disclosure, Durrance's details of the crime were largely consistent with his 2001 interview. (P.C. Def. Ex. 65 at 6-7.) In December 2004, Refik Eler (hereinafter referred to as "Eler"), Defendant's trial counsel, took Durrance's deposition. (P.C. Def. Ex. 186.) Again, Durrance recounted details surrounding Defendant's confession. (P.C. Def. Ex. 186 at 29, 42, 45-48, 52, 53, 60, 66.) Durrance acknowledged in his deposition the timeline of events had faded from his memory over time, as the conversations with Defendant occurred years earlier. (P.C. Def. Ex. 186 at 72.)

Durrance's testimony at trial regarding Defendant's confession was largely consistent with the notes from Durrance's interviews and his 2004 deposition. (R. Vol. XV at 871-83.) Durrance testified he spoke to Defendant on several occasions, before and after the murders. (R. Vol. XV at 871-83.) Durrance testified at trial he believed Defendant may have gone through a window, but acknowledged it was possible he misunderstood Defendant. (R. Vol. XV at 879, 908.) Durrance further testified Defendant stated he attacked Big Archie first and, when Kimbler tried to run, he struck her with the axe. (R. Vol. XV at 879.)

During his evidentiary hearing testimony, Caliel indicated that Durrance's account of Defendant's confession carried a significant amount of weight not only for the specific details about the murder victims, but also the timing of Durrance's disclosure. (P.C. EH at 940, 976-77, 1086.) Caliel stated,

> I thought the strength in our case was the combination of DNA evidence along with the timing of Mr. Durrance's disclosure, which was before the DNA had been tested. That there was a physical crime scene that led us, piece by piece, the axe and then the barbed wire fencing and then the actual clothing that had the victim's blood on it and the testing of that, that contained the defendant's DNA was a pivotal piece of evidence. And you combine that with Mr. Durrance's disclosure which

> was before those clothes had been tested and nobody knew that there was DNA on those clothing, I thought that combination was the most damning evidence against Mr. Simpson.

(P.C. EH at 940.) Indeed, once FDLE tested Defendant's DNA against the clothing behind the church, it found a full profile match of Defendant's DNA on the sweatshirt and the victims' DNA on the clothing. (P.C. EH at 940, 952, 978.) As to minor inconsistencies in Durrance's account, Caliel stated that did not concern him, as the investigation spanned nearly a decade and it is common for witnesses to have inconsistencies in testimony. (P.C. EH at 1086.)

Defendant's attack on the minor inconsistencies in Durrance's testimony are not sufficient to support a Giglio claim. First, Defendant has failed to prove Durrance's testimony was false or that the State knew it to be false; specifically as to whether one person committed the crime or where Defendant found the axe. Giglio requires Defendant to show that the statements are indeed false, not simply that the statement may have been false. Maharaj, 432 F.3d at 1313.

As to the remaining allegation, this Court finds any inconsistency with the exact method of entry into the victims' home is not material when considering the information as a whole. See generally Floyd v. State, 18 So. 3d 432, 450 (Fla. 2009) ("Indeed, an individual would not be expected to use identical words when recounting the same event on two separate occasions."). Durrance knew both Big Archie and Kimbler suffered blows from an axe, and that Defendant struck Big Archie first. This is consistent with the positioning of Big Archie's body at the crime scene. (P.C. Def. Ex. 203 at 8-9.) The positioning of Kimbler's body indicates she attempted to get out of bed at the time the perpetrator hit her, also consistent with Durrance's account of Defendant's confession. (P.C. Def. Ex. 203 at 2, 5, 7.) Caliel testified not all details in Durrance's disclosure of Defendant's confession may be completely consistent with the crime

scene as Defendant may have altered some things he told Durrance or Durrance misunderstood what Defendant said. (P.C. EH at 975-77.) However, as discussed throughout this Ground, the important details are consistent with the condition of the crime scene. Durrance's testimony of the crime scene details is consistent with the evidence and corroborated by Defendant's DNA on the clothing. It is clear from Caliel's testimony at the evidentiary hearing, and the fact that he prosecuted Defendant, that he believed Defendant was responsible for the instant offenses and that Durrance's testimony was truthful.

As to the letters from Starrett and Glover, this Court does not find these documents support a Giglio allegation. First and foremost, the letters express the personal opinions of certain individuals with regard to Durrance's credibility. As mentioned above, Caliel felt that in this individual circumstance, Durrance's account of the confession was credible and carried weight based on the timing of the disclosure, the subsequent results of the DNA testing, and the details of the crime. (P.C. EH at 940, 976-77, 1086.) When presented with another individual and his alleged account of Defendant's confession, the State chose not to use him for potential credibility reasons and issues with his account of the crime. (P.C. EH at 1087-92.) However, Caliel chose to present Durrance because other evidence from the scene of the crime corroborated his testimony. (P.C. EH at 1086.)

Contrary to Defendant's allegations in the instant Motions, there was no internal debate at the Office of the State Attorney as to whether Durrance should testify. At the time Starrett wrote her letter, she was no longer an assistant state attorney; instead, she wrote the letter about her personal feelings in her capacity as an individual citizen. (P.C. EH at 2290, 2309, 2312.) With regard to Starrett's comments about him in the letter, Caliel stated,

> [O]ut of courtesy I told her that Mr. Durrrance was back and he was a witness and would be testifying in Simpson. She became agitated and upset about that. She did

> not want Mr. Durrance getting any benefit because she believed earnestly in his prosecution that his sentence was appropriate. I could tell she was upset about it and I told her, Laura, I'm sorry, but his testimony was corroborated by the DNA evidence, I anticipate on using him as a witness. I can only assume that is what prompted her to write this letter. . . . The only independent recollection about the letter before trial was [Assistant State Attorney] George Bateh asked me did I have a conversation with Laura Starrett. I expressed to him that I told her [Durrance] was back and was testifying, that she became upset. We discussed that and both of us knew that we were presenting the evidence properly and proceeded.

(P.C. EH at 1084-85.) It is evident Caliel used Durrance as a witness based on the fact that the crime scene and DNA testing supported Durrance's account of Defendant's confession. Indeed, Starrett acknowledged during her testimony at the evidentiary hearing Caliel never affirmatively stated that he did not believe Durrance during the conversation that prompted her letter. (P.C. EH at 2322.) Accordingly, this Court does not believe the letter from Starrett supports an allegation of Giglio.

Glover's letter also fails to meet the threshold of Giglio. While Glover wrote Durrance had "zero credibility" with law enforcement due to his long criminal record, the letter also stated Durrance provided information to JSO that was "accurate and useful." (P.C. Def. Ex. 137.) Again, this letter neither specifically mentions the Crook, Sr. and Kimbler murders, nor does it express anything more than the personal opinion of Glover, who wrote the letter with regard to Durrance's cooperation in another case several years before Defendant's trial. (P.C. Def. Ex. 137.) This Court finds this letter does not show Durrance's testimony was false or that the State knew the testimony was false at the time it was presented to the jury. Defendant is not entitled to relief

Durrance's Alleged Benefit: Motion to Reduce Sentence and Prison Accommodations

Defendant alleges Durrance lied during his testimony about receiving a benefit in exchange for his testimony. Defendant maintains Caliel promised Durrance he would

recommend a sentence reduction in Durrance's drug trafficking case and that no one from law enforcement would oppose the reduction. Defendant cites to a letter from Durrance to Caliel, dated September 17, 2007, to support these contentions. Defendant concedes that the jury heard about the motion to reduce sentence, but maintains the jury never saw there were multiple, unopposed motions to continue that were directly tied to Defendant's trial schedule.

During direct examination, the jury heard that Durrance received a sentence of thirty-two years with a fifteen-year minimum mandatory after his trial in 2001. (R. Vol. XV at 864, 893.) Durrance testified the State never offered him a deal in his underlying trafficking case, forcing him to go to trial where the jury convicted him. (R. Vol. XV at 886-87.) Durrance stated he filed a motion for a sentence reduction in the trafficking case based upon his cooperation in Defendant's trial, with said motions still pending at the time of Defendant's trial. (R. Vol. XV at 889-90.) Indeed, Durrance admitted that he was not providing his testimony for altruistic reasons but, instead, hoped for a sentence reduction. (R. Vol. XV at 892.) Further, the jury heard about Durrance's criminal record. (R. Vol. XV at 863.)

In opening statements, Eler told the jury they would hear about the motions to correct sentence, and that Durrance filed motions in 2002, 2003, and 2004. (R. Vol. XIII at 520.) During cross-examination, Charles Fletcher (hereinafter referred to as "Fletcher"), Defendant's trial counsel, elicited testimony from Durrance that he would do "just about anything" to get out of prison. (R. Vol. XV at 898.) Fletcher asked Durrance about his history of filing for postconviction relief, during which Durrance acknowledged that he filed six motions to reduce sentence. (R. Vol. XV at 930.) Fletcher brought to the jury's attention through his questioning of Durrance that the motions were unopposed, and that Durrance continued to file motions as he cooperated in Defendant's case and while he waited for Defendant's trial to start. (R. Vol. XV at

930.) Notably, Durrance stated he hoped the jury would convict Defendant, and testified he knew Defendant informed on him to the police, leading to Durrance's arrest and subsequent conviction. (R. Vol. XV at 884-85, 930.) Counsel highlighted during cross-examination that, indeed, Durrance knew Defendant had been an informant on Durrance's wiretap. (R. Vol. XV at 913-16.)

Caliel testified at the evidentiary hearing that Mr. Oliver Barksdale (hereinafter referred to as "Barksdale"), Durrance's attorney, alerted Caliel that he had filed a Motion to Reduce Sentence in Durrance's trafficking case. (P.C. EH at 1008.) Caliel stated when he spoke to Barksdale, he indicated he would be willing to testify as a fact witness for Durrance and would tell the court of Durrance's cooperation in Defendant's case. (P.C. EH at 1008, 1010, 1013-14.) Caliel testified he did not offer to make any recommendations to the court, only that he would appear as a fact witness, which is commonplace in those types of proceedings. (P.C. EH at 1008, 1009-10.)

Defendant maintains in his Motion that a September 2007 letter shows Caliel made assurances to Durrance that he would recommend a sentence reduction and that no one from law enforcement would appear to oppose the reduction. (P.C. Def. Ex. 110.) Upon review of this letter, however, this Court finds no such assurances. Instead, this letter is merely a request from Durrance to be transferred to a different correctional institution. (P.C. Def. Ex. 110.) There is no mention of Defendant's trial and, in fact, Durrance acknowledges Caliel may be unable or unwilling to facilitate the move when Durrance mentions writing the Inspector General's Office. (P.C. Def. Ex. 110.) Upon a review of Durrance's Department of Corrections' records, the only transfer to any of the prisons mentioned in Durrance's September 2007 letter occurred in November 2002. (P.C. Def. Ex. 141.) Defendant also cites to Detective Dale Gilbreath's

(hereinafter referred to as " Detective Gilbreath") supplemental report that indicates he visited Durrance on October 17, 2002, and during that visit, Durrance asked Detective Gilbreath to transfer him closer to Duval County. (P.C. Def. Ex. 65 at 7.) Detective Gilbreath's report indicates he alerted Caliel of this request. (P.C. Def. Ex. 65.)

Caliel testified he did not have an independent recollection of this letter. (P.C. EH at 1094-95.) Caliel stated, however, that he did have Durrance moved closer to Duval County at certain times because the prosecution needed Durrance close for trial purposes. (P.C. EH at 1007, 1093.) Thus, anytime Caliel moved Durrance closer to Duval County was for trial purposes, as he stated pretrial and during the evidentiary hearing, not the alleged benefit Defendant now contends. (R. Vol. VI at 1075-76.)

This Court finds none of Durrance's testimony regarding any alleged benefits from the State to be false. Durrance candidly testified at Defendant's trial about his pending motions to reduce sentence and the fact that he hoped for some benefit as a result of his cooperation. Further, the jury heard that the State did not oppose the motions to reduce sentence. As to Caliel's potential future testimony about Durrance's cooperation, Defendant fails to present any evidence of an agreement between the State and Durrance. Instead, the only information presented to this Court is the fact that Caliel offered to tell the court about any cooperation on the part of Durrance in Defendant's trial. This information does not render Durrance's testimony false within the purview of Giglio. See Wyatt v. State, 71 So. 3d 86, 106, 107 (Fla. 2011) (concluding "prosecutor Morgan wrote a letter to federal authorities stating that McCoombs had assisted the State in Wyatt's cases and recommending sentence mitigation for McCoombs. However, this was not based on any prior agreement," and concluding "[b]ecause the record is devoid of evidence to support his contention that Morgan's letter or post-trial assistance rendered

McCoombs' trial testimony false or misleading in any way, Wyatt has failed to demonstrate that he is entitled to relief under Giglio.").

This Court finds Defendant has failed to prove Durrance's testimony regarding any benefits from the State was false. Accordingly, Defendant is not entitled to relief.

Durrance's Alleged Benefit: 2001 Sentencing Hearing

Defendant contends Durrance received a benefit from the State at his 2001 sentencing hearing because at a sidebar conference, the parties informed the sentencing court about his cooperation in the Crook, Sr. and Kimbler murder investigation. Defendant maintains this renders Durrance's trial testimony false. Defendant alleges the benefit was twofold; first, Starrett reduced her recommendation from life to forty-five years; and second, Judge McCaulie reduced Durrance's sentence to thirty-two years.

It is clear from the above evidentiary hearing and trial testimony that Durrance hoped for a benefit in the underlying trafficking case, but the State did not actually make any deal with Durrance that would equate to a benefit at the 2001 sentencing. Steven J. Weinbaum (hereinafter referred to as "Weinbaum"), Durrance's attorney in the trafficking case, acknowledged the State did not offer Durrance any negotiated disposition prior to his sentencing in 2001, but advised his client to cooperate in the hopes he would receive potential consideration in his trafficking case. (P.C. EH at 683, 711-12.) While both Starrett and Weinbaum testified they discussed the Crook, Sr. and Kimbler murder investigation with Judge McCaulie at sidebar, their testimonies indicate it was only a part of a much larger conversation about Durrance's cooperation in numerous homicides. (P.C. EH at 690, 708, 2303, 2318.) Weinbaum testified that while the sidebar was lengthy, the large majority of it involved Judge McCaulie reading Glover's letter and questioning the attorneys about its contents. (P.C. EH at 690.)

The State made a sentence recommendation that was less than what it previously indicated in Durrance's case; however, Starrett testified Durrance's assistance in locating the body of a missing person, Keith Cauley (hereinafter referred to as "Cauley"), was the thrust of his cooperation and the main reason for her request of forty-five years instead of life in prison. (P.C. EH at 2303, 2318-19.) This Court does not believe a State's sentence recommendation amounts to a benefit as Gilgio simply does not support that conclusion. Tarver v. Hopper, 169 F.3d 710, 717 (11th Cir. 1999) ("Some promises, agreements, or understandings do not need to be disclosed, because they are too ambiguous, or too loose or are of too marginal a benefit to the witness to count."). Durrance never reached a definitive agreement with the State for his cooperation with the Cauley murder, as well as numerous other homicides. Ultimately, the sentencing court made the decision as to Durrance's sentence. Therefore, this Court finds Durrance did not receive a benefit from the State at his 2001 sentencing hearing, as a sentence recommendation is not a definitive sentence or agreement with the State. Even assuming *arguendo* the State's recommendation could be seen as a benefit, the State based its sentencing recommendation on Durrance's cooperation in the Cauley investigation.

Further, it is clear that Weinbaum advised his client to cooperate with law enforcement in an effort to help reduce a possible life sentence. While it is evident from the testimony of Starrett and Weinbaum that they discussed the Crook, Sr. and Kimbler murders at sidebar during Durrance's sentencing hearing, it is clear from Glover's letter along with Starrett's evidentiary hearing testimony that Durrance's cooperation in the Cauley investigation was front and center at the 2001 sentencing hearing. (P.C. EH at 2303, 2318-19; P.C. Def. Ex. 137.) This Court finds any discussion of Big Archie and Kimbler was relatively minor and Durrance did not receive a benefit from his cooperation in that case at the time of his 2001 sentencing. See Tarver, 169

F.3d at 717 ("The [Giglio] rule does not address nor require the disclosure of all factors which may motivate a witness to cooperate. The simple belief by a defense attorney that his client may be in a better position to negotiate a reduced penalty . . . is not an agreement within the purview of Giglio.").

As to any alleged benefit from Judge McCaulie, both Starrett and Weinbaum declined to speculate what Judge McCaulie considered in giving Durrance his sentence of thirty-two years. (P.C. EH at 709, 2305.) While they had their personal opinions on what prompted the sentence, they acknowledged the ultimate decision rested with the sentencing court. (P.C. EH at 709, 2320.) This Court believes it is too speculative to conclude the reasons for Judge McCaulie's sentence, as Weinbaum presented a myriad of reasons for a lesser sentence apart from Durrance's cooperation with law enforcement, which Judge McCaulie discussed at sentencing. (P.C. Def. Ex. 130 at 44-50, 53-56.) Thus, this Court declines to find a benefit on the part of the sentencing court.

For the above-discussed reasons, this Court finds Defendant has failed to prove Durrance's trial testimony regarding any benefits from the State was false. Accordingly, Defendant is not entitled to relief.

Notably, in his closing memorandum, Defendant raises a new allegation of ineffective assistance of counsel related to counsel's failure to depose Starrett and Wienbaum.[15] (Def. Closing Mem. at 14.) Defendant alleges counsel should have deposed these individuals to learn about the off-the-record conversation during Durrance's sentencing. (Def. Closing Mem. at 14.) This Court addresses this allegation *infra* Ground H.

[15] The only claim of ineffective assistance of counsel for failure to depose in Defendant's Rule 3.851 Motion relates to the medical examiner, as discussed in Ground C(11).

Remaining Allegations from Motion

As discussed in greater detail *infra* A(3), Durrance did not testify at the evidentiary hearing held in this matter. Thus, Defendant's allegations that Durrance admitted he fabricated Defendant's confession or that Caliel assured him the State would support his Motion to Reduce Sentence are without evidentiary support. Further, the alleged conversation between Durrance and Caliel detailed in Defendant's Rule 3.851 Motion is unsupported by any evidence presented during the three-week evidentiary hearing. (Def. 2d Am. Mot. at 26-27.) Accordingly, this Court finds Defendant is not entitled to relief.

***Giglio* (Newly Raised Allegation at Evidentiary Hearing)**

Defendant alleged during the evidentiary hearing that Durrance received assistance from JSO in his forfeiture case as a benefit for his cooperation in Defendant's case. (P.C. EH at 696-99.) Defendant presented a letter Durrance wrote to Detective Gilbreath to support this allegation. (P.C. Def. Ex. 131.)

Initially, Defendant did not raise this allegation in his underlying Rule 3.851 Motion. As such, this Court will not permit Defendant to amend his Rule 3.851 Motion through questions at the evidentiary hearing. To allow otherwise permits Defendant to circumvent Rule 3.851 and abuse the postconviction process. Thus, this allegation is not properly before this Court. Even if this Court were to consider this claim, postconviction counsel elicited the opinion of Weinbaum as to what Durrance's letter meant. (P.C. EH at 696-99.) Weinbaum's personal opinion regarding this letter carries no weight with this Court. Detective Gilbreath did not testify about the forfeiture proceedings against Durrance or the undated letter Durrance wrote to him, nor did Durrance testify to that information. As Defendant fails to provide any evidentiary support regarding the letter to show Durrance's statements at trial were false, this Court finds Defendant

is not entitled to relief.

Brady (Raised in the instant Motion)

Defendant argues the State withheld Brady material by failing to disclose the letters from Starrett and Glover, indicating that neither the State Attorney's Office nor JSO believed Durrance was credible. Defendant avers this material was exculpatory and would have led the defense to call both Starrett and Glover as witnesses to confirm their mistrust of Durrance.

Brady requires the State to "disclose material information within its possession or control that is favorable to the defense." Riechmann v. State, 966 So. 2d 298, 307-08 (Fla. 2007). To establish a Brady claim, a defendant has the burden to show: (1) favorable evidence, either exculpatory or impeaching; (2) which was willfully or inadvertently suppressed by the State; and (3) because the evidence was material, the defendant suffered prejudice. Id.

Initially, as to the letter from Starrett, this Court finds no Brady obligation. It is a letter from a private citizen, expressing a personal opinion about a witness. Starrett admitted during the evidentiary hearing that she knew nothing about Defendant's case or Durrance's assistance in this case aside from that disclosed by Caliel. (P.C. EH at 2317, 2322-23.) Even assuming *arguendo* that she was still an assistant state attorney at the time she wrote the letter, it would not have been Brady material as Defendant now suggests. See Duest v. State, 12 So. 3d 734, 745-46 (Fla. 2009) (concluding internal office memorandum concerning "prosecutor's views on the strength of the case were no more than that: the prosecutor's views on the strength of the evidence.").

As to the letter from Glover, this Court finds no Brady violation. While Defendant zeros in on the statement that Durrance "lacks all credibility" with law enforcement as the potential impeachment evidence, this letter also acknowledges Durrance's cooperation in a number of

homicides and that some of his information was "accurate and useful." (P.C. Def. Ex. 137.) Further, the Crook, Sr. and Kimbler murders are not specifically mentioned in this letter, as they were not the focus or reason for same. Indeed, Durrance's cooperation in the Cauley investigation prompted the letter. As such, Defendant cannot establish the first prong of Brady.

Even assuming the letters were material and willfully suppressed by the State, this Court does not find Defendant or his defense suffered any prejudice from the lack of these letters. The jury heard about Durrance's criminal history, potential vendetta against Defendant because Defendant informed on him to law enforcement, and the fact that he was hoping to get a sentence reduction for cooperation in Defendant's case. (R. Vol. XV at 863, 884-85, 889, 892, 930.) Because Defendant has failed to establish the prongs of Brady, this Court finds he is not entitled to relief.

Brady (Raised at Evidentiary Hearing/Closing Memorandum)

Defendant alleges in his closing memorandum additional Brady allegations that he did not raise in the underlying Motion. As discussed *infra* Ground H, Rule 3.851 does not permit such amendments. However, in an abundance of caution, this Court will briefly address the Brady allegations related to this Ground, raised for the first time in the closing memorandum, because Defendant states he received the information that forms the basis of these allegations during the evidentiary hearing.

Disclose Law Enforcement's Investigation of Durrance for Cauley and Schmedes

Defendant maintains the State withheld information that Durrance was under investigation for two other homicides and had "essentially confessed" to being an accessory-after-the-fact in one of those homicides. (Def. Closing Mem. at 21-23.) Defendant contends that had counsel been aware of this, he would have used this information to impeach Durrance. (Def.

Closing Mem. at 21-23.)

This Court finds Defendant fails to meet the elements of Brady. Under Brady, nondisclosure of impeachment evidence is material if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. Doorbal v. State, 983 So. 2d 464, 481 (Fla. 2008). In this case, this Court does not believe that the proposed impeachment evidence would have resulted in a different outcome at trial. The jury was well aware of Durrance's motives for testifying in this case and his biases. (R. Vol. XV at 862-945); see Mansfield v. State, 911 So. 2d 1160, 1177–78 (Fla. 2005) ("We find no error in the trial court's determination that extra charges pending against Randall would not have made Randall sufficiently less credible in the jury's eyes than he already was . . . ."). Moreover, even assuming this impeachment evidence became known, there was still overwhelming evidence to convict Defendant. Simpson, 3 So. 3d at 1147-48. Accordingly, this Court finds Defendant is not entitled to relief.

Durrance's Diagram of Victims' House

Defendant avers the State withheld a diagram Durrance drew of the victims' home, allegedly made during an interview in which Durrance described Defendant's confession. (Def. Closing Mem. at 24-25.) Defendant alleges this diagram would have been "extremely relevant" to impeach Durrance's testimony that Defendant entered the victims' home through the laundry room window and then a kitchen window. (Def. Closing Mem. at 24-25.)

At the evidentiary hearing, Defendant presented Hugh A. Eason's (hereinafter referred to as "Lieutenant Eason") report from the Cauley investigation, disclosed to postconviction counsel during the evidentiary hearing, which documents that Durrance drew a diagram during an interview on October 1, 2001. (P.C. Def. Ex. 99 at 11-12.) Lieutenant Eason could not recall

this interview during his testimony at the evidentiary hearing. (P.C. EH at 3084-85.) Lieutenant Eason did state he was working on the Cauley murder investigation at the time of this interview and would not have put this diagram in the Cauley file. (P.C. EH at 3087-88.) Defendant also presented Detective Mark Bialkoski's (hereinafter referred to as "Detective Bialkoski") report to show there is no mention of a diagram. (P.C. Def. Ex. 59 at 2-3.)

This Court finds Defendant's allegations to consist of pure speculation. Defendant assumes, with no evidence, that this diagram would have provided counsel with impeachment evidence for his cross-examination of Durrance. See Overton v. State, 976 So. 2d 536, 562 (Fla. 2007) (holding speculation is insufficient to establish Brady violation); see also Hampton v. State, 219 So. 3d 760, 770 (Fla. 2017) ("Mere speculation is not sufficient to form the basis for postconviction relief."); Maharaj, 778 So. 2d at 951 ("Postconviction relief cannot be based on speculation or possibility."). Thus, Defendant cannot overcome the first prong of Brady. See Riechmann, 966 So. 2d at 307-08. Moreover, counsel was well aware of Durrance's account of Defendant's confession prior to trial as he attempted to impeach Durrance regarding his statements about the window, thereby defeating any potential prejudice under Brady. (R. Vol. XV at 903-08); see id. Further, during trial, Eler cross-examined the evidence technician about the window and reviewed the photographs to show the glasses blocking entry through that space. (R. Vol. XIV at 620-21.) As such, Defendant is not entitled to relief.

Richard Summa's Facsimile

Defendant contends the State failed to disclose a February 5, 2003 facsimile from Durrance's appellate attorney, Richard Summa (hereinafter referred to as "Summa"), who informed the State that Durrance was asserting his Fifth Amendment rights and instructed the

State not to contact his client.[16] (P.C. Def. Ex. 231; Def. Closing Mem. at 25-28.) Defendant alleges that despite receiving this facsimile, Caliel went to Durrance and persuaded him it was "safe for him to waive that privilege." (Def. Closing Mem. at 25.) Defendant contends Caliel undoubtedly entered into an informal immunity agreement with Durrance during the meeting on February 5, 2003, based upon Durrance's decision to testify in Defendant's case. (Def. Closing Mem. at 28.) Defendant avers that had counsel been aware of this facsimile, it would have been "powerful evidence" to discredit the State's reliance on Durrance's testimony. (Def. Closing Mem. at 28.)

Initially, this Court finds the State did not withhold this information from the defense. It is clear from the facsimile that the Office of the Public Defender, specifically Alan Chipperfield (hereinafter referred to as "Chipperfield"), Defendant's original attorney, scheduled the deposition of Durrance. (P.C. Def. Ex. 231.) This facsimile indicates that Summa informed Chipperfield that Durrance would be exercising his Fifth Amendment rights at the deposition, and that the deposition would be cancelled. (P.C. Def. Ex. 231.) Chipperfield also knew, based upon a conversation with Caliel on January 28, 2003, that Caliel intended to send Detective Gilbreath to speak with Durrance about his testimony, despite Summa's advice to Durrance. (P.C. EH at 3196-99; P.C. Def. Ex. 28.) It was after Detective Gilbreath spoke with Durrance on February 4, 2003, that Durrance stated he wanted to speak with the State. (P.C. Def. Ex. 229 at 135-37.) While this conversation between Caliel and Chipperfield may have occurred prior to the facsimile, Defendant's counsel was still well aware of Caliel's intent. Further, a chronology contained in Eler's file shows counsel knew Caliel sent detectives to speak to Durrance on

[16] Defendant represented at the evidentiary hearing that he had never received the facsimile from the State. However, in "Defendant's Second Motion to Reopen Evidence and Motion to Extend Deadline for Closing Argument," filed on or about April 12, 2018, postconviction counsel alerted this Court that they had, in fact, received this document from the State in the Capital Collateral Records Repository. Regardless, this Court briefly addresses this allegation.

February 4, 2003. (P.C. Def. Exs. 33; 34.) Thus, this Court finds the content of this facsimile is merely an embodiment of what Chipperfield and Eler already knew.

Summa dated the facsimile February 5, 2003, but there is a time stamp of February 4, 2003 at 22:58 p.m. (P.C. Def. Ex. 231.) The parties filed a stipulation in which they agreed that Caliel did not receive this facsimile until after he spoke with Durrance. (Stip. at 3-4, ¶15.) Now, Defendant maintains Caliel must have received this facsimile prior to speaking to Durrance. While Defendant relies on Detective Gilbreath's deposition to support his contention that Caliel knew about this facsimile, it is clear from Detective Gilbreath's deposition that he could not recall the sequence of events. (P.C. Def. Ex. 229 at 136.) Detective Gilbreath testified Caliel had "picked up information" that Durrance was not going to participate in his deposition, completely consistent with Chipperfield's testimony that he discussed with Caliel on January 28, 2003, Durrance's decision not to participate in the deposition. (P.C. EH at 3196-99; P.C. Def. Ex. 28.) To further support this contention, Defendant goes so far as to reorganize State Attorney Investigator Jay Farhat's (hereinafter referred to as "Farhat") memorandum of that day to support his allegations, creating his own factual dispute from the reorganization. (Def. Closing Mem. at 27.) This Court, however, finds this to be pure speculation, as this Court does not believe Caliel carried the Office of the State Attorney fax machine with him 24 hours a day. (P.C. Def. Ex. 228; Def. Closing Mem. at 27.) If this Court were to engage in speculation, it could equally deduce that this facsimile sat in the fax machine inbox until someone brought it to Caliel's attention later in the day on February 5, 2003, as indicated by Farhat's memo. (P.C. Def. Ex. 228.)

As to what occurred during this meeting on February 5, 2003, Defendant contends Caliel offered Durrance some sort of informal immunity agreement to waive his Fifth Amendment

rights. Defendant presented no concrete evidence to support this contention that Caliel made such statements to Durrance. Instead, Defendant relies on inferences and his perceived innuendos to support his allegations. Defendant then maintains Caliel's meeting with Durrance on February 5, 2003, takes on "even more sinister implications" because Durrance acknowledged at trial that his statements at Defendant's trial could be used against him at a retrial, should one occur. (Def. Closing Mem. at 27.) Again, these allegations do not support Defendant's contentions that this facsimile would have somehow undermined Durrance's testimony at Defendant's trial. Indeed, the jury was well aware of Durrance's motives and bias for testifying against Defendant. (R. Vol. XV at 862-945).

Upon a review of the record and this facsimile, this Court finds Defendant's allegations overall are based on pure speculation. See Hampton, 219 So. 3d at 770; Maharaj, 778 So. 2d at 951. The only thing this facsimile possibly establishes is that Durrance chose to decline his appellate attorney's advice and speak with the State about Defendant's case. There is no evidence whatsoever of an immunity agreement between the State and Durrance related to these murders. Accordingly, this Court finds Defendant has failed to establish any of the prongs of Brady and is not entitled to relief. Lastly, to the extent Defendant attempts to argue that by allegedly violating Durrance's Fifth Amendment rights the State violated Defendant's rights, Defendant is without standing to do so. See State v. Wellington Precious Metals, Inc., 510 So. 2d 902, 905 (Fla. 1987) (addressing standing to assert Fifth Amendment rights of another). Defendant is not entitled to relief.

2. *Defense Counsel Failed to Move to Strike Durrance's Testimony-Ineffective Assistance of Counsel*

Defendant maintains counsel was ineffective for failing to move to strike Durrance's testimony based on the statements he made regarding his oath. Specifically, Defendant states

Durrance admitted, under oath, that he would lie to get out of prison and stated on direct-examination he was testifying in hope of getting a reduction in his sentence for an unrelated cocaine trafficking conviction. As a result, Defendant alleges Durrance's statements vitiated his oath and reasonably competent counsel would have moved to strike his testimony.

Defendant cites to Willis v. Romano, 972 So. 2d 294 (Fla. 5th DCA 2008), and State v. Keyes, 322 A.2d 615, 618 (N.H. 1974),[17] to support his contentions; however, this Court finds these cases distinguishable from the instant case. In Willis, the witness refused to take the oath from the clerk before the testimony began, rendering the witness unsworn. 972 So. 2d at 294-95. In Keyes, the witness was previously found insane, causing concern as to his competency to testify. 322 A.2d at 616-18. Here, Durrance took the oath at trial and there is no record that a medical professional or court previously found Durrance insane. (R. Vol. XV at 862.) Thus, these cases are distinguishable and irrelevant to Defendant's claim.

Fletcher thoroughly cross-examined Durrance about his motivation to testify for the State and that he would possibly lie under oath, thereby attacking Durrance's credibility on the stand. (R. Vol. XV at 897-98.) This Court finds counsel was not ineffective for failing to strike Durrance's testimony. While counsel did not move to strike his testimony, counsel did attempt to diminish Durrance's credibility by exposing Durrance's motivation to lie to the jury. As such, counsel's actions were reasonable and Defendant is not entitled to relief.

Notably, in his closing memorandum, Defendant raises a new allegation of ineffective assistance of counsel related to counsel's Motion for New Trial. (Def. Closing Mem. at 19.) Defendant alleges counsel should have attacked Durrance's credibility, among other things, in a Motion New Trial. (Def. Closing Mem. at 19.) This Court addresses this allegation *infra* Ground H.

[17] This case is also unpersuasive given that it comes from a nonbinding state court in New Hampshire.

3. *Defense Counsel Failed to Demonstrate the Murders Could Not Have Been Committed as Durrance Claimed- Ineffective Assistance of Counsel*

Defendant presents a three-fold argument in this sub-claim. Defendant alleges counsel was ineffective for failing to demonstrate to the jury during trial that Defendant could not have entered through a window as Durrance suggested in his testimony. Defendant further alleges counsel should have sought a crime scene reconstruction expert to show it was impossible for one defendant to complete the murders while wearing the sweat clothes. Last, Defendant maintains counsel failed to bring forth evidence of Durrance's benefits with the State.

Ineffective Assistance of Counsel: Window

Defendant alleges counsel was ineffective for failing to demonstrate to the jury during trial that Defendant could not have entered through the kitchen or laundry room windows as Durrance suggested in his testimony. Defendant maintains competent counsel would have used the State's photographs and deposition testimony to show Durrance was lying.

At the evidentiary hearing, Fletcher testified he "made a big deal" about the window during his cross-examination of Durrance. (P.C. EH at 474.) Indeed, counsel thoroughly reviewed Durrance's account of Defendant's confession and brought to the jury's attention flaws in Durrance's account of what happened, in an attempt to challenge his credibility. (R. Vol. XV at 903-08.) Contrary to Defendant's allegations, Fletcher did in fact show pictures to the jury of the undisturbed items on the windowsill to illustrate that it is unlikely someone crawled through the window. (R. Vol. XV at 906.) Further, during trial, Eler cross-examined the evidence technician about the window and reviewed the photographs to show the glasses blocking entry through that space. (R. Vol. XIV at 621.) Thus, the jury heard the inconsistencies in Durrance's testimony and saw the photographs of the window on more than one occasion, yet still convicted Defendant of the instant offenses. This Court finds counsel was

not ineffective as he thoroughly cross-examined Durrance about Defendant's confession in an attempt to discredit Durrance's testimony. Defendant is not entitled to relief.

Ineffective Assistance of Counsel: Crime Scene Reconstruction Expert

Defendant asserts counsel was ineffective for not challenging the State's theory that only one defendant committed the instant crimes. Instead, Defendant maintains it was physically impossible for a single perpetrator to complete the murders. Defendant alleges counsel should have sought an expert in blood spatter reconstruction to show it was impossible for one perpetrator to complete the murders while wearing the sweat clothes.

To support this claim, Defendant presented Jan Johnson (hereinafter referred to as "Johnson") at the evidentiary hearing, who has training and/or experience in the fields of crime scene processing, evidence collection and storage, crime scene reconstruction, and blood spatter analysis. (P.C. EH at 1667-68.) Johnson testified that based upon the blood spatters from photographs of the crime scene, along with documentation from JSO, it is her opinion that more than one perpetrator committed this crime. (P.C. EH at 1770.) When asked if the hat and sweatshirt would have blood stains, Johnson testified she would expect to find blood on the cuffs of the sweatshirt. (P.C. EH at 1770-71.) To further support her theory, Johnson testified the female victim "would have had to have heard" the axe hit the canopy of the bed during the attack on Big Archie, thereby positing that a second perpetrator restrained Kimbler, blocking her escape. (P.C. EH at 1774.) Ironically, Johnson rendered this opinion based on the photographs and evidence collected from the crime scene, which she testified JSO collected below the standards dictated at the time. (Def. Closing Mem. at 12.)

At the evidentiary hearing, Eler testified he chose not to consult a blood spatter expert during this case. (P.C. EH at 166.) Instead, Eler chose to depose the State's witnesses, which

included evidence technicians who worked on the crime scene. (P.C. EH at 167-68.) Eler further stated some evidence technicians have experience in spray and spatter, although he could not specifically recall if the technicians in the instant case had such experience in their backgrounds. (P.C. EH at 167-68.) Eler stated deposing these witnesses helped his strategy to focus on the State's evidence and argue the lack of, or conflicts in, evidence, to support a finding of reasonable doubt by the jury. (P.C. EH at 168.) Further, Eler acknowledged he could have retained a blood spatter expert to evaluate the case but felt that if it further implicated his client, it could cause ethical concerns for him at trial if he attempted to present testimony or evidence to the contrary of the blood spatter expert's findings. (P.C. EH at 169.)

This Court finds counsel's strategy reasonable. Eler testified his strategy was to focus on flaws and lack of evidence in the State's evidence and police work to show reasonable doubt. At trial, counsel followed through with this strategy. (R. Vols. XIV at 624, 674-76, 685-86, 740, 741, 743, 744-45, 746, 765-66; XV at 953, 991-94; XVI at 1012-16, 1026, 1077; XVII at 1215-17, 1221-22.) Defendant contends counsel was deficient for failing to retain an expert; however, this Court finds counsel provided a reasonable strategy for his decision not to consult an expert. Accordingly, this Court finds no deficiency. Bradley v. State, 33 So. 3d 664, 680 (Fla. 2010), as revised on denial of reh'g (Apr. 22, 2010) ("Although the strategy chosen by trial counsel . . . did not prevail, that fact alone does not render the strategy unreasonable or deficient. Were that the test, all defendants sentenced to death would have claims for ineffective assistance of trial counsel.").

As to potential prejudice, Defendant cannot demonstrate prejudice such that this Court's confidence in the outcome is undermined. There is no reasonable probability that presenting a blood spatter reconstruction expert would have created a different result at trial. Defendant

argues the expert's testimony that more than one perpetrator committed the crime would have excluded him; however, this contention is fatally flawed. The DNA evidence on the clothing, specifically the stain on the sweatshirt that provided a full DNA profile match to Defendant, along with the victims' blood, shows Defendant was a participant in this crime. Accordingly, this Court does not find counsel was ineffective for failing to utilize a blood spatter expert as it would not have impacted this trial.

Notably, in his closing memorandum, Defendant raises a new allegation of ineffective assistance of counsel related to counsel's failure to use an expert such as Johnson to show JSO evidence technicians fell below applicable standards when documenting the crime scene.[18] (Def. Closing Mem. at 12.) Specifically, Defendant points to Johnson's evidentiary hearing testimony that JSO evidence technicians fell below those standards by "not properly documenting the locations and sizes of the bloodstains, not using a light and collection equipment to collect trace debris from the bedroom such as hairs, not collecting Big Archie's pager or the [black book] seen on the dining table, and packing the clothes found by the church together, thereby promoting cross-contamination." (Def. Closing Mem. at 12.) This Court addresses this new allegation *infra* Ground H.

Ineffective Assistance of Counsel: Durrance's Benefits

Last, Defendant maintains counsel failed to show Durrance's benefits from the State. Defendant states counsel only alluded to the unopposed motions for continuance, but failed to show the unopposed motions were tied to Durrance's testimony in the instant case, or admit the motions as evidence. Further, Defendant alleges the State moved Durrance to a different

[18] Indeed, the only allegations raised in the instant Motion involved ineffective assistance of counsel for failing to use Johnson to show, based on the blood spatter patterns and the location and position of the bodies, that more than one individual executed this crime and that it was impossible for the perpetrator to have worn the sweat clothes. (Def. 2d Am. Mot. at 31.)

correctional institution so that he could be closer to his family, yet another direct benefit.

This Court thoroughly addressed these allegations *supra* Ground A(1) in its discussion of Giglio. Because this Court found there were no benefits above, it follows that counsel cannot be held ineffective for failing to bring forth nonexistent benefits to the jury. See Hayward v. State, 183 So. 3d 286, 312 (Fla. 2015) (affirming trial court's finding defendant failed to carry burden under Strickland after trial court concluded no Giglio violation established). Moreover, counsel presented information regarding the motions to reduce sentence during Durrance's testimony; thus, the jury was aware of the pending motions. (R. Vol. XV at 930.) Accordingly, this Court finds no ineffective assistance of counsel.

Defendant further maintains in his closing memorandum that counsel was ineffective for failing to interview and depose Wienbaum, review the wiretap application, the depositions of the detectives who prepared the application, and the sentencing transcript of Durrance's sentencing in the trafficking case. (Def. Closing Mem. at 13, 15, 17.) Defendant maintains these items would have revealed facts that would have destroyed Durrance's credibility. (Def. Closing Mem. at 13.) Again, as is a common trend throughout his closing memorandum, Defendant did not raise any of these allegations in his underlying Rule 3.851 Motion. Thus, to the extent Defendant raises it for the first time in his closing memorandum, this Court addresses this allegation *infra* Ground H. Notably, as this Court stated previously, counsel elicited on cross-examination of Durrance that he knew Defendant had been an informant on the wiretap application that lead to his arrest for trafficking, and that he hoped the jury would convict Defendant. (R. Vol. XV at 884-85, 913-16, 930.) Thus, the jury was well aware of Durrance's trafficking case, the wiretap application, and Defendant's involvement.

4. Durrance Has Recanted-Newly Discovered Evidence

Defendant maintains Durrance has recanted his trial testimony by stating to Defendant's private investigator that he fabricated Defendant's confession in retaliation for Defendant being a confidential informant against him. Defendant also contends Durrance further recanted his previous testimony that the State did not give him any benefits in exchange for his testimony.

A claim of newly discovered evidence requires that the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence. Fla. R. Crim. P. 3.850(B)(1). To obtain a new trial based on newly discovered evidence, a defendant must demonstrate that:

> (1) the evidence was not known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial.

Hitchcock v. State, 991 So. 2d 337, 349 (Fla. 2008); see also Huffman v. State, 909 So. 2d 922, 922-23 (Fla. 2d DCA 2005) (concluding that newly discovered evidence must also be admissible and it "must be of such a nature that it would probably produce an acquittal on retrial.").

Recantation testimony is exceedingly unreliable, especially where the recantation involves a confession of perjury. Sochor v. State, 883 So. 2d 766, 786 (Fla. 2004) (citing Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994)); Marquard v. State, 850 So. 2d 417, 424 (Fla. 2002). The Florida Supreme Court has repeatedly rejected claims of newly discovered evidence based on out-of-court recantations that the purported recanting witness did not repeat under oath at an evidentiary hearing. See Mansfield v. State, 204 So. 3d 14, 17 (Fla. 2016), cert. denied, 137 S. Ct. 1818 (2017); Duckett v. State, 918 So. 2d 224, 232-33 (Fla. 2005) (rejecting a newly discovered evidence claim where recanting witness invoked privilege against self-incrimination at the evidentiary hearing rather than recant under oath); Robinson v. State, 707

So. 2d 688, 691 (Fla. 1998) ("The absence of direct testimony by the alleged recanting witness is fatal to this claim.").

Defendant's investigator, Monica Jordan (hereinafter referred to as "Jordan"), testified at the evidentiary hearing that she had a conversation with Durrance on July 7, 2010, while he was incarcerated at Columbia Correctional Institution. (P.C. EH at 642-43.) During this interview, Durrance allegedly told Jordan he had not been truthful in his trial testimony and indicated he would sign an affidavit to that effect. (P.C. EH at 647.) On October 25, 2010, Durrance allegedly stated to Jordan that Defendant never confessed to him and he fabricated the confession because of Defendant's work as a confidential informant in the wiretap application. (P.C. EH at 648-49.) On July 7, 2011, Jordan met with Durrance for the final time. (P.C. EH at 656, 657-58.) During this meeting, Durrance refused to sign any affidavits about his alleged recantation. (P.C. EH at 657.)

During the State's direct examination of William Barker (hereinafter referred to as "Officer Barker"), Officer Barker testified he interviewed Durrance in October 2014 on an unrelated matter. (P.C. EH at 2549.) When Officer Barker rose to leave, Durrance allegedly asked Officer Barker to relay a message to Caliel. (P.C. EH at 2550-51.) In essence, Durrance allegedly stated he was not going to recant his trial testimony. (P.C. EH at 2551.)

Durrance did not testify at the evidentiary hearing. (P.C. EH at 633.) Instead, Defendant played a DVD of Durrance's deposition by postconviction counsel for this Court's consideration. (P.C. EH at 633-39.) During the videotaped deposition, which lasted a few minutes, Durrance refused to answer any questions posed by the State or defense. (P.C. EH at 633-39; P.C. Def. Ex. 202.)

This Court finds there is no newly discovered evidence because there is no recanted

testimony. Durrance has had multiple opportunities to recant under oath, including at his postconviction deposition. The inconsistency surrounding Durrance's potential recantation demonstrates its unreliability. Moreover, while Durrance's conversation with Jordan may amount to a potential intent to recant, this Court finds Durrance's alleged statements do not qualify as such. In fact, the only evidence that Durrance recanted was in the interview with Jordan, notably without an affidavit or similar supporting documentation. In light of Durrance's inconsistent statements to the investigator, officers, and at his deposition, this Court does not find it credible that Durrance recanted. It is clear from the testimony presented at the evidentiary hearing that when asked to state his recantation under oath, through writing or deposition, Durrance failed to recant. The parties further agreed that Durrance would not testify at the evidentiary hearing and would repeat his deposition testimony and, therefore, admitted the DVD of his deposition. It is at best a roll of the dice that Durrance's testimony would change at all if called for a new trial. For good reason, this is not enough to satisfy the standard that dictates this type of claim. See Duckett, 918 So. 2d at 232-33; see also Mansfield, 204 So. 3d at 16-18; Marquard, 850 So. 2d at 424; Robinson, 707 So. 2d at 691.

Accordingly, this Court finds Durrance did not recant his trial testimony under oath at the evidentiary hearing, deposition, or through an affidavit, thereby defeating any newly discovered evidence claim on this issue. See Mansfield, 204 So. 3d at 17; Duckett, 918 So. 2d at 232-33; Robinson, 707 So. 2d at 691. Even if this Court were to consider this recantation, this Court finds Defendant's newly discovered evidence claim would still fail, as it would not have produced an acquittal on retrial. Indeed, there was sufficient evidence to convict Defendant outside of Durrance's testimony, including Defendant's DNA on the clothing from the crime scene. Simpson, 3 So. 3d at 1147-48; see also Duckett, 918 So. 2d at 233 ("Sufficient additional

circumstantial evidence exists in this case so that a new trial would not produce a different verdict."). As such, Defendant is not entitled to relief.

B. The Physical Evidence is Insufficient to Support the Conviction Absent Constitutional Violations

In Ground B, Defendant maintains that absent the presence of Defendant's DNA and hair on the sweat clothes, there is insufficient evidence to support Defendant's conviction, let alone an arrest. Defendant reviews the evidence presented at trial, highlighting the fact that Defendant's DNA was not found in the bedroom, on the axe, hat, the victims' fingernail scrapings, or shoes, but only on the sweatshirt and sweatpants. Further, Defendant maintains the DNA samples from the sweat clothes are mixtures, indicating that another person wore the clothes. Defendant states DNA testing could not exclude Archie Crook, Jr. (hereinafter referred to as "Little Archie"), Big Archie's son, as a contributor to the DNA on the neckline of the sweatshirt. Further, Defendant asserts DNA testing could not exclude Shawn Smallwood (hereinafter referred to as "Smallwood"), a friend of Little Archie who was at the home of the victims on the night of the murders, as a contributor to droplets of blood on the floor of the victims' bedroom.[19] Defendant maintains that, had counsel moved to exclude the evidence, had the evidence tested, impeached the conclusions of the State's analysts, and objected to improper State arguments mischaracterizing DNA results, the jury would have acquitted Defendant.

5. In Bad Faith, the State Destroyed Evidence it Knew Could Exonerate Defendant-Youngblood[20]

Defendant contends the State violated Youngblood by failing to properly preserve evidence in the instant case. Defendant maintains this occurred after JSO collected the evidence at the crime scene and stored the evidence in its warehouse, during the State's trial preparation,

[19] Smallwood could be included as a contributor based on DNA at one genetic marker. (R. Vol. XVI at 1149.)
[20] Arizona v. Youngblood, 488 U.S. 51 (1988).

and after trial when the Duval County Clerk's office took possession of the evidence. Due to these actions, Defendant avers he had to forego certain postconviction testing of this evidence.

The United States Supreme Court held the constitutional duty to preserve evidence is limited to evidence that "both possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 489 (1984). The Supreme Court held the State violates a defendant's due process rights where material exculpatory evidence, that might be expected to play a significant role in the suspect's defense, is not preserved. Id. at 488. The destruction of material exculpatory evidence violates due process regardless of whether the government acted in bad faith. Id. at 488.

The Supreme Court subsequently held the Due Process Clause requires a different result when the State fails to preserve evidence that does not possesses an apparent exculpatory value, but which is merely "potentially useful" to the defense. Youngblood, 488 U.S. at 57. "Potentially useful" evidence is evidence "of which no more can be said then that it could have been subjected to tests, the results of which might have exonerated the defendant." Id. When the State fails to preserve potentially useful evidence, due process is violated only if the defendant can show bad faith on the part of the police or prosecution. Id. at 58; Beasley v. State, 18 So. 3d 473, 487 (Fla. 2009); Dufour v. State, 905 So. 2d 42, 68 (Fla. 2005). Youngblood explained the "presence or absence of bad faith . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Youngblood, 488 U.S. at at 56 n.*; Guzman v. State, 868 So. 2d 498, 509 (Fla. 2003).

Evidence that has not been examined or tested by government agents does not have "apparent exculpatory value" and, therefore, cannot form the basis of a claim of bad faith

destruction of evidence. See King v. State, 808 So. 2d 1237, 1242 (Fla. 2002) (holding defendant failed to show bad faith on part of the State in destroying hair and tissue evidence, in part because defendant failed to show police made a "conscious effort to prevent the defense from securing the evidence"); Merck v. State, 664 So. 2d 939, 942 (Fla. 1995) (holding defendant failed to show bad faith in police detective's failure to preserve pair of pants found at crime scene, because detective believed they did not have evidentiary value); State v. Bennett, 111 So. 3d 943, 945 (Fla. 2d DCA 2013) (citation omitted) ("In the context of destroyed evidence, we have described bad faith as 'a flagrant and deliberate act done . . . with the intention of prejudicing the defense.'").

Notably, to support his allegations in the instant Motion, Defendant cites to orders filed in circuit court cases State v. Williams and State v. Schwartz. (P.C. Def. Exs. 146; 148.) This Court finds neither of these cases binding. See Dep't of Highway Safety & Motor Vehicles v. Robinson, 93 So. 3d 1090, 1093 (Fla. 2d DCA 2012) (upholding trial court's conclusion that case was not binding authority because it was a decision of a sister circuit court).

Storage of Evidence After Collection at Crime Scene: JSO

Defendant contends JSO stored the evidence in its rodent infested warehouse that had no refrigeration for biological evidence. Defendant alleges that even when JSO moved the evidence to a new JSO facility, JSO did not refrigerate or store the evidence in a climate-controlled environment. As a result, Defendant maintains he was unable to test postconviction any of the physical evidence stored at the JSO warehouse.

To support his allegations, Defendant presented Johnson's testimony about her review of evidence in the JSO warehouse in 2011. Johnson testified she viewed most of the evidence, with the exception of some of the larger pieces. (P.C. EH at 1713.) Johnson stated JSO presented

boxes that contained individually packaged pieces of evidence. (P.C. EH at 1712, 1786-87.) During her testimony, Johnson presented a series of photographs of the evidence, notating the deteriorating condition of the bags, loose tape, opened packages, and rodent gnaw marks. (P.C. EH at 1712-20; P.C. Def. Ex. 204 at 2-20.) Johnson testified that, in her opinion, the evidence stored in the JSO warehouse would not be suitable for further testing because it was not in a temperature-controlled environment. (P.C. EH at 1769.)

Laura Spencer (hereinafter referred to as "Lieutenant Spencer"), a lieutenant with JSO, testified about the warehouses in which JSO stored evidence. The original facility was climate-controlled in certain areas but did get "hot" in other areas. (P.C. EH at 1648, 1653.) Lieutenant Spencer also testified there was a rat problem in the original warehouse. (P.C. EH at 1653.) At the time of the original warehouse's existence, the vaults were located at the Sheriff's Office, not the warehouse. (P.C. EH at 1648-49.) While there was a walk-in cooler at the warehouse, there was no freezer, and only blood, urine, or other items that required refrigeration were kept in the refrigerator. (P.C. EH at 1649-50.) Lieutenant Spencer stated if an item had a biohazard sticker, the item was not automatically refrigerated. (P.C. EH at 1650.) Lieutenant Spencer testified she did voice concerns to her supervisors about the conditions of the original warehouse and the potential for contamination or degradation of evidence. (P.C. EH at 1660-61.) Her concerns were ultimately resolved by moving to the new warehouse in 2004. (P.C. EH at 1661.)

The current facility opened in 2004, is climate controlled, and has refrigeration and freezer systems available to store evidence. (P.C. EH at 1632, 1634, 1647.) Lieutenant Spencer testified if an item of evidence was not previously frozen, however, the item would not now go in the freezer. (P.C. EH at 1634.) Lieutenant Spencer detailed how the warehouse receives evidence and that none of the evidence from Defendant's case has been discarded. (P.C. EH at

1640-43, 1662-63.)

At trial, Tracey Kennon (hereinafter referred to as "Kennon"), a JSO employee, testified about the receipt of evidence in the instant case. (R. Vol. XIV at 752-55.) Kennon testified she worked in the JSO property and evidence room as a police service technician at the time of the murders. (R. Vol. XIV at 752.) Kennon testified when she received evidence, she stored the evidence in the property room, unless the item was large and required storage at the JSO warehouse offsite. (R. Vol. XIV at 753-54.) Kennon stated it is not uncommon for law enforcement to send evidence in the property room to laboratories for testing. (R. Vol. XIV at 756-57.) Kennon testified she received the sweatshirt, sweatpants, hat, and sneakers into the property room on July 20, 1999. (R. Vol. XIV at 758.) Kennon testified she would not refrigerate items with dried blood, only items wet with blood. (R. Vol. XIV at 764.)

While the storage of evidence in the original JSO warehouse may be viewed as negligent, it is not enough to establish bad faith on the part of law enforcement. Bennett, 111 So. 3d at 945 ("Although the facts of this case reflected law enforcement's negligence, they clearly did not establish bad faith."). Indeed, Defendant has failed to show that law enforcement chose to store inappropriately the items in his case with the intent to allow them to deteriorate so that Defendant would not have an opportunity to test them. See Anderson v. State, 220 So. 3d 1133, 1149 (Fla. 2017) (holding to establish entitlement to relief under Youngblood, "Anderson would have had to assert that law enforcement believed that independent forensic testing of the items used in obtaining Anderson's conviction would actually exonerate him in the future, and, as a result, law enforcement chose to inappropriately store the items with the intent to allow them to deteriorate so that they would not be able to be retested by Anderson in the future."); King, 808 So. 2d at 1242. This is evident from Lieutenant Spencer's testimony that she voiced concerns to

her supervisors about the degradation of the evidence stored in the facility as a whole based on conditions of the warehouse, not just that of Defendant's case. All Defendant has established is that the deteriorating conditions of the original warehouse prompted JSO to open a new, properly functioning warehouse.

Defendant also assumes the alleged degradation of the evidence occurred at the warehouse. However, Defendant fails to specify when the evidence was held in the warehouse and when the alleged degradation occurred. As stated above, Kennon testified she received evidence in the property room, including the shoes, hat, and sweat clothes. There is no indication from her testimony that these items went to the warehouse. FDLE analyst Charles Badger (hereinafter referred to as "Badger") testified at the evidentiary hearing that the Jacksonville Regional Operations Center of FDLE (hereinafter referred to as "JROC") received items for testing on July 20 and 21, 1999. (P.C. EH at 1826.) Those items in these submissions, which included the sweat clothes, hat, and shoes, are contained within the September 20, 1999 report from Deane Johnson, a crime laboratory analyst of FDLE. (P.C. Def. Ex. 205.) Further, many of these items were in the custody of Cellmark from 2003 until 2006. (R. Vol. VII at 1237-38.) Given the evidence was in the custody of multiple entities from the time of its collection until it went into the custody of the Duval County Clerk of Court at trial, Defendant fails to prove where the alleged degradation occurred and that the individual in possession of that evidence degraded the evidence in bad faith.[21]

As to the evidence stored in JSO's warehouse that was never tested or submitted at trial, this Court finds no due process violation. Defendant essentially contends that, had this evidence

[21] Law enforcement did not discover the sweat clothes, hat, and shoes until several days after the murders. (R. Vol. XIV at 726-29.) Thus, these items were potentially exposed to heat, humidity, and UV light, which Badger and Dr. Charlotte Word acknowledged contribute to DNA degradation. (P.C. EH at 2018, 2232, 2267-68.) Moreover, the axe and socks were also exposed to the conditions, although it was for a shorter amount of time. (R. Vol. XIV at 725.)

been properly preserved and subsequently tested, it may have exonerated him. This is not sufficient under Youngblood to establish a due process violation. See Guzman, 868 So. 2d at 510 ("Guzman asserts that if the hair sample had been tested, the result of the test might have exonerated him; however, the destruction of evidence that, if tested, might have exonerated Guzman is not sufficient under Youngblood to establish a due process violation. Guzman's claim of bad faith destruction of evidence must fail."). Accordingly, Defendant is not entitled Youngblood to relief.

This Court also finds meritless Defendant's allegations under section 925.11, which governs postsentencing DNA testing.

> Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement *shall maintain any physical evidence* collected at the time of the crime for which a postsentencing testing of DNA may be requested.

§ 925.11(4)(a), Fla. Stat. (emphasis added). This Court finds JSO has maintained this evidence as required by Florida law. § 925.11(4)(a). While Defendant asserts JSO should have preserved the evidence in more pristine conditions, Defendant presents no case law that dictates the exact conditions in which JSO should have maintained certain evidence. Instead, Defendant only presents case law of the duty to maintain, which JSO did in fact do. This Court is cognizant that Defendant presents an interim report from the Committee on Criminal Justice, issued in October 2010 and a Senate Staff Analysis and Economic Impact Statement, dated January 22, 2004 and February 18, 2004. (P.C. Def. Exs. 215; 216; 217.) The Legislature, however, did not enumerate within the statute the specific points cited by Defendant in the closing memorandum. (Def. Closing Mem. at 46.) If the Legislature intended for these standards discussed within these documents to become part of this law, it would have made it so. See Fla. Dep't. of Revenue v.

Fla. Mun. Power Agency, 789 So. 2d 320, 324 (Fla. 2001) ("Under fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the Legislature clearly has not done so."). Accordingly, Defendant is not entitled to relief.

Storage of Evidence After Collection at Crime Scene: FDLE

Defendant contends FDLE destroyed evidence by using inappropriate tubes for storage. Specifically, Defendant states FDLE stored the DNA extracts of Kimbler's fingernail scrapings in polypropylene tubes after its examination. As a result, Defendant maintains the vials were "bone dry." (Def. 2d Am. Mot. at 42.)

Defendant presented the testimony of Lynn Burley ("Burley"), an independent DNA expert from the Santa Clara, California District Attorney's Office,[22] who testified that low bind tubes are more appropriate for the long-term storage of DNA extracts. (P.C. EH at 2200, 2202.) Burley testified that she found research as far back as 1998 supporting the use of low bind tubes over polypropylene tubes. (P.C. EH at 2201.) Burley testified she works with polypropylene tubes but not for long-term storage; as such, she has never had to resuspend DNA contained within a polypropylene tube. (P.C. EH at 2225.) Burley conceded, after listening to Badger's evidentiary hearing testimony, that she did not attempt to heat the tubes to re-suspend the DNA and, in hindsight, would have done so. (P.C. EH at 2225; P.C. Def. Ex. 158.) Burley further agreed there was still DNA in these tubes. (P.C. EH at 2225.)

Badger testified that polypropylene is a type of organic plastic that most of the tubes in his laboratory consist of. (P.C. EH at 2020.) Badger acknowledged there is a tendency for DNA to bind to the sides of polypropylene tubes and is predominately an issue in extraction methods where minimal or small amounts of DNA are recovered and stored in the tubes for long periods

[22] As noted in the instant Motion, the Santa Clara laboratory is associated with the Santa Clara District Attorney's Office, but accepts private cases as time allows.

of time. (P.C. EH at 2020.) Badger testified, however, DNA does not evaporate like water and can be reconstituted in these tubes. (P.C. EH at 2017-20.)

This Court finds no evidence to support Defendant's allegations of a Youngblood violation. Initially, this Court finds Defendant has failed to establish the evidence contained within the tubes has been destroyed, given Badger's testimony and the fact that Burley was unfamiliar with how to reconstitute the DNA in the tubes. Further, Defendant presents no evidence whatsoever that FDLE purposefully stored DNA extracts in polypropylene tubes with the intent to degrade evidence and hinder Defendant's ability to conduct further testing. See Anderson, 220 So. 3d at 1149. Accordingly, Defendant is not entitled to relief.

Handling of Evidence During Trial Preparation: Office of the State Attorney

Defendant maintains the State was fully aware of the exculpatory nature of the evidence in the instant case based on the fact that it had the items tested before trial and its actions related to the evidence during the postconviction stages of Defendant's case. Defendant contends the State knew the sweat clothes, shoes, and hat evidence were potentially useful to the defense because these items contained mixtures of DNA, and because the State tested to eliminate certain known standards from the mixtures. Defendant further alleges the State failed in its duty by not continuing to test the items until it found the identity of every contributor. Instead, Defendant contends the testing stopped once it identified Defendant. While Defendant maintains the State did not fully destroy the sweat clothes and victims' fingernail scrapings, he asserts the State eroded the evidentiary value of the sweat clothes and victims' fingernails.

Defendant does contend the State destroyed the evidentiary value of all other critical items in this case. As to the axe, Defendant maintains the State suspected the killer cut himself, thus, it knew the axe carried potentially exculpatory evidence. Defendant avers this is evident

because the State instructed FDLE to examine the handle of the axe to try to identify blood that might belong to the killer. Further, the State submitted the fingernail clippings and scrapings for DNA testing because it believed the victim sustained defensive wounds during a struggle with the killer. Defendant contends the State further exhibited its knowledge of the exculpatory value of this evidence through its postconviction actions.

Defendant maintains that while the State may have known the evidence had exculpatory value, it hired a forensic artist prior to trial, Jim McMillian (hereinafter referred to as "McMillian"), who brought the evidence to his personal residence to create the displays the State used at trial. According to Defendant, McMillian had no training in the proper handling of DNA evidence and stored the exhibits in a closet in his home while he worked on the displays. By taking these items to his home studio, Defendant contends McMillian essentially tampered with and destroyed the evidentiary value of the evidence. Defendant alleges these displays had no protective covering and McMillian did not create them in a sterile environment, leading to contamination. Defendant alleges that when FDLE returned the evidence containing biological material to the State, it marked the materials with clear warnings that they needed refrigeration. Despite these clear warnings, Defendant maintains the State did not follow the law or warning, and the evidence is now lost to contamination.

Defendant alleges the most egregious actions by the State involve the axe itself. Specifically, Defendant states McMillian mounted the axe onto a cardboard display with no protective covering, which the jury then handled directly in the deliberation room. Defendant further alleges the axe no longer appears to have traces of blood on it because of this mishandling. Moreover, Defendant avers McMillian mounted the shoes and hat on a display with no protective covering, which the jury also had access to during deliberations. Finally,

Defendant contends that because the State removed the fingernail clippings from refrigeration for a display, allowed McMillian and the jury to handle the evidence, and returned the clippings to the Duval County Clerk of Court where they were not refrigerated,[23] any evidentiary value was lost and Defendant could not test the fingernails for these proceedings.

As for the sweat clothes, the State tested the evidence and knew it contained DNA mixtures and that one mixture contained the DNA of Little Archie. Defendant maintains that because one of the mixtures contained DNA from Little Archie, it confirms Defendant was telling the truth and Little Archie is the killer. McMillian mounted this evidence as well, but it had a Mylar covering over it, which preserved the evidence for further testing. Defendant contends, however, the State's failure to refrigerate this evidence adversely affected Defendant's ability to obtain information about the other individual(s) who may have worn the clothing.

During the evidentiary hearing, McMillian testified about his studio and process for creating the exhibits used in this case. Initially, McMillian stated he has an AA degree in criminal justice and has taken courses in the area of forensic art. (P.C. EH at 1491-92.) McMillian testified he had a professional studio space in his home where he made the exhibits that contained a locked storage closet for evidence. (P.C. EH at 1496-97.) In the studio, McMillian had a large table on which he created the exhibits and would line the table with paper, changing the paper between exhibits. (P.C. EH at 1503.) McMillian wore gloves and changed into fresh gloves when handling a new item to prevent contamination. (P.C. EH at 1494-95, 1501-02.) McMillian testified that he never cleans evidence before it is mounted on a display. (P.C. EH at 1506.)

During the hearing, the defense reviewed with McMillian the condition of the exhibits he made for the instant trial. (P.C. EH at 1504-34.) As to the axe, McMillian acknowledged he

[23] This Court discusses allegations concerning the Duval County Clerk of Court in further detail *infra*.

built a display but did not create a see-through top to the display. (P.C. EH at 1505.) Instead, McMillian indicated the cover would have been made of foam. (P.C. EH at 1505.) As to trial Exhibit 87, the sweatshirt, trial Exhibit 88, the sweatpants, and trial Exhibit 85, the socks, McMillian testified that he placed these items on a display and secured the items with a Mylar covering. (P.C. EH at 1515-16, 1519, 1526-27.) Notably, much of the evidence viewed by McMillan during the evidentiary hearing was no longer contained in the same displays he created for trial, as the items were repackaged due to postconviction DNA testing.[24] (P.C. EH at 1515, 1524, 1533.) When asked if the jury could have touched the exposed evidence, McMillian replied, "I guess so." (P.C. EH at 1537.)

This Court finds Defendant's allegations as to Youngblood meritless. Defendant fails to show the evidence has been destroyed or that any alleged degradation of evidence was done in bad faith. Essentially, Defendant contends that because the State tested this evidence, some of which contain mixtures, it means the State knew it was exculpatory. To support this contention, Defendant argues the State knew Little Archie's DNA was on one of the items and, therefore, acted in bad faith by using McMillian to mount the exhibits. This Court rejects such a conclusion. State Attorney Melissa Nelson (hereinafter referred to as "Nelson"), who prosecuted the case with Caliel, testified the State often submits evidence for testing that may or may not have forensic value, in an effort to give the fact finder a full picture. (P.C. EH at 559.) While Little Archie could not be excluded from two of the DNA samples in evidence, neither could 22% and 24% of the population, respectively. (R. Vol. XVI at 1177-78, 1194.) This does nothing to convince this Court the State planned to degrade and destroy evidence through its use of McMillan and ultimately does not prove Little Archie is the killer as Defendant contends. See Anderson, 220 So. 3d at 1149 (rejecting defendant's conclusion that "'testing' evidence is a

[24] Photographs of the evidence from 2011 show the evidence still encased in Mylar. (P.C. Def. Ex. 204 at 33-35.)

'clear indication of its exculpatory value.'").

It is clear from the testimony that McMillian took precautions, such as using gloves and changing out the gloves and paper on the table regularly, to ensure no contamination of the evidence occurred while he created the exhibits used at trial. Further, as stated previously, multiple entities had possession of the evidence including Defendant. (R. Vol. VII at 1237-38.) Defendant fails to establish when and with whom the degradation occurred. Indeed, neither Caliel nor Nelson testified at the evidentiary hearing that they knew the evidence would degrade or be destroyed with the use of McMillian and chose to use him anyway to intentionally degrade and/or destroy evidence. As Defendant has not established bad faith, Defendant is not entitled to relief. See Youngblood, 488 U.S. at 57; see also King, 808 So. 2d at 1242; Merck, 664 So. 2d at 942; Bennett, 111 So. 3d at 945.

This Court further finds no evidence to support Defendant's contention that the jury personally handled and contaminated the evidence during deliberations. McMillian could only speculate what occurred in the jury room. (P.C. EH at 1537.) Further, while Defendant cites to Nelson's testimony to support this allegation, Nelson "presumed" this evidence was tendered to the jury. (P.C. EH at 549, 551, 563-65.) Even if the evidence went into the jury room, Defendant cannot show the jury contaminated these items. Given that Defendant bases this allegation on pure speculation, Defendant is not entitled to relief. See Hampton, 219 So. 3d at 770; Maharaj, 778 So. 2d at 951.

Evidence Storage Post-Trial: Duval County Clerk

Defendant avers the State's failure to maintain evidence continued after trial. Defendant asserts that, once in the custody of the Clerk's office, the exhibits were stored in a non-climate controlled vault. Further, Defendant maintains any member of the public, including Little

Archie, could have viewed the evidence.

Johnson testified about the conditions of the Clerk's office and evidence when she viewed the evidence at the Clerk's office in 2011.[25] (P.C. EH at 1729-66.) Johnson testified the clerk did not wear gloves, the clerk placed opened evidence on the floor, the evidence storage area had a broken thermostat, and the office did not have a protected area to view evidence. (P.C. EH at 1730, 1731, 1732, 1752, 1758.) Johnson presented a series of photographs to show the condition of the evidence when she viewed it in 2011. (P.C. Def. Ex. 204 at 21-143.)

Buffy Stagg (hereinafter referred to as "Stagg"), senior manager of the felony department, testified about the Duval County Clerk's Office evidence policies. Stagg testified the Clerk's office denotes all death penalty cases with a yellow sticker indicating the case is a death penalty case. (P.C. EH at 1613-14.) Stagg further testified if a piece of evidence is identified to the clerk as containing DNA, a clerk places a biohazard sticker on the item. (P.C. EH at 1576-77.) The clerk, however, does not determine whether an item contains DNA. (P.C. EH at 1580.) Further, the only time an item would be refrigerated is if it was brought into the courtroom refrigerated. (P.C. EH at 1599.) When a clerk handles evidence, gloves are required. (P.C. EH at 1594.) Stagg testified that in the new courthouse, the biohazard evidence is stored in a climate controlled area. (P.C. EH at 1572-73.) All vaults in the new courthouse are secured by a keypad and card-swipe feature, each person having access assigned an individual pin number. (P.C. EH at 1573-74.) According to Stagg, fewer than ten people have access to these vaults. (P.C. EH at 1573.) As to the storage of evidence, Stagg testified that an item would be wrapped in butcher paper, excluding certain posters that the clerk places in poster boxes, and if the item contained biohazardous material and was identified to the clerk as such, the clerk would affix a

[25] At the time of the 2011 review, the new Duval County courthouse had not yet opened. This review occurred at the older courthouse.

biohazard sticker to the evidence. (P.C. EH at 1576-77.)

Defendant challenges the Clerk's office storage of the evidence and attempts to include his allegations within the umbrella of Youngblood. Initially, this Court declines to extend Youngblood to the post-trial destruction of evidence by an agency unrelated to the prosecution of the case. In Youngblood, the United States Supreme Court addressed the extent to which a defendant is deprived of the right to a fair trial when the State fails to preserve physical evidence for testing before trial. Youngblood, 488 U.S. at 58; see also Moore v. State, 903 So. 2d 238, 239 (Fla. 2d DCA 2005). Thus, it is reasonable to conclude that Youngblood does not extend to the post-trial destruction of evidence. E.g. Lovitt v. True, 330 F. Supp. 2d 603, 634 (E.D. Va. 2004), aff'd, 403 F.3d 171 (4th Cir. 2005) (reasoning "[n]otwithstanding the state court decisions cited in the petition, this Court is inclined to agree that the rule announced in Youngblood, which was based upon Trombetta, does not extend due process protection to post-trial destruction of evidence or to the actions of state officials who are unrelated to the prosecution of the case," but acknowledging that a higher court should make the determination).

Even considering Defendant's allegations pursuant to Youngblood, this Court finds Defendant's contentions meritless. To succeed on this claim, Defendant would have to show the Clerk's office was aware of the exculpatory value of the evidence and made a conscious effort to destroy the evidence to prevent Defendant from further testing of the evidence. See Youngblood, 488 U.S. at 58. Indeed, Defendant presents absolutely no evidence to support this conclusion. While Defendant attempts to meet this standard by alleging the clerk did not wear gloves when handling evidence and placed the evidence on the floor during the postconviction examination, among other things, this Court finds this evidence insufficient to establish a Youngblood violation. Notably, none of the photographs presented to this Court show a clerk

handling evidence without gloves.[26] Further, none of the evidence photographed has warnings marked as a biohazard to indicate the need for refrigeration. (P.C. Def. Ex. 204 at 119.)

The Duval County Clerk did not destroy the evidence in its possession, as this Court viewed the evidence during this evidentiary hearing. There is no evidence whatsoever that the Duval County Clerk's office withheld these items from Defendant or allowed these items to allegedly deteriorate for the sole purpose that Defendant would be hindered in his postconviction relief. See Anderson, 220 So. 3d at 1149. As Defendant has failed to establish any bad faith on the part of the Duval County Clerk's office, this Court finds Defendant is not entitled to relief.

Further, this Court finds Defendant's allegations meritless under section 925.11, which governs postsentencing DNA testing. This Court finds the Clerk's office has maintained this evidence as required by Florida law. See § 925.11(4)(a). While Defendant asserts the Clerk's office should have preserved the evidence in more pristine conditions, Defendant presents no case law that dictates the exact conditions in which the Duval County Clerk's office should have maintained certain evidence. Instead, it only presents case law of the duty to maintain, which the Clerk's office did in fact do. Defendant had access to the items received by the Clerk's office at trial and subsequently tested said items, obtaining results. As stated previously, if the Legislature intended for the standards discussed within the report issued by the Committee on Criminal Justice in October 2010 or the Senate Staff Analysis and Economic Impact Statement, dated January 22, 2004 and February 18, 2004, to become part of this law, it would have made it so. (P.C. Def. Exs. 215; 216; 217.)

As to Defendant's insinuation that a member of the public, such as Little Archie, may have tampered with the evidence if allowed to view it, Defendant presented absolutely no

[26] There are several photographs of a clerk holding a display without gloves on; however, the actual evidence is contained within Mylar and not exposed to the clerk's hands. (P.C. Def. Ex. 204 at 33-34, 110.)

evidence that a member of the public viewed and tampered with this evidence. In fact, Stagg testified she has never had a member of the public ask to view evidence, except for the media requesting copies of certain evidence. (P.C. EH at 1585, 1613, 1616-17.) Moreover, contrary to Defendant's allegations here, Florida law requires the Clerk's office to make evidence available for the public to view. § 119.07, Fla. Stat.; Fla. R. Jud. Admin. 2.420. As this argument is outrageously speculative, this Court finds it does not warrant any additional discussion. See Hampton, 219 So. 3d at 770; Maharaj, 778 So. 2d at 951. Defendant is not entitled to relief.

6. *Defense Counsel was Ineffective in Not Having the Evidence Tested Before Trial-Ineffective Assistance of Counsel*

Defendant alleges he asked trial counsel to retest the evidence tested by the State and counsel made it appear to Defendant that an expert completed the retesting. According to the instant Motion, Eler reported to the trial court, Defendant, and Fletcher that the court-appointed expert completed the testing, but the results were not helpful to the defense. Defendant maintains, however, that the court-appointed expert never completed testing, contrary to Eler's representations.

Defendant states his original attorneys retained Orchid Cellmark (hereinafter referred to as "Cellmark") to conduct the testing and shipped the evidence and paperwork to the laboratory. Defendant opines, however, that Eler failed to communicate with Dr. Charlotte Word (hereinafter referred to as "Dr. Word"), the laboratory director at Cellmark. By failing to communicate with Dr. Word, Defendant asserts Eler failed to provide the information necessary for Dr. Word to assess whether additional testing could produce exculpatory results. This alleged information included the defense Defendant planned to use at trial; specifically, that he owned the clothing. Indeed, Defendant highlights numerous instances in Dr. Word's notes where information she recorded from Eler is inconsistent with the facts of this case. Defendant

maintains counsel had no reason not to use Dr. Word, as her expertise was "unimpeachable." (P.C. Def. Ex. 160; Def. Closing Mem. at 51.)

Defendant contends failing to have the evidence tested renders counsel deficient because Defendant adamantly denied being near the crime scene prior to the murders and thus, further testing would show he was not there. Moreover, Defendant contends any additional testing of the sweat clothes, shoes, or hat would not advance the State's case. Defendant avers additional testing could have revealed additional contributors, such as Little Archie, Smallwood, or Durrance, and prevented Defendant's conviction. As to prejudice, Defendant asserts it is impossible to know what the outcome of testing would have been because the State subsequently tampered with and degraded the evidence in question.[27] Defendant maintains there is ample reason to believe additional independent laboratory testing could have exonerated Defendant. To further support prejudice, Defendant cites to Burley's postconviction testing.[28]

Eler testified at the evidentiary hearing that prior to speaking with Dr. Word, he was leaning toward refraining from doing additional testing or using Dr. Word as an expert. (P.C. EH at 423.) Eler stated he thought it would be a better strategy to make the State prove its own case and argue conflicts and flaws in the evidence. (P.C. EH at 423.) Eler consulted with Dr. Word about whether she could do testing and what the potential results may be. (P.C. EH at 423.) Eler stated that during their conversation, Dr. Word indicated her testimony may end up corroborating the State's case and its DNA findings, thereby advising Eler it may not be prudent for her to testify. (P.C. EH at 423.) Eler further stated he went over statistical information with Dr. Word and the information about who could be included and excluded based on the State's testing. (P.C. EH at 164.) A draft letter Dr. Word sent to Eler in November 2005, followed by a

[27] This Court discusses the State's alleged destruction of evidence *supra* Ground B(5).
[28] This Court addresses Burley's findings *infra* Ground B(7).

finalized letter sent in January 2006, corroborates Eler's recollection of this conversation.[29] (P.C. Def. Ex. 162; P.C. State Ex. 3.) Eler acknowledged during the evidentiary hearing that Dr. Word asked for additional materials[30] but that, at the end of the day, Dr. Word indicated her testimony would most likely support the State's case. (P.C. EH at 423.) Eler testified he felt he had meaningful conversations with Dr. Word and that he was able to understand what Dr. Word could do in the case and offer as an expert. (P.C. EH at 424.)

The pretrial status hearings in the record confirm Eler's intentions regarding the DNA testing in this case. The trial court appointed Eler to the instant case on April 30, 2004. (R. Vol. II at 249-50.) On July 26, 2004, Eler told the trial court he was in communication with Cellmark about the status of the DNA testing. (R. Vol. VI at 1118.) Subsequently, on August 30, 2004, Eler told the trial court that his Cellmark contact had been on maternity leave causing some delay. (R. Vol. VI at 1124.) At a status hearing on February 23, 2005, Eler asked for a continuance because Cellmark was examining the evidence. (R. Vol. VI at 1146-47.) Eler indicated he spoke to Marissa Kennedy (hereinafter referred to as "Kennedy") at Cellmark who gave him a timeframe for a preliminary analysis.[31] (R. Vol. VI at 1147.) On March 16, 2005, Eler told the trial court he had spoken to Kennedy, and he had scheduled numerous teleconferences with her to review the items of evidence. (R. Vol. VI at 1152.) On June 9, 2005, Eler told the trial court he spoke to Dr. Word and that further funds were required. (R. Vol. VII at 1168-69.)

On August 10, 2005, Eler came before the trial court and stated he had a lengthy phone conference with Dr. Word and needed further funding to have additional items possibly tested

[29] The first page of State's Exhibit 3 indicates Dr. Word sent the letter in January 2005. However, the subsequent pages denote the correct date of January 2006.
[30] The additional required documents are detailed in Dr. Word's letter. (P.C. Def. Ex. 162; P.C. State Ex. 3.)
[31] The record reveals that Gonzalo Andux, one of Defendant's original trial attorneys, also discussed the case with Kennedy. (R. Vol. VI at 1064.)

due to some discrepancies. (R. Vol. VII at 1175-76.) Eler told the trial court at this conference that Cellmark had not done actual testing of the evidence. (R. Vol. VII at 1176-77.) Eler did state that it was not his inclination to have any other testing done, but after speaking to Dr. Word, there may be several items that required more testing. (R. Vol. VII at 1181-82.) In a status conference held on September 15, 2005, Eler indicated to the trial court that he was planning to conduct testing. (R. Vol. VII at 1188.) On November 22, 2005, however, Eler stated to the trial court that Cellmark finished with its investigation and analysis of the evidence and he was awaiting the final report from Cellmark, consistent with Dr. Word's emails.[32] (R. Vol. VII at 1197-98; P.C. Def. Ex. 162.) It is worth noting that Defendant was present at all of these status hearings. (R. Vols. VI at 1118, 1123, 1146, 1152; VII at 1168, 1175, 1188, 1195.)

As to his conversations with Defendant, Eler testified Defendant deferred to counsel's position on whether further testing should be done. (P.C. EH at 50-51.) Eler had no recollection of Defendant adamantly requesting retesting of these items. (P.C. EH at 50-51.) Indeed, Eler testified he explained the pros and cons to Defendant about further testing, and Defendant seemed to understand. (P.C. EH at 52-53, 208.) Eler stated he looked at all of the DNA evidence and decided not to make DNA his sole feature of trial. (P.C. EH at 158-59.) Eler testified he did not want to pursue DNA for fear that it may result in additional DNA results harmful to his client. (P.C. EH at 158-59.) Regardless of whether he would have to disclose the results to the State, Eler acknowledged that DNA could have produced additional results consistent with his client, creating potential ethical dilemmas with Eler's planned presentation of evidence. (P.C. EH at 365-66.) Eler testified that after considering whether to test the evidence, Defendant ultimately agreed with the decision not to have additional DNA testing done in this

[32] This Court notes that Eler told the trial court he was having difficulty opening the report, which is consistent with e-mails he exchanged with Dr. Word. (R. Vol. VII at 1197-98; P.C. Def. Ex. 162.)

case. (P.C. EH at 51.)

During the evidentiary hearing, Dr. Word testified that when she conducts analysis of cases she starts with minimal information. (P.C. EH at 2268.) Dr. Word testified she prefers to review the data and testing to do her own independent interpretation. (P.C. EH at 2268.) Dr. Word testified that following this initial interpretation, the following occurs:

> [I]n many cases I can just say here's what I see and they're like, fine, thank you very much and we're done. In others, they need help understanding the implications of that in the context of their case. And then they may discuss their theories of the context of how it was found, when it was found, or whatever else happened.

(P.C. EH at 2269.) Dr. Word stated that in the early days of DNA testing, this was typically the type of service she provided to defense attorneys. (P.C. EH at 2107.)

Conversely, when speaking of this case, Dr. Word expressed she could not obtain enough information to gain an understanding of Defendant's case, blaming Eler's lack of communication. (P.C. EH at 2078-79, 2083, 2092.) She further testified that neither she nor Eler had a solid understanding of Defendant's case. (P.C. EH at 2085.) To support this testimony, Dr. Word detailed various notes of conversations and how this gave her the indication that Eler did not "have a handle" on the case. Dr. Word acknowledged her handwritten notes are merely her attempts to scribble down as much information as she can from what the attorney is saying during a conversation and may not be accurate. (P.C. EH at 2076, 2246; P.C. Def. Ex. 163.) Indeed, during the evidentiary hearing, Dr. Word was unable to make sense of certain notes and went so far as to call some of her own notes "cryptic." (P.C. EH at 2075, 2245.)

This Court finds counsel was not ineffective for failing to use Dr. Word as a DNA expert or conduct additional testing in this case, because it is evident from the record that Eler did use Dr. Word's services and made a decision not to conduct additional testing based on her analysis

and review of the evidence. It is not in dispute that the defense team retained Cellmark to evaluate and potentially test DNA evidence in the instant case. Moreover, it is not in dispute that Eler communicated with Dr. Word during the pendency of the case. Defendant simply maintains Eler could have made, in his view, better use of Dr. Word as an expert.

The record reveals Eler not only communicated with Dr. Word, but other individuals at Cellmark as well. Eler communicated with Dr. Word about the analysis and review of evidence done in this case and, after Dr. Word told him she would most likely corroborate the results of the State, Eler chose not to use her as an expert in this case. Instead, Eler decided to go with the trial strategy discussed throughout this Order; mainly, attack the lack of investigation and flaws in the State's case. Consistent with Eler's testimony from the evidentiary hearing, Eler thoroughly cross-examined Badger at trial to show flaws in the State's case and testing. (R. Vol. XVII at 1215-16, 1217, 1229.) Through this testimony, Eler brought forth the possibilities of other individuals having worn these clothes in an attempt to create reasonable doubt. (R. Vol. XVII at 1233-34, 1235, 1237, 1242.) Dr. Word testified at the postconviction evidentiary hearing that Badger's conclusions are not wrong, thereby affirming Eler's fears of what she would have said in front of the jury had Eler called her to testify. (P.C. EH at 2259-61.) Just because original counsel intended to have the evidence retested does not render Eler ineffective, as Eler made a reasonable, strategic choice not to test the evidence. See Strickland, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

While Defendant relies on Dr. Word's handwritten notes to support his contention that Eler had no handle on this case, this Court finds Dr. Word's notes show she spoke with Eler during the pendency of Defendant's case but does not find the notes to be a complete and

accurate account of their conversations. Further, it is worth noting Cellmark received the case from the original attorneys on the case, and Cellmark communicated with these attorneys as well, not just Eler.

While his strategy ultimately failed because Defendant was convicted, this Court cannot, in hindsight, find counsel deficient simply because his strategy ultimately failed. Based on this reasoning, this Court finds counsel's decision not to seek additional testing reasonable. See Crain v. State, 78 So. 3d 1025, 1037, 1040 (Fla. 2011) (holding "Crain cannot establish deficient performance for failure to retain an expert witness when trial counsel made a reasonable decision to confront and challenge the State's own witness at trial through cross-examination . . . ." after consulting with an expert); see also Hodges v. State, 213 So. 3d 863, 872-73 (Fla. 2017) (finding no ineffective assistance of counsel for trial counsel's tactic of bringing out the limitations of the expert testimony through cross-examination); see generally Allred v. State, 186 So. 3d 530, 537 (Fla. 2016) (holding "defense counsel [was] not ineffective for deciding not to seek an additional mental health evaluation after receiving an extremely unfavorable evaluation.").

As to Defendant's contention that Eler lied to not only him, but also to Fletcher and the trial court, this Court finds nothing in the record to support these contentions. It is clear from the status conference transcripts cited above that Eler told the trial court retesting had not yet been done and that additional testing may be done. Further, there is no evidence that Eler lied to Fletcher. Fletcher repeatedly stated he could not recall a conversation where this occurred, only that he knew the defense had no new DNA results to offer at trial. (P.C. EH at 462-67.) After observing Fletcher's testimony and viewing his demeanor, it was clear Fletcher could not recall what exactly Eler told him about subsequent testing. Instead, Fletcher could only confirm that Eler was in charge of DNA testing and there were no new results at the time of trial. (P.C. EH at

465.) This is entirely consistent with Eler's testimony about his discussion with Dr. Word and his ultimate decision not to seek any further testing.

Moreover, this Court finds flawed Defendant's contention that further testing would not advance the State's case, as further testing that would place even more of Defendant's DNA on the clothing would certainly have helped the State's case. While Defendant maintains he admitted that he owned the clothing, thereby implying that his DNA on the clothes is irrelevant to who committed the murders, this Court finds otherwise and so did the jury. Additional testing that would place Defendant's DNA on the articles would have no doubt increased his culpability in the minds of the jury. Further, this Court finds incredible Defendant's contention that if another individual's DNA appeared on the clothing he would be absolved of wrongdoing. Defendant's DNA on this clothing in conjunction with the other evidence presented a trial supports the jury's finding of guilt, regardless of whether another mixture is present. See Simpson, 3 So. 3d at 1147-48; see also Serrano v. State, 225 So. 3d 737, 756 (Fla. 2017).

This Court further finds Defendant suffered no prejudice. Defendant mainly contends additional DNA testing *could have* provided exculpatory results; however, a mere possibility of a different outcome is insufficient to establish prejudice under Strickland. Burley's test results, as discussed in further detail *infra* Ground B(7), are not exculpatory as Defendant contends and do not support a finding of prejudice. For the reasons set forth above, this Court finds no ineffective assistance of counsel.

7. *Postconviction DNA Test Results Require a New Trial Under Rule 3.853- Newly Discovered Evidence*

Defendant maintains testing done postconviction severely undermines Defendant's trial so as to warrant a new trial. To support this, Defendant states Burley recently tested the sweat clothes and fingernail scrapings and extracts in the instant case using new scientific testing

techniques. Defendant states Burley's testing of the sweatpants revealed one mixture that contains the DNA of Defendant, but also two other people (with no trace of blood from the victims). Defendant contends these results severely undermine the testimony at trial of FDLE analyst Badger. Burley also tested the fingernail clippings of both victims. Burley found at least two DNA profiles under the fingernails of Big Archie, contrary to the results that Badger testified to at trial. Defendant states Burley attempted to test the fingernail clippings of Ms. Kimbler, but was unable to retrieve any material to test due to the degradation of the evidence.

A claim of newly discovered evidence requires that the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence. Fla. R. Crim. P. 3.850(B)(1). To obtain a new trial based on newly discovered evidence, a defendant must demonstrate that:

> (1) the evidence was not known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial.

Hitchcock, 991 So. 2d at 349; see also Huffman, 909 So. 2d at 923 (concluding that newly discovered evidence must also be admissible and it "must be of such a nature that it would probably produce an acquittal on retrial."). The postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial. Swafford v. State, 125 So. 3d 760, 775-76 (Fla. 2013).

As to the first prong, Burley testified at the evidentiary hearing that when postconviction counsel retained her, she recommended using the Identifilier Plus test kit to complete any testing in the case. (P.C. EH at 2186.) The Identifilier Plus test kit became active in 2010. (P.C. EH at 2185.) Thus, this Court finds Defendant has met the first prong of newly discovered evidence because counsel and Defendant could not have known the testing results produced by the

Identifiler Plus test kit at the time of Defendant's trial and original testing, which occurred prior to 2010. This Court finds, however, that the results of this new testing are not of such a nature that it would probably produce an acquittal on retrial. This Court discusses the results from the sweat clothes and nails below.

Sweat Clothes

Burley testified at the evidentiary hearing regarding her testing of the sweat clothes and the subsequent results. On the sweatshirt, Burley tested nineteen items. (P.C. Def. Exs. 156; 157.) On item 87-5, the back right shoulder of the sweatshirt, Burley found Defendant to be included as a possible major contributor. (P.C. Def. Ex. 156 at 4.) Of the items that resulted in partial profiles, Burley found Defendant to be the source of DNA from item 87-6, the exterior back right shoulder, and to be a included as a possible contributor to the following items: 87-1, the exterior front lower right arm; 87-2, exterior front mid-chest; 87-3, exterior front upper left chest; 87-7, exterior left cuff; and 87-12, interior and exterior of the neck area.[33] (P.C. Def. Exs. 156; 157.) As to the items resulting in a DNA mixture of DNA profiles, Burley found Defendant to a possible major contributor to item 87-9, interior right cuff, and a possible contributor to the following items: 87-10, interior left cuff; 87-16, scraping of the interior right elbow and armpit; and 87-17, scraping of the interior left elbow and armpit. (P.C. Def. Exs. 156; 157.) Burley found partial DNA profiles on items 87-13 and 87-14, both cuttings from the garment tag, but due to insufficient genetic material could not draw conclusions. (P.C. Def. Exs. 156; 157.) Burley also found partial DNA profiles from at least two individuals on items 87-15, scraping of the interior waistband, and 87-19, scraping of interior chest area, and profiles of three individuals on 87-18, scraping of interior of the waistband. (P.C. Def. Ex. 157.) Due to the complexity of

[33] As to items 87-1, 87-3, and 87-7, Burley indicated that if Defendant is a possible contributor there must also be a second individual contributor. (P.C. Def. Ex. 156 at 4.)

the mixtures and low levels of DNA, however, she did not draw conclusions. (P.C. Def. Ex. 157.)

Burley tested fourteen items from the sweatpants. (P.C. Def. Exs. 156; 157.) Burley found Defendant to be the source of DNA on item 88-4, the interior front knee. (P.C. Def. Ex. 156 at 5.) Of the items containing mixtures of DNA from at least two individuals, Defendant is included as a major contributor to item 88-5, interior right leg cuff, and a possible contributor to items 88-3, outer edges of the garment tag; and 88-6, interior waistband. (P.C. Def. Ex. 156.) As to items 88-3, 88-5, and 88-6, Burley excluded Big Archie, Kimbler, Little Archie, Smallwood, and Durrance as contributors. (P.C. Def. Ex. 156.) Burley also found partial DNA profiles on item 88-7, scraping of stain on the interior back upper left leg; 88-10, scraping from the interior upper crotch area; 88-13, scraping of garment tag; and 88-14, scraping of garment tag. Due to insufficient genetic material, however, Burley could not draw conclusions as to these partial profiles. (P.C. Def. Ex. 157.) Burley found mixtures of partial DNA profiles of two or more contributors on items 88-9, scraping of interior lower crotch area; 88-11, scraping of interior left leg seam; and 88-12, scraping of interior right leg seam, but due to insufficient genetic material could not draw conclusions. (P.C. Def. Ex. 157.) Burley noted in her report that she did not obtain results from items 88-1 and 88-2, visible stains on the interior back right and left thighs. (P.C. Def. Ex. 156.)

During Defendant's trial, Badger testified about the results of the DNA testing done on the shoes, hat, sweatpants, axe, bedroom floor, and fingernail scrapings of the victims. (R. Vols. XVI at 1108-1200; XVII at 1207-12; P.C. Def. Ex. 151.) Badger testified about various DNA mixtures present on the clothing during his testimony at Defendant's trial. (R. Vol. XVI at 1174-80, 1185-88, 1191-94; P.C. Def. Ex. 151.) Eler highlighted the mixtures during his cross-

examination of Badger, as well as the lack of Defendant's DNA on certain evidence. (R. Vol. XVII at 1220, 1222, 1228, 1229-37, 1239-41, 1251, 1252-53, 1262.) Badger further testified, on both direct and cross examination, that he could not exclude Little Archie from some mixtures present on the clothes. (R. Vols. XVI at 1177, 1194; XVII at 1232, 1250-51.)

While Defendant maintains Burley's results are exculpatory, this Court disagrees. The additional testing done by Burley merely shows Defendant's DNA on more areas of the clothing, including several interior areas of the clothing. Moreover, item 88-5, interior right leg cuff of the sweatpants, and item 88-6, interior waistband of the sweatpants, exclude Little Archie as a contributor. Defendant's DNA on the clothing shows he wore the clothing, and while Defendant maintains he owned the clothing but did not wear it on the night of the murders, the jury found otherwise. The jury heard there were mixtures on the clothing at trial, and this Court does not believe presenting more mixtures that continue to show Defendant as the source of DNA or a primary contributor to DNA mixtures would have changed the result of trial. See Banks v. State, 219 So. 3d 19, 29 (Fla. 2017) (reasoning that while evidence may have corroborated defendant's testimony it would have supported the State's theory, and concluding, therefore, there was no reasonable probability of a different verdict). Accordingly, this Court finds the newly discovered evidence is not of such a nature it would produce an acquittal. Accordingly, Defendant is not entitled to relief.

Fingernails

Defendant further maintains newly discovered evidence acquired from the testing of the fingernail scrapings requires a new trial.[34] Burley testified at the evidentiary hearing that some minor alleles discovered underneath Big Archie's fingernails indicate a mixture. (P.C. EH at

[34] Defendant further contends counsel was ineffective for failing to have the fingernails tested prior to trial. This Court discusses this allegation *infra* Ground C(12). Additionally, this Court discussed Defendant's allegations about the use of polypropylene tubes *supra* Ground B(5).

2197.) As a result, Defendant maintains Burley's testing revealed at least two individuals detected on the fingernails of Big Archie. (P.C. Def. Ex. 157 at 2.) Big Archie is included as a possible major contributor, but Burley did not draw any conclusions about the remaining alleles. (P.C. Def. Ex. 157 at 2.)

In Badger's report from July 25, 2006, Badger stated he collected a swabbing from Big Archie's fingernails for DNA extraction. (P.C. Def. Exs. 153; 205.) From the right hand, Badger reported that he obtained a DNA profile from the STR analysis at amelogenin and at two loci. (P.C. Def. Exs. 153; 205.) Results as to the remaining loci, however, were either not obtained or were not interpretable. (P.C. Def. Exs. 153; 205.) Badger further reported there were no DNA profiles foreign to Big Archie reported. (P.C. Def. Exs. 153; 205.) As to the left hand, no DNA profile was obtained. (P.C. Def. Exs. 153; 205.)

While Defendant maintains this evidence of an additional contributor of DNA underneath Big Archie's fingernails requires a new trial, this Court finds otherwise. First, Burley's testing could not reach any conclusion about the contributor of the minor alleles to the DNA underneath Big Archie's fingernails. (P.C. EH at 2197.) Second, it is speculative to assume that this evidence establishes that the contributor to this DNA mixture was actually the person who murdered Big Archie. Indeed, this evidence merely establishes that Big Archie had contact with another individual at some point in time prior to his death. Accordingly, this Court finds the evidence discovered underneath the fingernails of Big Archie would not likely produce an acquittal on retrial. See Bogle v. State, 213 So. 3d 833, 851 (Fla. 2017), reh'g denied, SC11-2403, 2017 WL 1366109 (Fla. Apr. 13, 2017), and cert. denied sub nom. Bogle v. Florida, 138 S. Ct. 738 (2018); Serrano, 225 So. 3d at 756. Defendant is not entitled to relief.

8. Defense Counsel was Ineffective for Failing to Use DNA Expert Charlotte Word

Defendant maintains much of the State's most damning testimony and argument regarding the scientific results in this case were misleading and even false, and thus, had counsel used Dr. Word's expertise to impeach them, there is a reasonable probability the outcome of Defendant's trial would have been different. Specifically, the defense focuses on three separate issues regarding counsel's failure to use Dr. Word to: (1) impeach Badger's findings; (2) impeach Dr. Martin Tracey's (hereinafter referred to as "Dr. Tracey") conclusions; and (3) address confirmation bias.

Impeach Badger's Findings

Defendant contends Badger's conclusion excluding Little Archie from mixtures on the clothing was incorrect because he based his conclusion on a flawed assumption there were only two contributors to each mixture. Defendant maintains that had Eler retained Dr. Word, she would have testified that this assumption is unsupported by evidence or science, and revived Little Archie's candidacy as a wearer of the sweat clothes and the killer.

At trial, Eler attacked flaws in the police work surrounding the DNA collection and the potential for different interpretations of the DNA evidence through his cross-examination of Badger. (R. Vol. XVII at 1217, 1219-21, 1231-32, 1235, 1237, 1239-41, 1251-53, 1261.) As recognized in the instant Motion, Defendant discusses how Badger conceded that Little Archie's exclusion would no longer apply if there were more than two contributors to the mixtures. (R. Vol. XVII at 1231-32, 1235, 1239-41.) Further, the jury heard that if you assume there are more than two contributors, results of the DNA testing may change. (R. Vol. XVII at 1239-41.)

Eler specifically attacked certain samples obtained from the clothing on cross-examination to diminish the State's conclusions and corroborate Defendant's assertion that he

wore the clothing but did not commit the murders. When discussing one of these samples, Stain E, State's Exhibit 122, Badger indicated Kimbler was the major contributor. (R. Vol. XVII at 1232-33.) When discussing the minor contributors, Eler specifically questioned Badger about the D3 allele to show the jury that although parts of the DNA are consistent with Defendant, this did not mean it matched Defendant, only that he could not be excluded. (R. Vol. XVII at 1232-34.) Further, Eler elicited from Badger that if you consider Stain E to be a mixture of three individuals, Big Archie and Little Archie could not be excluded. (R. Vol. XVII at 1235, 1237.)

As to the swabbing from the waistband of the sweatpants, Eler established that while Defendant may have been the primary profile found, there was a mixture containing an unidentified individual's DNA, thereby underscoring Defendant's testimony that he was a wearer of the clothing but not the only person to wear them. (R. Vol. XVII at 1239.) Further, Eler brought out to the jury that the likelihood of Defendant committing the crime diminishes if you consider it to be a mixture of three individuals instead of two. (R. Vol. XVII at 1239-40.) Moreover, on cross-examination, Badger testified Little Archie's DNA was present on the neck of the sweatshirt, State's Exhibit 128. (R. Vol. XVII at 1243-46, 1251.) While cross-examining Badger, Eler highlighted that Defendant's DNA was not present on the hat or sneakers, consistent with Defendant's position he was not wearing the clothes on the night of the murders. (R. Vol. XVII at 1253.)

Eler questioned Badger about the timing of DNA, presenting testimony that DNA cannot be time-stamped; in other words, it is unlikely that you will know when exactly a person deposited DNA on an item. (R. Vol. XVII at 1223.) Eler used the cross-examination of Badger to further attack the quality of the police work, consistent with his theory at trial that the police work was subpar. Specifically, Eler attacked the swabbing of DNA evidence and the fact that

there was still evidence that had not been examined. (R. Vol. XVII at 1217, 1219-21.) Eler's last question for Badger, on re-cross-examination, drove his point home to the jury: a mixture means at least two people wore the clothes. (R. Vol. XVII at 1261-62.) This question highlighted for the jury the possibility of another perpetrator.

As stated *supra*, Eler testified at the evidentiary hearing that, based on his years of experience in criminal law, he settled on a strategy to make the State prove its case, and he planned to argue conflicts and flaws in the evidence through various witnesses. (P.C. EH at 423.) Eler consulted with Dr. Word, and she indicated during their conversations that her testimony would likely corroborate the State's case and its DNA findings, thereby advising Eler it may not be prudent for her to testify for Defendant. (P.C. EH at 423; P.C. State Ex. 3; P.C. Def. Ex. 162.) Indeed, in her letter to Eler, Dr. Word states she reviewed Badger's February 2003 report and "agree[d] with the conclusions stated . . ." (P.C. Def. Ex. 162; P.C. State Ex. 3.) Further, Dr. Word wrote that while she is available as a witness, her testimony would likely corroborate and support the State's findings. (P.C. Def. Ex. 162; P.C. State Ex. 3.) At the evidentiary hearing, Dr. Word detailed her involvement in Defendant's case and her opinions regarding Badger's testing of the evidence and ultimate conclusions in the case. Dr. Word testified Badger's two-contributor assumptions were "totally appropriate" and that she had nothing to discredit Badger's findings in the instant case. (P.C. EH at 2259, 2261.) Dr. Word further testified she agreed with Badger's interpretations, finding them to be appropriate. (P.C. EH at 2260.)

This Court finds counsel was not ineffective for failing to call Dr. Word as an expert at trial as her testimony would fail to impeach Badger. Moreover, Eler thoroughly cross-examined Badger, bringing to light the mixtures on the clothing from the crime scene, the potential for

different results if Badger had considered more contributors in certain, relevant mixtures, and furthered his theory that the investigative work in this case failed to meet acceptable standards. Accordingly, Defendant is not entitled to relief.

Impeach Dr. Tracey's Findings

Similar to his other allegations, Defendant maintains Eler was ineffective for failing to go two steps further with his impeachment of Dr. Tracey. More specifically, Defendant contends in this allegation that Eler, despite obtaining "small victories" during cross-examination of Dr. Tracey, could have used Dr. Word to diminish further Dr. Tracey's findings and conclusions. To support this allegation, Defendant alleges Eler could have used Dr. Word to impeach Dr. Tracey on his use of the theory of conditional probability in his findings, the State's misleading use of the term "match," and Dr. Tracey's conclusions about who wore the clothing most recently.

During cross-examination, Eler questioned Dr. Tracey on several issues that supported the defense theory at trial. Dr. Tracey stated on direct-examination,

> Well, from a scientific perspective, all I can say with confidence is that the major profile, the larger amount of DNA, is consistent with the profile of Jason Simpson. The minor profile is not identified, okay, so we know that there was someone else on those swabbings.

(R. Vol. XVII at 1331.) Eler reiterated this statement on cross-examination, when Dr. Tracey admitted that when a profile on the clothing exists in addition to Defendant's DNA profile, it means more than one individual wore the clothing. (R. Vol. XVII at 1331, 1335.) Eler further highlighted this fact with the results from the cutting of the sweatshirt neck, pointing to the fact that Little Archie shared an allele with the minor profile. (R. Vol. XVII at 1335.) Dr. Tracey further conceded on cross-examination that you cannot date DNA, nor can you affirmatively identify the most recent wearer based on the major and minor profiles. (R. Vol. XVII at 1333-34, 1335-36.) On direct-examination, Dr. Tracey testified minor profiles of wearer DNA tend to

diminish or degrade based on laundering the clothing, and that the major profile would be from the person who wore the item more recently. (R. Vol. XVII at 1331.) Eler challenged Dr. Tracey's comment about laundry on cross-examination, ultimately getting Dr. Tracey to admit that one would not expect to see wearer DNA after laundering the item. (R. Vol. XVII at 1335.)

Defendant also maintains Dr. Word could have impeached the State's use of the word "matched." Notably, the State used the term "match" during the questions it posed to Dr. Tracey. When speaking about Defendant's DNA, Dr. Tracey did not use the term match, but instead repeatedly stated the DNA was "consistent" with Defendant or gave the opinion that it originated from Defendant's DNA. (R. Vol. XVII at 1330, 1331, 1333.) Thus, this Court finds counsel was not ineffective for failing to retain Dr. Word to impeach the State's use of the word match when the State's expert told the jury it was consistent.

As to counsel's failure to use Dr. Word to impeach Dr. Tracey's statements on conditional probability, Dr. Word testified at the evidentiary hearing that Dr. Tracey's statements about conditional probability may be deemed appropriate in statistics, but stated she did not feel it was appropriate in forensic sciences. (P.C. EH at 2156.) Dr. Tracey's testified as an expert in population genetics, DNA testing, and molecular biology at Defendant's trial. (R. Vol. XVII at 1296.) Eler stated his strategy was to challenge the flaws in the State's investigation and evidence, as well as point to other individuals who had motive and opportunity to commit the crime. (P.C. EH at 68, 132, 133, 160, 169, 273.) Eler used his cross-examination of Dr. Tracey to do just that. (R. Vol. XVII at 1333-36.) Accordingly, this Court believes Eler's strategy was reasonable and that he acted competently pursuant to Strickland as Defendant's attorney. 466 U.S. at 688-89. Defendant is not entitled to relief.

Address Confirmation Bias

Defendant contends confirmation bias plagued Defendant's case. To support this contention, Defendant alleges that after Durrance told police Defendant confessed, law enforcement identified Defendant as the subject and others as elimination standards when it sent evidence to FDLE for testing. Defendant alleges this gave "implicit weight" in the examiner's mind to the discovery of Defendant's DNA on the clothing, followed by the discounting of unidentified DNA as unrelated to the crime. Defendant further alleges that an unbiased analyst would not have stopped until he or she identified all wearers or the material had been exhausted. Defendant maintains Dr. Word could have testified that "confirmation bias" compromised FDLE's testing strategy and conclusions.

At trial, Deane Johnson testified she took cuttings from many items, even when there was no presence of blood, so that analysts could conduct subsequent testing for wearer DNA. (R. Vol. XVI at 1090-91, 1094, 1098.) This included cuttings from the scalp band on the inside of the cap.[35] (R. Vol. XVI at 1094-95.) At trial, Badger explained to the jury he attempted to obtain wearer DNA from the sweatpants and sweatshirt. (R. Vol. XVI at 1162-63.) Badger testified the cuttings made from stains on the clothes are straightforward because you can see those stains. (R. Vol. XVI at 1163.) Badger testified, however, that FDLE made additional cuttings to possibly test for wearer DNA. (R. Vol. XVI at 1162-63.) Badger testified he attempted to obtain DNA from the hat and shoes as well. (R. Vol. XVI at 1163-64.)

At the evidentiary hearing, Badger testified extensively about the testing he conducted in this case. (P.C. EH at 1814-2040, 2943-3006.) Badger explained his responsibility as an FDLE analyst is to test any DNA material, regardless of the alleged scenario. (P.C. EH at 1880.)

[35] Contrary to Defendant's allegations, Deane Johnson conducted a presumptive test for blood on the hat and received a negative result. (R. Vol. XVI at 1094.) As such, she took a cutting from the inside scalp band for further wearer DNA testing. (R. Vol. XVI at 1094-95; Def. Closing Mem. at 44-45.)

Badger testified analysts take a sampling of the items for wearer DNA and then determine who is excluded or not excluded. (P.C. EH at 1875.) When he received the cuttings from Deane Johnson, an analyst at JROC, who looked for red-brown stains, Badger testified he also examined the inside portion of the item of the clothing. (P.C. EH at 1952.) As a result, those samples are going to carry a portion of the interior including the wearer or wearers into the DNA extraction process and subsequent PCR analysis. (P.C. EH at 1952-53.) Badger stated, however, that when he took a swabbing of the inside leg cuffs and waistband, for example, he was careful not to allow the exterior to influence the sampling. (P.C. EH at 1953.)

Badger recalled dialogue that law enforcement considered multiple individuals for this crime. (P.C. EH at 1879.) Badger further testified that when he received evidence for testing in the instant case, he received an e-mail from JROC indicating there were three suspects; specifically, Defendant, Little Archie, and Smallwood. (P.C. EH at 2944.) Badger testified he uploaded all three profiles to CODIS[36] on December 1, 2000, and stated he would not upload an elimination standard to CODIS. (P.C. EH at 2943-44, 2946.)

Badger testified about a December 4, 2001 memorandum from Jim Pollock, a senior crime laboratory analyst, to the Serology Section of the Orlando Regional Operations Center of FDLE to compare the wearer DNA profiles obtained from the sweatshirt and cap, along with the hair found on the clothing to profiles developed earlier. (P.C. Def. Ex. 205.) While this memorandum listed Defendant as a suspect, Badger testified this document essentially requested that he compare the wearer DNA samples to the reference standards developed earlier to determine the presumed wearer. (P.C. EH at 1868, 1876.) Badger stated the known reference standards would be those of Big Archie, Kimbler, Smallwood, Little Archie, and Defendant. (P.C. EH at 1876.) Further, a message from Caliel on October 18, 2002, indicated a request for

[36] Combined DNA Index System.

additional swabbings from the interior of a Nike shoe. (P.C. Def. Ex. 205.) Badger testified he took a further sampling of the shoes to attempt to recover wearer DNA. (P.C. EH at 1934-35.) Notably, Burley acknowledged that there had been significant sampling of the sweatpants by FDLE during her testimony. (P.C. EH at 2228.)

This Court finds counsel was not deficient for failing to retain Dr. Word to impeach FDLE's findings based on confirmation bias. This Court finds no evidence of confirmation bias based on Badger's extensive testimony about testing these items, that he compared multiple known reference standards to the samples taken from the clothing, hat, and shoes, obtained additional swabbings for wearer DNA in 2002, and submitted Defendant, Little Archie, and Smallwood to CODIS as suspects. Badger's reports from his testing in this case show he tested multiple known standards. (P.C. Def. Ex. 205.) This Court fails to see any evidence of confirmation bias. Given that there is no evidence of confirmation bias, this Court finds counsel was not ineffective for failing to present Dr. Word to challenge confirmation bias. See generally Schoenwetter v. State, 46 So. 3d 535, 546 (Fla. 2010).

Defendant's contention that an unbiased analyst would have tested until exhaustion is preposterous. While the State cannot be faulted for consuming a sample in testing if there is only enough material for one test, FDLE should not consume all evidence in its own testing. See generally Gordon v. State, 863 So. 2d 1215, 1220 (Fla. 2003) ("Florida courts have held that the unavoidable consumption of testing material does not trigger a constitutional violation."); Hooks v. State, 956 So. 2d 515, 516 (Fla. 4th DCA 2007) ("The State has committed no constitutional violation as the unavoidable consumption of evidence during DNA testing, when done in good faith, does not violate due process."). To allow otherwise would deprive Defendant of due process and an opportunity to have items tested. Further, it is equally preposterous to assert

FDLE is biased because it did not continue to test until all wearers were identified on the clothing. Some of the wearer profiles consisted of a few alleles that could match upwards of 20% of the population. Defendant's contention that FDLE should test that 20% of the population to find a match is absurd.

Defendant also presents a series of bullet points related to what he perceives as confirmation bias. (Def. 2d Am. Mot. at 65.) Defendant contends confirmation bias exists because Badger and other FDLE analysts in this case worked at the direction of state law enforcement. This makes sense, as FDLE analysts work for a state law enforcement agency. Defendant further contends the defense had no control of what items FDLE tested, how FDLE tested or analyzed the evidence, or had access to FDLE work product. Any FDLE results were available to trial counsel during the discovery process, after which the defense could seek its own expert.[37] This is exactly the reason independent DNA experts and laboratories exist; so that defendants can have access to their own experts and testing. Defendant is not entitled to relief.

C. The Jury Was Prevented from Hearing Circumstantial Evidence that Little Archie's Actions Were Far More Inculpating than Defendant's Conduct

In Ground C, Defendant maintains that he did not commit these murders and that circumstantial evidence points more toward Little Archie. Defendant concedes that counsel was successful in putting forth evidence of Little Archie's alleged involvement; however, he alleges counsel did not go far enough, thus rendering ineffective assistance of counsel. Further, Defendant alleges the following claims set forth below, premised on Brady and newly discovered evidence, would have tipped the scales in favor of a different result.

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[37] As to Defendant's allegation of bias during the postconviction stages of his case because FDLE denied Defendant's postconviction expert access to FDLE laboratories, despite JSO and the State having "unfettered access," Florida Law dictates this requirement. § 943.33(3), Fla. Stat. ("This section does not authorize the presence of defense experts or others representing the defense inside a state-operated laboratory facility where actual testing or analysis is occurring . . . ."). JSO and the Office of the State Attorney are law enforcement agencies and, therefore, permitted access to FDLE.

9. *Postconviction Investigation Has Uncovered Evidence Removing any Room for Doubt About Little Archie's Motive to Kill the Victims- Newly Discovered Evidence/ Brady/Youngblood*

Within this subclaim, Defendant raises two theories related to Little Archie's motive to kill the victims. First, Defendant alleges newly discovered evidence from a witness, Shannon Elliott (hereinafter referred to as "Elliott"), who was a friend of Ms. Kimbler and lived on the victims' property prior to the murders. Further, Defendant alleges a Brady violation, stating JSO recovered from the crime scene a black book allegedly kept by Kimbler, and JSO, along with the Office of the State Attorney, withheld this book from the defense. Defendant maintains the black book contained a log of threats made by Little Archie against Kimbler.

Newly Discovered Evidence/Ineffective Assistance of Counsel

Defendant states Elliott would have provided substantial testimony supporting the defense theory that Little Archie, not Defendant, is responsible for the murders. To support this contention, Defendant presented Elliott at the evidentiary hearing, and she testified to: (1) gunshots on victims' property prior to the murders; (2) Little Archie's threats toward Kimbler's unborn child; (3) Little Archie's relationship with Big Archie; (4) Little Archie's threats toward Kimbler; and (5) Little Archie wearing black clothes on the victims' property prior to the murders. Defendant further maintains this evidence is newly discovered because this witness moved to Idaho before the murders and counsel, therefore, would not have had the ability to locate her. In the alternative, Defendant maintains counsel was ineffective for failing to locate, interview, and call Elliott to testify at trial.

To obtain a new trial based on newly discovered evidence, a defendant must demonstrate:

> (1) the evidence was not known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial.

Hitchcock, 991 So. 2d at 349.

This Court finds Defendant has failed to meet his burden of newly discovered evidence. First, this Court finds that with the exercise of due diligence, counsel could have learned about the existence of this witness. Elliott was Kimbler's purported best friend and tenant on the victim's property leading up to the murders. (P.C. EH at 1168.) Any investigation into the victims and their property would have surely yielded her existence. The fact that Elliott lived out-of-state at the time of the murders does not change this Court's conclusion, as Elliott testified that when she moved off the victims' property, some of her roommates remained in the trailer and had her contact information in Idaho. (P.C. EH at 1182); see e.g., Devoe v. State, 780 So. 2d 991, 994 (Fla. 5th DCA 2001) ("First, Devoe did not show why this evidence was unknown and could not have been discovered through due diligence. Devoe was very good friends with Jackson."); c.f. Davis v. State, 26 So. 3d 519, 528 (Fla. 2009) (concluding defendant made prima facie showing of diligence stating "counsel informed the postconviction trial court during the hearing that investigators conducted computer searches to locate the witnesses and traveled to Illinois in an attempt to find them.").

Even assuming *arguendo* counsel could not have located this witness with due diligence, this Court finds her testimony inadmissible, cumulative, or irrelevant, and what statements may have been admissible would not have changed the outcome of trial. Thus, even if Defendant could meet the first prong of newly discovered evidence, he would be unable to establish the second prong. Rutherford v. State, 926 So. 2d 1100, 1108 (Fla. 2006) ("In determining whether the evidence compels a new trial . . . the trial court must 'consider all newly discovered evidence which would be *admissible*. . . .'"(emphasis added)). Considering these allegations under ineffective assistance of counsel, this Court finds counsel was not deficient for failing to call

Elliott as much of her testimony would have been inadmissible. Further, Defendant suffered no prejudice as these statements, had they been admitted, would not have changed the outcome of the trial.

Notably, Elliott's testimony at the evidentiary hearing was not consistent with the statements and allegations raised within the instant Motion. As such, this Court will evaluate Elliott's testimony from the evidentiary hearing only, as those are the statements before this Court. This Court individually discusses each statement below.

Gunshots on Victims' Property Prior to Murders

Elliott testified during the evidentiary hearing that approximately 12 weeks[38] before the murders an unidentified individual fired shots at the victims' home. (P.C. EH at 1170.) This Court finds this testimony is not relevant and would not have impacted the trial. It is speculative to assume the homicides and this event are in any way related. To the extent Defendant argues counsel was ineffective to present this testimony, this Court finds Defendant is not entitled to relief as this testimony would have no relevance. See Schoenwetter, 46 So. 3d at 546.

Little Archie's Threats Toward Kimbler's Unborn Child

Elliott testified she heard Little Archie say that Kimbler's unborn child would never "see the light of day." (P.C. EH at 1172.) This Court finds this testimony would have been cumulative to testimony already presented at trial and, therefore, would not have impacted the jury verdict. (R. Vols. XV at 808; XVIII at 1473, 1489-90.) To the extent Defendant maintains counsel was ineffective for failing to present this testimony through Elliott at trial, this Court finds Defendant is not entitled to relief. See Valle v. State, 705 So. 2d 1331, 1335-36 (Fla. 1997) (holding failure to present cumulative testimony does not constitute ineffective assistance of

[38] Elliott testified that this event occurred eight weeks before she moved to Idaho. (P.C. EH at 1170.) Elliott moved to Idaho four weeks before the murders occurred. (P.C. EH at 1171.)

counsel); Jennings v. State, 583 So. 2d 316, 321 (Fla. 1991) (holding once counsel puts on evidence to make particular point to jury, counsel need not call every witness whose testimony might "bolster" that position); see also Gudinas v. State, 816 So. 2d 1095, 1106 (Fla. 2002) (finding trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation).

Little Archie's Relationship with Big Archie

Elliott testified about Little Archie stealing drugs from Big Archie, which she contends caused a rift in the father-son relationship. (P.C. EH at 1173-74.) Notably, Elliott did not provide any testimony about Little Archie threatening the life of Big Archie.

At trial, the jury heard that Little Archie lost a significant amount of Big Archie's drugs approximately a year and a half before the murders. (R. Vols. XIV at 677-78; XV at 919.) Moreover, the jury heard testimony that Little Archie threatened to kill Big Archie prior to the murders. (R. Vols. XV at 809; XVIII at 1473.) This Court finds Elliott's testimony would not have produced an acquittal at retrial, as the jury heard this information from other witnesses at trial. To the extent Defendant maintains counsel was ineffective for failing to present this testimony through Elliott at trial, this Court finds Defendant is not entitled to relief. See Valle, 705 So. 2d at 1335-36; Jennings, 583 So. 2d at 321; see also Gudinas, 816 So. 2d at 1106.

Little Archie's Threats Toward Kimbler

At the evidentiary hearing, Elliott testified she heard Little Archie threaten Kimbler's life at some undisclosed time prior to the murders. (P.C. EH at 1172.) Elliott further testified Kimbler stated that should anything happen to her, Little Archie did it. (P.C. EH at 1173.) Again, this statement allegedly occurred at some undisclosed time prior to the murders. Elliott

also testified Little Archie blamed Kimbler for his parents' inability to reunite. (P.C. EH at 1173.)

As previously stated, Little Archie testified he could have said he would kill the baby, Kimbler, and Big Archie. (R. Vol. XV at 809.) Brenda Crook also testified she heard Little Archie threaten to kill Kimbler. (R. Vol. XVIII at 1473.) Further, the jury heard from Little Archie himself that he blamed Kimbler for his parents' failure to reunite. (R. Vol. XIV at 783-85.) Thus, this Court does not find Elliott's testimony would have resulted in an acquittal because the jury heard this information through other witnesses. Moreover, this Court finds counsel was not ineffective for failing to present Elliott as her testimony would have been cumulative. See Valle, 705 So. 2d at 1335-36; Jennings, 583 So. 2d at 321; see also Gudinas, 816 So. 2d at 1106.

As to Elliott's testimony concerning Kimbler's alleged statement that if anything should happen to her, Little Archie did it, this Court finds such testimony would be inadmissible as hearsay. Hearsay is generally inadmissible in court proceedings due to its unreliable nature. This alleged statement by Kimbler falls within that notion. Elliott provided no timeline for this statement in her testimony, leaving this Court to speculate as to the statement's proximity to the actual murders. Indeed, Elliott testified she became friends with Kimbler in 1992, leaving a span of approximately seven years in which this alleged statement could have been made. (P.C. EH at 1168.)

Moreover, this testimony from Elliott is insufficient to establish the prerequisites for the victim's statement as an excited utterance, spontaneous statement, or statement relating to declarant's state of mind. See Sochor v. State, 43 Fla. L. Weekly S118 (Fla. Mar. 1, 2018); Johnson v. State, 969 So. 2d 938, 951 (Fla. 2007); Grim v. State, 841 So. 2d 455, 463-64 (Fla.

2003); Sybers v. State, 841 So. 2d 532, 545 (Fla. 1st DCA 2003) ("The courts of this state have repeatedly held that out-of-court statements . . . do constitute hearsay, and cannot be used to prove the state of mind or motive of someone other than the declarant."); Selver v. State, 568 So. 2d 1331, 1334 (Fla. 4th DCA 1990) (in finding statements inadmissible, court stated "they do not describe the victim's state of mind on the night of the murder."). Eler testified at the evidentiary hearing to the same, agreeing that statements about Kimbler fearing for her life with respect to Little Archie would have helped the defense, but acknowledging it may not have been possible to admit said statements into evidence. (P.C. EH at 218.) Because this statement would not have been admissible, counsel was not ineffective for failing to present this testimony.

Little Archie Wearing Black Clothes on Property

Elliott testified at the evidentiary hearing that at some unknown time before the murders, she observed Little Archie loitering in the backyard of the victims' home wearing all black clothes. Elliott testified he was in the back yard and on "the other side of the house where I couldn't see." (P.C. EH at 1175.) Elliott testified she alerted Big Archie about Little Archie's presence on the property. (P.C. EH at 1175.)

Again, Elliott provided no timeframe in which this alleged loitering occurred. This Court does not find this testimony relevant, as there is no direct evidence linking Little Archie to the homicides. Thus, counsel was not ineffective for failing to present this testimony.

Brady

Defendant maintains that after learning of the murders, Elliott called JSO to alert them of a black book maintained by Kimbler. Defendant contends Kimbler told Elliott that this book contained a log of drug deals and other private matters, including threats from Little Archie. Defendant alleges Elliott told JSO where to locate the book in the victims' bedroom.

As discussed *supra*, Brady requires the State to disclose material information that is favorable to the defense. Riechmann, 966 So. 2d at 307-08. To establish a Brady claim, a defendant has the burden to show: (1) favorable evidence, either exculpatory or impeaching; (2) which was willfully or inadvertently suppressed by the State; and (3) because the evidence was material, the defendant suffered prejudice. Id.

This Court finds Defendant has failed to meet his burden pursuant to Brady. As to the first prong, Defendant speculates this book would contain exculpatory or impeaching information. Elliott testified about the black book, stating it contained a log of drug transactions on the property. (P.C. EH at 1176.) Elliott never testified during the evidentiary hearing that the book contained threats from Little Archie. Thus, Defendant insinuates this book would be exculpatory and impeaching with no other supporting evidence.

As to the second prong, Defendant relies on testimony from Elliott to support his contention that the State withheld this evidence. Elliott testified at the evidentiary hearing,

> When I called the detective that was on the case at the time, said that he would go to evidence room and look for it. I waited a couple of weeks and when I didn't hear from him I called back and from what I understand, he retired and the next detective that was working the case went to look for it and -- the first detective told me it was there and the second detective that had taken over the case said it wasn't there. It came up missing.

(P.C. EH at 1176-77.) This testimony contradicts what Elliott stated under oath at her deposition; specifically, that she could not remember whether JSO followed up with her about the black book. (P.C. EH at 1184.) This Court finds Elliott's testimony not credible based upon her contradictory statements. See Foster v. State, 929 So. 2d 524, 537 (Fla. 2006) ("[T]he trial court has 'the superior vantage point to see and hear the witnesses and judge their credibility.'"). Furthermore, there is no evidence that JSO collected this book from the crime scene, as Detective David Chase (hereinafter referred to as "Detective Chase") testified JSO did not

collect the black book from the kitchen table. (P.C. EH at 1475; P.C. Def. Exs. 67; 85.) Detective Chase testified it was unlikely a book with dates, times, or names, would have been collected as evidence. (P.C. EH at 1488.) As such, Defendant fails to meet the second prong of Brady.

Because it is pure speculation what is contained within the black book, and Defendant has failed to show the State collected, let alone withheld this evidence, this Court finds Defendant suffered no prejudice. See Mordenti v. State, 894 So. 2d 161, 169 (Fla. 2004) ("[The Defendant] has not alleged any prejudice, only speculation that this entry from Gail Mordenti's date-book would have helped for the sake of investigatory purposes."). Defendant has failed to meet his burden under Brady and is not entitled to relief.

Youngblood

While Defendant omits Youngblood from the title of this subclaim, he raises allegations in the Motion and closing memorandum related to the State's alleged destruction of this evidence. Specifically, Defendant contends the State knew the black book was potentially useful evidence and that it would "probably" produce an acquittal on retrial had it been admitted.

The loss or destruction of evidence that is potentially useful to the defense violates due process *only if the defendant can show bad faith on the part of the police or prosecution.* See Youngblood, 488 U.S. at 58. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Id. Indeed, evidence that has not been examined or tested by government agents does not have "apparent exculpatory value" and, therefore, cannot form the basis of a claim of bad faith destruction of evidence. Id. at 57.

First and foremost, it is clear from the testimony of Detective Chase that this black book

was not collected by law enforcement. (P.C. EH at 1475; P.C. Def. Exs. 67; 85.) Because law enforcement never collected this evidence, this Court finds the police did not examine or test this evidence and, thus, it did not have apparent exculpatory value to warrant relief under Youngblood. 488 U.S. at 57; see also Merck, 664 So. 2d at 942. Accordingly, Defendant is not entitled to relief.

10. Defense Counsel Failed to Use Available Evidence Demonstrating Little Archie's Motive and Violent State of Mind at the Time of the Murders- Ineffective Assistance of Counsel

In this subclaim, Defendant challenges counsel's actions regarding his use of Misty McNeish (hereinafter referred to as "McNeish"), Little Archie's girlfriend, during the trial. First, Defendant alleges counsel was ineffective for failing to refresh McNeish's recollection of her statements concerning Little Archie's feelings about Kimbler's unborn child. Defendant further alleges counsel was ineffective for failing to use available evidence to show Little Archie's state of mind prior to the murders. Specifically, Defendant maintains counsel should have elicited from McNeish during the trial various domestic violence incidents that occurred during the two weeks immediately prior to the murders. Defendant contends McNeish would have testified to Little Archie's abuse of Xanax and other drugs that impacted his mental state in the days leading up to the murders. Lastly, Defendant contends counsel was ineffective for allowing Little Archie's mother, Rebecca "Rosie" Crook (hereinafter referred to as "Rosie Crook"), to contact McNeish during trial, in violation of the rule of sequestration.

Counsel called McNeish to testify about Little Archie. (R. Vol. XVIII at 1482.) During direct-examination, counsel asked McNeish if she heard Little Archie threaten Kimbler's baby, to which McNeish said she did not. (R. Vol. XVIII at 1484.) Counsel stated during the evidentiary hearing that McNeish's testimony was not what he expected based on her previous

deposition testimony; however, he had testimony from another witness to bring that information before the jury. (P.C. EH at 220; P.C. Def. Ex. 179 at 135-36.) Indeed, Eler called Detective James Williams (hereinafter referred to as "Detective Williams"), who testified McNeish communicated to him that Little Archie threatened the life of Kimbler's unborn child. (R. Vol. XVIII at 1489-90.) Based on his experience as an attorney, Eler stated he made a strategic decision not to impeach McNeish with her deposition testimony, as that can sometimes backfire and be "absolutely horrible." (P.C. EH at 416.) While counsel's questioning of McNeish did not go as planned, this Court cannot say counsel was deficient, as he successfully brought this information forth through Detective Williams. Moreover, Defendant did not suffer prejudice as Detective Williams testified to Little Archie's feelings regarding Kimbler's unborn child. Valle, 705 So. 2d at 1335-36 (holding failure to present cumulative testimony does not constitute ineffective assistance of counsel).

As to Defendant's allegations that counsel should have used McNeish to testify about domestic violence issues leading up to the murders, as well as Little Archie's alleged abuse of drugs and alcohol which allegedly resulted in erratic and violent behavior, Eler testified during the evidentiary hearing that he did not see how he could create a sufficient nexus to bring that information out at trial. (P.C. EH at 226-27.) This Court agrees. Eler testified that all he felt he needed from McNeish was testimony regarding Little Archie's threats to the unborn child. (P.C. EH at 417.) The proposed testimony Defendant suggests counsel should have elicited from McNeish would have been inadmissible at trial. See §§ 90.403, 90.404, 90.405, Fla. Stat. Even if counsel could have questioned McNeish about this information, this Court finds it highly speculative she would have answered the questions as Defendant states in his Motion, given her answers to other questions about Little Archie and her admission of perjury at the evidentiary

hearing. See Hampton, 219 So. 3d at 770 ("Mere speculation is not sufficient to form the basis for postconviction relief."); Maharaj, 778 So. 2d at 951 ("Postconviction relief cannot be based on speculation or possibility."). Accordingly, Defendant is not entitled to relief as this Court finds McNeish's evidentiary hearing testimony would have been inadmissible at trial, and further finds no credibility in McNeish's testimony at the evidentiary hearing that she would have testified to such at trial because she admitted that she perjured herself during her testimony at the underlying trial. (P.C. EH at 1151); see Bussell v. State, 66 So. 3d 1059, 1062 (Fla. 1st DCA 2011) ("it is within the province of the trier of fact to assess the credibility of witnesses, and upon evaluating the testimony, rely upon the testimony found by it to be worthy of belief and reject such testimony found by it to be untrue.").

Lastly, Defendant contends counsel was ineffective for having Rosie Crook contact McNeish about when to testify at trial because the parties had invoked the rule.[39] At trial, the following exchange occurred:

> MR. ELER: Judge, there was. The witness, defense witness, Misty McNeish, who we have been looking for for several weeks now, was advised by Ms. Rebecca Crook that she knows the whereabouts of this witness and is in the State of Florida, in Orange Park, and she indicated to me that she would provide that witness' whereabouts tomorrow. She is a material defense witness, Judge. I don't have an address, I can't send an investigator to subpoena her. I just wanted to alert the Court to that potential problem.
>
> . . .
>
> THE COURT: Ms. Crook, I apologize for running you back and forth, but there was one other matter that was just called to my attention. Apparently there's a witness that needs to be subpoenaed to appear for the trial by the name of Misty McNeish.

[39] Counsel subpoenaed both McNeish and Rosie Crook for trial. (R. Vol. IV at 705, 706.)

THE WITNESS: Right. We were just discussing that. When I get home, I'm going to contact her and I've got the phone number for her to contact the lady that's doing the subpoenas.

THE COURT: All right. Do you know where Ms. McNeish is?

THE WITNESS: I know she lives in Orange Park. I do not have the address for her.

THE COURT: Do you have the phone number.

THE WITNESS: I have the phone number at home.

. . .

THE COURT: All right, would you make sure she gets that information?

THE WITNESS: Sure.

THE COURT: Who is she supposed to get it to?

MR. ELER: My investigator, Mr. Jeffers, Your Honor.

(R. Vol. XIII at 492-94.)

First, the rule of sequestration is not a strict rule of law. Wright v. State, 473 So. 2d 1277, 1280 (Fla. 1985). Instead, the trial court has discretion in the enforcement of the rule. Id. Moreover, the Florida Supreme Court has stated "the rule must not be enforced in such a manner that it produces injustice." Id. This Court finds counsel's actions in securing McNeish's presence reasonable, considering there is no concrete evidence Rosie Crook influenced McNeish's testimony and the alternative was losing a defense witness. While Defendant maintains Rosie Crook threatened McNeish, drugged her, and influenced her to perjure her trial testimony, this Court finds no merit to Defendant's contentions that such actions occurred at the time of trial. Indeed, the only testimony to this effect comes from McNeish herself, who admitted to perjuring herself during the underlying trial. Defendant is not entitled to relief.

Notably, in his closing memorandum, Defendant states that if this Court disagrees with his

position, he alternatively raises a new allegation of newly discovered evidence related to McNeish. (Def. Closing Mem. at 80.) This Court addresses this new allegation *infra* Ground H.

11. Defense Counsel Mishandled the Medical Examiner's Opinion Undermining the Evidence that Little Archie Was With Big Archie Within an Hour of his Death

Defendant maintains counsel was ineffective for mishandling the medical examiner's testimony at trial. Defendant alleges Dr. Margarita Arruza's (hereinafter referred to as "Dr. Arruza") testimony assuming that the red particulate matter in Big Archie's stomach was meat yielded a blow to the defense. Defendant asserts this testimony hindered the defense theory that Little Archie ate cherry or strawberry pie and milk with Big Archie close to Big Archie's time of death. Defendant raises three separate issues in this subclaim, alleging counsel should have: (1) deposed Dr. Bonifacio Floro (hereinafter referred to as "Dr. Floro") and Dr. Arruza; (2) moved to exclude Dr. Arruza's testimony based on the Confrontation Clause; (3) presented an independent pathologist; and (4) persisted in clarifying Dr. Arruza's testimony. This Court addresses each issue below.

Depose Dr. Floro and Dr. Arruza

Defendant maintains counsel was ineffective for failing to depose Dr. Floro and Dr. Arruza prior to trial. Defendant alleges a deposition would have eliminated the surprise testimony from Dr. Arruza about the contents of Big Archie's stomach; specifically, that the red particulate matter was meat instead of cherries.

At trial, Dr. Arruza testified about the contents of Big Archie's stomach at the time of his death, stating it contained "[curdled] milk, beans, green vegetables, and red particulate material." (R. Vol. XV at 861.) Fletcher specifically inquired about the red particulate matter, asking if it could be a fruit like cherries or strawberries. (R. Vol. XV at 861.) Dr. Arruza testified she did not believe it was strawberries because they have a very particular look to them in the stomach.

(R. Vol. XV at 861.) Dr. Arruza, however, never stated the red particulate matter could not be cherries. (R. Vol. XV at 861.) Dr. Arruza also testified Big Archie ate within an hour of his death. (R. Vol. XV at 858.) Little Archie testified he was with his father on the night of the murders, and that Big Archie ate strawberry shortcake and drank milk during their visit. (R. Vol. XIV at 790.)

At the evidentiary hearing, Fletcher testified he conducted the cross-examination of Dr. Arruza because he was in charge of the penalty phase, and the medical examiner's testimony can play a part in the finding of certain aggravators. (P.C. EH at 488.) When asked why he did not interview or depose either medical examiner, Fletcher responded the cause of death was "pretty obvious." (P.C. EH at 489.) Fletcher went on to acknowledge that, at trial, it was important to establish there was red particulate matter in Big Archie's stomach. (P.C. EH at 490.)

In his postconviction deposition, Dr. Floro testified the red particulate matter present in Big Archie's stomach could be a number of different things. (P.C. Def. Ex. 230 at 11.) Dr. Floro said it could be cherries or strawberries, but he could not say with certainty what it was in the stomach. (P.C. Def. Ex. 230 at 31-32.)

This Court does not find counsel was deficient for failing to depose Dr. Floro or Dr. Arruza prior to trial. Dr. Arruza testified the stomach contained red particulate material which is consistent with Dr. Floro's findings. Thus, this Court does not find Dr. Arruza's testimony surprising. Further, even if counsel had deposed Dr. Floro, his postconviction deposition revealed he could not state with certainty that the red particulate matter was strawberries or cherries. Thus, Defendant suffered no prejudice from counsel's failure to interview or depose Dr. Floro. Moreover, this Court finds no prejudice. Little Archie testified he was present in Big Archie's home close to the time of death, during which Big Archie consumed strawberry

shortcake and milk. (R. Vols. XIV at 781, 790; XV at 861.) The jury heard Big Archie's stomach contained red particulate material and curdled milk, eaten within an hour of his death, consistent with the defense theory that Little Archie was present in close proximity to Big Archie's death. Regardless of whether the jury heard the red particulate matter was meat, strawberries, or cherries, the jury heard Big Archie ate within a short time of his death and Little Archie admitted being present while Big Archie ate. See generally Duest, 12 So. 3d at 743 (affirming trial court's finding that "Dr. Wright's revised opinions did not alter or cast any reasonable doubt about the facts and evidence.").

Accordingly, this Court finds Defendant is not entitled to relief.

Confrontation Clause

Dr. Floro conducted the autopsy of the victims in this case but retired prior to the trial. Defendant alleges his rights under the Confrontation Clause were violated when the State called Dr. Arruza to testify as the medical examiner at trial. To support this contention, Defendant cites to Crawford v. Washington, 541 U.S. 36 (2004).

The Florida Supreme Court has consistently held it is constitutionally permissible for a medical examiner to testify to the autopsy findings of a non-testifying medical examiner if the non-testifying medical examiner is unavailable at trial. Brooks v. State, 175 So. 3d 204, 237-38 (Fla. 2015) (allowing "surrogate" medical examiner testimony where testifying medical examiner based his opinion on a review of objective evidence and the unavailability of the medical examiner who performed the autopsy); Schoenwetter v. State, 931 So. 2d 857, 870-71 (Fla. 2006) (upholding "surrogate" medical examiner opinion testimony based on an independent review of autopsy report and the unavailability of the medical examiner who performed the autopsy); Brennan v. State, 754 So. 2d 1, 4-5 (Fla. 1999) (upholding use of "surrogate" medical

examiner testimony because the testifying medical examiner "made independent conclusions using objective evidence"); Geralds v. State, 674 So. 2d 96, 100 (Fla. 1996) (emphasis in original) (allowing "surrogate" medical examiner testimony based because the testifying medical examiner "based his *independent* conclusions largely on objective evidence"); Capehart v. State, 583 So. 2d 1009, 1013 (Fla. 1991) (holding trial court properly allowed a "surrogate" medical examiner to provide opinion "based upon the autopsy report, the toxicology report, the evidence receipts, the photographs of the body, and all other paperwork filed in the case.").

This Court finds meritless Defendant's contention that because he was able to subpoena Dr. Floro in the postconviction proceedings of this case, Dr. Floro would have been available at the time of trial. (P.C. Def. Ex. 38.) Dr. Floro, who performed the autopsy on both victims, was unavailable for trial due to a medical illness. (P.C. Def. Ex. 230 at 29); see Brooks, 175 So. 3d at 237-38 (finding original medical examiner was unavailable due to health issues).

This Court finds no violation of the Confrontation Clause because Dr. Arruza testified during trial to her own independent conclusions gleaned from a review of the objective autopsy reports and pictures. (R. Vol. XV at 838-39.) Defendant then had an opportunity to cross-examine Dr. Arruza on those findings. (R. Vol. XV at 855-62.) Moreover, the State did not introduce Dr. Floro's autopsy reports into evidence during the trial. (R. Vol. IV at 756-62.) Therefore, the Confrontation Clause was not implicated because the only expert medical examiner opinions rendered at trial were those of Dr. Arruza herself, not Dr. Floro, and Defendant was afforded the opportunity to confront and cross-examine Dr. Arruza on these opinions. See Rosario v. State, 175 So. 3d 843, 847 (Fla. 5th DCA 2015) (citing Crawford, 541 U.S. at 59, 68-69). Dr. Floro stated in his postconviction evidentiary hearing deposition that had he been healthy he would have testified at trial, but he retired at an early age due to an ongoing

illness. (P.C. Def. Ex. 230 at 29); see Brooks, 175 So. 3d at 237-38 (finding original medical examiner was unavailable due to health issues). As such, this Court finds counsel was not ineffective for failing to object or move to exclude Dr. Arruza based on the Confrontation Clause, as the motion would have been meritless. See Schoenwetter, 46 So. 3d at 546 ("[C]ounsel cannot be deemed ineffective for failing to make a meritless objection.").

Lastly, there is no controlling federal or state case law suggesting it is constitutionally improper for a medical examiner to render an independent expert opinion based on his or her review of an autopsy report generated by another, non-testifying medical examiner, so long as the autopsy report itself is not introduced into evidence. In all of the cases cited by Defendant, the Confrontation Clause was violated due to the introduction of a testimonial affidavit, report, or document into evidence that was written or generated by someone who did not testify at trial. See, e.g., Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011) (holding Confrontation Clause prohibits introduction of testimonial forensic laboratory report through in-court testimony of expert who did not perform or observe testing process, unless non-testifying expert is unavailable and subject to pre-trial cross-examine); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311, 329 (2009) (holding Confrontation Clause prohibits introduction of *ex parte* out-of-court forensic affidavits without analyst testifying at trial unless unavailable and subject to pre-trial cross-examination). Here, unlike the cases cited by Defendant, the autopsy reports were not introduced into evidence.[40] Therefore, the cases cited by Defendant are inapposite to the admissibility of Dr. Arruza's expert testimony. Defendant is not entitled to relief.

[40] Many of the cases cited by Defendant in this subclaim were issued after Defendant's trial. See Diaz v. State, 810 So. 2d 1023, 1025 (Fla. 2d DCA 2002) (counsel cannot be deemed ineffective for failing to anticipate the law).

Present an Independent Pathologist

Defendant maintains that had the trial court denied a motion to exclude Dr. Arruza, Defendant could have prepared for trial by retaining an independent pathologist to impeach her claim that the red particulate matter was probably meat and not strawberries. Defendant alleges an independent pathologist, such as Dr. Charles Wetli (hereinafter referred to as "Dr. Wetli"), could have testified the red particulate matter could not be meat and that, by contrast, cherries and strawberries appear as red particulate matter in the stomach.

At the evidentiary hearing, Defendant chose not to present the testimony of Dr. Wetli. As such, this Court finds Defendant waived this part of his claim. See Ferrell v. State, 918 So. 2d 163, 174 (Fla. 2005) (finding "Ferrell 'opted to forego' the presentation of such evidence at the scheduled evidentiary hearing and thus waived the claim.").

Even assuming *arguendo* Defendant presented this testimony through Dr. Wetli, this Court finds counsel was not ineffective for failing to call an independent pathologist. As stated above, Fletcher testified he mainly needed Dr. Arruza to testify there was red particulate matter in the stomach. (P.C. EH at 490.) Dr. Arruza testified to such at trial. (R. Vol. XV at 861.) The jury heard that Big Archie's stomach contained red particulate material and curdled milk, eaten within an hour of his death, consistent with the defense theory that Little Archie was present, eating cherry pie and milk with Big Archie, in close proximity to Big Archie's death. Accordingly, this Court does not find counsel was ineffective.

Clarify Dr. Arruza's Testimony

Defendant contends Fletcher should have persisted in his cross-examination of Dr. Arruza to ensure that she stated the red particulate matter could be cherry pie.

As stated above, Dr. Arruza testified about the contents of Big Archie's stomach, stating it contained "[curdled] milk, beans, green vegetables, and red particulate material." (R. Vol. XV at 861.) Fletcher specifically inquired about the red particulate matter, asking if it could be a fruit like cherries or strawberries. (R. Vol. XV at 861.) Dr. Arruza testified she did not believe it was strawberries because they have a very particular look to them in the stomach. (R. Vol. XV at 861.) Dr. Arruza, however, never stated that the red particulate could not be cherries. (R. Vol. XV at 861.) Dr. Arruza also testified Big Archie ate within an hour of his death. (R. Vol. XV at 858.)

Thus, the jury heard that Big Archie's stomach contained red particulate material and curdled milk, eaten within an hour of his death, consistent with the defense theory that Little Archie was present, eating cherry pie and milk with Big Archie, in close proximity to Big Archie's death. Accordingly, this Court does not find counsel was ineffective. Defendant is not entitled to relief.

12. Defense Counsel Allowed the State to Use False and Unsupported Argument to Explain Away Little Archie's DNA Under Kimbler's Nails- Giglio/Ineffective Assistance of Counsel

Defendant raises two allegations within this subclaim. Initially, Defendant contends counsel was ineffective for failing to alert the jury to issues surrounding the fingernails being tested, as well as for failing to have the fingernails tested for nuclear DNA. In addition, Defendant maintains the State falsely argued about the DNA under Kimbler's fingernails belonging to Big Archie, as this position was "highly implausible" based upon the evidence at trial.

Ineffective Assistance of Counsel

Defendant maintains counsel was ineffective for failing to present to the jury that the

State misplaced the rape kit performed on Kimbler prior to trial and, as a result, tested it closer to trial. Defendant avers counsel should have made the jury aware that Defendant did not object to the State's continuance to test this rape kit. Defendant asserts that putting these facts before a jury would have demonstrated both that the State had been "extraordinary cavalier with crucial evidence" and exhibited Defendant's clear "consciousness of innocence."

As to this allegation, this Court finds Defendant is not entitled to relief. While Defendant contends counsel should have brought forth this issue to the jury, this Court finds counsel acted reasonably and consistently with his trial strategy by opting not to do so. Indeed, counsel spent time during trial showing omissions on the part of the State when it came to investigating and testing evidence in this case. (R. Vols. XIV at 624, 674-76, 685-86, 740, 741, 743, 744-45, 746, 765-66; XV at 953, 991-94; XVI at 1012-16, 1026, 1077; XVII at 1215-17, 1221-22.) This evidence was ultimately tested and counsel chose to attack the choice of test performed on the fingernails, as discussed *infra*, consistent with his strategy at trial. (R. Vol. XVI at 1077; P.C. EH at 132, 169, 274.) Thus, this Court finds counsel was not ineffective for bringing this issue of delayed testing to the jury's attention.

Next, Defendant maintains the State did not differentiate between father and son when it tested the samples from the rape kit. Defendant asserts counsel was ineffective for failing to have the samples immediately retested with a nuclear test that would have resolved the question of whether the sample came from Big Archie or Little Archie.

At trial, Badger testified that, with regard to the DNA from Kimbler's fingernail scraping, a small concentration of male DNA was present in relation to the female DNA. (R. Vol. XVII at 1210.) Badger stated he would have consumed the foreign sample had he attempted to obtain a total DNA sample, and he did not believe the DNA sample would have shown the male DNA

given the ratio of female to male DNA. (R. Vol. XVII at 1210.) As a result, he forwarded the sample to LabCorp, an outside laboratory, to conduct YSTR analysis. (R. Vol. XVII at 1209.) Shawn Weiss (hereinafter referred to as "Weiss"), an analyst from LabCorp, testified he developed a YSTR DNA profile from the extract. (R. Vol. XVI at 1072-73.) Weiss testified that if there is minor biological material left behind by a male individual, the Y chromosome allows analysts to develop a profile that disregards the female DNA. (R. Vol. XVI at 1071.) Weiss further stated on cross-examination that Little Archie could not be excluded as a contributor to the DNA found under Kimbler's fingernails based on the results of the YSTR testing, as Little Archie and Big Archie shared the same Y-chromosome. (R. Vol. XVI at 1077.)

At the evidentiary hearing, Badger echoed his original testimony from Defendant's trial. Badger stated there was a very small amount of male DNA detected in the entire sampling of Kimbler's fingernails; specifically, the concentration was greater than one part male and twenty parts female. (P.C. EH at 1960.) Badger testified that had he attempted STR testing on the sample, he would see only Kimbler's DNA and no foreign DNA. (P.C. EH at 1960.) As such, Badger transferred the DNA extract from both the right and left hands to an external laboratory for further YSTR testing. (P.C. EH at 1960.)

This Court finds counsel was not ineffective for failing to have the DNA retested for nuclear DNA as the foreign material retrieved for the victim's fingernails was not large enough to conduct STR testing, and the sample would have been consumed in the STR testing. As stated by Badger at trial and the evidentiary hearing, the sample was not large enough to conduct a meaningful STR analysis because the female DNA in the sample would overwhelm any foreign male DNA in the sample. Thus, he sent the sample to LabCorp to conduct YSTR testing, which would discern a male DNA profile from the female DNA profile. Counsel would have been

unable to conduct STR testing on the material and, therefore, cannot be deemed ineffective for failing to do so. Further, this Court does not find counsel was ineffective for failing to argue the State's testing choice demonstrated the State did not seriously consider Little Archie a suspect. Indeed, counsel used the ambiguity in the test to argue that Little Archie may be the source of DNA under Kimbler's fingernails.

In this subclaim, Defendant further alleges counsel was ineffective for failing to respond to the State's arguments that the DNA came from Big Archie, not Little Archie. Defendant contends there was no evidence that Kimbler scratched Big Archie during sexual intercourse or engaged in rough sexual intercourse. Defendant asserts that this means the State's theory that Big Archie's DNA under Kimbler's fingernails due to sexual intercourse prior to the murders is "highly implausible."

This Court finds outlandish Defendant's contention that the State's theory regarding Big Archie's DNA under Kimbler's fingernails was "highly implausible." Evidence at trial concerning the intimate contact between Kimbler and Big Archie, specifically Big Archie's semen in Kimbler's vagina, supports a theory that Kimbler's fingernails had contact with Big Archie's skin. (R. Vol. XVII at 1208-09.) Counsel challenged the State's choice of testing during his cross-examination of Weiss, to support his overarching theory at trial that the State did shoddy police work. (R. Vol. XVI at 1077; P.C. EH at 132, 169, 274.) Thus, counsel was not ineffective for failing to go through each individual autopsy photograph to determine if Big Archie had scratches from intimate contact. Furthermore, this Court declines to speculate on the rigorousness with which Kimbler and Big Archie engaged in intercourse prior to the murders. Defendant's assertion that if counsel challenged whether Kimbler scratched Big Archie during intercourse it would have resulted in an acquittal is equally outlandish. There was sufficient

evidence outside of Kimbler's fingernails to convict Defendant. Simpson, 3 So. 3d at 1147-48. Accordingly, this Court does not find counsel was ineffective.

Giglio

In this subclaim, Defendant maintains the State presented argument it knew to be false when it stated a blow from the axe immediately paralyzed Kimbler. (R. Vol. XIX at 1689.) Defendant asserts the State knew this evidence to be false because Kimbler had scratches on her hands and abdomen. Further, Defendant maintains the State knew it was false based on its argument for the HAC aggravator during the penalty phase.

As stated *supra*, a defendant must establish: (1) the prosecutor or witness gave false testimony; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Marshall, 854 So. 2d at 1251-52. "The State may commit such a violation either by deliberately presenting false evidence or by allowing false evidence to go uncorrected when it appears." Spencer v. State, 842 So. 2d 52, 70 (Fla. 2003) (citing Giglio, 405 U.S. at 153.) The State, however, may argue reasonable inferences in light of the evidence presented during the trial. See Bogle, 213 So. 3d at 845 (concluding no Giglio violation when "prosecutor argued reasonable inferences in light of the evidence presented.").

At trial, Dr. Arruza reviewed the injuries to Kimbler's body. Dr. Arruza testified about the chopping wound to Kimbler's neck, stating there was a chopping wound underneath the jaw that fractured. (R. Vol. XV at 847.) Dr. Arruza further stated two vertebrae in Kimbler's neck broke as a result of this chopping wound. (R. Vol. XV at 847.) As to the abrasions on Kimbler's finger and abdomen, Dr. Arruza stated,

> ARRUZA: We have incise wounds here on the third finger. There's small abrasions and there are more abrasions here is the right side of the abdomen. This is the belly button.

STATE: In your opinion, are these wounds also consistent with defensive wounds?

ARRUZA: The one in the hand, yes. And the other is just--also, I mean they are injuries because it cut there.

(R. Vol. XV at 849.) On cross-examination, however, Dr. Arruza testified the injury to the neck would have been fatal.

DEFENSE: And can you describe a little bit more -- I think Ms. Nelson described that as an injury that broke her neck?

ARRUZA: Yes, on the left-- left side of -- actually on the right side of --of the neck she had a very deep wound that actually goes through bone and actually cuts the first and second cervical vertebrae. That is an immediate death. There is hemorrhage in the under surface of the brain, also due to that injury. That's -- that's fatal, immediately fatal to them.

DEFENSE: So when that blow was struck, she died instantly?

ARRUZA: At that point, yes.

(R. Vol. XV at 859-60.) Dr. Arruza went on to say during cross-examination that other wounds existed on Kimbler, but there was no way to tell in which order the injuries occurred. (R. Vol. XV at 860.)

This Court finds the State's comment about Kimbler being immediately paralyzed by the blow, preventing her from scratching her assailant, is a reasonable inference from Dr. Arruza's testimony about Kimbler's broken neck. Moreover, the State tied this inference to the DNA underneath Kimbler's fingernails, attributing the DNA to Big Archie, with whom she had sexual contact with prior to her death. (R. Vol. XIX at 1689.) Thus, this Court finds no Giglio violation occurred.

As to Defendant's contention that the State's penalty phase statements prove its guilt phase statements were false, this Court finds the penalty phase statements were also consistent

with the medical examiner's testimony, as described above, and therefore do not constitute false evidence or argument under Giglio. Accordingly, this Court finds Defendant is not entitled to relief.

13. Defense Counsel Failed to Investigate and Attack Little Archie's False Alibi-Ineffective Assistance of Counsel

Defendant contends counsel was ineffective for failing to investigate Little Archie's alibi by interviewing Heather Smith (hereinafter referred to as "Smith") and Stacey Gill (hereinafter referred to as "Gill").[41] Defendant maintains Little Archie's alibi that he spent the night with Smith when the murders occurred is false. Defendant alleges Smith would have testified Little Archie asked her to lie and tell police he had spent the night with her when the murders occurred. Defendant further alleges Smith's roommate, Gill, overheard the conversation and had previously banned Little Archie from their home. Defendant avers that had counsel interviewed these witnesses, counsel could have presented this information to the jury by having these women testify. Defendant further contends counsel was ineffective for failing to attack the State's case by demonstrating the police never checked Little Archie's alibi.

Chipperfield represented Defendant from the beginning of Defendant's case in 2002, until the trial court appointed Eler in 2004. At the evidentiary hearing, Chipperfield testified locating Smith was important because she was with Little Archie on the night of the murders. (P.C. EH at 3169.) Chipperfield testified he asked in several depositions for information on how to locate Smith. (P.C. EH at 3169-70.) Chipperfield, however, was unable to locate Smith, as evidenced by the memorandum he wrote at the time he turned the case over to Eler; indeed, locating Smith was still an outstanding item. (P.C. EH at 3169; P.C. Def. Ex. 19.) Eler testified he could not recall whether he asked his investigator to look into Smith's whereabouts. (P.C. EH

[41] Gill is also listed as Stacey Parman in documents presented to this Court.

at 353-54.) Moreover, Michael Hurst (hereinafter referred to as "Hurst"), Defendant's pretrial investigator, could not recall if he investigated Smith, and all of his notes of this case are destroyed. (P.C. EH at 447-48, 451-52.)

While Defendant contends Eler was ineffective for failing to locate Smith, he fails to take into consideration that for the first two years of his case, his original trial attorneys were unable to locate her either. At the time Chipperfield gave the case to Eler, nearly five years had already elapsed since the murders occurred. While Defendant contends it would have been "easy" for Eler to find Smith,[42] it is evident, based on Chipperfield's inability to locate Smith, that was simply not the case. Notably, JSO was also unable to locate Smith, which is discussed in further detail *infra*. (P.C. EH at 2930.) Thus, while neither Eler nor Hurst could remember if they attempted to locate her, it is clear Defendant's former counsel made efforts to do so without success. Accordingly, counsel was not deficient.

Further, this Court finds the testimony presented regarding what Gill and Smith would have told counsel had he found and interviewed them constitutes hearsay. Hearsay is generally inadmissible for three reasons: "(1) the declarant does not testify under oath; (2) the trier of fact cannot observe the declarant's demeanor; and (3) the declarant is not subject to cross-examination." Banks v. State, 790 So. 2d 1094, 1097 (Fla. 2001). Both Gill and Smith are unavailable to testify because they are deceased. (P.C. Def. Exs. 164; 166.) As such, counsel attempted to enter Smith's statements through testimony from her mother, Sandy Smith. As to Gill, counsel presented an affidavit and the testimony of his postconviction investigator, Daniel Ashton (hereinafter referred to as "Ashton").[43] While Defendant maintains these statements and affidavit are not hearsay because they are offered to show what Gill and Smith would have told

[42] (P.C. EH at 1193.)
[43] Notably, Gill did not author the affidavit herself. (P.C. EH at 1250-51.)

counsel had he interviewed them during the pendency of the case, not for the truth of the matter asserted, this Court finds it to be a distinction without a difference. Defendant offers these statements and affidavit to show that the statements are indeed true and counsel, in turn, could have used these witnesses at trial. Accordingly, the statements from Smith and the statements and affidavit of Gill are hearsay. See Banks, 790 So. 2d at 1098-99 (stating "[w]hen the only possible relevance of an out-of-court statement is directed to the truth of the matters stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a non-hearsay label.") (quoting Keen v. State, 775 So. 2d 263, 274 (Fla. 2000)). This Court will address each witness below to evaluate whether a proper hearsay exception applies.

Initially, the testimony of Sandy Smith contains hearsay and, at times, layers of hearsay. Sandy Smith testified her daughter communicated information about Little Archie's whereabouts on the night of the murders to her in 2012, more than ten years after the murders occurred. (P.C. EH at 1199.) Smith allegedly told her mother that Little Archie arrived at her home at 4:30 a.m. on the morning of the murders. (P.C. EH at 1194.) Smith further told her mother that Little Archie said if anyone asked, to say he was there all night. (P.C. EH at 1195.) This Court finds these statements to be hearsay without an exception. § 90.804(2)(a)-(f), Fla. Stat.

As to Gill, counsel presented the testimony of Ashton along with an affidavit of Gill. Ashton testified he learned of Gill's existence through Sandy Smith. (P.C. EH at 1228.) Ashton stated he met with Gill in 2013 and obtained an affidavit from her about Little Archie's whereabouts on the evening of the murders. (P.C. EH at 1229, 1235.) In the affidavit, Gill states that after the murders, Little Archie came to the residence she shared with Smith. (P.C. Def. Ex. 165.) Gill further states she listened to their conversation through an open window, and Little

Archie told Smith to tell the police he came over on the night of the murders. (P.C. Def. Ex. 165.) Gill states she is positive Little Archie did not spend the night on the evening of the murders. (P.C. Def. Ex. 165.) This Court finds this affidavit rife with hearsay and bears no exception. § 90.804(2)(a)-(f). Accordingly, this Court finds the affidavit inadmissible. See Randolph v. State, 853 So. 2d 1051, 1062 (Fla. 2003); Lightbourne v. State, 644 So. 2d 54, 56 (Fla. 1994).

Defendant maintains that even if the statements are deemed inadmissible, this Court should allow the statements because they are inherently reliable and neither woman had motive to lie. This Court finds this argument meritless. According to the alleged statements, Little Archie hit Smith prior to and after the murders occurred. (P.C. EH at 1201, 1231.) This alleged abuse resulted in Gill banning Little Archie from her property. (P.C. EH at 1231; P.C. Def. Ex. 165.) It is pure speculation to assume that this would provide a motive for the women to lie, but also just as speculative to assume it would not, as Defendant contends. See Hampton, 219 So. 3d at 770; Maharaj, 778 So. 2d at 951. Further, Defendant's contention that these witnesses put themselves at great personal risk is unsupported by any evidence presented at the evidentiary hearing.

While Defendant maintains in his closing memorandum that Smith and Gill's statements are "much the same" because Gill was presumably asleep when Smith said Little Archie arrived, this Court finds there is a notable conflict in Gill and Smith's alleged statements. Smith allegedly told her mother that Little Archie was at the house in the early morning hours after the murders, whereas Gill stated Little Archie was never there as she previously banned him from the property. (P.C. EH at 1194, 1231; P.C. Def. Ex. 165.) This conflict, coupled with the hearsay nature of the statements, exemplifies the unreliability of these alleged statements from

Smith and Gill and further condemns their admissibility.

Defendant also speculates that both statements are true and assumes Eler would have had no reason not to use these statements. Given the conflict in their statements, it would be reasonable for Eler to decline to use these witnesses. Moreover, Defendant speculates without evidence that these two witnesses would have been available and willing to testify at trial. Nelson v. State, 875 So. 2d 579, 584 (Fla. 2004); see Nelson v. State, 73 So. 3d 77, 88 (Fla. 2011) (concluding witness availability integral to establish prejudice); see also Hampton, 219 So. 3d at 770; Maharaj, 778 So. 2d at 951. Indeed, the only evidence he presents is that these witnesses were alive at the time of trial, which by no means proves they were available and willing to testify. See Nelson, 73 So. 3d at 88 ("There are many reasons for a witness's unavailability, ranging from the assertion by the witness of his or her right to remain silent, or the inability to locate witnesses or serve them with a subpoena.").

Even assuming *arguendo* this Court accepted this testimony and concluded Little Archie was not with Smith on the night of the murders, their testimony does not exonerate Defendant. Defendant's DNA at the crime scene, in conjunction with the other evidence, demonstrates his guilt of the instant crimes. Simpson, 3 So. 3d at 1147-48. While Defendant repeatedly contends throughout his Motion that law enforcement did not find his DNA at the crime scene, this Court finds otherwise. While testing did not recover his DNA inside the bedroom, the crime scene encompassed more than the bedroom. Indeed, law enforcement recovered the clothing that contained Defendant's DNA from the church located just behind the victims' property. There was a clear path from the bedroom, leading to the barbed-wire fence, and ultimately the clothing at the church, thereby indicating that these locations were also part of the crime scene. (R. Vols. XIV at 604, 606, 725, 730-32; XVI at 1092; XVII at 1268-82; P.C. Def. Ex. 203 at 78-104); see

e.g. Jennings v. State, 123 So. 3d 1101, 1127 (Fla. 2013) ("While depicting a murder scene, the [crime scene] photographs . . . were used by law enforcement officers in describing how the officers found the victims *and other evidence* . . . ." (emphasis added)). Thus, Defendant's DNA was at the crime scene.

As to Defendant's allegation that counsel was ineffective for failing to attack the State's case by demonstrating the police never checked Little Archie's alibi, Detective Williams testified JSO was unable to locate Smith. (P.C. EH at 2930.) Because JSO did attempt to locate Smith, counsel cannot be ineffective for failing to attack its investigation on this point. Moreover, to show reasonable doubt, counsel highlighted the flaws in JSO's police work as well as the lack of evidence in the State's case. (R. Vols. XIV at 624, 674-76, 685-86, 740, 741, 743, 744-45, 746, 765-66; XV at 953, 991-94; XVI at 1012-16, 1026, 1077; XVII at 1215-17, 1221-22.) Accordingly, this Court finds counsel was not deficient. Defendant is not entitled to relief.

14. Defense Counsel Failed to Effectively Address Little Archie's Whereabouts the Night of the Murders- Ineffective Assistance of Counsel

In this subclaim, Defendant contends counsel was ineffective for failing to properly impeach Little Archie about his whereabouts on the night the murders occurred. Defendant avers counsel had ample evidence with which he could have impeached Little Archie during his testimony. Specifically, Defendant contends counsel could have impeached Little Archie on what time he arrived at the victims' home, how long he stayed at the home, and what he did before and after seeing the victims. Further, Defendant contends Little Archie's testimony about smoking marijuana with Big Archie was false because the medical examiner did not find cannabinoids in Big Archie's body. Defendant asserts, albeit weakly, that these various inconsistencies would "probably" have been enough to create reasonable doubt for the jury that

Defendant was not the perpetrator.[44]

Little Archie's Arrival Time at the Victims' Home

At trial, when asked at "about" what time he arrived at Big Archie's house, Little Archie testified he arrived somewhere between 10 p.m. and 11 p.m. (R. Vol. XIV at 781.) Chris Howard (hereinafter referred to as "Howard"), Big Archie's brother-in-law, testified that he saw Little Archie at Big Archie's house on the evening of the murders. (R. Vol. XIII at 551.) When asked what time he saw Little Archie, Howard stated, "it was later, 9:00, 10:00 o'clock, something like that." (R. Vol. XIII at 551.) Howard later acknowledged it was dark outside when Little Archie arrived. (R. Vol. XIII at 551.) During cross-examination, Howard stated he saw Little Archie arrive "between 10 and 11" and also stated between 10:30 and 11:30. (R. Vol. XIII at 567-68, 571.)

As to the time at which Little Archie was present at the victims' home, Defendant fails to take into account the time span over which this case transpired. The murders occurred in 1999, and the trial did not occur until nearly a decade later. Defendant cites to what he considers numerous discrepancies from witnesses about timing. Many of these witnesses acknowledged in their testimony, however, that the time was an estimate. These types of minor inconsistencies are common and do not necessarily require impeachment. Floyd, 18 So. 3d at 450; Asay v. State, 769 So. 2d 974, 984 (Fla. 2000) (upholding trial court finding that inconsistencies in witnesses' previous versions of events were relatively insignificant and reliability of the trial would not have been increased had witnesses been further impeached). Counsel established through testimony the main points that supported the defense theory; specifically, that Little Archie was present at Big Archie's home on the evening of the murders. Accordingly, this Court

[44] Defendant references counsel's failure to present Smith and Gill within this subclaim. This Court thoroughly addressed these witnesses *supra* C(13) and relies on that analysis to refute these contentions.

finds counsel was not deficient.

Little Archie at the RaceTrac

At trial, counsel called Terry Thompson (hereinafter referred to as "Thompson") during the defense's case. Thompson testified that on the night of the murders, he saw Little Archie and Smallwood at the RaceTrac gas station, a short distance from the victims' home. (R. Vol. XVIII at 1496-97.) On direct-examination, Thompson testified after seeing Little Archie at the RaceTrac he went to the victims' home and knocked on the door, but no one answered. (R. Vol. XVIII at 1497-98.) On cross-examination, Thompson stated he saw Little Archie at the RaceTrac between midnight and 12:30 a.m. (R. Vol. XVIII at 1499.) Thompson further stated he had a conversation with Little Archie and Little Archie seemed "normal." (R. Vol. XVIII at 1499.) Dana Guinn (hereinafter referred to as "Guinn"), Christy Perry's (hereinafter referred to as "Perry") father, testified he saw Little Archie "[c]lose to 11:30, it seems like. At night." (R. Vol. XVIII at 1577.) Guinn testified he could not recall if Little Archie had a shirt on. (R. Vol. XVIII at 1575.) When asked if that would stick out in his mind, Guinn stated no, because it was the summertime. (R. Vol. XVIII at 1575.) Counsel also presented Guinn's deposition testimony for the jury, during which Guinn described Little Archie as "jittery" and "nervous" at the RaceTrac. (R. Vol. XVIII at 1576.) After seeing Little Archie at the gas station, Guinn testified he, Thompson, and Perry, went to Big Archie's house. (R. Vol. XVIII at 1577.) Guinn stated they arrived at the victims' home, "probably 11:35, 11:40, somewhere in that area." (R. Vol. XVIII at 1578.)

At the evidentiary hearing, Thompson testified he saw Little Archie and Smallwood at the RaceTrac gas station[45] on the night of the murders. (P.C. EH at 1331.) When asked what time he saw Little Archie and Smallwood, Thompson stated "[a]round 12:30, 12:45,

[45] Notably, there was both a RaceTrac and a Hess gas station within close proximity to the victims' residence.

somewheres." (P.C. EH at 1331-32.) Thompson stated Little Archie was in a Monte Carlo. (P.C. EH at 1332.) In addition, counsel presented the testimony of Ashton as to what Perry would have testified to had counsel interviewed and presented her testimony to the jury.[46] Perry was in a relationship with Thompson and moved onto the victims' property with Thompson on the day of the murders. (R. Vol. XVIII at 1498, 1572; P.C. EH at 1328.) Counsel elicited from Ashton that Perry stated Little Archie was not wearing a shirt at the RaceTrac gas station on the night of the murders and was acting more "bizarre," "amped up," and "excited" than normal. (P.C. EH at 1239, 1260-61.) In addition to Ashton's testimony, Defendant submitted an affidavit from Perry. (P.C. Def. Ex. 168.) Notably, none of these statements from Ashton's testimony, allegedly made by Perry, are included in Perry's affidavit. (P.C. Def. Ex. 168.) Defendant further maintains counsel would have presented Perry's testimony on these points as she was alive at the time of trial.

To support many of the contentions regarding Perry raised by Defendant in his closing memorandum, Defendant cites almost exclusively to Ashton's testimony, not the affidavit given by Perry, as many of the statements are not included in her affidavit.[47] (P.C. EH at 1237-49, 1252-60; P.C. Def. Ex. 168.) Again, this Court finds Ashton's testimony constitutes hearsay as Defendant is offering Perry's statements for the truth of matter asserted and offers no exception. § 90.804(2)(a)-(f), Fla. Stat. While Defendant maintains these statements and affidavit are not hearsay because they are offered to show what Perry would have told counsel had he interviewed and/or deposed her during the pendency of the case, not for the truth of the matter asserted, this Court, again, finds it to be a distinction without a difference. Defendant offers these statements and affidavit to show the statements are indeed true and counsel, in turn, could have used this

[46] Perry is deceased. (P.C. Def. Ex. 167.)
[47] Notably, Perry did not author the affidavit herself. (P.C. EH at 1250-51.)

witness at trial. Accordingly, the statements from Ashton are hearsay. See Banks, 790 So. 2d at 1098-99.

Moreover, Defendant again assumes that simply because this witness was alive at the time of trial it means she was available and willing to testify at trial. This Court finds Defendant's contention speculative and lacking in evidentiary support. See Nelson, 73 So. 3d at 88; see also Hampton, 219 So. 3d at 770; Maharaj, 778 So. 2d at 951. Perry does not state in her affidavit that she was available at the time of trial, which is required for this type of claim. Nelson, 875 So. 2d at 584; see Nelson, 73 So. 3d at 88. Assuming *arguendo* she was available at the time of trial and told counsel these statements, this Court acknowledges they would have been admissible at trial because they were Perry's own personal observations. This Court, however, does not find her testimony would have swayed the verdict. Her observation that Little Archie did not have a shirt on is as probative that he committed the murders as it is that Little Archie shed his shirt because it was a humid July evening in Florida. As to her alleged observations of Little Archie's behavior, Thompson, also a witness for the defense, testified Little Archie acted normal at the RaceTrac. Perry's father, Guinn, provided testimony that Little Archie acted jittery and nervous. Guinn also testified Thompson got out of the car and went to speak to Little Archie at his vehicle. (R. Vol. XVIII at 1580.) Guinn testified that while Thompson was speaking to Little Archie, he sat in the car with Perry and they had a conversation. (R. Vol. XVIII at 1581-82.) Guinn testified he could not really see Little Archie and only heard bits and pieces of Thompson's conversation with Little Archie because they were sitting in the car a distance away. (R. Vol. XVIII at 1581, 1582.) Given the evidence against Defendant in this case, this alleged testimony from Perry does not shake this Court's confidence in the outcome of the trial. Simpson, 3 So. 3d at 1147-48.

Defendant also maintains competent counsel would have presented that Officer R. Gonzalez (hereinafter referred to as "Officer Gonzalez") observed Little Archie at a Lil' Champ at 10:55 on the night of the murders in a tan Mercury Cougar, thereby defeating Little Archie's testimony that he and Smallwood left Big Archie's home in a gray Monte Carlo. (R. Vol. XV at 824; P.C. Def. Exs. 32; 42.) Notably, the Lil' Champ listed by Officer Gonzalez is on Hammond Boulevard, located less than a mile from the victims' home. (P.C. Def. Ex. 32); Bal Harbour Vill. v. City of N. Miami, 678 So. 2d 356, 361 (Fla. 3d DCA 1996) (holding court may take judicial notice of a map). Officer Gonzalez stated he saw Little Archie at 10:55 p.m. (P.C. Def. Exs. 32; 42.) Little Archie testified he arrived at the victims' home between 10 and 11, and stayed for an hour-and-a-half, thereby indicating that Officer Gonzalez saw Little Archie before he went to the victims' home, not after as Defendant contends. (R. Vol. XIV at 789-91.) Further, this Court does not believe impeaching Little Archie with what car he drove on the night of the murders prejudiced Defendant and impacted the verdict at trial. Accordingly, counsel was not ineffective for failing to impeach on this matter. See Green v. State, 975 So. 2d 1090, 1104 (Fla. 2008) (finding counsel cannot be deemed ineffective for failing to impeach a witness with every inconsistent statement and stating "[n]o prejudice result[s] from counsel's failure to present cumulative evidence of inconsistent statements.").

Notably, while Defendant maintains counsel was ineffective for discussing the Hess station, this Court finds there was both a RaceTrac and a Hess gas station within close proximity to the victims' home and that the mix-up in names did not impact the verdict. (P.C. EH at 1435-36.) Indeed, counsel established his point through Thompson's testimony: that Little Archie stopped at the RaceTrac after visiting Big Archie, and Big Archie then failed to answer his door when Thompson knocked on the door shortly thereafter. Defendant is not entitled to relief.

Cannabinoids in Big Archie's System

Lastly, Defendant contends counsel should have presented physical evidence that Big Archie did not have cannabinoids in his system at the time of his death. Defendant avers this would further impugn Little Archie's testimony because he testified he smoked marijuana with Big Archie on the night of the murders. The following exchange occurred at trial:

> STATE: Did anybody smoke anything, things of that nature?
>
> LITTLE ARCHIE: Yeah, we smoked a joint, marijuana cigarette and my dad ate some strawberry short cake and drank some milk.

(R. Vol. XIV at 790.) At no point did Little Archie specifically say Big Archie smoked marijuana, but instead used an ambiguous "we." Again, counsel cannot be held ineffective for failing to point out every potential inconsistency in testimony. See Green, 975 So. 2d at 1104. Defendant is not entitled to relief.

15. The State Withheld, and Trial Counsel Failed to Investigate, the Fact that Little Archie Was Assisting Jacksonville Sheriff's Office in its Investigation of Durrance and Was Granted Immunity as to the Big Archie/Kimbler Murders for His Continued Cooperation-Ineffective Assistance of Counsel/Brady/Newly Discovered Evidence/Youngblood

Defendant contends Little Archie assisted the State in its investigation of Durrance and, as a result, received immunity with regard to the Crook, Sr. and Kimbler murders. Defendant avers the State withheld this information from the defense at the time of trial. To support this contention, Defendant presents newly discovered evidence in the form of a sentencing memorandum, filed on behalf of Little Archie by counsel in federal court. Defendant contends, in the alternative, that counsel was ineffective for failing to investigate this immunity agreement while he represented Defendant and use this immunity agreement at trial to cast reasonable doubt on Defendant's guilt. Defendant maintains law enforcement administered a polygraph to clear Little Archie as a suspect in the crimes, but then destroyed the results in violation of

Youngblood. Notably, Defendant did not provide any written argument for these allegations in his closing memorandum. (Def. Closing Mem. at 86.)

Brady

Defendant maintains the State withheld information that Little Archie was serving as a confidential source to JSO and FDLE at the time of the murders and received favorable treatment from both agencies as a result of his cooperation. Defendant contends records show Little Archie was acting as a confidential source to JSO and FDLE in 2001, but it may have gone as far back as 1998. As part of his work as a confidential source, Defendant maintains Little Archie assisted in providing information for a wiretap application. Further, Defendant alleges Little Archie's cooperation with the State resulted in many benefits, including immunity for the Crook, Sr. and Kimbler murders, his release after his arrest for aggravated battery against McNeish, and his release when a stolen gun and drugs were found in Smallwood's vehicle. Defendant contends this arrangement with the State is obvious, based on the fact that the State allegedly ignored all of the evidence that Little Archie actually committed these murders and failed to confirm Little Archie's alibi.

Caliel testified that during the postconviction stages of the instant case, he contacted JSO and FDLE to verify whether Little Archie acted as a confidential informant. (P.C. EH at 1015-16, 1020, 1028.) Further, Caliel contacted the special prosecution unit of the Office of the State Attorney to verify if Little Archie acted as a confidential informant. (P.C. EH at 1015-16.) Caliel stated there are no records indicating Little Archie acted as a confidential informant for any of the above-mentioned agencies. (P.C. EH at 1016, 1020.)

Agent Mark Brutnell of FDLE (hereinafter referred to as "Agent Brutnell") testified he believed Little Archie acted as a confidential source for the wiretap application in Durrance's case. (P.C. EH at 876.) Agent Brutnell testified Little Archie was a source of information, but

FDLE does not maintain records of this unless the source is an informant that is paid. (P.C. EH at 881.) Agent Brutnell went on to state that Little Archie gave an interview, from which FDLE gleaned information. (P.C. EH at 884.) At no point in his testimony did Agent Brutnell indicate Little Archie received any benefit whatsoever from his interview with FDLE.

Agent Charles Bates of FDLE (hereinafter referred to as "Agent Bates") testified about his employment with JSO; specifically, about his involvement in a narcotics investigation of Durrance. (P.C. EH at 3115-16, 3117, 3119-20, 3123.) Agent Bates testified Little Archie did speak to narcotics investigators. (P.C. EH at 3128-29.) When asked if Little Archie did so in an attempt to reduce his charges, Agent Bates testified Little Archie's charges were unrelated to their investigation. (P.C. EH at 3129.) Indeed, Agent Bates testified that just because someone is listed as a "confidential source" does not automatically mean the person is actively working with law enforcement, working toward a deal, or hoping for a sentence reduction. (P.C. EH at 3156-57.) Instead, it could merely mean the individual gave an interview in which law enforcement gained information. (P.C. EH at 3156-57.)

This Court finds no evidence that Little Archie acted as a paid, confidential informant in Durrance's trafficking case. It is evident from testimony presented at the evidentiary hearing that Agent Brutnell and Agent Bates had a conversation with Little Archie and garnered information that JSO and FDLE used in the wiretap application pertaining to Durrance. Thus, while these agencies may have used information from an interview Little Archie gave for purposes of the wiretap application, there is no indication that these agencies made any deals with Little Archie for his cooperation. In fact, at that time, Little Archie faced federal charges for counterfeiting[48] and, thus, these agencies would not have had the authority to offer Little Archie any type of deal or sentence reduction. Notably, there is some evidence that Little Archie

[48] (P.C. EH at 1397-98, 2914.)

provided information in a homicide from West Palm Beach, of which a jury ultimately convicted Durrance. (P.C. EH at 1375-76, 2439-43, 3146.) This Court finds no evidence, however, that these agencies valued confidential source information from Little Archie more than properly solving a double homicide, which is essentially Defendant's contention here. Further, Defendant presents no evidence that these agencies actively chose to allow a double axe murderer to go free because the alleged murderer had information for law enforcement about narcotics activity. Accordingly, Defendant is not entitled to relief.

As to Defendant's contention that Little Archie had an immunity agreement in place for the instant murders, Little Archie stated the following during a deposition, which forms the basis of Defendant's contention that he had an undisclosed agreement with the State:

> The only -- I mean, when I got caught -- or no. When my daddy got killed is when it was. They -- something -- what is it, where they can ask you questions like, you know about my --like, my doings and my selling drugs. There was some kind of piece of paper they made me sign, them and my lawyer, about where they couldn't take these charges and put them on me. . . . I don't know what it was.

(P.C. Def. Ex. 184 at 76.) Little Archie went on to testify that Detective Williams was the law enforcement officer that was involved in the above-described event. (P.C. Def. Ex. 184 at 77.) Later in his deposition, Little Archie recounted the polygraph, stating it occurred shortly after his father's death. (P.C. Def. Ex. 184 at 133.) Again, Little Archie referred to Detective Williams when discussing the polygraph. (P.C. Def. Ex. 184 at 134.) During the evidentiary hearing, Little Archie testified the State neither offered him immunity in the murders, nor offered him anything in exchange for his testimony in the instant case. (P.C. EH at 1376-84, 1401, 1432.) Little Archie testified law enforcement worked diligently to solve the murders and, had he committed the murders, the State would have arrested him. (P.C. EH at 1382.) While Little Archie acknowledged he did cooperate with federal authorities in his trafficking case, this

occurred after Big Archie's murder and Defendant's trial.[49] (P.C. EH at 1431.)

This Court finds Defendant has failed to carry his burden as to the alleged immunity agreement, and Defendant concedes in his closing memorandum that the evidence does not show an immunity agreement. (Def. Closing Mem. at 86.) Defendant never presented the formalized agreement during the hearing, which allegedly was signed by Little Archie, law enforcement, and an attorney representing Little Archie. Defendant never called the defense lawyer who allegedly counseled Little Archie about signing an agreement to testify about same at the evidentiary hearing, despite Little Archie saying in his deposition that his attorney was present. Moreover, there is no evidence what Little Archie signed was an immunity agreement, as Little Archie could not recall the specifics. Because there is no evidence that an immunity agreement exists as Defendant has been unable to produce it or provide testimony from anyone present at the alleged signing of the immunity agreement that could testify to its existence, and Little Archie's deposition does not specifically provide that he signed an immunity agreement, this Court finds no immunity agreement between Little Archie and the State existed. Accordingly, this Court finds no Brady violation.

As to Defendant's contention that an immunity agreement is evident because JSO did little to investigate Little Archie and excused various crimes he committed, this Court finds evidence to the contrary. Detective Williams testified that JSO considered Little Archie a person of interest because he was the last known person to see the victims alive. (P.C. EH at 2877, 2907.) JSO interviewed Little Archie, conducted a polygraph, and took DNA swabs for comparison to evidence obtained from the crime scene. (P.C. EH at 2868-69, 2876-77, 2915-18.) According to Detective Williams's notes, he met with Little Archie and arranged for a

[49] Little Archie had a pending counterfeiting charge in federal court during the investigation of the instant case. (P.C. EH at 1397-98, 2914.)

polygraph to occur. (P.C. Def. Ex. 57.) An entry on August 8, 2000, states Little Archie passed the polygraph, and includes some notes about Defendant, Big Archie, the shoes from the crime scene, and other individuals that may have been involved in the murders. (P.C. Def. Ex. 57.) Detective Williams testified at the evidentiary hearing that he recalled Little Archie took a polygraph in this case. (P.C. EH at 2915.)

At the evidentiary hearing, Defendant asked a series of questions related to whether Little Archie was able to hold his child because of passing the polygraph. While Defendant seems to insinuate JSO bribed Little Archie to take the polygraph by promising to let Little Archie hold his child, this Court does not find this allegation proven or relevant to the instant proceedings. Detective Williams stated at the evidentiary hearing that he did arrange for Little Archie to see his child, but that it was never a condition of passing the polygraph. (P.C. EH at 2917.) Moreover, Detective Williams's notes from his conversation reflect same. (P.C. Def. Ex. 57.)

As to the alleged failure to confirm his alibi, Detective Williams stated JSO was unable to find Smith. (P.C. EH at 2871, 2930.) Thus, JSO could not interview Smith to find out about her roommate Gill.[50] It is not unreasonable for JSO to conclude after the above-mentioned investigation that Little Archie was not a suspect. To the extent Defendant argues the polygraph examination is subject to Brady, this Court finds Defendant is not entitled to relief, as police eventually ruled Little Archie out as a suspect based only in part on the results of his polygraph. See Duest, 12 So. 3d at 747 ("Rather, the conclusion from the polygraph was that Mr. Shifflett was truthful as to his lack of involvement in the crime. Based on the information contained in the investigative report about Mr. Shifflett's polygraph examination, Duest *cannot* establish that the polygraph reports are exculpatory as to his involvement in the killing of Mr. Pope.").

[50] In his deposition, Little Archie was unable to provide the names of Smith's roommates. (P.C. Def. Ex. 183 at 178.)

Defendant is not entitled to relief.

Newly Discovered Evidence

Defendant maintains he recently learned that Little Archie received a sentence reduction for a federal prison sentence due, in part, to his cooperation in the instant case. Defendant states this memorandum shows Little Archie was secretly working with the State to convict Defendant and the State had a vested interest in protecting Little Archie.

To obtain a new trial based on newly discovered evidence, a defendant must demonstrate that:

> (1) the evidence was not known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial.

Hitchcock, 991 So. 2d at 349; see also Huffman, 909 So. 2d at 922-23 (concluding that newly discovered evidence must also be admissible and it "must be of such a nature that it would probably produce an acquittal on retrial.").

According to the sentencing memorandum, Little Archie assisted authorities in the investigation of the instant homicides and contributed to the eventual conviction of Defendant. (P.C. Def. Ex. 169.) Upon a review of the record and the testimony from the trial and evidentiary hearing, this Court finds the information in the sentencing memorandum is not newly discovered. It is evident from the record that Little Archie cooperated with law enforcement during the investigation of these murders, for example, giving a cheek swab, sitting for interviews with the police, and ultimately testifying at the trial. (R. Vols. XIV at 775-800; XV at 804-29; P.C. EH 1035, 1042-43, 1048, 1049, 2868-69, 2877, 2916-18.) Defendant has failed to provide any evidence that there was some other sinister agreement in place between Little Archie and the State to convict Defendant of Little Archie's own crimes. Instead, this Court finds the

sentencing memorandum entirely consistent with what occurred in this case. (P.C. Def. Ex. 169.)

Defendant also alleges that Little Archie's account of why he went to his father's house on the night of the murders in the sentencing memorandum differs from what he testified to at Defendant's trial, amounting to newly discovered evidence. This Court finds this allegation meritless for two reasons. First, an attorney prepared this sentencing memorandum as opposed to Little Archie. (P.C. Def. Ex. 169.) The attorney who wrote the memorandum did not testify in this case about the memorandum. Second, the statements in the sentencing memorandum are not direct quotes from Little Archie, but the attorney's summary of the events. (P.C. Def. Ex. 169.) Thus, it is not surprising there may be a discrepancy. Further, Little Archie testified at the evidentiary hearing that he had no recollection of this memorandum or its contents. (P.C. EH at 1400.)

Ultimately, this Court finds Defendant has not provided any evidence to be considered as newly discovered. Instead, Defendant raises a series of allegations with no evidentiary support. As Defendant cannot meet the elements of newly discovered evidence, he is not entitled to relief. Hitchcock, 991 So. 2d at 349; see also Huffman, 909 So. 2d at 922-23.

Youngblood

Defendant maintains JSO administered a polygraph examination to Little Archie after the murders that it never disclosed to defense counsel. Defendant further alleges JSO failed to produce the polygraph and suggested to postconviction counsel it was destroyed.

As discussed *supra*, there are two separate tests that apply to determine whether the government's failure to preserve evidence rises to a due process violation. Tromebetta addresses the destruction of materially exculpatory evidence whereas Youngblood addresses the

destruction of potentially useful evidence. Trombetta, 467 U.S. at 489; Youngblood, 488 U.S. at 57. For evidence to meet the standard of constitutional materiality, it "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Trombetta, 467 U.S. at 488-89. However, "the Due Process Clause requires a different result when [ ] deal[ing] with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Youngblood, 488 U.S. at 57. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Id. at 58.

This Court finds Defendant's claim as to Youngblood is without merit. Initially, Defendant fails to specifically allege what the State destroyed in regards to the polygraph. It is clear from Detective Williams's notes that Little Archie passed the polygraph with a score of +7. (P.C. Def. Ex. 57.) In his official report, made available to defense counsel, Detective Williams also states Little Archie passed the polygraph with a score of +7. (P.C. Def. Ex. 54 at 25.) Thus, the score results of the polygraph were known to counsel prior to trial. Further, this Court fails to see how the polygraph results are potentially useful evidence for Defendant. It is clear from the testimony presented that Little Archie passed the polygraph and that he was asked during the polygraph examination whether he killed his father. (P.C. EH at 2918; P.C. Def. Exs. 183 at 210; 184 at 133.) Further, the State never attempted to use the results of the polygraph against Defendant at trial. Even assuming *arguendo* this evidence was potentially useful, Defendant presented no evidence that law enforcement destroyed the results of Little Archie's polygraph in bad faith. Youngblood, 488 U.S. at 58 ("We therefore hold that unless a criminal defendant can

show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."). Accordingly, Defendant is not entitled to relief.

Ineffective Assistance of Counsel

Defendant maintains that, to the extent counsel had any information of Little Archie's confidential informant status, immunity, or related deals, he was ineffective for failing to utilize it at trial. Given this Court's analysis of Brady *supra*, this Court finds counsel was not ineffective as such information would not have been material and did not exist.

As stated above, Defendant presents no evidence that an immunity agreement between Little Archie and the State existed regarding the murders of Big Archie and Kimbler. As there was no such agreement, counsel cannot be held ineffective for failing to investigate this information or present it to the jury at trial. Defendant is not entitled to relief.

16. Defense Counsel Failed to Demonstrate the Extent of Little Archie's Reaction to the Murders- Ineffective Assistance of Counsel

Defendant contends in this allegation that counsel did not adequately present and argue available evidence regarding Little Archie's reaction to the murders. Defendant maintains Little Archie knew key details about the murders before anyone told him, had more interest in his inheritance than his father's death, and showed paranoia and a general lack of sadness following the murders.

This Court finds Defendant has failed to carry his burden as to these allegations and that counsel acted competently during trial. Initially, Little Archie testified at trial about the morning he learned of the murders. Little Archie stated Smallwood informed him of his father's death, telling him Big Archie had been shot. (R. Vol. XIV at 794-95.) Little Archie testified that when he arrived at the scene, the police were there as well as many of his family members. (R. Vol. XIV at 795-96.) Little Archie stated everyone at the scene discussed what happened. (R. Vol.

XIV at 796.)

During his cross-examination of Troy Crook, the individual who discovered the bodies, counsel asked if he informed Little Archie of the condition of the bodies. (R. Vol. XIII at 546.) Troy Crook denied ever telling Little Archie that information. (R. Vol. XIII at 546.) Detective Williams testified on cross-examination that he never told Little Archie the positioning of the bodies at the crime scene. (R. Vol. XIV at 743.) Further, Detective Williams testified that he would not have told people about the fact that the perpetrator used an axe in the homicide, as that is a unique detail of the crime. (R. Vol. XIV at 744.) Yet, counsel elicited from Little Archie that he told Detective Williams and/or Detective Dewayne Darnell (hereinafter referred to as "Detective Darnell") the condition of the bodies from the crime scene. (R. Vol. XV at 821.) Thompson testified many Crook family members were present at the crime scene on the morning the bodies were discovered. (R. Vol. XVIII at 1502.) Thompson further testified that not just that morning, but the days following, many people knew the condition of the bodies and the manner in which the bodies were found. (R. Vol. XVIII at 1502-03.)

At the evidentiary hearing, counsel presented Perry's affidavit. (P.C. Def. Ex. 168.) In the affidavit, Perry states that when Little Archie arrived at the crime scene, she was standing with the entire family on the street outside of Big Archie's home. (P.C. Def. Ex. 168.) Perry states Little Archie was immediately apprehended by police and put in a police vehicle. (P.C. Def. Ex. 168.) Perry states that at no point did Little Archie speak to the family standing outside. (P.C. Def. Ex. 168.)

Counsel attempted to elicit at trial the fact that Little Archie knew details about the crime scene through his questions to Detective Williams and Troy Crook. Thus, this Court finds counsel acted competently, as he did bring forth testimony that Little Archie had knowledge of

the crime scene before those details were released. As stated *supra*, this Court finds testimony from Perry would not have changed the outcome of the trial. Defendant has not presented any evidence showing Perry was willing and able to testify at Defendant's trial, and even assuming she was available, the testimony would not have impacted the trial, as the jury heard the testimony of Troy Crook and Detective Williams.

Defendant attempts to present other testimony through Perry's affidavit and Ashton's testimony. Specifically, Perry's affidavit states that following the murders, Little Archie acted "bizzare" and "paranoid." (P.C. Def. Ex. 168.) Perry specifically states in the affidavit that Little Archie seemed paranoid over the fact that she heard a door slam in the early morning hours of July 16, 1999, and gave her a cell phone on which he called her daily. (P.C. Def. Ex. 168.) Further, Ashton testified Perry told him she noticed a strained relationship between Little Archie and Smallwood following the murders. (P.C. EH at 1258-59.) This Court finds the contents of Ashton's testimony to be inadmissible hearsay without an exception. § 90.804(2)(a)-(f), Fla. Stat. Further, the affidavit from Perry itself amounts to hearsay with no exception.[51] § 90.804(2)(a)-(f); see Randolph, 853 So. 2d at 1062; Lightbourne, 644 So. 2d at 56. Thus, this Court does not find the affidavit admissible for this purpose and will not consider its contents. Notably, even if this Court considered Perry's statements about Little Archie's "bizarre" and "paranoid" mentality following the murders, it is speculative to assume Little Archie acted this way because he, in fact, committed the murders as Defendant contends. One can equally speculate that Little Archie acted this way due to the fact his father had just been murdered and he feared for his own safety.

Defendant failed to present any evidence at the evidentiary hearing about the remaining allegations within this subclaim, including those regarding a reaction about his inheritance and

[51] As stated *supra*, Perry did not author the affidavit herself. (P.C. EH at 1250-51.)

Brenda Crook's alleged statements about his behavior following the murders. (Def. 2d Am. Mot. at 88.) When Defendant rested at the evidentiary hearing, Defendant stated he did not wish to present any additional witnesses. Because Defendant failed to present any evidence about these allegations, this Court finds Defendant waived these contentions. See Ferrell, 918 So. 2d at 174 (finding "Ferrell 'opted to forego' the presentation of such evidence at the scheduled evidentiary hearing and thus waived the claim."). Thus, Defendant failed to carry his burden. For the reasons detailed above, Defendant is not entitled to relief.

30. Little Archie has Now Confirmed Key Details in Defendant's Alibi, Contrary to His Sworn Testimony at Trial- Newly Discovered Evidence[52]

In the instant subclaim, Defendant alleges newly discovered evidence in the form of Little Archie's postconviction deposition. Defendant maintains that in this deposition, Little Archie contradicted his trial testimony by stating he went to Defendant's trailer in the months preceding the murders and suspected Defendant was a confidential informant because he found Lieutenant Tom Waugh's (hereinafter referred to as "Lieutenant Waugh") business card while Defendant was taking a shower.

As stated *supra*, to obtain a new trial based on newly discovered evidence, a defendant must demonstrate that:

> (1) the evidence was not known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial.

Hitchcock, 991 So. 2d at 349; see also Huffman, 909 So. 2d at 923. The postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial. Swafford, 125 So. 3d at 775-76.

[52]Grounds 30 and 31 are from "Amendments to Defendant's Second Amended Initial Rule 3.851 Motion for Collateral Review," filed on October 30, 2017, and, thus, bear different, non-sequential numbering than the original grounds.

During Defendant's trial, Little Archie testified about his interactions with Defendant prior to the murders. The following exchange occurred:

THE STATE:	Prior to your father's death, had you gone over, in the days beforehand, had you gone over to Defendant's house?
LITTLE ARCHIE:	No, sir.
THE STATE:	Have you ever borrowed any clothing belonging to this Defendant?
LITTLE ARCHIE:	No, sir.
THE STATE:	Any hats, any sweats, any sneakers?
LITTLE ARCHIE:	No, sir.

(R. Vol. XIV at 799.) Little Archie further stated during direct-examination that he had been to Defendant's residence sometime prior to his father's death. (R. Vols. XIV at 800; XV at 804.) Little Archie indicated it was sometime prior to June or July, but could not recall if it was before March. (R. Vol. XV at 804.) Little Archie acknowledged at trial that he believed Defendant to be an informant because law enforcement released Defendant quickly after an arrest. (R. Vol. XIV at 798-99.)

Subsequently, during cross-examination, Eler specifically inquired about Little Archie's visit to Defendant's trailer. The following exchange occurred:

DEFENSE:	Let me ask you a little about--about [Defendant] and going over to [Defendant's] house. Is it your testimony, sir, that -- for this jury that before your father's death you'd never been over to his residence?
LITTLE ARCHIE:	No sir, I've went over there one time.
DEFENSE:	Where was that? What was the address? Do you remember?
LITTLE ARCHIE:	I don't know the address. I know it was his mother's

house.[53]

DEFENSE: His mother's house. Does the address 118th Street ring a bell with you, sir?

LITTLE ARCHIE: It was off Fouraker Road.[54]

DEFENSE: Um-hum. Do you remember taking him home on that occasion and him taking a shower and you taking a sweatshirt and sweatpants and finding a business card of a Lieutenant Waugh from Clay County Sheriff's Office? Do you remember that?

LITTLE ARCHIE: No, sir.

DEFENSE: You don't remember Lieutenant Waugh?

LITTLE ARCHIE: I remember carrying him home but I ain't took no sweatshirt from his house, sir.

(R. Vol. XV at 817-18.)

At the evidentiary hearing, Little Archie testified he visited Defendant's trailer after Defendant's release from jail in 1999. (P.C. EH at 1385.) Little Archie stated he learned Defendant was "snitching" because he found Lieutenant Waugh's business card on Defendant's dresser when he visited Defendant's trailer before the murders. (P.C. EH at 1385.) Later in his testimony, however, Little Archie could not recall what he saw. (P.C. EH at 1423.)

Defendant maintains Little Archie contradicts his trial testimony by now stating he had been to Defendant's trailer after Defendant's release and this testimony "corroborates much of Defendant's alibi." First, Defendant's alibi at the time of trial was that he spent the night at his mother's house on the evening the murders occurred. Thus, this testimony does not support Defendant's alibi as Defendant contends in the title of this ground.

Second, Little Archie's testimony from the evidentiary hearing is largely consistent with

[53]As discussed during trial, Defendant's mother lived on Star Bright Court. (R. Vol. XVIII at 1468.)
[54] Fouraker Road is located within a few miles of 118th street in Jacksonville. See Bal Harbour Vill., 678 So. 2d at 361.

what he testified to at trial. Little Archie stated at trial that he had been to Defendant's trailer on one occasion prior to his father's death; this is completely consistent with his testimony at the evidentiary hearing. Defendant maintains his testimony now that he had been to the trailer after Defendant's release somehow strengthens Defendant's trial testimony. Indeed, Defendant seems to infer that by Little Archie providing testimony he went to the trailer after Defendant's release and prior to the murders, means Little Archie took black clothing and subsequently committed the murders. Defendant maintains the jury would have seen this information in the same light and acquitted Defendant. This Court finds no merit to this argument. The discrepancy in this testimony is minor, and further, arises nearly twenty years after this allegedly occurred. Little Archie acknowledged at trial that he believed Defendant to be an informant because law enforcement released Defendant quickly after an arrest. Further, Little Archie never disagreed at trial that he found the business card, only that he did not take sweat clothes during his one visit to Defendant's trailer. (R. Vol. XV at 817-18.) This new testimony that he saw the business card does not change the fact that Little Archie had knowledge of Defendant's confidential informant status. Further, Little Archie never testified that he took black clothing from Defendant during this visit at trial or in these postconviction proceedings.

Even assuming *arguendo* Little Archie testified to taking the black clothing, it still leaves Defendant's contentions meritless because this visit to the trailer occurred weeks prior to the murders. Further, it requires the speculative assumption that Defendant only owned one pair of black sweat clothes, whereas Defendant maintained throughout this evidentiary hearing that there was a robbery ring where multiple individuals shared black clothing. Given the other evidence presented at trial, this Court does not believe this postconviction testimony from Little Archie would produce an acquittal at trial. Accordingly, Defendant fails to meet the newly discovered

evidence standard and is not entitled to relief.

31. Newly Discovered Evidence Established that Little Archie Maintained a Bag of Black Clothing Worn by Defendant and Others for Committing Home Invasion Robberies-Newly Discovered Evidence/Ineffective Assistance of Counsel

Defendant contends new testimony from Thompson is "extremely exculpatory" as to Defendant's guilt. Defendant opines this new testimony is newly discovered evidence because counsel could not have learned of it through the exercise of due diligence. In the alternative, however, Defendant alleges ineffective assistance of counsel.

Newly Discovered Evidence

Defendant alleges Thompson stated in his postconviction deposition that the clothes used in the home-invasion robberies were black clothes, contrary to his pretrial deposition that they were regular clothes. (P.C. Def. Ex. 185 at 12-13.) Further, Defendant maintains Thompson now states that Little Archie, Defendant, and Durrance shared these black clothes, and that Little Archie kept these black clothes in a bag at the victims' home.

As stated *supra*, to obtain a new trial based on newly discovered evidence, a defendant must demonstrate that:

> (1) the evidence was not known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial.

Hitchcock, 991 So. 2d at 349; see also Huffman, 909 So. 2d at 923. The postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial. Swafford, 125 So. 3d at 775-76.

At the evidentiary hearing, Thompson waivered as to whether Little Archie, Defendant, and Durrance were involved in the robbery ring. (P.C. EH at 1343-44.) Indeed, when asked if Little Archie was specifically involved, Thompson stated "...I guess so." (P.C. EH at 1343.)

When asked about Defendant being involved, Thompson replied, "I couldn't say yes or no." (P.C. EH at 1343.) As to Durrance, Thompson stated, "I'm not real sure if he was part of that or not." (P.C. EH at 1344.) While postconviction counsel attempted to impeach Thompson with his postconviction deposition testimony, it was clear from his testimony that Thompson had no concrete knowledge of who actually participated in this alleged robbery ring. (P.C. EH at 1343-44.)

Thompson further testified there was bag of black clothes in Little Archie's laundry room. (P.C. EH at 1344.) When asked if the bag belonged to Little Archie, Thompson testified "possibly." (P.C. EH at 1344-45.) Postconviction counsel then impeached Thompson with his deposition testimony. (P.C. EH at 1345.) On cross-examination, Thompson again waivered in his testimony that that these individuals wore black clothing in the robbery ring. (P.C. EH at 1345-46.) Thompson could not state with certainty that these individuals wore the clothes for that purpose, stating only that he "assumed" they wore black clothing, but acknowledging he never actually saw them in the black clothes. (P.C. EH at 1345-46.) Further, he stated he just saw some black clothing around but never saw anyone wear the clothing. (P.C. EH at 1346.) At no time during his testimony did Thompson affirmatively state Little Archie, Defendant, and Durrance shared any black clothing, let alone committed the robberies.

After observing Thompson and hearing his testimony, this Court finds no credibility in Thompson's testimony about the robbery ring. See Foster, 929 So. 2d at 537 ("[T]he trial court has 'the superior vantage point to see and hear the witnesses and judge their credibility.'"). Thompson repeatedly waivered about who was involved in the robbery ring, whether those individuals wore black clothing, and who had ownership of an alleged bag of black clothing. Thompson largely bases his testimony on his assumptions, not his personal knowledge and

observations. Thus, this Court finds no newly discovered evidence exists as Thompson does not provide new, credible testimony. See Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (concluding evidence supported postconviction court's findings that proffered testimony was not newly discovered or credible and would not have warranted new trial).

Even assuming *arguendo* this Court found his testimony to be credible, it again does little to change this Court's confidence in the outcome of Defendant's trial. Thompson did not testify that these individuals shared the clothing. Further, as stated *supra*, Little Archie possessing black clothing at some undisclosed time prior to the murders requires a large speculative leap to link him to the instant murders. While it may have minimally corroborated Defendant's trial testimony, there was still sufficient evidence to convict Defendant of the instant crimes. Simpson, 3 So. 3d at 1147-48. As such, this Court does not believe Thompson's testimony would have produced an acquittal on retrial. Accordingly, Defendant is not entitled to relief. See Blanco, 702 So. 2d at 1252.

Ineffective Assistance of Counsel

In the alternative, Defendant alleges counsel was ineffective for not being sufficiently diligent during Thompson's deposition and eliciting these facts prior to trial. As stated *supra*, this Court neither finds Thompson's testimony credible, nor does it believe said testimony would have affected the trial. Accordingly, this Court finds no ineffective assistance of counsel. Defendant is not entitled to relief.

D. The State Used False Evidence and Improper Argument and Withheld Material Evidence to Inculpate Defendant

In Ground D, Defendant opines the State greatly exaggerated the incriminating effect of the evidence it laid out in its Response to Defendant's first amended 3.851 Motion. Defendant further avers that the use of much of this evidence violates Defendant's constitutional rights, as

set forth through the grounds below.

17. *Defense Counsel Allowed the State to Falsely Undermine Defendant's Defense that Little Archie Took the Sweat Clothes a Few Weeks Before the Murders-Giglio/Ineffective Assistance of Counsel*

In this subclaim, Defendant contends counsel was ineffective for allowing the State to undermine Defendant's claim that Little Archie took sweat clothes from Defendant prior to the murders. Defendant further contends the State elicited false testimony and argument that the jail released Defendant in March 1999 to undermine his contention that Little Archie borrowed the clothing in short proximity to the murders.

Giglio

Defendant contends the State committed a Giglio violation when it directly and indirectly represented during trial that the jail released Defendant in March 1999. Defendant alleges that while the State resolved the charges in Duval County in March 1999, law enforcement transported Defendant to Columbia County due to a pending detainer. Defendant contends the State's insinuation during Little Archie's testimony and subsequent closing arguments were material and affected the verdict. Notably, Defendant withdrew certain allegations regarding Nelson contained within this subclaim through "Defendant's Notice of Formal Withdrawal of Allegation Regarding State Attorney Melissa Nelson," filed on November 14, 2017.

As stated *supra*, to succeed on a Giglio claim, the defendant must establish: (1) the prosecutor or witness gave false testimony; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Marshall, 854 So. 2d at 1251-52. False testimony is material if there is a reasonable likelihood that it could have affected the jury's verdict. Ventura, 794 So. 2d at 563. To demonstrate willfully offered perjury, a defendant must show more than mere inconsistencies due to memory lapse, unintentional error, or oversight. Maharaj, 778 So. 2d at

956.

This Court finds Defendant's claims as to a Giglio violation fail. Initially, this Court notes that the portions of the record cited by Defendant involve either closing arguments by the State or its cross-examination questions of Defendant. These statements and questions from the prosecutor are not evidence. See Huggins v. State, 161 So. 3d 335, 353 (Fla. 2014) ("Huggins cannot demonstrate that the State violated Giglio because the 'evidence' in question is actually the prosecution's closing argument."); Spencer, 842 So. 2d at 70-71 (finding no Giglio violation occurred where the prosecution was alleged to have misstated evidence during opening and closing arguments). Indeed, the trial court instructed the jury of this very notion, stating that the evidence consists of testimony from the witnesses and exhibits presented during trial. (R. Vol. V at 785.) Further, when Caliel spoke about March 1999 during closing argument and questions on cross-examination, he referenced that the release was from the Duval County jail, rendering these statements true because the Duval County jail did release Defendant in March 1999. (R. Vols. XVIII at 1425; XIX at 1618, 1643.) This Court recognizes Defendant's argument revolves around the misconception the State's argument left on the jury. However, given the State's questions on cross-examination and closing arguments are not evidence, this Court finds Defendant has failed to meet the first two prongs of Giglio.

As to prong three, this Court finds statements and arguments related to Defendant's release date were not material. The thrust of Defendant's argument is that by challenging the date of his release, the State undermined Defendant's testimony that Little Archie came to his home and took the black clothing. Little Archie testified at trial that he recalled taking Defendant home prior to the murders. (R. Vol. XV at 817-18.) Little Archie could not recall when this occurred, but gave a range of possible months, stating it was not before March, but

was before the murders occurred. (R. Vols. XIV at 800; XV at 804.) Defendant subsequently testified Little Archie drove him home from his mother's house and came inside his trailer to borrow black clothing to "hit a lick."[55] (R. Vol. XVII at 1383-87.)

When Little Archie came to the trailer is not material; instead, the material aspect to this testimony is the fact Little Archie visited Defendant's home in the time preceding the murders. Little Archie's testimony that he went to Defendant's home within a few months of the murders is consistent with Defendant's testimony that Little Archie came to his home prior to the murders. Thus, when exactly this occurred is immaterial, as the material aspect is that it, in fact, occurred at all. Because Defendant cannot establish the prongs of Giglio for the foregoing reasons, he is not entitled to relief.

Ineffective Assistance of Counsel

Defendant contends counsel was ineffective for failing to use information available to the defense at trial to correct the State's argument and innuendos regarding Defendant's release date from jail. Defendant avers counsel should have presented public records confirming Defendant's timeline that he was not released from custody until June 1999.

At the evidentiary hearing, Eler testified Defendant could not recall during his testimony the specific dates of his release. (P.C. EH at 239.) Eler did not feel the State's impeachment of Defendant was significant, given that Defendant himself could not recall the specific dates. (P.C. EH at 239, 241.) When asked why he would not use available information to challenge the State's argument and innuendo, Eler stated one must look at the big picture outside of the vacuum. (P.C. EH 245.) Eler testified it may not be worth correcting the State's argument if "the big picture paints more dirt" on Defendant. (P.C. EH at 245.) By presenting information about his actual release date, Eler would have solicited information about not only Defendant's

[55] "Hit a lick" is a term referring to illegal activity. (R. Vol. XIV at 652.)

Duval County arrest, but also the pending violation of probation in another county. (P.C. EH at 245.) Fletcher's testimony at the evidentiary hearing echoed that of Eler. Fletcher stated that even if counsel had the documentation, it would involve impeaching his client in front of the jury. (P.C. EH at 429.) Fletcher testified this, in turn, would affect his ability to argue Defendant's credibility in closing arguments. (P.C. EH at 429.)

It is worth noting that while the State's cross-examination challenged Defendant's timeline, Defendant's testimony was corroborated by that of Detective Robert Hinson (hereinafter referred to as "Detective Hinson"). Defendant testified that when Little Archie drove him to his trailer in June 1999, he asked Defendant to "hit a lick" that evening. (R. Vol. XVII at 1385-86.) This testimony is corroborated by Detective Hinson's testimony that Defendant contacted him in June 1999, stating Little Archie wanted Defendant to "hit a lick." (R. Vol. XIV at 651-52.) Thus, while the State may have insinuated Little Archie's visit occurred in March, April, or May 1999, Detective Hinson's testimony supports Defendant's statements that it occurred in June 1999.

This Court finds reasonable counsels' decision to refrain from presenting such information, which could ultimately unveil additional harmful evidence against his client or diminish his credibility in front of the jury. Counsels' reasoning is consistent with their strategy at trial, as evidenced by Eler specifically asking the trial court to restrict what Little Archie could say about Defendant's previous charges for Robbery. (R. Vol. XIV at 772-75.) Accordingly, this Court finds Fletcher and Eler were not deficient, and Defendant is not entitled to relief. See Strickland, 466 U.S. at 690.

Notably, in his closing memorandum, Defendant raises a new allegation of ineffective assistance of counsel in this subclaim. Defendant alleges counsel should have done an

investigation after trial and raised this issue in a Motion for New Trial. (Def. Closing Mem. at 37.) This Court addresses this allegation *infra* Ground H.

18. Defense Counsel Let the State Put on False Evidence and Argument to Support its Theory Defendant Entered Through the North Rear Door

Defendant contends counsel was ineffective for failing to attack the State's theory that Defendant entered through the north rear door of the victims' home on the night of the murders. Defendant avers the State knew this theory was false because Thompson stated in his pre-trial deposition that, after seeing Little Archie at the RaceTrac gas station, he went to the victims' home and found the north rear door of the home locked. Defendant states this is contrary to Little Archie's testimony that he left the north rear door unlocked. Defendant maintains counsel was ineffective for failing to demonstrate the falsity of the State's theory.

Fatal to this claim is that Defendant automatically assumes Little Archie lied because Thompson's pretrial deposition testimony is, in his view, correct. Giglio requires the defendant to show the statement or argument by the State or its witness is actually false, not simply that it may have been false. Maharaj, 432 F.3d at 1313. Here, Defendant fails to take into account that there is conflicting testimony from Thompson and Little Archie about whether the north rear door was locked. This conflicting testimony is not a Giglio violation as Defendant contends. See Mungin v. State, 141 So. 3d 138, 145-47 (Fla. 2013) (affirming lower court's holding no Giglio violation occurred when defendant presented testimony of witness whose testimony was merely inconsistent with State witness's version). As a result, Defendant has not conclusively shown that Little Archie's testimony, and in turn the State's argument, is actually false. Instead, the State's argument is just an interpretation of the evidence presented. See Bogle, 213 So. 3d at 845. Moreover, the State acknowledged in its closing argument that the evidence does not really show how Defendant entered the home. (R. Vol. XIX at 1689-90.) While Thompson stated in

his deposition that the door was locked on the evening of the murders, he also testified, both at trial and in his deposition, that it was not uncommon for Big Archie to leave doors unlocked at his home. (R. Vol. XVIII at 1501; P.C. Def. Ex. 185 at 8, 18-19.) Accordingly, this Court finds no Giglio violation and, therefore, counsel was not ineffective for failing to raise a meritless argument. See Schoenwetter, 46 So. 3d at 546.

Furthermore, counsel did present testimony from Thompson and Guinn that after leaving the RaceTrac and arriving at the victims' home, no one answered the door. (R. Vol. XVIII at 1497-98, 1577-78.) This testimony helped support the theory that Defendant attempted to build at trial to show reasonable doubt; specifically, that Little Archie was responsible for the murders. (P.C. EH at 132, 133-34.) Accordingly, counsel was not deficient and Defendant is not entitled to relief.

19. Defendant's Mother's Number Was Not the Last One to Page Big Archie-Giglio/Brady/Ineffective Assistance of Counsel

Defendant maintains Big Archie's pager was a crucial piece of evidence in this case that the State never disclosed to counsel and wrongfully destroyed. Defendant raises Giglio, Brady, and ineffective assistance of counsel claims related to this pager and the testimony presented at trial about the pager.

Brady

Defendant maintains the State committed a Brady violation for failing to give defense counsel access to Big Archie's pager from the crime scene. Defendant alleges the State destroyed the pager so Defendant would not gain access to exculpatory information contained within the device.

The first prong of Brady requires Defendant to show the evidence at issue is favorable to the accused, either because it is exculpatory or impeaching. Riechmann, 966 So. 2d at 307-08.

This Court finds Defendant has demonstrated neither. First, Defendant makes unsupported allegations that the numbers called by Detective Williams did not belong to Melanie Stuckey. Thus, it is questionable whether Detective Williams could have been impeached by that information. Second, the pager is not exculpatory to the extent argued by Defendant. For example, Defendant states a page from Defendant arriving after the murders took place would be exculpatory because a killer would not page someone they know to be dead. This is highly speculative and, indeed, could be construed to the opposite end. A defendant may page a victim after the murder to cover his or her involvement in the crime by making it look as if they paged someone he or she believed to be alive. Thus, this Court finds the pager to be neither exculpatory nor impeaching, and does not amount to favorable evidence.

As to Brady's second prong, Defendant fails to present any evidence that this pager was indeed collected from the crime scene by evidence technicians and willfully or inadvertently suppressed by the State. See id. In fact, postconviction counsel admitted during his questioning on direct examination of Detective Williams that the pager is not listed as an item collected from the crime scene. (P.C. EH at 2847-48.) Detective Bialkoski testified he could not recall if the pager was collected, but stated it would not be necessary to collect the pager. (P.C. EH at 2601-02.) Specifically, Detective Bialkoski stated if the information from the pager is recorded by a detective, a subpoena can get any additional information from the phone carrier, making the collection of the physical pager irrelevant. (P.C. EH at 2602.) Detective Chase, the lead evidence technician, testified he processed the scene at the direction of the detectives on this case. (P.C. EH at 1446.) The evidence logged on the property storage card does not reveal a pager was collected. (P.C. Def. Ex. 67.) This Court finds this consistent with Detective Chase's testimony that he collected evidence at the direction of the detectives, and Detective Bialkoski's

testimony that it would not be unusual to record the numbers in lieu of collecting the physical pager. Accordingly, Defendant has failed to meet his burden that this item was collected, withheld, and/or destroyed by the State.

Assuming *arguendo* that the State withheld the pager, this Court finds Defendant did not suffer prejudice as a result of the suppression of the pager as there was overwhelming evidence of Defendant's guilt at trial. While Defendant argues that all of the evidence is circumstantial, the Florida Supreme Court found otherwise when it reviewed the sufficiency of the evidence in the instant case. Specifically, the Florida Supreme Court found Durrance's account of Defendant's confession to be direct evidence of Defendant's guilt. Simpson, 3 So. 3d at 1147. Further, the Florida Supreme Court relied on Defendant's DNA on the clothing. Id. This evidence was the thrust of the Court's conclusion that there was sufficient evidence to convict Defendant. Notably, the Court also highlighted some of the circumstantial evidence in this case, including the page from Melanie Stuckey's home, but by no means did it solely rely on that piece of evidence in finding support for Defendant's convictions. Id. at 1148. Thus, this Court finds Defendant did not suffer any prejudice from the alleged suppression of the pager as there was other evidence of Defendant's guilt.

Giglio

Defendant maintains the State knew the pager was exculpatory and that Detective Williams's trial testimony was false. Specifically, Defendant alleges Detective Williams's testimony that he called the "first number" on the pager, which was Defendant's mother, was false. To show the false nature of the testimony, Defendant states Detective Bialkoski recorded the number *693*-9884 in his notes at the crime scene, whereas Detective Williams's report lists *793*-9884 as the number from the pager that he called to reach Defendant's mother. (P.C. Def.

Exs. 45; 54.) Further, Defendant contends the State knew this testimony was false because it attempted to subpoena records for another number, *783*-9884.

At trial, Detective Williams testified he scrolled through the pager and wrote down the phone numbers stored in its memory. (R. Vol. XIV at 735.) Detective Williams testified that later, after calling the numbers that appeared on the pager, he learned the first number to appear on the pager belonged to Defendant's mother, Melanie Stuckey. (R. Vol. XIV at 735.) On September 13, 1999, Detective Williams called every number from the pager in an attempt to make contact with the individuals who paged Big Archie. (R. Vol. XIV at 735.) Detective Williams's trial testimony is consistent with his September 26, 2000 report. (P.C. Def. Ex. 54.) This Court is cognizant that at trial the State asked if Detective Williams reviewed the pager in September 1999. While the State's question alluded to the fact that this occurred on September 13, 1999, this Court finds the State's question poorly worded, as it also asked if Detective Williams reviewed the pager "during the course of the investigation." (R. Vol. XIV at 734.) Regardless, this Court finds the record evidence in this case supports the conclusion that Detective Williams reviewed the pager at the crime scene because that was the only opportunity the detectives had to see the pager, as JSO never collected the pager from the crime scene. (P.C. Def. Ex. 67.) This Court is also aware that Detective Williams stated at the 2018 evidentiary hearing that the only place he could get the numbers stored in the pager's memory was from Detective Bialkoski's report, which conflicts with Detective Williams's trial testimony that he scrolled through the numbers stored in the pager's memory himself. (R. Vol. XIV at 735; P.C. EH at 2848.) However, this Court finds his trial testimony, given more proximately to the actual events, more persuasive than that given nearly twenty years later.

This Court is aware that a written note allegedly found in Eler's file contains Melanie

Stuckey's phone number; however, it is a piece of paper in Eler's file about which Eler never testified. (P.C. Def. Ex. 31.) This Court finds Defendant has failed to show the number on Detective Williams's report is not a number at which Melanie Stuckey could have been reached. In fact, the only thing Defendant states in his motion is the alleged discrepancy of the prefixes, but he did not present any evidence to support these statements. What this Court finds most important is that after viewing the numbers on the pager, Detective Williams called a number that reached Melanie Stuckey. When presented with the discrepancy in the reports of one digit at the 2018 evidentiary hearing, Detective Williams testified it was most likely a simple error. (P.C. EH at 2849-50; P.C. Def. Exs. 45; 54.)

Furthermore, Defendant has failed to show Detective Williams's statement that he called the first number on the pager screen was false. Testimony at the evidentiary hearing revealed that the pager did not assign dates to the entries, only times. (P.C. EH at 2846.) Detective Williams testified at trial he "scrolled" through the entries on the pager at the crime scene. (R. Vol. XIV at 734-35.) Detective Williams also testified he called the first number to appear on the pager screen, which is not necessarily the last number to page the beeper. Thus, it is plausible that the first number on the pager could have been Defendant's mother, as it is unclear where the scrolling began in the listed numbers at the time it was in Detective Williams's possession. The State's argument that Defendant's mother's number was the most recent page was not improper as it could have reasonably been inferred by the evidence. Ford v. State, 702 So. 2d 279, 280 (Fla. 4th DCA 1997) (citing Huff v. State, 437 So. 2d 1087, 1090 (Fla. 1983)); see Merck v. State, 975 So. 2d 1054, 1064 (Fla. 2007) (finding no impropriety in prosecutor's comments based on facts in evidence and common-sense inferences from those facts); McKenzie v. State, 830 So. 2d 234, 238 (Fla. 4th DCA 2002) ("While recognizing that wide latitude should

be permitted in closing argument, a prosecutor's comments must be based on facts in evidence or fair inference from those facts."). Any alleged discrepancy in the first three digits of the number does not shake this Court's confidence in the outcome of this case. There was other sufficient evidence at trial to convict Defendant, aside from Defendant's page on Big Archie's pager. Simpson, 3 So. 3d at 1147-48.

As to Defendant's allegations regarding Caliel's subpoenas, Caliel testified during the evidentiary hearing that his administrative assistant inadvertently subpoenaed the wrong number in the initial subpoena. (P.C. EH at 1069; P.C. Def. Exs. 196; 197.) His administrative assistant subsequently corrected this error and filed a subpoena with the number from Detective Williams's report. (P.C. EH at 1069.) This Court finds Defendant has failed to meet his burden under Giglio.

Ineffective Assistance of Counsel

Defendant opines counsel was ineffective for failing to properly respond to testimony about the pager. Defendant contends counsel should have presented evidence of Melanie Stuckey's correct phone number to impeach Detective Williams's testimony. Further, Defendant maintains counsel should have demanded the pager in discovery and when the State did not comply, file a motion to suppress any reference to the pager.

As discussed *supra*, Defendant has failed to establish the telephone number called by Detective Williams did not reach Melanie Stuckey. Thus, this Court declines to find counsel deficient in failing to impeach on that point. During cross-examination of Detective Williams, counsel asked if he was surprised Defendant's mother's number was on the pager given that Defendant was a confidential informant who was currently informing on Big Archie. (R. Vol. XIV at 741-42.) The State objected to the question and the objection was ultimately sustained by

the trial court. (R. Vol. XIV at 741-42.) Thus, this Court finds counsel was not ineffective as he attempted to discredit the evidence through his cross-examination of Detective Williams by attacking the relevance of the page itself.

As to a motion to suppress the pager, this Court finds Defendant's argument would have been meritless. See Johnston v. State, 63 So. 3d 730, 740 (Fla. 2011) (stating counsel cannot be deemed ineffective when motion to suppress would have been meritless); Zakrzewski v. State, 866 So. 2d 688, 694 (Fla. 2003) (citation omitted) ("[W]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious."). As discussed *supra*, there is no evidence that the pager was collected from the crime scene. Further, as he testified at trial, Detective Williams spoke to Melanie Stuckey when he called the numbers on the pager. As to the dates and times on the pager, Detective Bialkoski testified he recorded the times because that is what appeared on the screen, and that any additional information could be subpoenaed. (P.C. EH at 2602, 2606-07.) Thus, there would not have been a basis to suppress the pager or it's information because law enforcement did not collect the item and there were available means for counsel to gather information from the pager. Accordingly, this subclaim is denied.

Youngblood

While not specifically mentioned in the title of this subclaim, Defendant appears to allege, albeit insufficiently, the destruction of the pager constitutes a Youngblood violation. In an abundance of caution, this Court briefly addresses the allegations in this subclaim pursuant to Youngblood.

As stated previously, the loss or destruction of evidence that is potentially useful to the

defense violates due process *only if the defendant can show bad faith on the part of the police or prosecution*. See Youngblood, 488 U.S. at 58. Indeed, evidence that has not been examined or tested by government agents does not have "apparent exculpatory value" and, therefore, cannot form the basis of a claim of bad faith destruction of evidence. Id. at 57.

First and foremost, it is clear from the testimony of Detective Chase that he processed the evidence from the scene and the property storage card does not show this pager was collected by law enforcement. (P.C. EH at 1446; P.C. Def. Ex. 67.) Because law enforcement never collected this evidence, this Court finds the police did not examine or test this evidence and, thus, it did not have apparent exculpatory value to warrant relief. See Youngblood, 488 U.S. at 57-58. Accordingly, Defendant is not entitled to relief.

20. *Defense Counsel Should Have Sought to Exclude Evidence of the Cut on Defendant's Hand, and Previously Concealed Exculpatory Evidence Shows the State Took Advantage by Presenting False Testimony it Was an "Oozing Gash"- Giglio/Brady/Ineffective Assistance of Counsel*

In this subclaim, Defendant challenges testimony and references throughout trial to the cut on his hand. Detective Hinson testified at trial that he met with Defendant on the morning law enforcement discovered the victims. (R. Vol. XIV at 656.) During this meeting, Detective Hinson testified he observed a "large gash" on Defendant's finger, which prompted Detective Hinson to ask Defendant about the injury. (R. Vol. XIV at 656.) Defendant responded he injured his finger on the electrical panel in his mother's home because the power went out in his mother's neighborhood. (R. Vol. XIV at 656-57.) Defendant also testified at trial that he scratched his finger on an electrical panel. (R. Vol. XVII at 1391-93.) After meeting with Defendant, Detective Hinson told detectives investigating the murders that he believed Defendant might be involved. (R. Vol. XIV at 660.) Defendant maintains this testimony from Detective Hinson influenced the verdict and raises three separate theories related to the cut:

(1) ineffective assistance of counsel; (2) Brady; and (3) Giglio.

Ineffective Assistance of Counsel

Defendant maintains counsel was ineffective for failing to move to suppress any evidence about the cut on Defendant's hand. Defendant alleges there was no competent evidence the killer cut his hand and, thus, the trial court would have granted a motion to suppress because the prejudice clearly outweighed any probative value.

This Court finds meritless Defendant's argument that the prejudicial nature of this evidence outweighed any probative value. Law enforcement believed the perpetrator may have injured himself due to perfectly formed droplets of blood on the bedroom floor. (R. Vols. XIII at 594-96; XIV at 715-16; P.C. Def. Ex. 51 at 2.) Detective Williams testified at the evidentiary hearing that he and Dr. Floro, the medical examiner, determined at the scene that the blood on the floor indicated the attacker may have injured himself. (P.C. EH at 2834; P.C. Def. Ex. 54 at 11.) As such, the fact that Defendant had an injury to his hand is incredibly probative. During Defendant's direct appeal, the Florida Supreme Court believed the injury was probative of guilt as well. Simpson, 3 So. 3d at 1148. Accordingly, this Court does not find counsel was ineffective for failing to raise a motion to suppress evidence related to the injury on Defendant's hand, as any motion would have been meritless. See Johnston, 63 So. 3d at 740; Zakrzewski, 866 So. 2d at 694. Notably, counsel weaved the injury into his strategy that the police did a poor job investigating this case. During his cross-examination of Detective Hinson, counsel highlighted the fact that Detective Hinson neither photographed the injury to Defendant's hand that day nor took a picture of the electrical panel. (R. Vol. XIV at 674-76.) Defendant is not entitled to relief.

Brady

Defendant maintains the State withheld Brady material in the form of Detective Hinson's handwritten notes that describe the wound as a "small cut," which conflict with his trial testimony that the wound was a large cut. Defendant maintains postconviction counsel learned of this information in postconviction discovery through the Capital Collateral Records Repository.

Initially, this Court finds notes written by the detectives, from which they compiled their reports, are not subject to disclosure under Florida Rule of Criminal Procedure 3.220. See Green, 975 So. 2d at 1102-03. In an abundance of caution, however, this Court addresses the Brady allegations. To prevail on a Brady claim, Defendant must show the evidence was favorable, in that it was either exculpatory or impeaching. Riechmann, 966 So. 2d at 307-08. Based upon a review of the notes, this Court does not find the contents exculpatory. However, these notes may have provided some minimal impeachment value to defense counsel. As to the second prong, regarding suppression, postconviction counsel represented to this Court that these notes were not disclosed until postconviction proceedings commenced and the notes were discovered in the Capital Collateral Records Repository. This Court finds Defendant has met the second prong as, indeed, Detective Hinson testified at the evidentiary hearing that he believed these notes had been destroyed during the pendency of the investigation. (P.C. EH at 2496.)

This Court finds, however, Defendant's claim fails as to the third prong. To meet the materiality prong, the defendant must demonstrate "a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." Smith v. State, 931 So. 2d 790, 796 (Fla. 2006) (citing Strickler v. Greene, 527 U.S. 263, 289, 296 (1936)); see also United States v. Bagley, 473 U.S. 667, 682 (1985). At issue is whether "the favorable

evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Smith, 931 So. 2d at 796 (citation omitted); Floyd, 18 So. 3d at 450. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Wickham v. State, 124 So. 3d 841, 851 (Fla. 2013), as revised on reh'g (Oct. 17, 2013).

As detailed in the Florida Supreme Court's opinion on direct appeal, there was overwhelming evidence of Defendant's guilt, including Defendant's DNA on clothing at the crime scene and a confession to Durrance. Simpson, 3 So. 3d at 1147-48. This Court finds Detective Hinson's notes do not put this whole case in such a different light as to undermine confidence in the jury's verdict. Moreover, even if the alleged notes had been available, Eler testified he would not have used them because making the type and degree of the cut a feature of the trial was not in Eler's strategy. (P.C. EH at 262-74.) Thus, impeaching Detective Hinson with his own notes or addressing the State's comments about the cut would not support the strategy Eler formulated to present to the jury. (P.C. EH at 271-72, 273-74.) Indeed, Eler wanted to provide an explanation for the cut and move on, in lieu of drawing attention to injuries that had the potential to associate his client with the crime. (P.C. EH at 266, 267, 273-74.)

To that end, Detective Hinson testified at trial that when he asked Defendant what happened to his finger, Defendant responded he injured his finger on the electrical panel in his mother's home because the power went out in his mother's neighborhood. (R. Vol. XIV at 656-57.) Defendant also testified at trial that he scratched his finger on an electrical panel. (R. Vol. XVII at 1391-93.) In conjunction with, and to support Defendant's explanation of the injury, counsel presented the testimony of Russell Durham (hereinafter referred to as "Durham"), an electric reliability specialist with the Jacksonville Electric Authority ("JEA"). (R. Vol. XVIII at

1464.) Durham testified there was a power outage on July 16, 1999, at 7:56 a.m., and multiple callers reported the outage to JEA, including Defendant. (R. Vol. XVIII at 1466-69.) Eler stated he did not want to go back and address this issue further as that would be feeding attention to the State's theory regarding the wound. (P.C. EH at 266.)

As detailed above, to satisfy a Brady claim, Defendant must meet three separate prongs. This Court finds Defendant has failed to meet the third prong as the conflicting descriptions of the cut are just that, conflicting descriptions. The material part of Detective Hinson's testimony was the fact that Defendant had an injury to his finger, which counsel was aware of prior to trial and addressed through Defendant and Durham's testimony at trial. Therefore, Defendant is not entitled to relief.

Giglio

Defendant maintains the State committed a Giglio violation by presenting Detective Hinson's testimony at trial that Defendant had a "large gash" on his finger. Further, Defendant challenges the State's argument that the gash was oozing, as no witness testified to this characterization of the wound.

This Court finds Defendant has failed to establish the prongs of Giglio. As to the first prong, Defendant has failed to establish Detective Hinson gave false testimony. At trial, Detective Hinson testified that when he met with Defendant on the morning law enforcement discovered the murder victims, the first thing he noticed was a "large gash" on Defendant's finger. (R. Vol. XIV at 656-57.) Defendant insinuates that Detective Hinson's testimony is false because his original, handwritten notes from the investigation reveal that he wrote "small cut" when describing the wound on Defendant's finger. This Court disagrees with that conclusion.

At the evidentiary hearing, postconviction counsel presented the handwritten notes of

Detective Hinson from his interactions with Defendant around the time of the murders. (P.C. Def. Ex. 50.) Detective Hinson acknowledged that the notes were in fact his. (P.C. EH at 2408.) In the notes, Detective Hinson described the injury to Defendant's right index finger as a "small cut." (P.C. Def. Ex. 50 at 2.) Detective Hinson reduced his notes to written report in 2002, per the instruction of Lieutenant Richard Graham. (P.C. EH at 2384.) According to his police report, dated September 16, 2002, Detective Hinson wrote Defendant had a "rather large gash" on his finger. (P.C. Def. Ex. 64.)[56]

Detective Hinson testified at the evidentiary hearing that notes are not an official record but work product. (P.C. EH at 2500.) Instead, Detective Hinson testified that the point of making notes is to write down his real-time thoughts, with the intent of later reducing it to writing in the report, which becomes the official record. (P.C. EH at 2498-99.) More specifically, Detective Hinson stated the notes would help to refresh his memory of what he did on a case. (P.C. EH at 2332.) Detective Hinson testified that he would not consciously omit information from a report. (P.C. EH at 2332.)

The main contention here is that Detective Hinson's notes describe the wound as a "small cut" whereas at trial, Detective Hinson testified that when he met Defendant on the morning of the murders, the first thing he noticed was a "large gash" on Defendant's finger. (R. Vol. XIV at 656-57.) This Court finds this minor difference in the wound's characterization is neither material nor does it create a reasonable probability of a different outcome. Detective Hinson testified that when he wrote the official report he included the injury to Defendant's finger, as his notes stimulated his memory of the cut on Defendant's finger. This Court is cognizant that postconviction counsel presented a photograph of a cut on Detective Hinson's arm for

[56] This postconviction exhibit is bate-stamped with "Eler," indicating to this Court that it was retrieved from Mr. Eler's file and, thereby, not withheld from the defense at the time of trial.

identification that they submit provides a description of what Detective Hinson believes to be a "small cut." (P.C. Def. Ex. 210.[57]) However, as Detective Hinson stated, this photograph of his own arm has nothing to do with the instant case. (P.C. EH at 2397.) This Court agrees.

The Merriam-Webster dictionary describes a cut as "to penetrate with or as if with an edged instrument." *Cut*, Merriam-Webster Dictionary (2017). It further defines a gash as "a deep long cut in flesh." *Gash*, Merriam-Webster Dictionary (2017). Regardless of what term one uses, in this context, a gash or cut means a wound. Indeed, it is also important to put this injury in perspective. The injury was a wound to Defendant's finger; a small surface area. Thus, even a small injury to the finger can be described as large, based on the perspective of the viewer. Nevertheless, the injury to Defendant's finger was large enough and of such a nature to prompt Detective Hinson to inquire what happened and make a note of the injury.

This Court finds Detective Hinson's notes regarding the wound were not false, but merely an inconsistency due to word choice. This does not rise to the level of a Giglio violation as Defendant suggests. See Maharaj, 778 So. 2d at 956. Accordingly, Defendant has not established the first prong.

As to materiality, the jury heard that Defendant had a fresh injury to his hand the morning after the murders. This Court does not believe testimony as to whether it was a "one inch scrape," "oozing gash," or some other description would change the view of the injury in the jury's mind. Instead, the jury heard that Defendant had an injury to his hand. Notably, trial counsel testified he chose not to attack the description of the cut, but rather the way in which Defendant received the injury. To do that, counsel presented Defendant who testified he received the cut working on the electrical panel in his home. Further, counsel presented Durham, a JEA employee, who testified there was in fact a power outage at Defendant's address that

[57] This Court entered this exhibit for identification purposes only. (P.C. EH at 2513-14.)

morning. This Court finds the alleged description in Detective Hinson's handwritten notes was not material.

Lastly, as to the State's characterization of the wound being an "oozing gash," Defendant acknowledges this occurred during opening and closing statements. Thus, the State did not offer the characterization that the wound was an "oozing gash" as evidence or testimony from a witness. Huggins, 161 So. 3d at 353 ("Huggins cannot demonstrate that the State violated Giglio because the 'evidence' in question is actually the prosecution's closing argument."). Instead, it was the State's characterization of evidence, which is permissible in opening and closing arguments. See Merck, 975 So. 2d at 1064 (finding no impropriety in prosecutor's comments based on facts in evidence and common-sense inferences from those facts); see also Huggins, 161 So. 3d at 353 (citation omitted) ("In closing argument, counsel is permitted to review the evidence and fairly discuss and comment upon properly admitted testimony and logical inferences from that evidence.").

This Court finds Detective Hinson's trial testimony is consistent with the statements contained within his written police report. Further, the State's comments regarding the wound in opening and closing were not false, but reasonable based on the evidence during trial. As such, this Court finds Defendant has failed to meet the prongs of Giglio, as the State did not present false testimony. Defendant is not entitled to relief.

21. The State Falsely Argued that Detective Hinson Did Not Call Defendant's Mother's House the Morning After the Murders-Giglio

Defendant contends the State falsely argued during trial that Detective Hinson did not call Defendant at his mother's house the morning of the murders. Defendant maintains the State made Defendant "look guilty" by making this argument and, as such, Defendant is entitled to a new trial. In the alternative, Defendant maintains counsel was ineffective for failing to correct

the State's allegedly false arguments during trial.

Giglio

Defendant alleges the State committed a Giglio violation by presenting testimony from Detective Hinson that he paged Defendant on the morning of the murders. Defendant further attacks the State's closing arguments that Detective Hinson tried to page Defendant and did not call Defendant's mother's house, which Defendant maintains is contrary to Detective Hinson's statements and deposition testimony that he called Defendant's mother's house in an attempt to contact Defendant.

Detective Hinson stated in his 2003 pretrial deposition that he attempted to page Defendant and call his home on the day law enforcement discovered the victims' bodies. (P.C. Def. Ex. 192 at 6.) When asked if he was sure that he called Defendant's house, Detective Hinson stated "I believe I would have, yes." (P.C. Def. Ex. 192 at 6.) Detective Hinson later stated that he paged Defendant more than he called. (P.C. Def. Ex. 192 at 6.) At trial, Detective Hinson testified he was trying to contact Defendant the morning that law enforcement discovered the victims' bodies. (R. Vol. XIV at 653.) He stated, "[a]t that point, I started calling, trying to page Jason . . . ." (R. Vol. XIV at 653.) Detective Hinson went on to say that he believed he had been paging Defendant. (R. Vol. XIV at 654.) However, on cross-examination, Detective Hinson acknowledged that he was uncertain if he tried to page or call Defendant. (R. Vol. XIV at 668.) Detective Hinson was adamant that he reached out to Defendant, despite being uncertain of which medium he used to contact him. (R. Vol. XIV at 668.)

This Court finds no Gilgio violation as Detective Hinson's trial testimony was essentially consistent with what Defendant alleges Detective Hinson said in his deposition. More specifically, Detective Hinson did testify at trial that he may have called Defendant's mother's

home, as he stated during in his deposition. Maharaj, 778 So. 2d at 956 (holding to succeed on Giglio claim, defendant must show more than mere inconsistencies due to memory lapse, unintentional error, or oversight). Thus, Defendant has failed to establish Detective Hinson's trial testimony was false.

Defendant further challenges the State's closing argument that Detective Hinson did not call Defendant at his mother's home, implying Defendant was caught in a lie when he stated he called Detective Hinson despite his pager being turned off. Upon a fair reading of Detective Hinson's trial testimony in conjunction with the State's closing argument, this Court finds no Giglio violation. See Spencer, 842 So. 2d at 71; Merck, 975 So. 2d at 1064. The State's comments could reasonably be inferred from the evidence; specifically, Detective Hinson's testimony that he *believed* he repeatedly paged Defendant that morning, but could not recall if he called Defendant's mother's home. As Defendant has failed to establish the State's closing argument was false, Defendant is not entitled to relief. Huggins, 161 So. 3d at 353; Merck, 975 So. 2d at 1064.

Ineffective Assistance of Counsel

As to Defendant's alternatively pled ineffective assistance of counsel claim, this Court finds Defendant is not entitled to relief. Initially, Detective Hinson's deposition testimony does not state that he called the mother's house, only that he believed he would have. Counsel brought forth during cross-examination that Detective Hinson might have called Defendant at his mother's house. Accordingly, counsel was not ineffective for failing to impeach Detective Hinson, as there was no inconsistent statement on which to impeach. See Wilcox v. State, 143 So. 3d 359, 383 (Fla. 2014) ("To be inconsistent, a prior statement must either directly contradict or materially differ from the testimony presented during trial."). Further, Defendant suffered no

prejudice as the jury still heard Detective Hinson may have called Defendant's mother's home. Accordingly, Defendant is not entitled to relief.

Brady

Notably, in his closing memorandum, Defendant does not address the ineffective assistance of counsel allegations raised in the instant Motion. Instead, Defendant raises an entirely new allegation of Brady related to Detective Hinson's notes. (Def. Closing Mem. at 90.) Defendant did not raise this Brady allegation in the instant Motion. (Def. 2d Am. Mot. at 102-03.) Specifically, Defendant contends that these notes, previously undisclosed to trial counsel, do not support Detective Hinson's testimony that he made numerous attempts to contact Defendant. (Def. Closing Mem. at 90.) This Court addresses this allegation *infra* Ground H.

22. *Defense Counsel Allowed the State to Present False Testimony and Argument that Defendant Became Less Cooperative With Detective Hinson After the Cheek Swabs-Giglio/Ineffective Assistance of Counsel*

In this subclaim, Defendant maintains counsel allowed the State to present false testimony and argument that Defendant became less cooperative with law enforcement after Detective Hinson took a cheek swab from him. Defendant avers the false testimony amounts to a Giglio violation and counsel's failure to correct this information for the jury amounts to ineffective assistance.

Giglio

Defendant avers the State committed a Giglio violation by presenting evidence that Defendant demonstrated a consciousness of guilt when he stopped cooperating with law enforcement after Detective Hinson took a cheek swab. Defendant contends the State knew Detective Hinson's testimony regarding Defendant's cooperation was false because Defendant provided information relevant to Durrance's wiretap application. Further, Defendant maintains

Detective Hinson's testimony is false because: (1) Detective Hinson testified he had difficulty getting in contact with Defendant after the cheek swab; however, Defendant points out that Detective Hinson had difficulty contacting Defendant prior to the cheek swabs; and (2) Detective Hinson was a homicide detective, and Defendant's work was with narcotics and automobile theft, so Defendant followed up with narcotics instead of Detective Hinson.

As stated *supra*, defendant must establish: (1) the prosecutor or witness gave false testimony; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Marshall, 854 So. 2d at 1251-52. "The State may commit such a violation either by deliberately presenting false evidence or by allowing false evidence to go uncorrected when it appears." Spencer, 842 So. 2d at 70. The State, however, may argue reasonable inferences in light of the evidence presented during the trial. See Bogle, 213 So. 3d at 845.

This Court finds Defendant has failed to meet his burden pursuant to Giglio. Detective Hinson's testimony regarding Defendant's cooperation centered on his own interactions with Defendant around the time of the murders, not that of the agencies as a whole. Detective Hinson testified Defendant provided information on homicides as well as narcotics and automobile theft. (R. Vol. XIV at 650.) Notably, Detective Hinson testified Defendant worked as a confidential informant for more than just him. (R. Vol. XIV at 668, 680, 687-88.) Detective Hinson stated that when he met with Defendant after the cheek swab, Defendant's demeanor seemed more hostile towards him. (R. Vol. XIV at 672.) As a result, Detective Hinson testified he did not continue to use Defendant as a confidential informant. (R. Vol. XIV at 677, 678.) Based on Detective Hinson's testimony, it is clear that Defendant's change in demeanor and attitude prompted Detective Hinson to cease his relationship with Defendant, not the lack of communication as Defendant contends. While Defendant contends Detective Hinson's

testimony is false because Defendant continued to cooperate with other agencies, this Court finds Detective Hinson only described Defendant's cooperation with him. Defendant has failed to demonstrate the falsity in Detective Hinson's testimony that Defendant became less cooperative, as Detective Hinson's statements about Defendant's attitude and demeanor following the cheek swabs supports his statement that Defendant was uncooperative.

Further, Defendant has failed to demonstrate the State's argument regarding Defendant's cooperation is false. Again, the State's argument is a reasonable inference based on the testimony presented. (R. Vols. XIV at 648-91; XIX at 1604); see Bogle, 213 So. 3d at 845. Accordingly, this Court finds no Giglio violation, and Defendant is not entitled to relief.

Ineffective Assistance of Counsel

Defendant maintains counsel was ineffective for failing to challenge the State's theory that Defendant demonstrated a consciousness of guilt when he stopped cooperating with law enforcement after Detective Hinson took his cheek swab. Defendant suggests that had counsel properly developed that Defendant provided information used for Durrance's wiretap application, that Detective Hinson had difficulty getting in touch with Defendant prior to the cheek swabs, and that Defendant reported to detectives in narcotics and automobile theft, the jury never would have used the alleged "consciousness of guilt" argument provided by the State to support the verdict.

This Court does not find counsel acted ineffectively during his cross-examination of Detective Hinson. Counsel utilized his cross-examination effectively by showing Defendant's cooperation with law enforcement and giving examples of information he provided to various agencies. Counsel elicited on cross-examination that Defendant worked for multiple agencies outside of JSO. (R. Vol. XIV at 665, 667.) Detective Hinson testified about Defendant feeding

information to law enforcement and acknowledged that he continued to use Defendant as an informant to find out information about the murders. (R. Vol. XIV at 665-66, 677-78.) Detective Hinson testified he met with Defendant three or four times while he acted as a confidential informant. (R. Vol. XIV at 681.) Further, counsel brought forth facts showing Defendant reported to more than just Detective Hinson, he returned Detective Hinson's communication at the time of the murders, and gave the cheek swab voluntarily. (R. Vol. XIV at 665, 667, 671, 673.) Counsel also brought out the fact that Detective Hinson instructed Defendant to report illegal activity to Detective Wayne McNeal in narcotics and "turned [Defendant] to them to work." (R. Vol. XIV at 666, 669-70.) During closing argument, counsel reiterated that Defendant cooperated with multiple agencies at this time. (R. Vol. XIX at 1666.) Notably, through other testimony at trial, the jury heard about Defendant's cooperation in Durrance's wiretap application. (R. Vol. XV at 913-16.)

Thus, this Court finds counsel properly challenged inferences made by the State by eliciting the above information during cross-examination and statements made during his closing argument. Defendant is not entitled to relief.

23. Defense Counsel Should Have Shown that Defendant Was, in Fact, Late to Work Before Being Accused of the Murders- Ineffective Assistance of Counsel

Defendant maintains the State argued at trial that Defendant exhibited a consciousness of guilt when he told police he had to leave an interview because he was late for work. Defendant asserts competent counsel would have presented evidence that Defendant was indeed late for work at the time of the police interview. (P.C. Def. Ex. 101.) Defendant alleges counsel had these records, but failed to utilize them during the trial.

At the evidentiary hearing, Fletcher could not recall if he obtained Defendant's work records as part of his penalty phase investigation, but testified that had the records been

available, he would not have utilized the documents for purposes of the guilt phase. (P.C. EH at 493-95.) Fletcher testified he did not believe the work records were necessary to support Defendant's statement that he was late for work and left the police interview as a result. (P.C. EH at 494-95.) Moreover, Fletcher stated the records may not have had the results postconviction counsel alleged, as the record could demonstrate Defendant did not care about being late to work because his employer had previously written up Defendant for tardiness. (P.C. EH at 495.)

This Court finds counsel's actions reasonable and that counsel was not ineffective for failing to utilize the work records to support Defendant's statements that he was late for work during the police interview. Defendant is not entitled to relief.

Brady: Lieutenant Eason's Notes

In his closing memorandum, Defendant raises what this Court assumes is a new allegation of Brady related to Lieutenant Eason's notes of this interview, despite it being woefully insufficiently pled. Defendant did not raise this allegation in the instant Motion. (Def. 2d Am. Mot. at 105.) Specifically, Defendant contends that these notes, not disclosed until during the evidentiary hearing, support Defendant's trial testimony that he was late for work and Detective Bialkoski made threatening remarks. (Def. Closing Mem. at 92-93.) Because Defendant asserts these notes were not disclosed until the evidentiary hearing, this Court will briefly address these allegations.

Detective Bialkoski's report indicates that at 1430 hours on November 8, 2001, Defendant arrived at the police memorial building to speak with Lieutenant Eason and Detective Bialkoski. (P.C. Def. Ex. 59 at 4.) According to the report, Defendant told the Detectives he had to be at work at 1530 hours. (P.C. Def. Ex. 59 at 4.) Lieutenant Eason's notes, at the center of this

claim, indicate the same information. (P.C. Def. Ex. 212.) Lieutenant Eason wrote that at 1430 hours Defendant arrived at the police memorial building and told both detectives that he had to be at work at 1530. (P.C. Def. Ex. 212.) The notes indicate that at 1500 hours the detectives entered the interview room with Defendant. (P.C. Def. Ex. 212.) Lieutenant Eason testified at trial Defendant came to the police memorial building to speak to him. (R. Vol. XXII at 947.) Lieutenant Eason testified that once in the interview room, he and Detective Bialkoski questioned Defendant about the Crook, Sr. and Kimbler murders. (R. Vol. XVII at 949.) Shortly after the questioning began, Defendant stated he needed to leave for work. (R. Vol. XVII at 950.) During cross-examination, Lieutenant Eason testified that he did not recall leaving Defendant unattended in an interview room for 15 to 20 minutes. (R. Vol. XVII at 952.)

This Court finds Defendant fails to meet the elements of Brady. These notes are not exculpatory or impeaching, as Lieutenant Eason's notes and Detective Bialkoski's report reflect that Defendant arrived at the police memorial building at 1430 hours and that all individuals entered the interview room after his arrival. (P.C. Def. Exs. 59; 212); see Riechmann, 966 So. 2d at 307-08. There is no indication from Lieutenant Eason's notes or Detective Bialkoski's report that Defendant sat in the interview alone prior to the detectives entering the room; instead, the notes and report indicate all three individuals entered the interview room together. (P.C. Def. Exs. 59; 212.) Lieutenant Eason's trial testimony is consistent with what is contained within the reports. Moreover, there is nothing in Lieutenant Eason's notes that indicate Detective Bialkoski's threatened Defendant with a violation of probation. (P.C. Def. Ex. 212.) Thus, this Court fails to see how these notes "still help corroborate" Defendant's testimony that he felt threatened as Defendant contends in his closing memorandum. (Def. Closing Mem. at 93.) Because counsel had access to Detective Bialkoski's report, which is entirely consistent with

Lieutenant Eason's notes, this Court finds defeated any Brady claim related to Lieutenant Eason's notes.

24. *The Key Jacksonville Sheriff's Officers Had Just Framed Another Innocent Man, Brenton Butler- Brady/Ineffective Assistance of Counsel*

In May of 2000, Juan Curtis (hereinafter referred to as "Curtis") murdered a woman named Mary Ann Stephens in Jacksonville. Curtis v. State, 876 So. 2d 13, 16 (Fla. 1st DCA 2004). Prior to Curtis's arrest, the State prosecuted a juvenile named Brenton Butler (hereinafter referred to as "Butler") for the same crime, who was ultimately acquitted at trial.[58] Defendant maintains that the same JSO officers, eventually sanctioned for their investigation of Butler, also investigated Defendant. Specifically, Defendant lists the following individuals: J.H. Williams (previously listed as "Detective Williams"), D. Gilbreath (previously as "Detective Gilbreath"), D.E. Darnell (previously listed as "Detective Darnell"), M.P. Bialkoski (previously listed as "Detective Bialkoski"), H.S. McKean (hereinafter referred to as "Detective McKean"), J.A. Joiner (hereinafter referred to as "Sergeant Joiner"), M.E. Glover (hereinafter referred to as "Detective Glover"), and Hugh A. Eason (previously listed as "Lieutenant Eason").

Ineffective Assistance of Counsel

Defendant alleges Eler should have obtained the personnel, internal affairs, and FDLE records to impeach the officers who handled Defendant's investigation. Defendant contends counsel was aware of Butler's prosecution as he represented Curtis, the actual perpetrator of the Mary Anne Stephens murder. However, Defendant states Eler did not impeach any of the officers with their disciplinary records. Defendant also alleges it was a conflict of interest for

[58] "Juan Curtis was the second suspect tried for the robbery and murder of Mary Ann Stephens. The state originally claimed that a juvenile named Brenton Butler had committed the crimes. Butler had been identified by the victim's husband and he had confessed to police officers that he shot Mrs. Stephens. The case against Butler proceeded to trial, but he was acquitted. Subsequently, the state accused Curtis and another man, Jermel Williams, of the robbery and murder of Mrs. Stephens. Williams entered a plea to a reduced charge and became a witness for the state." Curtis, 876 So. 2d at 16.

Eler to represent Defendant while he represented Curtis, the individual ultimately convicted for the murder of which Butler was previously acquitted.

At the evidentiary hearing, Dwain Senterfitt (hereinafter referred to as "Senterfitt"), retired undersheriff of JSO, testified about his time as a Lieutenant in Internal Affairs. (P.C. EH at 2751.) Senterfitt testified the Internal Affairs investigation following Butler's acquittal looked into Sergeant Joiner, Detective Williams, Detective Bialkoski, Lieutenant Eason, Detective Darnell, and Detective Glover. (P.C. EH at 2760.) More specifically, Senterfitt testified the main investigation focused on Detective Glover, as he was accused of obtaining a confession by physically coercing and/or beating Butler. (P.C. EH at 2752-53, 2759.) Senterfitt prepared a summation of his findings in a memorandum that Francis Mackesy (hereinafter referred to as "Mackesy"), former chief of detectives at JSO, reviewed and approved. (P.C. EH at 740; P.C. Def. Exs. 172; 173.) Internal Affairs found the detectives failed to meet performance expectations and issued written reprimands in May of 2002. (P.C. EH at 2775-76; P.C. Def. Exs. 172; 175; 176.)

Senterfitt testified an arbitrator ultimately reversed Internal Affairs' findings in September 2002; however, only after Detective Williams, Detective Darnell, and Sergeant Joiner filed a grievance. (P.C. EH at 2774; P.C. Def. Ex. 174.) Senterfitt explained that despite just three of the individuals filing a grievance, JSO reversed the decision as to all individuals. (P.C. EH at 2776.) Detective Williams, Detective Gilbreath, Detective Darnell, Detective Bialkoski, Detective McKean, Sergeant Joiner, Detective Glover, and Lieutenant Eason received formal counseling instead of disciplinary action. (P.C. EH at 2774, 2776, 2783.) The State elicited on cross-examination of Senterfitt that a violation of JSO regulations does not equate to a violation of Florida Law. (P.C. EH at 2778-79.) Senterfitt stated that, to the best of his knowledge, the

officers were never investigated for their work in the Crook, Sr. and Kimbler murders. (P.C. EH at 2781.) In fact, Mackesy testified that what occurred in the Butler case was indicative of what happened in an isolated piece of time, and to say that the detectives involved were incompetent in every investigation they participated in would be a "severe overstatement." (P.C. EH at 770, 801.) Mackesy stated,

> [B]ecause of the nature of the Brenton Butler case, and the furor that it kicked off in our community, if I had left them in the detective division, whether they left on their own or they left because I was going to put them out, my issue was future investigations and these guys having to answer questions on a case that they may have done everything right on and what happened in Brenton Butler being used to impeach them. I think that we owe our victims better than that. That's why they would have been moved if they didn't move voluntarily. But to say that they were incompetent in every investigation is a severe overstatement.

(P.C. EH at 800-01.) Many of the individuals at the center of the Internal Affairs investigation also testified at the evidentiary hearing, stating the grand jury did not indict them and that they received formal counseling after the Internal Affairs investigation. (P.C. EH at 2620-21, 2623-25, 2730, 2739, 2741, 2803; 3098-99; P.C. Def. Ex. 171.)

Defendant maintains counsel should have discussed Butler's case and impeached Detectives at Defendant's trial with their disciplinary records from JSO. From the list of above-named JSO employees, only Detective Williams, Lieutenant Eason, and Detective Gilbreath testified at Defendant's trial. As such, this Court will address only the ineffective assistance of counsel allegations related to Detective Williams, Lieutenant Eason, and Detective Gilbreath, as counsel can only impeach a witness that testified. As indicated by the testimony detailed above, JSO did not discipline Detective Williams, Lieutenant Eason, or Detective Gilbreath for their involvement in the Butler case. Instead, the Detectives received formal counseling, a non-disciplinary action, according to JSO procedures and regulations.

Further, and even more devastating to this claim, is the fact that even if counsel had

attempted to use these records of "formal counseling" to impeach these detectives, it would have been inadmissible. First, under section 90.609, Florida Statutes (2007), a party may attack the character of a witness only by reputation evidence referring to character relating to truthfulness. No witness testified to the detectives' reputations in the community for truthfulness. Thus, Defendant's allegations related to the shortcomings of the detectives involved in this case when they investigated Butler would have to be excluded. See Jackson v. State, 545 So. 2d 260, 264 (Fla. 1989).

Second, section 90.610, Florida Statutes (2007), directs that a party may only impeach a witness's credibility by convictions of crimes involving dishonesty or false statements. Formal counseling from JSO is not a criminal conviction contemplated by section 90.610. See Eaglin v. State, 19 So. 3d 935, 942 (Fla. 2009), as revised on denial of reh'g (Oct. 8, 2009) ("In Eaglin's case, it is clear that the report was not a 'conviction' administered through a judicial court process as defined by this Court, but instead was an internal reprimand."); see also Roebuck v. State, 953 So. 2d 40, 42 (Fla. 1st DCA 2007) ("Thus, as a general rule, credibility may not be attacked by proof that a witness committed specific acts of misconduct which did not end in a criminal conviction."); State v. Bullard, 858 So. 2d 1189, 1192 (Fla. 2d DCA 2003) ("The investigation that resulted in Deputy Broome's suspension did not arise from the same incident as Bullard's criminal charges and it did not involve the use of excessive force. Because it was completely unrelated to Bullard's case, it would not have been admissible."); Bain v. State, 691 So. 2d 508, 509 (Fla. 5th DCA 1997).

Notably, counsel called Detective Williams, one of the alleged detectives, as a witness for the defense to obtain certain information about threats Little Archie made toward Kimbler.[59] (R. Vol. XVIII at 1489-90.) Had counsel attempted to destroy the credibility of those Detectives

[59] Detective Williams's testimony is discussed *supra* Ground C(10).

called by the State with information about the Butler case, he would have discredited his own defense witness in the process.

Given that counsel could not have impeached the Detectives with the alleged information, this Court finds counsel was not deficient. See Campbell v. State, 139 So. 3d 490, 498 (Fla. 2d DCA 2014). Further, because this information was inadmissible and irrelevant to Defendant's trial, this Court finds no conflict of interest. See Bogle, 213 So. 3d at 852 ("[T]he possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.") (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). Because this Court finds no deficiency, it declines to address the prejudice prong. Strickland, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.").

Brady

Defendant alleges the State had a duty to provide personnel, internal affairs, and FDLE records related to the above-named officers and detectives. Defendant further alleges the State has continued to violate Brady and Rule 3.852 in postconviction proceedings by failing to disclose certain records.

Brady requires the State to disclose material information within the State's possession or control that tends to negate the guilt of the defendant. See Guzman, 868 So. 2d at 508. The rule is premised on the principle that reversal is warranted when the State fails to disclose to the defense exculpatory or impeaching evidence that prejudices the defendant, thereby undermining confidence that he received a fair trial:

The principle . . . is not punishment of society for misdeeds of a prosecutor but

> avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly . . . . A prosecution that withholds evidence . . . which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .

Rodriguez v. State, 39 So. 3d 275, 287 (Fla. 2010). The state, however, does not violate its disclosure obligations under Brady for failing to provide a defendant with information about one arresting officer's police misconduct or knowledge of police department's internal investigation, which was unrelated to the information gathered by the police for defendant's prosecution. Gonzalez-Pena v. Herbert, 369 F. Supp. 2d 376, 390-92 (W.D.N.Y. 2005). Such information cannot be imputed to the prosecutor when there is no reasonable probability that the disclosure would lead to a different result at trial. Id.

As detailed above, the evidence Defendant alleges the State may not have disclosed would not have been permissible impeachment evidence. See Guzman, 868 So. 2d at 508. Defendant, therefore, cannot meet the first prong of Brady, as such records would not have been favorable to the accused. Further, there is evidence in the record that Eler drew attention to potentially faulty police work during his questioning at trial. (R. Vols. XIV at 624, 674-76, 685-86, 740, 741, 743, 744-45, 746, 765-66; XV at 953, 991-94; XVI at 1012-16, 1026, 1077; XVII at 1215-17, 1221-22.)

As to the allegations about the failure of agencies to disclose records in postconviction proceedings, this Court finds the allegations not cognizable in a Rule 3.851 motion. Initially, and perhaps more importantly, the purpose of a Rule 3.851 motion is to challenge the validity of a defendant's underlying conviction and sentence of death. Put another way, this Court's intermittent rulings and issues that arise during the litigation of the postconviction motion *per se*

should not give rise to additional claims for attacking the underlying conviction and sentence. Fla. R. Crim. P. 3.851 (1993 Adoption commentary). Consequently, any alleged lack of cooperation in postconviction discovery and with Rule 3.852 is not a cognizable claim in a motion for postconviction relief. Defendant is not entitled to relief.

25. *The State Got Away with Flagrantly Improper Arguments in Closing-Giglio/Ineffective Assistance of Counsel*

Defendant contends the State made legally improper and factually inaccurate arguments during its closing. Defendant maintains counsel was ineffective for failing to object to the legally improper arguments. Further, Defendant opines the State violated Giglio by making factually inaccurate statements in its closing.

Ineffective Assistance of Counsel

Defendant alleges counsel was ineffective for failing to object to a series of prosecutorial comments during the pendency of the case. (Def. 2d Am. Mot. at 111-16.)

Initially, this Court notes Defendant previously raised claims regarding prosecutorial comments in its closing argument on direct appeal. Simpson, 3 So. 3d at 1146-47. While Defendant contends these claims are not procedurally barred because he raises them as ineffective assistance of counsel in the instant Motion, Florida law requires otherwise. Indeed, Defendant may not now couch his allegations in terms of ineffective assistance of counsel. See Arbelaez v. State, 775 So. 2d 909, 915 (Fla. 2000) (stating, "Arbelaez may not relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel."); Cherry, 659 So. 2d at 1072 ("We have consistently recognized that '[a]llegations of ineffective assistance cannot be used to circumvent the rule that post-conviction proceedings cannot serve as a second appeal.'"); Lopez v. Singletary, 634 So. 2d 1054, 1057 (Fla. 1993) ("Charges of ineffective assistance of counsel cannot be used to get around the rule that postconviction

proceedings cannot be used as a second appeal.").

The Florida Supreme Court addressed the issue of improper prosecutorial comments on direct appeal:

> None of the comments individually or collectively rises to the level of fundamental error. In fact, the majority of the comments were based on facts in evidence and therefore proper. *See Gonzalez v. State*, 990 So. 2d 1017, 1028-29 (Fla. 2008) ("[T]he proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence.") (quoting *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985)); *Gore v. State*, 719 So. 2d 1197, 1200 (Fla. 1998) (recognizing that attorneys are permitted wide latitude in closing argument, but that latitude does not extend to allow improper argument). Several of the comments could be construed as impermissible bolstering. *See Gorby v. State*, 630 So. 2d 544, 547 (Fla. 1993). However, the comments were brief and in no way do they constitute fundamental error.

Simpson, 3 So. 3d at 1146-47. Because Defendant could not show the State's comments in its closing argument were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of this case. See Chandler v. State, 848 So. 2d 1031, 1046 (Fla. 2003). Accordingly, Defendant is not entitled to relief.

Giglio

Next, Defendant maintains the State committed Giglio violations by making factually inaccurate statements in its closing argument. Defendant contends the evidence or any reasonable inference therefrom did not support these statements. (Def. 2d Am. Mot. at 114-16.) Notably, in his closing memorandum, Defendant withdraws his allegations regarding two of the comments raised in the instant Motion. (Def. Closing Mem. at 96.)

This Court finds this claim procedurally barred as it presents a substantive claim of improper closing argument, which should have been raised on direct appeal. See Ferrell v. State, 29 So. 3d 959, 977 (Fla. 2010) (concluding trial court did not err in denying Giglio claim

because claim "actually presents a substantive claim of improper closing argument, which should have been raised on direct appeal, and is thus procedurally barred."); see also McKenzie v. State, 153 So. 3d 867, 880 (Fla. 2014) (holding "an allegation of improper argument by the prosecution is procedurally barred if not asserted on direct appeal."). Thus, Defendant is not entitled to relief.

E. Defense Counsel Failed to Display Minimal Competence at Key Points of the Trial

In Ground E, Defendant challenges counsel's competence during closing argument, as well as with certain issues regarding jurors.

26. Defense Counsel Presented an Incoherent Closing-Ineffective Assistance of Counsel

Defendant maintains counsel was ineffective for offering a "disjointed" and "incoherent" closing argument at Defendant's trial. Defendant asserts counsel's inconsistent and unsupported closing argument planted doubt as to Defendant's innocence, rendering him ineffective.

During the evidentiary hearing, Eler testified about his strategy throughout the trial, including his closing argument. (P.C. EH at 132, 133, 169, 274, 399.) Eler stated he wanted to show reasonable doubt by attacking the State's evidence; specifically, by focusing on shoddy police work, conflicts in the evidence, Durrance's credibility, minimal circumstantial evidence, and Little Archie and Smallwood. (P.C. EH at 132, 133, 169, 274.) Eler further stated Defendant agreed with this strategy. (P.C. EH at 169.) Eler testified that, based on his experience, this would be the best strategy to plant reasonable doubt in the minds of the jury. (P.C. EH at 406-07.) Eler further testified he felt pointing the finger at someone else would assist in that strategy, as juries like to "hang their hat" on another individual if they are going to acquit the accused. (P.C. EH at 177, 406-07.)

As to the closing argument planning, Eler testified he prepared his closing argument

based on what he thought the evidence from trial would show. (P.C. EH at 393.) Eler stated he listened to the State's closing argument and then, when it was his turn, attacked the State's version of events, moved into his prepared argument, and used the PowerPoint to aid in his final presentation to the jury. (P.C. EH at 393-94.)

Upon a review of Eler's closing argument, this Court finds counsel acted competently and made reasonable inferences based on the evidence at trial to argue reasonable doubt to the jury. Eler summed up his strategy during his closing argument, focusing on law enforcement's shoddy investigation, Durrance's credibility and possible motives for committing the murders, Little Archie's motive and opportunity, and the circumstantial evidence in the case. (R. Vol. XIX at 1649-75.) As to Defendant's individual critiques of the closing argument, this Court finds no ineffective assistance of counsel, as counsel made reasonable inferences based on evidence and testimony presented during trial.[60] Eler's closing argument clearly falls within the "wide range of professionally competent assistance" described in Strickland and, therefore, this Court finds counsel was not ineffective. Strickland, 466 U.S. at 690; see Brown v. State, 846 So. 2d 1114, 1126 (Fla. 2003) ("Although in hindsight one can speculate that a different argument may have been more effective, counsel's argument does not fall to the level of deficient performance simply because it ultimately failed to persuade the jury.") (quoting Ferguson v. State, 593 So. 2d 508 (Fla. 1992)).

27. Defense Counsel Failed to Seek an Interview of Juror C.C.[61] Before the Jury Was Discharged at the Conclusion of the Guilt Phase-Ineffective Assistance of Counsel

Defendant maintains counsel was ineffective for failing to move for an interview of Juror C.C. before the trial court discharged the jury at the conclusion of the guilt phase and for failing

[60] While Defendant maintains counsel was ineffective for pointing the finger at both Durrance and Little Archie during his closing argument at trial, it is worth noting that Defendant essentially did the same thing during the three-week evidentiary hearing in this matter.

[61] This Court will refer to the juror by initials only.

to object to Juror C.C. participating in the penalty phase before the trial court resolved the issue of her guilt phase verdict. Defendant contends counsel's actions prejudiced him because Juror C.C. heard all of the penalty phase evidence, including counsel's acceptance of the guilty verdict.

Initially, this Court notes Defendant raised a series of claims related to Juror C.C. on direct appeal. Simpson, 3 So. 3d at 1140-45. To the extent Defendant attempts to couch these allegations as ineffective assistance of counsel within the instant Motion, this Court finds he is not entitled to relief. See Arbelaez, 775 So. 2d at 915; Cherry, 659 So. 2d at 1072; Lopez, 634 So. 2d at 1057.

Nevertheless, in an abundance of caution, this Court will briefly address Defendant's allegations. First, Defendant maintains counsel should have moved for an interview of Juror C.C. prior to the discharge of the jury at the end of the guilt phase, because she allegedly repudiated her guilty verdict between the guilt and penalty phases.

A party who has reason to believe the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror. Fla. R. Crim. P. 3.575. "The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge." Fla. R. Crim. P. 3.575. It is well settled that jury inquiry is limited to allegations that involve an overt prejudicial act or external influence. Reaves v. State, 826 So. 2d 932, 943 (Fla. 2002). This may include such things as a "juror receiving prejudicial nonrecord evidence or an actual, express agreement between two or more jurors to disregard their juror oaths and instructions." Id.

This Court finds counsel was not ineffective for failing to move for an interview of Juror C.C. prior to the conclusion of the guilt phase because she "hesitated" during the polling of the verdict. (Def. 2d Am. Mot. at 120.) The record reflects Juror C.C. stated on the record that the

verdict was indeed hers. (R. Vol. XIX at 1726.) During the evidentiary hearing, Nelson stated she recalled a "significant hesitation" when one juror returned a verdict during the polling. (P.C. EH at 612.) Nelson, however, indicated that despite the hesitation, the juror ultimately confirmed her verdict of guilty. (P.C. EH at 610.) This Court finds a juror's hesitation prior to announcing his or her verdict does not provide sufficient reasoning to justify a juror interview. Fla. R. Crim. P. 3.575. Notably, the Florida Supreme Court reached this same conclusion on Defendant's direct appeal. Simpson, 3 So. 3d at 1144 ("The trial court also did not err in denying [Defendant's] motion for a jury interview because [Juror C.C.'s] concerns arose from matters which inhered in the verdict itself and thus could not be the subject of a jury interview.").

Moreover, there is no overt prejudicial act or external influence that occurred in the instant case. Indeed, Juror C.C. ultimately confirmed, after being questioned by the trial court and counsel prior to the penalty phase, that it was indeed her verdict as to the guilt phase. (R. Vol. XXII at 1837-38.) Juror C.C. told the trial court that she reached the decision after weighing the physical evidence against the testimony provided. (R. Vol. XXII at 1837-38.) In an abundance of caution, the trial court again inquired of Juror C.C. after the conclusion of the penalty phase, and she again affirmed the guilt phase verdict was her verdict. (R. Vol. XXII at 1980-81.)

Next, Defendant alleges counsel was ineffective for failing to object to Juror C.C. participating in penalty phase deliberations given that the issue with her guilt phase verdict remained unresolved. On February 6, 2007, after the guilt phase but prior to the beginning of the penalty phase, Juror C.C. reported to a judicial assistant that she needed to speak to the trial court. (R. Vol. XXII at 1826.) The trial court brought Juror C.C. into the courtroom, outside the presence of the other jurors, and inquired as to her issue. (R. Vol. XXII at 1827.) Juror C.C.

stated to the trial court that she had unresolved questions prior to announcing her verdict. (R. Vol. XXII at 1827-28.) After hearing this, the parties approached sidebar and counsel moved for a mistrial based on Juror C.C.'s comments. (R. Vol. XXII at 1828.) The trial court found counsel's motion premature and opted to question Juror C.C. about her statements. (R. Vol. XXII at 1829-32.)

The parties then inquired of Juror C.C. what questions she had and addressed the alleged issues with her guilt phase verdict. (R. Vol. XXII at 1831-38.) Significantly, and relevant to this claim, counsel thoroughly questioned Juror C.C. about her verdict prior to the commencement of the penalty phase. (R. Vol. XXII at 1832-36.) Subsequently, counsel again moved for a mistrial prior to the opening statements of the penalty phase, which the trial court denied. (R. Vol. XXII at 1839-40.) The trial court resolved the issue related to Juror C.C.'s guilt phase by denying counsel's motion for mistrial on two occasions. As such, counsel was not deficient for failing to object to Juror C.C.'s participation in the penalty phase as he attempted to do so by moving for a mistrial. Finally, as described in detail *infra* Ground G, this Court is granting Defendant a new penalty phase, thereby finding any prejudice from Juror C.C.'s participation in the penalty phase moot. Accordingly, Defendant is not entitled to relief.

28. *Defense Counsel Was Ineffective During Jury Selection and in Handling Juror L's*[62] *Disclosure He Knew Troy Lamar Crook-Ineffective Assistance of Counsel*[63]

In this claim, Defendant incorporates Grounds 23 and 26 from "Defendant's Amended Initial Rule 3.851 Motion for Collateral Review and Memorandum of Law," filed on November 21, 2011. Defendant concedes, however, that he is unable to establish bias. Further, Defendant

[62] See *supra* footnote 61.

[63] As discussed herein, Defendant incorporates Grounds 23 and 26 from "Defendant's Amended Initial Rule 3.851 Motion for Collateral Review and Memorandum of Law," filed on November 21, 2011. This Court notes, to avoid confusion, that while the title of subclaim 28 only mentions Juror L, Defendant raises incorporated grounds concerning Juror L and Juror R.

states he raises this claim for preservation purposes only. (Def. 2d Am. Mot. at 120-21.) Defendant did not present any evidence at the evidentiary hearing as to these allegations, solidifying this Court's conclusion Defendant included this subclaim for preservation purposes only. In an abundance of caution, this Court will briefly address Defendant's allegations.

Incorporated Ground 23

Defendant alleges counsel was ineffective for failing to properly examine jurors during voir dire. Defendant claims counsel failed to follow the advice of his jury consultant. Defendant maintains prejudice is most clearly shown with Juror R, who served on the jury. Defendant claims Juror R stated she was a "six" on a scale of one to five, five being most in favor of the death penalty. Further, Juror R advised her daughter was actively pursuing a career with JSO. Defendant avers counsel's failure to rehabilitate Juror R or strike her for cause constituted ineffective assistance of counsel.

During jury selection, the State inquired of each juror their feelings on the death penalty using a scale of one to five, five being in favor. The following exchange took place with Juror R:

MR. CALIEL:	[Juror R].
PROSPECTIVE JUROR:	I strongly oppose.
MR. CALIEL:	Strongly oppose? And on a scale of one to five, where would you say you fall?
PROSPECTIVE JUROR:	Six.
MR. CALIEL:	Six? Okay. You strongly --
PROSPECTIVE JUROR:	No, five.
MR. CALIEL:	--a scale of one to five--
PROSPECTIVE JUROR:	Five.

THE COURT:	If five means you're strongly in favor of the death penalty?
PROSPECTIVE JUROR:	Yes, I am.
MR. CALIEL:	Okay. You're strongly in favor of the death penalty. Would your feelings inhibit your ability to return a guilty verdict if you felt the State had proved its case beyond a reasonable doubt.
PROSPECTIVE JUROR:	No.
MR. CALIEL:	And could you recommend death if you felt it was appropriate?
PROSPECTIVE JUROR:	Yes.

(R. Vol. XII at 300-301.)

It is clear from the record that Juror R clarified during voir doire that she found herself to be a rating of five, contrary to Defendant's allegations that she believed herself to be a six. Further, the trial court inquired of the venire if they could follow the trial court's instruction of law that a defendant can only be found guilty if the State proves its case beyond a reasonable doubt, to which all of the prospective jurors affirmed. (R. Vol. XI at 45-46.) Moreover, the State asked the venire if their personal feelings on the death penalty would preclude them from following the law in this case, to which the jurors responded in the negative.[64] (R. Vol. XII at 263.) Thus, this Court finds counsel was not deficient with regard to Juror R as any objection would have been meritless. See Pietri v. State, 885 So. 2d 245, 257 (Fla. 2004) ("Jurors who initially may express firm views pertaining to the death penalty are permitted to serve if they clearly indicate an ability to abide by the trial court's instructions."); Walls v. State, 641 So. 2d 381, 386 (Fla. 1994) (concluding the "juror in question had stated that she favored the death

[64] The State inquired of each row of prospective jurors individually when asking this question. (R. Vol. XII at 263-64, 267-68.)

penalty but, on further questioning, also stated that she could follow the judge's instructions regarding the law. That being the case, we find no error on this point. There clearly was no sufficient reason to excuse the juror for cause . . . .").

As to prejudice, in the absence of a showing of actual bias, it is speculative to argue that a different group of people sitting on the jury would have altered the outcome of the case. Therefore, this ineffective assistance claim lacks merit. See Carratelli v. State, 961 So. 2d 312, 320-24 (Fla. 2007); Maharaj, 778 So. 2d at 951 ("Postconviction relief cannot be based on speculation or possibility."); Brown v. State, 827 So. 2d 1054, 1056 (Fla. 2d DCA 2002) (finding postconviction claim "speculative, attenuated, and too fanciful to warrant relief."). Defendant is not entitled to relief.

Incorporated Ground 26

Defendant maintains counsel was ineffective for failing to address juror misconduct. Defendant raises three separate arguments as to this claim. First, Defendant maintains counsel was ineffective for failing to address Juror L when given the option by the trial court and not moving for a mistrial. Instead, Defendant maintains counsel agreed to accept Juror L as an alternate.

At trial, Juror L approached the bailiff and stated he needed to speak to the trial court before deliberations began. (R. Vol. XVIII at 1513.) Juror L stated to the trial court that he knew Troy Crook, but did not know his last name until he learned it during Troy Crook's testimony. (R. Vol. XVIII at 1513.) The trial court inquired of the relationship he had with Troy Crook and learned it was not an extensive relationship. (R. Vol. XVIII at 1513-14.) In fact, Juror L explained he never had a relationship with him but would only see him occasionally at his neighbor's house when they worked on trucks. (R. Vol. XVIII at 1513-14.) Upon further

questioning, Juror L told the trial court that he could disregard any relationship in deciding the case. (R. Vol. XVIII at 1514.) Notably, as an alternate, Juror L did not deliberate on either the guilt or penalty phase verdict. (R. Vols. XIX at 1694-95, 1712-13, 1717-18, 1725-27, 1730; XXII at 1972-74, 1976-80.) This Court finds counsel was not ineffective with regard to his decisions regarding Juror L, as it is clear from the trial court's inquiry that Juror L swore he could continue his duties as a juror and counsel ultimately agreed to have Juror L made an alternate. (R. Vols. XVIII at 1514; XIX at 1694.) Further, Defendant suffered no prejudice as Juror L did not partake in deliberations or rendering of the verdict. (R. Vols. XVIII at 1514; XIX at 1694-95, 1712-13, 1717-18, 1725-27, 1730; XXII at 1972.)

Next, Defendant maintains he witnessed Juror L communicate with other jurors about his relationship with Troy Crook to "advocate for a conviction." Defendant did not present any evidence at the evidentiary hearing in support of this claim despite this Court's granting of an evidentiary hearing. See Ferrell, 918 So. 2d at 174 (finding "Ferrell 'opted to forego' the presentation of such evidence at the scheduled evidentiary hearing and thus waived the claim."). Accordingly, Defendant is not entitled to relief.

Last, Defendant alleges Nelson furiously typed on her computer while a juror looked over her shoulder. This Court finds this claim wholly speculative as to what Nelson typed and what the juror witnessed. See Hampton, 219 So. 3d at 770; Maharaj, 778 So. 2d at 951. Further, Defendant did not present any evidence regarding this claim at the evidentiary hearing, despite stating his intent to do so at the Case Management Conference. See Ferrell, 918 So. 2d at 174. Accordingly, Defendant is not entitled to relief.

F. The Cumulative Prejudice from the Foregoing Claims Requires Relief

It is well-settled that a claim of cumulative error cannot stand in cases where, following

individual evaluation, alleged errors are found to be without merit or procedurally barred. Lukehart v. State, 70 So. 3d 503, 524 (Fla. 2011); Israel v. State, 985 So. 2d 510, 520 (Fla. 2008) ("As discussed in the analysis of the individual issues above, the alleged errors are either meritless, procedurally barred, or do not meet the Strickland standard for ineffective assistance of counsel. Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit."); see Suggs v. State, 923 So. 2d 419, 442 (Fla. 2005) (holding that when a defendant does not successfully prove any of his individual claims and, consequently, counsel's performance is deemed sufficient, a claim of cumulative error must fail); Parker v. State, 904 So. 2d 370, 380 (Fla. 2005) ("Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit."). Here, Defendant has not demonstrated he is entitled to relief as to any of the above-mentioned allegations. Accordingly, Defendant is not entitled to relief.

PENALTY PHASE

G. Defendant's Sentences are Unconstitutional

29. The Sentences Resulted From a Clear Violation of Ring

While Defendant's Rule 3.851 Motion was pending, the United States Supreme Court issued its decision in Hurst v. Florida, 136 S. Ct. 616 (2016), holding, in short, "that Florida's capital sentencing scheme [is] unconstitutional to the extent that it fail[s] to require the jury, rather than the judge, to find the facts necessary to impose the death sentence." Hurst v. State, 202 So. 3d 40, 43-44 (Fla. 2016). In response to Hurst v. Florida, the Florida Supreme Court considered whether Hurst v. Florida and Hurst v. State should apply retroactively to post-Ring capital cases in Mosley v. State, 209 So. 3d 1248 (Fla. 2016). In Mosley, the Court employed the Witt retroactivity framework, as well as the fundamental fairness retroactivity analysis set

forth in James v. State, 615 So. 2d 688 (Fla. 1993). Id. The Court held that, "because [the defendant] raised a Ring claim at his first opportunity and was then rejected at every turn, . . . fundamental fairness requires the retroactive application of Hurst, which defined the effect of Hurst v. Florida, to [the defendant]." Id. The Court further found the Witt framework also supported the retroactive application of Hurst v. Florida and Hurst to post-Ring cases. See id.

Because Defendant's death sentences stem from a vote of 9-3 and 8-4, his sentences fall within the purview of Hurst. Prior to the evidentiary hearing held during postconviction proceedings, the parties agreed Defendant is entitled to a new penalty phase and, thus, this Court did not address any penalty phase claims at the evidentiary hearing. Accordingly, this Court grants Defendant a new penalty phase.

H. New Grounds Raised in Defendant's Closing Memorandum

Notably, throughout the evidentiary hearing and in his closing memorandum, Defendant attempted to add additional allegations that he did not raise in his underlying Rule 3.851 Motion.[65] Indeed, Defendant raises new claims of ineffective assistance of counsel, Brady, and newly discovered evidence. (Def. Closing Mem. at 12-15, 17, 19, 21-22, 37, 80, 90, 91-92[66].) Indeed, Defendant never sought permission to amend these claims, which is required by Rule 3.851(f)(4),[67] and many of these allegations are insufficiently pled within the closing memorandum. The documents related to these allegations were available to counsel prior to the evidentiary hearing, yet counsel failed to include these allegations within his "Amendments to

[65] See "Defendant's Second Amended Initial Rule 3.851 Motion for Collateral Review and Memorandum of Law," filed on March 14, 2017.

[66] Specifically, this Court refers to the allegations relating to Stucki's notes of the interview. As this Court does not find these allegations relate to any of the Grounds raised and discussed above, it is included only in Ground H of this Order.

[67] "A motion filed under this rule may be amended up to 30 days prior to the evidentiary hearing upon motion and good cause shown. The trial court may in its discretion grant a motion to amend provided that the motion sets forth the reason the claim was not raised earlier and attaches a copy of the claim sought to be added." Fla. R. Crim. P. 3.851(f)(4).

Defendant's Second Amended Initial Rule 3.851 Motion for Collateral Review," filed on October 30, 2017.

This Court will not permit Defendant to amend his Rule 3.851 Motion by virtue of an argument in his post-evidentiary hearing memorandum or questions at the evidentiary hearing. To allow otherwise permits Defendant to circumvent Rule 3.851 and abuse the postconviction process. Accordingly, this Court has not and will not consider these allegations. See Deparvine v. State, 146 So. 3d 1071, 1103 (Fla. 2014), as revised (Aug. 28, 2014) ("This argument was not specifically raised in either the initial postconviction motion, the reply to the State's response to the motion, or the amended postconviction motion. Deparvine raised this specific claim for the first time in closing arguments. Thus, the postconviction court properly summarily denied this claim as insufficiently pled."); Darling v. State, 966 So. 2d 366, 379 (Fla. 2007) ("[T]his claim was not specifically pled in the 3.851 motion, as is required under the rule. Therefore, the trial court properly summarily denied this claim."); Henyard v. State, 883 So. 2d 753, 759 (Fla. 2004) ("Initially, we would note that this specific claim was not made in [the defendant's] postconviction motion, and therefore it is procedurally barred."); see also Wickham, 124 So. 3d at 853 ("Wickham failed to raise this claim in his postconviction motion; therefore, it was not preserved.").

ORDERED AND ADJUDGED that:

1. "Defendant's Rule 3.851 Motion for Collateral Relief After Death Sentence," filed on October 1, 2010; "Defendant's Amended Initial Rule 3.851 Motion for Collateral Review and Memorandum of Law," filed on November 21, 2011; and "Defendant's Second Amended Initial Rule 3.851 Motion for Collateral Review and Memorandum of Law," filed on March 14, 2017 are **GRANTED** to the extent Defendant is entitled to a new penalty phase and **DENIED** as to all other respects for the reasons set forth above. Defendant's "Amendments to Defendant's Second Amended Initial Rule 3.851 Motion for Collateral Review," filed on October 30, 2017, is hereby **DENIED**.

2. Defendant shall have thirty (30) days from the date this Order is filed to take an appeal, by filing Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida this 6 day of July, 2018.

Michael R. Weatherby

MICHAEL R. WEATHERBY
Senior Circuit Judge

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the above-named parties by United States Mail this _____ day of _____, 2018.

_____,
Deputy Clerk

Case No.: 16-2002-CF-11026-AXXX-MA
/ar

Filing # 53711622 E-Filed 03/14/2017 02:54:01 PM

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

STATE OF FLORIDA,

Plaintiff,

v.

Case No. 2002-CF-11026
Division CR-H

JASON ANDREW SIMPSON,

DEATH SENTENCE IMPOSED

Defendant.

DEFENDANT'S SECOND AMENDED INITIAL RULE 3.851 MOTION FOR COLLATERAL REVIEW AND MEMORANDUM OF LAW

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I. INTRODUCTION

Pursuant to Rule 3.851 and this Court's order allowing this second amended motion to be filed by March 7, 2017, the Defendant Jason Andrew Simpson challenges his May 29, 2007, judgment of conviction on two-counts of first degree murder imposing death sentences for the brutal murders of Archie Crook, Sr. ("Big Archie") and Kimberly Kimbler. (**Exhibit 1**.) On appeal, the Supreme Court found sufficient evidence to support the conviction, found the sentences proportionate, and rejected the following appellate claims:

> (1) the trial court erred in not granting a mistrial or requiring that the jury deliberate further when a juror recanted her guilty verdict before evidence was presented in the penalty phase; (2) the trial court erred in denying Simpson's motion to exclude the public from the courtroom during the questioning of the juror; (3) the trial court erred in allowing the jury to proceed to the penalty phase after hearing testimony from the juror that the guilty verdict was not hers; (4) the trial court erred in not granting Simpson's motion for a jury interview when the juror recanted her guilty verdict before the jury proceeded to the penalty phase; (5) the trial court erred in not making a definitive ruling on Simpson's motion for a pretrial ruling on the admissibility of "reverse *Williams* rule" evidence, *Williams v. State*, 110 So.2d 654 (Fla.1959); and (6) the State committed prosecutorial misconduct during the guilt and penalty phase closing arguments, resulting in fundamental error.

(**Exhibit 2.**) This motion seeks to set aside the judgment both as to guilt and penalty.

II. GOVERNING LEGAL STANDARDS

Simpson claims based are based on prosecutorial misconduct under *Giglio v. United States*, 405 U.S. 150 (1972), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Arizona v. Youngblood*, 488 U.S. 51 (1988), ineffective assistance of counsel, and newly discovered evidence.

A. Giglio

Giglio prohibits the State from obtaining a conviction based on facts that it knows are not true. 405 U.S. at 153-54.

> To establish a claim for relief under *Giglio*, the defendant must demonstrate that (1) the prosecutor either presented or failed to correct false testimony, (2) the prosecutor knew the testimony was false, and (3) the evidence was material. Once the first two

> prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. Under this standard, the State has the burden to prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt.
>
> The standard applied under the third prong of the *Giglio* test has been described as being more "defense-friendly" that the *Brady* standard. The reason for this characterization is that once the defendant establishes that the State knowingly presented false testimony, the burden is on the State to prove beyond a reasonable doubt that the knowing use of the false testimony, or failure to disclose the false testimony once it was discovered, did not affect the verdict.

State v. Dougan, 202 So. 3d 363, 377-78 (Fla. 2016) (citations omitted).

B. Brady

Brady requires the State to provide the defendant with all evidence favorable to the defense that tends to exculpate the defendant or impeach the State's evidence. 373 U.S. at 87-88.

> In order to establish a *Brady* violation, the defendant must demonstrate that (1) favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. To meet the materiality prong, the defendant must demonstrate a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine this Court's confidence in the outcome. However, in making this determination, a court cannot simply discount the inculpatory evidence in light of the undisclosed evidence and determine if the remaining evidence is sufficient. It is the net effect of the evidence that must be assessed.

Mungin v. State, 79 So. 3d 726, 734 (Fla. 2011) (citations, quotation marks, and alterations omitted); *see also Kyles v. Whitely*, 514 U.S. 419, 434 (1995) ("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict."); *United States v. Scheer*, 168 F.3d 445, 452-53 (11th Cir. 1999) (suppressed *Brady* information must be evaluated in light of the effect on the prosecution's case as a whole and the "importance and specificity" of the witnesses' testimony).

> [S]uppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." *See* American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11 (a). When the "reliability of a given witness may well be determinative of guilt or

> innocence," nondisclosure of evidence affecting credibility falls within this general rule. *Napue* [*v. Illinois*, 360 U.S. 264], 269 [(1959)].

Giglio, 405 U.S. at 153-54.

C. *Youngblood*

Youngblood prohibits the State from destroying evidence it knows could assist the defense. 488 U.S. at 56-58. In order to establish a *Youngblood* violation, the defendant must demonstrate that the State destroyed evidence that is "potentially useful to the defense" in bad faith, which requires that they knew "of the exculpatory value of the evidence at the time it was lost or destroyed." *Guzman v. State*, 868 So. 3d 498, 509 (Fla. 2004). The very nature of a *Youngblood* claim is that the defendant is unable to prove prejudice in terms of demonstrating that the destroyed evidence would exonerate him. But the removal of the *Brady* burden of proving prejudice comes at a price; the defendant must prove the State's bad faith, an element not imposed by *Brady*:

> Part of the reason for the difference in treatment is found in the observation made by the Court in [*California v.*]*Trombetta*[, 467 U.S. 479, 486 (1984)], that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause ... as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Patterson v. State, 199 So. 3d 253, 257 (Fla. 2016) (quoting *Youngblood*, 488 U.S. at 57-58)).

Direct evidence of bad faith is not required. Instead if "the circumstances alleged suggest a possibility of bad faith that is not refuted by the record," the defendant must be "given the opportunity to prove his allegations of bad faith, and the postconviction court should make findings based on the evidence presented." *Schofield v. State*, 32 So. 3d 90, 96 (Fla. 2d DCA

2009). While Simpson's *Youngblood* claims are dispersed in different places of this motion to maintain a logical order based on the evidence against him, he submits that the analysis of whether the State exhibited bad faith must take into account the collective pattern of spoliation of the evidence. To whatever extent any single instance may appear innocent in isolation, the number and materiality of items of evidence that have been destroyed or lost shows an overall pattern of bad faith.

D. Ineffective Assistance of Counsel ("IAC")

Strickland v. Washington, 466 U.S. 668, 686-91 (1984), holds that the State is required to provide a defendant with counsel who renders reasonably effective representation.

> [A] claim for ineffective assistance of trial counsel must satisfy two criteria. First, counsel's performance must be shown to be deficient. Deficient performance in this context means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. When examining counsel's performance, an objective standard of reasonableness applies, and great deference is given to counsel's performance. The defendant bears the burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. This Court has made clear that strategic decisions do not constitute ineffective assistance of counsel. There is a strong presumption that trial counsel's performance was not ineffective.
>
> Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. A defendant must do more than speculate that an error affected the outcome. Prejudice is met only if there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Both deficient performance and prejudice must be shown.

State v. Fitzpatrick, 118 So. 3d 737, 747-48 (Fla. 2013) (citations, quotation marks, and alteration marks omitted).

E. Newly Discovered Evidence ("NDE")

The defendant must establish two elements to set aside a conviction based on newly discovered evidence:

> First, the evidence must not have been known by the trail court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Newly discovered evidence satisfies the second prong … if it weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability.
>
> ….
>
> [I]n determining whether the evidence compels a new trial, the postconviction court must consider all newly discovered evidence which would be admissible and must evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial. This determination includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether this evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

Aguirre-Jarquin v. State, 202 So. 3d 785, 790-91 (Fla. 2016) (citations, quotation marks, and alteration marks omitted).

III. CONTEXT FOR SHOWING PREJUDICE: THE EVIDENCE AGAINST SIMPSON

Most of the claims stated in this motion require a showing of some level of prejudice. In order to provide context for that issue and to familiarize the Court with the evidence produced at trial, Part A presents an account of the State's case-in-chief, and Part B details the defense case. The State did not put on a case in rebuttal. All ambiguities are resolved in favor of the State.

A. The State's Case

The State produced no eyewitnesses to the murders and no physical evidence directly placing Simpson at the scene of the murders. (T:1-19:1733.) There is no dispute, however, that Big Archie and Kimbler were murdered by multiple axe blows to the neck, head, and upper torso in the bedroom of Big Archie's home on the Westside of Jacksonville on the evening of July 15, 1999. (T:577, 588, 836-37, 840-44.)

To understand the testimony and several of the claims in this motion, it is helpful to see the layout of the house and its three doors, one in front and two in back. Attached hereto as **Exhibit 3** is a copy of a floorplan prepared by the lead evidence technician, David Chase, and admitted as State's Exhibit 2. He confirmed on direct examination by the State that the front door was "impossible" and "that entry or exit through that door was not possible" because it was blocked by "a lot of clothes and other stuff stacked in front of it." (T:585; *see also* State Exh. 8 (photo showing door is impassable).) As the diagram shows, the north rear door opened to a hallway leading to the kitchen between a bathroom and a utility room, and the south rear door opened from a deck into the master bedroom where the victims were found.

The last people known to have seen the victims alive were Big Archie's son, Archie Crook, Jr. ("Little Archie"), and Little Archie's close friend, Shawn Smallwood. (T:815.) Smallwood did not testify because he had been killed in a motorcycle accident sometime after Big Archie's death. (T:782.) Little Archie did testify, however. (T:774-15:829.)

Little Archie admitted to being angry that his father was dating Kimbler and that she was pregnant with Big Archie's child. (T:783-85.) This upset him because he hoped that his parents would reconcile and believed that the pregnancy would prevent that from happening. (T:784-85.) He conceded it was possible, although he did not remember, that he had told his former girlfriend, Misty McNeish, that the baby "wouldn't see the light of day" and had told his aunt, Brenda Crook, that he would "kill all three of them." (T:808-09.)

Little Archie admitted that he and Smallwood had been at Big Archie's house the night of the murders. (T:781.) He testified that they arrived sometime between 10:00 and 11:00 that evening. (T:781.) They arrived on the back deck and knocked on the south rear door to the

bedroom, which was locked. (T:789-90.) Little Archie had his own key (T:812), but they waited for Kimbler to them in. (T:789-90, 812.)

Little Archie testified that they stayed at the house for about an hour and a half. (T:790.) He said that he, Big Archie, and Smallwood smoked a joint, ate strawberry shortcake, drank milk, and chatted until Big Archie was sleepy and ready for bed. (T:790-91.) Little Archie had keys to the hour (T:812), and he testified that he and Smallwood let themselves out the north rear door, which they left unlocked. (T:791-92.) Kim was in bed, and Little Archie was falling asleep on the living room couch and did not follow them to lock the door behind them. (T:791-92.)

Little Archie testified that he went to spend the night with a girlfriend named Heather Smith, and Smallwood went to stay with Little Archie's mother, Rosie Crook (Big Archie's wife). (T:793-94.) Little Archie testified that was about midnight when he was dropped off at Smith's home. (T:823.)

Early the next morning, Big Archie's father, Troy Crook, went to Big Archie's house because they had planned to work on a family member's roof that day. (T:531.) He knocked on the south rear door, and when there was no answer he tried the door and found that it was unlocked. (T:536-37.) He entered and, though it was dark, he saw Big Archie lying on the bed and Kimbler on the floor with her foot on the bed. (T:538-39.) He discovered that they were dead and Kimbler was lying in a pool of blood. (T:539.) He ran to get Chris Howard, Big Archie's brother-in-law and next-door neighbor, for help. (T:540.)

After Howard called the police, detectives and evidence technicians from the Jacksonville Sheriff's Office ("JSO") spent the rest of the day taking pictures, collecting evidence inside the house, and surveying the scene. (T:555-56; 578.) Blood had been splattered all around the room, including not only on the bed and floor immediately under the victims, but also on the

surrounding rugs and floor, furniture, clothes on the couch at the foot of the bed, the walls and window blinds, and by the south rear door. (T:590-98, 626-28.) Blood also was found just outside the door on the back deck and on papers found on the ground. (T:625-26.) Blood samples were taken from throughout the crime scene and kept sterile so that they could be tested for DNA in the lab. (T:598.)

The north rear door was unlocked, and the State's evidence technician testified that fingerprints found on the knob were not identified or "of value." (T:583-84.) Footprints were discovered in the kitchen, and an evidence technician, who was never qualified as an expert, reported seeing drops of blood on the floor that he speculated were either one of the victim's blood dripping from the axe or possibly from a wound to the assailant. (T:592; 595-96, 613.)

That afternoon, Howard noticed that a chicken pen in Big Archie's back yard had been knocked over. (T:560.) He took the police into the backyard, but they did not see anything out of place. (T:562.) Later, when his kids got home from school, Howard allowed them to go into the back yard as long as they did not cross the police tape. (T:562.) Within a few minutes, they found an axe and some white socks in the back yard. (T:562.) They showed Howard, and he looked around some more and discovered two torn pieces of black cloth on a barbed wire fence at the back of Big Archie's yard. (T:562.) He then alerted the police to these ite (T:564.) The police discovered blood, subsequently identified as belonging to the victims, on the axe, but no fingerprints. (T:1088, 1160, 1171.) There was no obvious no physical evidence, such as blood, found on the socks. (T:1088; 1160.)

The next day, Dr. Bonifacio Floro conducted autopsies on the two victims (T:836-37.) Dr. Floro did not testify at trial, however. Instead, Dr. Margarita Arruza, the circuit's chief medical examiner, testified without objection based solely on her review of Dr. Floro's report

and photographs. (T:838-39.) She testified that both victims died from multiple chopping wounds of the head and neck. (T:840-41.) Kimbler had a chopping wound on the back of the arm that fractured the humerus, although she did not know whether it was a compound fracture because Dr. Floro did not address that in his report. (T:848.) Dr. Floro ran drug tests, but found no evidence of marijuana use in either victim. (T:854-55.) Big Archie's stomach contained a "very large amount" of partially digested food consisting mainly of curdled milk, beans, green vegetables, and some "red particulate material." (R.15:858; 861.) Dr. Arruza testified that because the contents of Big Archie's stomach were "well-preserved" and contained a "very large amount of very recognizable food, very undigested," she estimated that Big Archie died within an hour of ingesting the food. (T:858.) She testified that Dr. Floro reported that the contents of Big Archie's stomach and intestines included curdled milk and what Dr. Floro described as "red particulate matter," which she was "assuming to be meat." (T:861.) When asked on cross-examination whether the red matter could be cherries or strawberries, she testified, "Strawberries are very particular when you look at them in the stomach, too, and so I don't think it's strawberries." (T:861.)

On July 20, 1999, a few days after the murders, a young man mowing the lawn at the church behind Big Archie's house found a pile of black clothes next to an air conditioning unit. (T:698.) The police were called and collected the clothing for processing. (T:699.) The clothing consisted of a ball cap, sweat shirt, sweat pants, and a pair of sneakers. (T:729-30.)

These items and others from the crime scene were provided to the Florida Department of Law Enforcement in 1999, but were not actually tested until 2001 and later. (T:961, 1214.) The State ultimately tested four stains from the bedroom floor, the sweatshirt, the sweatpants, the ball cap, two of nineteen hairs recovered from the trace debris sweep of the clothing, the sneakers,

blood samples from the back deck, a bloody magazine, the axe, the two white socks, scrapings from Kimbler's fingernails, and a sexual assault kit from Kimbler. (T:1144-1183, 1207-09.)

Kimbler's DNA was found on the stains from the bedroom floor, four of nineteen stains tested from the sweatpants, two of four locations tested on the sneakers, and the axe. (T:1144; 1167-68, 1171, 1175-79, 1183.) Big Archie's DNA was found on two stains from the sweatpants, and he Big Archie could not be excluded as a contributor to possible DNA mixtures on one of the stains from the bedroom floor, one cutting from the sweatpants, and the axe. (T:1149; 1172; 1175-76, 1181-82.) Neither victim's DNA was found on the ball cap, sweatshirt, or socks. (T:1088; 1090; 1094.) Indeed, though inspected by FDLE analysts, not a drop of blood was found on the socks, the hat, or the sweatshirt. (T:1088-90; 1094.)

One swabbing from the floor produced a mixture from which Smallwood could not be excluded. (T:1149.)

The State found a full profile of Simpson's DNA on a crusty stain on the shoulder of the sweatshirt and two of the 19 hairs recovered from an FDLE analyst's raking of the sweat shirt and pants for trace evidence. (T:1211-12.) A partial profile consistent with Simpson's DNA was recovered from the neckline of the sweatshirt and the waist- and cuff-bands of the sweatpants. (T:1211-12.) Those three locations contained a mixture of DNA, indicating that one or more persons other than Simpson had left DNA on the clothes. (T:1239, 1262.) The State's expert opined that Little Archie could be excluded from two of the mixture and that while Little Archie could not be excluded from the third mixture (on the neckline), neither could twenty-five percent of the population. (T:1194, 1324-25.) These opinions were based on the assumption that that there were only two contributors and would not be valid if three or more people had contributed to the mixture. (T:1122-23, 1166-67, 1180, 1188, 1231-32, 1235, 1239-41.) If there more than

two contributors, the expert conceded that Little Archie could not be excluded from any of the mixtures. (T:1235.)

DNA testing on the scrapings from under Kimbler's fingernails yielded a profile that was consistent with both Big Archie and Little Archie, but excluded Simpson. (T:1075.) The type of test the lab performed could not distinguish between the DNA of a biological father and son. (T:1075.) An expert for the State testified that the scrapings could be explained if Big Archie and Kimbler "had had intimate contact" that evening. (T:1075.) While there was no evidence Big Archie had been scratched during sex or that he and Kimbler, who was over six months pregnant, engaged in rough sex, a rape kit showed that Big Archie's semen was in Kimbler's vagina. (T:1208-09.) On cross, the State's expert conceded the DNA under Kimbler's nails could also be explained if Little Archie was the killer, and Kimbler struggled with him. (T:1077.) He also conceded that if the State had conducted nuclear DNA testing, it would have been able to determine whether the DNA came from Big Archie or Little Archie. (T:1077.)

At trial, George Michael Durrance provided the only direct evidence against Simpson. (T:879-83.) He knew Simpson, Big Archie, and Little Archie and had been selling large amounts of cocaine to Big Archie for a number of years. (T:864-65.) He testified that "less than a week" before the murders, Simpson showed up at his door out of the blue to say that he planned to rob Big Archie. (T:874-75.) Durrance claimed that Simpson also told him that Big Archie had offered $10,000 to kill Durrance, but Simpson said he would not do it. (T:871-73.) Durrance did not see Simpson again until after the murders. (T:876.)

Durrance testified that after the murder, Simpson came to his house and said "matter of factly" that "I'm the one who killed him, you know I did." (T:876-78.) Simpson allegedly explained that he waited for Big Archie and Kimbler to fall asleep, found the axe in the

backyard, and entered "through the laundry room window." (T:879, 904.) Durrance testified that Simpson confessed he then went into the bedroom and killed Archie first, and when Kimbler "tried to make a run for it," he killed her, too. (T:879, 903-904.) Durrance testified that in a subsequent conversation, Simpson confirmed he had acted alone. (T:81-82.)

Durrance did not come forward to inform law enforcement of Simpson's alleged confession until Durrance was arrested and charged with conspiracy to traffic cocaine almost two years after the murders. (T:885-88.) After his arrest, but before coming forward about the murders, Durrance discovered that Simpson had been cooperating with the police, which led to a wiretap, which in turn led to his arrest and ultimately a 32-year prison sentence. (T:885-87.) When asked at Simpson's trial why he had waited over two years to tell the police Simpson had confessed, Durrance testified that he waited until he though the information could help him avoid the possible fifty-year sentence he was facing on his trafficking case. (T:888-91.) The State asked Durrance no fewer than five times whether it had offered him anything at all in exchange for his testimony, and he repeatedly said nothing had been offered, although he hoped he would receive a sentence reduction for his assistance. (T:887-89.)

On cross-examination, Durrance admitted that he would do "anything" to get out of prison, including lying under oath, although he denied he was lying in his testimony. (T:898.) Defense counsel reminded Durrance that in his deposition he had testified that Simpson had climbed through the kitchen window, not the laundry room window. (T:902-04.) When asked whether he was telling the truth in the deposition or at trial about the window, Durrance replied, "They're both – the laundry room separates from the kitchen. There's like when you walk in the door, there's an area where you got washer and drier and then there's the kitchen window. Both of them are the same area." (T:904). He testified, based on his memory of the house, that

Simpson would have first climbed through the laundry room window and then "open up the kitchen room window." (T:904.)

Defense counsel then showed Durrance pictures of the kitchen window from the crime scene that showed it would have been impossible for someone to have climbed through the kitchen window because there were angled pieces of wood preventing the window from opening and a number of wine glasses were stacked up on the windowsill. (T:906-07; *see also* T:621 (evidence technician acknowledging undisturbed wine glasses blocked the windowsill); T:813 (Little Archie admitting the kitchen window was kept locked).) Durrance explained, "I think it's possible that I misunderstood Jason, what window, or you know, it's been a long time." (T:908.) Counsel later elicited from JSO Lieutenant Hugh Eason that when Durrance was first interviewed about Simpson's alleged confession in October 2001 that he reported that Simpson told him he entered through the kitchen window. (T:955.)

JSO Detective Robbie Hinson testified that Simpson began working with him as a confidential informant on June 10, 1999, while investigating a group of suspected criminals including Big Archie and Durrance. (T:650.) He testified that Simpson had contacted him on June 21, 1999, to report that "Archie" –Hinson says he was not sure whether this was Little Archie or Big Archie – had contacted him and wanted to "hit a lick," which meant do something illegal. (T:651-52.) He told Simpson to contact "the narcotics detectives" and that he would get back in touch with Simpson later. (T:652.) He tried to get in touch with Simpson several times after that beginning the next day, June 22, but did not speak to him until July 16, the morning after the murders. (T:652-53.) When Hinson heard about a double murder that morning, he recognized the address as Big Archie's and paged Simpson. (T:653-54.)

Simpson called him back around noon and arranged for Hinson to pick him up at his mother's house. (T:655.) Hinson testified that when he got there, he noticed a "large gash" on Simpson's finger, which Simpson explained was the result of getting upset during the night and hitting the electrical panel in his mother's garage. (T:656-57.) When Hinson told Simpson of Big Archie and Kimbler's deaths, he said that Simpson said "he wasn't really sorry and then he said that when you live by the sword, you die by the sword and he kind of shrugged his shoulders." (T:659.) Simpson told him that Big Archie and Little Archie had both "been putting the word out on the street that he was snitching or cooperating with the police." (T:659.) Simpson advised that the last time he spoke with Big Archie was about two weeks prior when they went to someone's residence to buy drugs. (T:658.) Hinson had Simpson show him where that house was and then dropped Simpson back at his mother's house. (T:658-60.) Hinson finished by asking Simpson to get close to the Crook family and to find out all he could about the murders. (T:678.)

JSO Office James Williams testified that two months after the murders, he examined Big Archie's pager, which had been collected at the scene. (T:734.) He scrolled through and wrote down all of the numbers stored in the pager's memory. (T:735.) He testified that "the first number that came up on the pager" was the number for Simpson's mother and that she answered when he dialed the number. (T:735.) He did not disclose the date of the alleged page.

JSO Lieutenant High Eason testified that he and Detective Mark Bialkoski briefly interviewed Simpson in November 2001 and told him "we were working with Crook Kimbler." (T:949.) When Simpson stated he did not know who they were talking about and they said Archie Crook, Simpson admitted he knew him. (T:949.) Eason testified that Simpson then "immediately looked at his watch and said, it's time for me to go, I've got to get to work."

(T:950.) Eason characterized Simpson as "belligerent" and testified that Simpson told them they could not hold him there and "I don't scare easy." (T:951.)

Detective Dale Gilbreath testified that in August 2002, FDLE advised it had found Simpson's DNA on the clothes found at the church, and he set up an interview with Simpson. (T:1339-40.) Gilbreath testified that when he told Simpson he "wanted to talk to him about the Crook and Kimbler murders," Simpson denied knowing them. (T:1343.) Gilbreath then "asked if he did not know Archie Crook, Sr., and at that point [Simpson] said he knew him a little." (T:1343.) Gilbreath asked Simpson what he would say if Gilbreath told him that his DNA was found at the murder scene. (T:1344.) Simpson replied that was impossible. (T:1344.)

The next day, Gilbreath interviewed Simpson again and showed him photos of the clothes found by the church. (T:1346, 1349-50.) He testified that when he told Simpson the clothes were related to the murders and that he had information the clothes belonged to Simpson, Simpson replied the information was wrong. (T:1351.) He then showed Simpson a close-up photo of the pile of clothing and Simpson denied that they were his. (T:1351.) On cross-examination, Gilbreath admitted the photos he showed Simpson, including the close-up, were substantially smaller than the ones presented at trial; they were 4 x 6. (T:1358-59.) Even from the blown up photos at trial, Gilbreath could not tell whether they were inside out and noted that they appear to be dark blue in one of the photos. (T:1360.) The State's expert fiber analyst from FDLE, Heather Velez, who spent hours looking at the clothes admitted that she could not identify them from the photos either. (T:1283-84.)

B. The Defense Case

Simpson took the stand and denied the murders. (T:1396.) He testified that he had prior convictions and got out of jail early in 1999 to work with law enforcement as a confidential informant to develop information mainly about drug dealers. (T:1377-80.) Right after he was

released, he rented a room in a trailer on 118th Street, although he also spent a good bit of time at his mother's house. (T:1380-81.) One day, he was painting at his mother's house when Little Archie came over. (T:1383.) Little Archie said he heard that Simpson was working for the police and joked that "I think I hear a tape recorder." (T:1383.) Simpson brushed it off and Little Archie gave him a ride back to the trailer on 118th street. (T:1383-84.) On the way, Little Archie asked to borrow some dark clothes because he was going to steal a Chevrolet Impala that night. (T:1384-86.) Little Archie said he wanted to "hit a lick." (T:1385.)

At the trailer, intending to fulfill his role a confidential informant against Little Archie, Simpson told Little Archie to pick something out of a pile of clothes on the floor. (T:1387-89.) As Simpson was getting ready to step into the shower, he saw Little Archie pick up some black clothing. (T:1387.) When he got out of the shower, Little Archie was gone. (T:1387.) Simpson's dresser drawer was open, and Waugh's card was on top of the dresser, which led Simpson to conclude Little Archie knew he was a confidential informant. (T:1387.) Simpson testified that he immediately called Hinson and Waugh to tell them what had happened. (T:1389.) Hinson told him to call Waugh, who told him to try to go with Little Archie that night. (T:1389.) Bit Simpson did not see Little Archie again that night. (T:1389.)

Simpson testified that he only lived in the trailer for "a couple of weeks" and then moved in with his mother shortly thereafter, which was about two weeks prior to the murders. (T:1382, 1390, 1423-24.) On cross-examination, the State suggested Simpson had been released from jail back in March 1999, which would have put Little Archie's visit to this trailer to borrow clothes as occurring in April instead of a few weeks before the murders as Simpson had claimed. (T:1422-24.) Simpson conceded he did not know the exact date he was released and, when asked to explain the State's suggestion his timeline was off, Simpson stated, "It's been a long time ago.

I don't remember exactly." (T:1423.) When the State asked if he was sure about how long he stayed at the trailer, he replied, "It could have been longer. I'm not sure, sir." (T:1424.) The State used this exchange throughout closing to claim Simpson's testimony that Little Archie borrowed his clothes was fabricated. (T:1618-19, 1643-44, 1679, 1681-82.)

In any event, Simpson testified that he spent the entire night of the murders at his mother's house. (T:1390-91.) He woke up around seven or eight that morning and had breakfast. (T:1391.) The power was out, so he went to the dark garage and scratched his finger on the breaker box. (T:1391-92.) He testified the injury was "nothing really major," just a scratch instead of "a gaping, oozing wound." (T:1392-93.) (An employee from JEA confirmed that the power had gone off for three minutes at about 3500 residences, including Simpson's mother's, that morning. (T:1468-69.)) Unemployed at the time, he had nothing to do that morning and went back to bed. (T:1393-94.) Later, his mother woke him and told him that Detective Hinson had called. (T:1394.) He called Hinson back and showered and dressed for the day. (T:1394-95.) When Hinson picked him up and told him that Big Archie and Kimbler had been murdered, he was shocked, but did not have much to say because "it took awhile to kick in." (T:1394; 1397.) He agreed he had told Hinson something to the effect of "if you live by the sword, you die by the sword," but explained this was simply a Bible verse he referenced because he knew Big Archie always carried a gun, and he assumed Big Archie had been shot. (T:1398, 1447.)

Simpson testified that the black sweatclothes found at the church were the clothes that Little Archie had taken. (T:1408-09.) He admitted he was shown pictures of clothing by the police and denied they were his, but testified that he could not tell they were his from the pictures, noting that even in the blown up pictures used at trial, they looked blue. (T:1408, 1410-11.) Simpson denied that the cap and sneakers found with the clothes were his. (T:1407, 1411.)

They are size ten, but Simpson buys size nine and a half, and the jury was shown that even that size is big for his feet. (T:1399-1400, 1406-07.) The State sought to impeach Simpson by placing his shoes next to the shoes in evidence to show that the exterior dimensions appeared the same. (T:1417-18, 1642.)

Simpson confirmed what he had told Hinson – the last time he had seen Big Archie was about two weeks before the murders. (T:1439.) The State asked Simpson whether he had paged Bit Archie the day before the murders, and Simpson responded that he did not remember, but that would not be out of the ordinary. (T:1439.)

Simpson testified that he agreed, at Hinson's request, to be interviewed by Eason and Bialkoski before he had to go to work one day. (T:1413-14.) He said that when he got there, they were very rude to him and locked him in an interview room for a while. (T:1414-15.) Simpson denied telling them that he did not know Big Archie and said that he misunderstood Bialkoski at first: "He didn't say Crook, he said Crews. I said the crews? What kind of crew you talking about? The people I hang out with? Who's the crews. I don't know no crews. He said, you don't know Archie and Kim? I said, of course I know them." (T:1427-28.) He explained that when Bialkoski started yelling at him and trying to scare him by threatening to violate his probation, he replied he was not scared of them and had to leave to get to work across town. (T:1415, 1428-29.) Simpson testified that in the subsequent interview a year later, Gilbreath also started by asking him about "Crooks" or "Crews." (T:1442-43.) Simpson replied he did not know who Gilbreath was talking about, but when Gilbreath told him he was referring to "Archie, Sr. and Kim," he confirmed knowing them. (T:1442-43.)

The defense sought to put on evidence that Susan Hambrick, a friend of Kimbler, that Big Archie had told her around two months before the murders that he was afraid of his son.

(T:1289-90, 1455-56.) Defense counsel conceded that she would testify that she did not remember this, and his intent was to put her on to say she did not remember and then call officer Williams to testify that she had told him that back in July 1999. (T:1456-57; *see also* T:748 (Williams testifying he had interviewed Hambrick shortly after the murders).) The Court indicated it believe Big Archie's fear would be relevant, but held that it could not be introduced in this manner through double hearsay. (T:1457-58, 1461-63, 1508-11.)

The defense called Brenda Crook, Big Archie's sister Brenda Crook, and she testified that before Kimbler had gotten pregnant, she was involved in a conversation with Big Archie, Kimbler, and Little Archie in which Little Archie stated he would "kill all three of them if they ever had a baby," but Big Archie told her that Little Archie was "just running his mouth, not to pay no attention to him." (T:1473.) The defense next called Troy Lamar Crook, Big Archie's oldest son and Little Archie's big brother, and he admitted he had told police that he had heard that "Little Archie said that the baby Kim was going to have would not see the light of day." (T:1478-79, 1481.) He denied that he had heard this directly from Little Archie or that he had told the police that; he had only heard it "through the grapevine." (T:1479-80.) The defense also called Misty McNeish, Little Archie's former girlfriend and the mother of his six-year-old daughter, but she denied ever hearing Little Archie make statements about killing anyone or being upset that Kimbler was pregnant.[1] (T:1482-85.)

The defense then called JSO officer Williams back to the stand to read from his July 21, 1999, report that Troy had "said that Little Archie said the baby Kim was going to have would not see the light of day" and that "Little Archie was not happy about Kim being pregnant with a

[1] Before she testified, defense counsel and the State announced that counsel had agreed he would not ask McNeish about any prior "bad acts" by Little Archie and specifically would not bring up anything about an injunction she had gotten against him for "getting punched in the nose or nothing like that." (T:1458-59.)

male child." (T:1489-90.) McNeish had told him that Little Archie was upset that Kimbler was pregnant and "the baby would never see the light of day." (T:1490.) He testified that on July 20, 1999, Little Archie had told him about the position of the bodies even though Williams had not disclosed that information to him. (T:1491-92.) Indeed, Little Archie admitted telling Williams that Big Archie "was probably lying in bed when he was hit and that Kim was trying to get out of bed when she was hit and that Kim's leg was up on the bed." (T:821.) That is the exact way the bodies were found. When Williams asked him how he knew that, Little Archie responded that his grandfather had told him. (T:1492.) But his grandfather had directly denied this earlier in the trial. (T:546.)

Terry Thompson, one of Little Archie's cousins, testified that around midnight of the night of the murders, he saw Little Archie and Smallwood at a RaceTrac gas station about five minutes from Big Archie's house. (T:1496-97.) He testified on cross that they appeared normal, they all "shared a couple laughs," and Big Archie told him they had just been "drinking milk and eating cookies" at Big Archie's house. (T:1499.) Thompson, who was renting a trailing next door to Big Archie's house, then went home and went over to knock on Big Archie's door to see whether his phones were working. (T:1500.) Thompson knocked on the north rear door, pointing to it on the floor plan diagram and clarifying that he did not try "what's referred to as the south rear door to their bedroom." (T:1500-01.) He noted that he had been to Big Archie's house many times when the doors were unlocked and this door had a double dead bolt that required a key to lock it on the way out. (T:1501.) He testified that there was no answer and that he did not call out. (T:1497-98, 1502.) He was not asked by either side whether the door was locked. Shortly after defense counsel excused Thompson, he sought to recall him for additional direct

examination about "something I couldn't find before," but the bailiff could not find him and counsel admitted he had been excused from his subpoena. (T:1511, 1515, 1519.)

The final witness was Dana Guinn, whose daughter Christie Perry was living with Thompson in the trailer at the time of the murders. (T:1571-72.) He and Perry were with Thompson that night when they saw Little Archie and Smallwood at the RaceTrac. (T:1572-73.) He described Little Archie as acting jittery and nervous and noted that it was possible Little Archie was not wearing a shirt. (T:1575.)

After the close of the evidence, the jury deliberated for two hours before finding Simpson guilty on both counts of first-degree murder. (T:1723-26.) When polled, each juror affirmed the verdict. (T:1726-27.) As the Court acknowledged, one juror, Juror Cody, appeared timid and was looking down when the verdict was read. (T:1830.) One week later, on the first morning of the penalty phase, Juror Cody asked to speak with the Court about "some questions that were unanswered before the verdict was made." (T:1826-28.) After reminding her that the jurors had been polled under oath, the Court asked her directly, "Was that, in fact, your verdict?" (T:1835.) She replied, "No." (T:1835.) She stated that it had been her understanding that she could only consider the physical evidence and "not take into consideration everyone's testimony as well," and that when she incorporated the testimony with the physical evidence, she did not believe that Simpson was guilty. (T:1838.) As noted above, the Supreme Court affirmed the Court's rulings denying relief because these disclosures came after the she had confirmed the verdict when polled and the jury was excused from the guilt phase.

IV. CLAIMS FOR RELIEF

A. Simpson's Conviction Rests on the Demonstrably False and Now Recanted Testimony of Michael Durrance.

Durrance's testimony was the most important evidence against Simpson, and the jury never could have convicted him without it. Indeed, the case would not have even gotten to the jury. As Durrance's attorney, David Barksdale, documented in the motion he prepared to secure a reduction in Durrance cocaine trafficking sentence for the assistance he provided in this case, the lead prosecutor against Simpson, Assistant State Attorney Mark Caliel, confirmed that Durrance's testimony was vital to Simpson's conviction. Indeed, the supreme court emphasized Durrance's testimony in its opinion finding the evidence sufficient to sustain Simpson's conviction. *See* **Exhibit 2** at 22 ("[B]ecause this case is not entirely circumstantial, in that the State introduced Durrance's testimony that Simpson confessed that he killed Crook and Kimbler, the special standard of review applicable to solely circumstantial cases does not apply."). Without Durrance's testimony, the State's case would have been entirely circumstantial. "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." *State v. Law*, 559 So. 2d 187, 188 (Fla. 1989). The circumstantial evidence in this case failed to meet that test because the only other evidence that could be described as inculpatory against Simpson was the sweat clothes, on which at least one other person's DNA was deposited along with his. Without the confession, the clothes were no more probative of Simpson having committed the murders than of the other DNA contributor(s) doing so. In short, any constitutional violation or newly discovered evidence that would eliminate or cast reasonable doubt on Durrance's testimony requires relief.

1. The State Knew Durrance's Testimony Was False – *Giglio*/*Brady*

Approximately six months before Simpson's trial, there was an internal debate in the State Attorney's Office about whether to put Durrance on the stand. This was revealed in a June 25, 2006, letter finally disclosed by the State after Simpson's amended 3.851 motion was filed

and only then because postconviction counsel moved to compel production of state attorney files on various named witnesses, including Durrance. In that letter, Assistant State Attorney Laura Starrett urged State Attorney Harry Shorstein not to let Caliel use Durrance as a witness at Simpson's trial. Specifically, she wrote then (and has confirmed to post-conviction counsel since) that Caliel "has admitted to me that he does not believe Durrance's claims that he did not have a role in the murders and feels Durrance was actually behind the Kimbler/Crooks homicide." Though there was no more zealous prosecutor in that office, Starrett clearly recognized the solemn duty imposed on the prosecution by *Giglio* and did everything she reasonably could to ensure her office stayed within the bounds of the law by alerting her boss of her concern that fellow prosecutors may be "intending to put a witness on the stand whose credibility they question."

The State Attorney's Office was not the only arm of the State that did not believe Durrance. In a draft letter to Judge Greg McCaulie from then Sheriff Nathaniel Glover, dated November 2001, but not disclosed by the State until after Simpson filed his first amended 3.851 motion, Glover addressed Durrance's assistance to law enforcement as a means of reducing his sentence for his Duval County drug trafficking conviction. Glover indicated to the Court that "Durrance had absolutely zero credibility with law enforcement." Simpson anticipates that both Starrett and Glover will confirm the forgoing at the evidentiary hearing.

All available evidence corroborates that Caliel knew that Durrance was lying based on factual problems with the alleged Simpson confession. First, there were obvious red flags, such as the impossibility of a single killer wielding against to victims to wreak the bloody carnage found in Big Archie's bedroom, but failing to get a single drop of blood anywhere on his sweatshirt. Equally implausible was that Simpson went unarmed to kill Big Archie and just

happened to find an axe lying in the backyard while waiting for Crook and Kimbler to fall asleep – an axe that Little Archie insisted could not have been on the property. (R.15:825.) We know that Caliel focused on this because his own needs revealed he had flagged the need for a "blood splatter expert to explain why no victim blood on shirt or hat."

But the State had more irrefutable evidence that Durrance concocted the alleged confession. Caliel knew for a fact that the killer could not have entered Big Archie's house the way Durrance claimed. When Durrance first informed the State, over five years prior to the trial, that Simpson had allegedly confessed, he advised that Simpson had climbed through the kitchen window. (T:955.) The police report from that interview confirms this unequivocal contention, and Durrance repeated it in his deposition. But the State's investigation of the crime scene demonstrated that this was impossible because that window was over a sink, locked, and blocked by undisturbed wine glasses. (T:621, 812-13, 906-07.) Crime scene photos of the outside of the house show that there was an undisturbed grill blocking the window on the outside as well.

Undeterred by this reality and by the ethical concerns Starrett had raised, Caliel not only put Durrance on the stand anyway, but he clearly coached Durrance to alter his story:

> Q Please detail for the jury what this defendant told you about how he killed Archie Crook, Sr., and Kimberli Kimbler?
>
> A He told me that he – he waited outside for a little while, I guess until they went to sleep, and then snuck in through a window.
>
> Q You specifically remember he said he snuck in through a window?
>
> A As best I can remember, yes. I want to remember that that's what he said, told me he went in through the laundry room window, I think.

(T:879.) While this change in testimony clearly caught defense counsel unprepared (T:904), Caliel knew that it was equally impossible for the killer to have come in through the laundry window based on photographs taken by JSO investigators at the crime scene. Photos of the inside

show the window was blocked by piles of dirty laundry, closed drapes and blinds, and the open door to the dryer. Photos on the outside showed an undisturbed screen on the outside of the window.

The way Caliel addressed this in closing confirms his awareness that Durrance was not telling the truth. While he otherwise tracked Durrance's claims in describing the State's theory of how the crimes were committed, he came up with an alternate story for how Simpson allegedly entered – the north rear door. Pointing to Little Archie's testimony that they left that door unlocked, Caliel painted a picture that managed to simultaneously obscure Durrance's clear lie, evoke sympathy for Little Archie, and incriminate Simpson: "[U]nbeknownst to them, it would be the last time they would see Archie and Kim alive. And even more tragic is by not locking that door behind them they left access, access that this defendant took advantage of that night when he went in through the kitchen." (T:1596-97.) As demonstrated in Claim 18, below, this argument rest on Caliel putting on other false testimony, but the point for present purposes is that he knew Durrance's testimony was a lie because he knew Simpson could not have come in through either window.

Aside from the false substance of Durrance's testimony, it now appears that when Durrance testified repeatedly that he had not been promised any benefit in exchange for his testimony (T:887-90), Caliel knew he was lying. Indeed, the only reason Durrance testified was because Caliel signaled he would recommend that Durrance get a sentence reduction on his drug trafficking conviction and that no one from law enforcement would appear to oppose the reduction. According to a September 17, 2007, letter from Durrance to Caliel, first disclosed by the State after Simpson filed his amended Rule 3.851 motion, Caliel made such assurances to Durrance more than once.

Defense counsel did elicit on cross that Durrance was not only hoping to get a reduction of his 32-year sentence for cocaine trafficking based on the assistance he provided the State in this case, but that he had filed six unopposed motions to extend the time for the court to decide the matter. (T:929-30.) But the jury did not see any of these motions, so it did not know that they were directly tied to this trial and that each time this trial was continued, the time for the court to rule on Durrance's motion was extended without the State's opposition. The State's decision not to oppose these extensions was a clear benefit in exchange for Durrance's testimony by itself, but is also strong evidence that the State led Durrance to believe it would not oppose his request for a reduction so long as he favorably against Simpson. Moreover, what neither the jury nor defense counsel could have known was that Starrett had alerted Shorstein that Caliel had made it known in the State Attorney's Office that he was "considering reducing the sentence of George Michael Durrance" six months before the trial. (Ex. 4.) All these circumstances strongly suggest that Caliel intentionally led Durrance to believe the State would agree to or at least not oppose a reduction in his sentence if he testified against Simpson.

This circumstantial evidence has been corroborated Durrance himself, who has admitted to two private investigators and undersigned counsel (Mills) that not only did he fabricate the story about Simpson's confession (the subject of Claim 3 below), but also that he only testified against Simpson because Caliel had given him an assurance the State would support his motion for a sentence reduction in his trafficking case and that there would no law enforcement opposition to the motion if Durrance testified against Simpson and bolstered his credibility by admitting to his cocaine conspiracy. Specifically, Durrance states that before his deposition, he informed Caliel that he was willing to testify that Simpson confessed to the murders, but that he would "take the Fifth" if he was asked any questions about the drug conspiracy. Caliel responded

that Durrance's testimony about Simpson's alleged confession would be of little use to the State if he did not also admit to the drug conspiracy and he would not receive any credit for assisting the State. Durrance replied that he would admit to the conspiracy (and thereby render his pending appeal and postconviction motion moot) only if Caliel could give him an assurance that his sentence would be reduced to fifteen years. When Caliel explained that the State could not offer to do that, Durrance replied that he would not testify and would instead just rely on his chances of overturning the conviction. At that point, Caliel assured him that if he would admit in his trial that he was guilty of conspiring to traffic in cocaine, then he would not "have to worry" about seeking post-conviction relief from those charges. Durrance understood this to be an implied promise that Caliel would help get a reduction to fifteen years, and in reliance on that belief, he admitted to the conspiracy in his deposition and at trial. (R.15:937.) While Caliel appears to have been sufficiently careful to avoid an enforceable quid pro quo deal, his wink-and-a-nudge approach clearly constituted an informal promise to help or at least not oppose Durrance's motion for a sentence reduction for the assistance he provided against Simpson.

Even if one did not draw the same conclusion from the circumstantial evidence and found Durrance's account of the foregoing not credible regarding promises of benefits for Durrance to testify against Simpson, the fact remains that the lead prosecutor in this case intentionally put on a witness he believed was actually responsible for the murders to provide testimony implicating that he knew to be false. Whether Caliel knew Durrance was lying about the confession for a fact or just suspected it should be immaterial. "The prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes." ABA Stds. For Crim. Justice 3-1.4(b); *see also* R. Regulating Fla. Bar 4-3.8 cmt. (noting that Florida

has adopted these standards). A new trial is required where the prosecution "consciously avoided recognizing the obvious – that is, that [a key prosecution witness] was not telling the truth." *United States v. Wallach*, 935 F.3d 445, 457 (2d Cir. 1991). "[W]hen the government learns that part of its case may be inaccurate, it must investigate. It cannot simply ignore evidence that its witness is lying." *United States v. Freeman*, 650 F.3d 673, 680 (7th Cir. 2011).

The State cannot possibly meet its burden of proving harmless error beyond a reasonable doubt as required for a *Giglio* claim. *Dougan*, 202 So. 3d at 377-78.

To whatever extent the Court may find the State was not sufficiently certain that Durrance's testimony was false, then Simpson is entitled to alternative relief under *Brady* because the fact remains that the State did not disclose the letters from Starrett and Glover indicating that neither the State Attorney's Office nor JSO believed Durrance was credible. This was clearly exculpatory *Brady* evidence that would have led the defense to call both Starrett and Glover as witnesses to confirm their mistrust of Durrance—testimony that Simpson will offer in his upcoming postconviction hearing.

Though it seems incredible that Simpson's prosecutors had no knowledge of their colleague's mistrust of Durrance, such knowledge need not be proven. *See Giglio*, 405 U.S. at 154 (imputing knowledge of a promise made to a witness by one prosecuting attorney to another prosecuting attorney in the same office for purposes of establishing *Brady* violation); *Kyles*, 514 U.S. at 438 (imputing knowledge of *Brady* evidence gathered by police investigator to the State). In the face of such testimony, Durrance's allegation that Simpson confessed would never have been considered reliable by the jury. In short, had the foregoing evidence been disclosed, there is a reasonable probability that it would have altered the jury's verdict. Relief is therefore required under *Brady*. *Mungin*, 79 So. 3d at 734.

2. Defense Counsel Failed to Move to Strike Durrance's Testimony – IAC

At the beginning of his cross-examination at trial, Durrance admitted that he would lie under oath to get out of prison. (T:898.) He had already stated on direct that he was testifying in this case in the hope of getting a reduction in his sentence for cocaine trafficking. (T:891.) These statements entirely vitiated his oath and rendered his testimony the equivalent of testimony by a witness who refuses to take an oath. Reasonably competent counsel would have moved to strike Durrance's testimony in its entirety once he made clear he did not feel constrained by his oath.

Had defense counsel moved to strike this testimony, this Court would have been required to grant the motion. *See Willis v. Romano*, 972 So. 2d 294 (Fla. 5th DCA 2008) (holding that a witness who refuses to take an oath is not competent and his testimony may not be considered); *State v. Keyes*, 322 A.2d 615, 618 (N.H. 1974) ("If the trial court was not satisfied that Viano felt an obligation to tell the truth under oath, he should have been disqualified as a witness under applicable standards or his testimony should have been stricken. His testimony that the defendant had accompanied him and assisted him in the commission of the crime was so prejudicial to the defendant that its admission in the absence of a finding by the court that he was competent cannot be said to constitute harmless error.").

As noted above, without Durrance's testimony, the State would have had no direct evidence of Simpson's guilt, the jury never would have convicted Simpson, and even if the jury did, the Court would have been required to grant a judgment of acquittal. On the other hand, had the Court denied the motion, an evidentiary ruling would have been preserved for appeal. Because there was no motion to strike this evidence, appellate counsel had no issue to raise on appeal about this, and the Supreme Court was required to consider Durrance's testimony in determining that Simpson's conviction was supported by the evidence.

3. Defense Counsel Failed to Demonstrate the Murders Could Not Have Been Committed as Durrance Claimed – IAC

Although defense counsel was able to demonstrate at trial that Simpson could not have climbed in through the kitchen window as Durrance originally claimed, counsel was ineffective for being unprepared to counter Durrance's claim that Simpson told him he climbed in through the laundry window. Counsel had the same photos and deposition testimony that the State had, which is described in Claim 1, and they demonstrate Durrance was lying. Competent counsel would have used this evidence to demonstrate that Durrance's changed testimony was as impossible as his original testimony – nobody went through either window that night. Had the jury known this, it would have known Durrance was lying and would have had to acquit Simpson. But this was not counsel's only failing in countering Durrance's testimony.

Counsel was especially ineffective in failing to impeach Durrance's testimony and the State's theory of the offense that the killer acted alone in that bedroom that night. Competent counsel would have recognized early on that it was physically impossible for a single killer to inflicted this carnage without getting blood all of his sweatshirt and ball cap. Blood had been splattered all around the room, including not only on the bed and floor immediately under the victims, but also on the surrounding rugs and floor, furniture, clothes on the couch at the foot of the bed, the walls and window blinds, and by the south rear door. (T:590-98, 626-28.) Yet no blood was found on the sweatshirt or hat. The victim's blood was found only on the lower pants legs and the shoes, demonstrating that whoever wore those clothes was standing at a distance while another assailant wielded the axe. Yet counsel made no such argument.

To the contrary, near the very end of this argument – in a remarkable display of just how little he understood the basic facts of this case – counsel embraced the lone killer theory and argued that Little Archie must have gone back alone that night, entered "through the front door

with the axe because you ain't going through the window with an axe" (ignoring both that the front door was impassable and that it was impossible to go through either window with or without an axe), killed the victims, and stole money and drugs (though there was no evidence money or drugs were stolen). (T:1671.)

Competent counsel would also have recognized the need to have the Court appoint an expert on crime scene reconstruction. Indeed, as discussed in Claim 1 above, Caliel's own files include a note with an underlined star that this case "may need blood splatter expert to explain why no victim blood on shirt or hat." Postconviction counsel have retained such an expert, Jan Johnson, who will testify that based on the physical evidence in this case, including the blood spatter patterns and the location and positioning of the bodies, not only is it impossible for the actual killer to have worn the sweatclothes, but it is also extremely likely that there were at least two assailants – one wielding the axe and the other blocking Kimbler's escape route. Johnson, who has previously worked for the Federal Bureau of Investigations and the Florida Department of Law Enforcement, started work as an independent consultant for Forensic Pieces, Inc., in Pensacola, Florida in 2000. She was available to serve the defense as a crime scene consultant in the period leading up to Simpson's trial and could have testified as an expert in that field.

The testimony of a crime scene expert like Johnson would have eviscerated the State's case by demonstrating how much more likely it was that Little Archie, probably with Smallwood's help, killed Big Archie and Kimbler. Much of this evidence, including Little Archie's clear motive and the fact that he and Shawn Smallwood had the opportunity by being placed at the murder scene shortly before the time of death, are described in more detail in the claims in part C below. Regardless, counsel was ineffective for failing to use available evidence to demonstrate it was highly unlikely, if not outright impossible, for a single killer to have

committed these crimes, which would have shown Durrance's testimony was false. This undermines any confidence in this verdict.

Counsel was also ineffective by not going far enough for the jury to understand that the State had been giving Durrance benefits for his testimony. While counsel alluded to six unopposed motions for continuance of Durrance's motion, he failed to put the motions into evidence or link them up to the continuance in this case to show the State's decision to not oppose them was a significant benefit tied directly to Durrance's testimony in this case. Counsel also failed to elicit another benefit that Caliel had actually disclosed. Durrance had requested a transfer to a corrections facility in Baker County to be closer to his family. (T:1075-76.)

Had counsel presented the forgoing evidence, either individually or collectively, there is far more than a reasonable probability they would have rejected his testimony and acquitted Simpson. There can be no confidence in the outcome of this tainted trial.

4. Durrance Has Recanted – NDE

Since the trial, Durrance has admitted to private investigators Monica Jordan and Steven K. Brown that his testimony in this case was false, that Simpson never confessed to committing these murders and that Durrance made the whole story up to get back at Simpson for serving as a CI against him and to get a reduction of a drug sentence he was serving. And he has recanted his testimony that he was not given any benefits by the State in exchange for his testimony as detailed in Claim 1.

Because the recantation came well after the trial, it could "not have been known by the trial court, the party, or counsel at the time of the trial." *Mansfield v. State*, 204 So. 3d 14, 17 (Fla. 2016). Evidence of "a recantation is not precluded from being considered newly discovered evidence simply because the defendant knew, as reflected by what the defendant claimed the facts to be, that the recanting witness was not telling the truth at the time of the trial or because

the defendant took the stand to testify contrary to the witness." *Archer v. State*, 934 So. 2d 1187, 1194 (Fla. 2006). The recantation satisfies the second prong of the NDE test because it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Mansfield*, 204 So. 3d at 17 (quoting *Jones v. State*, 709 So. 3d 512, 521 (Fla. 1998)). A new trial is warranted where a key witness credibly recants testimony that was used by the State as a primary basis for prosecuting the defendant. *E.g., State v. Spaziano,* 692 So. 2d 174, 175-78 (Fla. 1997). Caliel himself has recognized that Durrance's testimony was vital to a conviction. The jury probably would have found reasonable doubt absent this evidence, and in any event, a judgment of acquittal would have been required because the circumstantial evidence in this case was all consistent with a reasonable hypothesis of innocence. *Law*, 449 So. 3d at 188.

To determine the credibility of the recantation, the Court must "examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial." *Armstrong v. State*, 642 So. 32d 730, 735 (Fla. 1994). Durrance has adhered to his recantation in interviews with two different investigators – Steven Brown and Monica Jordan – and undersigned counsel (Mills) made clear in the interview he attended that Durrance had nothing to gain but peace of mind from recanting his false testimony.[2] When told he may be called as a witness in this proceeding, Durrance did not back off his recantation. The various circumstances set forth in Claims 1 and 2 all make his recantation highly credible – far more credible than his original testimony.

[2] The State has alleged that "a lawyer representing Simpson on appeal … told Durrance if he would recant his testimony against Simpson, the lawyer would help Durrance on his appeal." (State's Amended Response Opposing Defendant's Amended Postconviction Motion at 40 n.12.) The State has not identified that lawyer, Simpson did not authorize any lawyer to make such an offer, and undersigned have no information that would corroborate this accusation of lawyer misconduct.

Durrance has been pressured by Little Archie, and his family not to testify, and it is possible he will invoke his rights against self-incrimination or even recant his recantation and revert to his former false testimony. Regardless, his recantation can still be proven at an evidentiary hearing through the credible testimony of investigators Brown and Jordan. Any invocation of his right to remain silent will, itself, tend to corroborate that he has admitted his perjury. In any event, Brown and Jordan's testimony will be admissible under section 90.804(2)(c), Florida Statutes, as statements against interest. *See Merritt v. State*, 68 So. 3d 936, 939-40 (Fla. 3d DCA 2011) (finding evidentiary hearing warranted on newly discovered evidence claim where testimony of three witnesses, who would testify to statements made to them by an individual confessing to the crime for which the defendant was convicted, could be admissible as statements against interest if proper predicate made). These statements are against Durrance's interest, in that he admitted he committed perjury at Simpson's trial. § 775.15(6), Fla. Stat.; § 837.02(2), Fla. Stat.

Lastly, to the extent section 90.802, Florida Statutes, would prohibit the testimony of investigators Jordan or Brown, it is unconstitutional. Simpson has a due process right to offer their testimony, particularly where it demonstrates that the only witness providing direct evidence of his guilt has admitted that Simpson never confessed to these crimes. *See Chambers v. Miss.*, 410 U.S. 284, 287 (1973) (holding that due process considerations can overcome state hearsay rule where the statements are critical to the defense, and among other things, are reliable, corroborated, and against interest).

B. The Physical Evidence Is Insufficient to Support the Conviction Absent Constitutional Violations.

Absent the presence of Simpson's DNA and hairs on the sweat clothes, none of the evidence presented at trial would have been enough even to arrest Mr. Simpson for the murders

of Big Archie and Kimbler, let alone convict him. In fact, even after Detective Bialkoski's October 1, 2001, detailed interview with Durrance about Simpson's alleged confession, Bialkoski wrote in his continuation report, "As of this time Jason Simpson has been developed as a possible suspect but there is not enough probable cause to make an arrest. Therefore, I request this case be continued until all leads have been exhausted and the results of the tests being conducted at FDLE are completed."

The sweat clothes were tied to the murders because they were found a few days later, along with a baseball cap and pair of sneakers, by a young man mowing the lawn at the church directly behind Big Archie's home. (T:698, 729-30.) After Durrance claimed that Simpson had confessed, the State conducted DNA testing on the clothes and several items collected in the house. Specifically, the State tested four blood stains from the bedroom floor, the sweatshirt, the sweatpants, nineteen hairs recovered from the trace debris sweep of the clothing, the cap, the sneakers, blood stains from Big Archie's back deck, a bloody magazine found in the backyard, an axe found in the backyard, two white socks found in the back yard, and nail clippings and scrapings from Big Archie and Kimbler. (T:1144-1183; 1207-08.)

As recounted above, the victims' blood was found on the bedroom floor, the axe, the shoes and the sweatpants, but not on the sweatshirt or hat. Simpson's DNA was found only on the sweatshirt and sweatpants, but not anywhere in the bedroom or on the axe, hat, or shoes. He was excluded from Kimbler's and Big Archie's fingernail scrapings (T:1075), and not a single piece of evidence linked him to the crime scene. The samples taken from the neckline, waistband, and cuffs of the sweatclothes all contained DNA mixtures, indicating that someone in addition to Simpson also wore the clothes. (T:1239-51, 1261-62.) Little Archie could not be excluded as a contributor to the mixture found on the neckline. (T:1192-94.)

Extracts taken from Kimbler's nail clippings revealed DNA consistent with both Little Archie and Big Archie – the test used by Labcorp could not distinguish between the two of them. The State's expert conceded at trial that the DNA could have been deposited by the killer during a struggle and that that would be one explanation for the presence of Little Archie's DNA. (T:1075-77) Simpson was excluded from both sets of scrapings.

Finally, drops of blood on the floor of the bedroom were of interest to the State, and should have been to trial counsel, given that the State argued the killer may have been cut and left traces of blood at the crime scene. One swabbing from the floor produced a mixture from which Smallwood could not be excluded. (T:1149.) While the State never presented any evidence to support that theory, it clearly thought enough of it to test various swabbings of blood from the floor and then, despite finding no evidence of Simpson's DNA, to argue it to the jury.

The record confirms that Simpson directed Refik Eler to have further testing done on all the evidence collected in the case, an expert was appointed (Charlotte Word), and the items were sent to an independent DNA lab for testing, for which the trial was continued. Eler told Simpson that he was having several items retested and strongly implied on the record the same, indicating that the results would be shared with the State only if they were going to be used at trial. (R2:226-33, 236, 238, 243-44, 277-78; R3:574; R6:1018, 1048-59, 1070-75, 1123-24, 1128-31, 1146-48, 1152-57; R7:1161-63, 1168-69, 1175-83, 1194-98, 1227-29.) None were ever disclosed or offered at trial and we now know that despite assurances to Simpson to the contrary, Eler never had the evidence tested.

Had the jury heard evidence that DNA from anyone but the victims and Simpson – especially Little Archie or Smallwood – was on any of these items, there would be no room to doubt under any standard that Simpson would have been acquitted. In that context, there was

much that Eler could have done to change the outcome of the case, including moving to exclude the evidence, having the evidence tested, impeaching the conclusions of the state's testifying analysts with the help of Charlotte Word, and objecting to improper State arguments mischaracterizing the DNA results. He did none of this. Further, postconviction counsel's ability to present the Court now with the results Eler could have obtained had he followed through with testing have been hampered by the State's intentional destruction of evidence in this case, though some results have been possible and they are compelling. Independently and collectively, the aforementioned IAC and due process violations, along with newly discovered evidence from the testing, require that Simpson's convictions be vacated.

5. In Bad Faith, the State Destroyed Evidence It Knew Could Exonerate Simpson – *Youngblood*

The Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution grant individuals the right to due process of law. Indeed, Justice Lewis, when writing to enjoin and prevent the destruction of evidence in the same time frame as involved in this case noted that the consideration of the propriety of the deadline for filing postconviction DNA testing motions, and the concomitant need for preservation of evidence to effectuate that right, were "not trivial issues, but matters that may impact literally the life or death of human beings." *See In re Amendments to Rule 3.853*, 857 So. 2d 190, 192 (Fla. 2003) (Lewis, J., concurring). He further stated that the potential destruction of evidence "concern[s] the rights to liberty guaranteed in the Constitution." *Id.*

The test to establish a destruction of evidence due process violation was first enunciated in *Trombetta.* It requires that the defendant show 1) the government destroyed evidence whose exculpatory value was "apparent before the evidence was destroyed"; and 2) the defendant is unable to obtain comparable evidence through other reasonable means. *Trombetta*, 467 U.S. at

489. *Youngblood* supplemented the test by adding a third requirement, that when the destroyed evidence was only "potentially useful," the defendant must demonstrate bad faith on the part of the government. *Youngblood*, 488 U.S. at 58. All three prongs are met in this case.

a. The government destroyed irreplaceable evidence whose exculpatory value was apparent before the evidence was destroyed.

The State was aware throughout pretrial proceedings that most of the physical evidence in this case was more than "potentially useful to the defense." The state and JSO instructed FDLE to test the axe, hat, shoes, sweat clothes, socks, fingernail scrapings, a magazine found in the yard, and swabbings from the bedroom floor. As soon as it was discovered that there were mixtures of DNA on the sweat clothes, making clear that Simpson was not the only person who wore them, the possibility that the clothes contained exculpatory evidence became a certainty, which should obviate any need to prove bad faith. Indeed, when the State learned that the defense might suggest Little Archie, Durrance, and/or Donald Griffis as possible suspects to the murder, it instructed FDLE to see if these suspects could be eliminated from the samples that were tested, thereby attempting to neutralize any possible defense theories. Thus, the State certainly realized the exculpatory value of the clothes. Somebody else wore those clothes and identifying that person or those persons would be exculpating of Simpson to some degree. Indeed, it would be extremely exculpatory if the contributor(s) had a motive to kill the victims. The same was equally true, if not more, of the hat and shoes, on which Simpson's DNA was never found. Somebody wore those items during the murder and there was no evidence it was Simpson, who admitted to owning the clothes but not the hat and shoes. If the State were truly interested in identify the killer, it would have continue to test until it found the identify of all contributors, instead of simply stopping once it confirmed that some of the DNA on the sweat

clothes belonged to the suspect it was looking to tie to the clothes to corroborate Durrance's story.

It goes without saying that the murder weapon, the axe, also carried potentially exculpatory evidence. Quite apart from the possibility of finding fingerprints or other DNA one might expect to find on such a weapon, the State's theory that the killer cut his hand provided another possible source of DNA material matching the killer – blood. Indeed, records in the FDLE file indicate that the State specifically requested that FDLE examine the handle of the axe to try to identify blood that might belong to the killer. Thus, it certainly recognized that the defense had an equally compelling interest in being able to do the same.

Similarly, the State requested that FDLE test the fingernail scrapings and clippings of the victims to determine if the killer's DNA could be identified in them. Kimbler's clippings were sent to LabCorp for further testing with a notation that the "victim sustained defensive wounds during the struggle" and the clippings were being submitted to determine the presence of foreign DNA. Thus, the State recognized the value of this evidence in identifying the killer.

If the State's testing of the evidence and attempts to have FDLE eliminate suspects it thought the defense might try to inculpate at trial were not enough to establish knowledge under *Trombetta*, the State further demonstrated its knowledge, albeit post hoc, when defense counsel arrived with their expert, Janice Johnson, at the Jacksonville Sheriff's Office in 2011 to examine the evidence being stored there. Johnson, a trained, former FDLE evidence examiner, arrived with the necessary equipment to handle and examine the evidence in a manner that would preserve its integrity, but was told by JSO Detective Meacham that Caliel would not allow her to unseal any of the boxes containing the evidence, just to inventory them. Counsel Rudenstine called Caliel to clarify his objection and he conveyed that his concern was that if Johnson were

to examine the items in a non-sterile environment, she risked contamination of possible exculpatory evidence.

Subsequently, Simpson filed a motion to compel the shipment of the evidence to a certified laboratory near Ms. Johnson's office so she could examine it. The State's response at that point was to deny that Simpson's postconviction team had any right to see or test any of the evidence. While Caliel has claimed at various times that the State did not oppose the team examining the evidence under the proper condition, the fact is that the Court (through Judge Arnold) denied Simpson's request to even examine the evidence. Simpson was forced to appeal to the Supreme Court his denial of access to the evidence for examination and testing under Rule 3.853 and as a matter of discovery on his IAC claim, and while he won that appeal, the State opposed him throughout and certainly did not confess error in Judge Arnold's ruling that the defense team could not even examined the evidence. *See Simpson v. State*, No. SC12-605 & SC12-633 (Fla. June 11, 2003) (holding that Defendant is entitled to examination and testing of evidence because the evidence had the potential to exonerate him under Rule 3.853 and could assist him in proving that trial counsel was ineffective under *Strickland* for failing to test it). Finally, well before trial, Caliel himself stated on the record that recent "new cases" and "new rules promulgated by the Supreme Court in regards to DNA testing" made it crucial to handle the evidence with care because post-conviction motions could require the evidence to be tested in the future, requiring the State to "incur costs of a new trial or something of that nature." (R6:1170.) In short, the State was fully aware of the exculpatory value of the evidence that it destroyed in this case and the Florida Supreme Court has confirmed its value as well.

As to the second *Trombetta* prong, the potentially exculpatory evidence in this case was irreplaceable, so could not have been obtained by other means. There was only one murder

weapon, one set of fingernail scrapings for each victim, and one set of clothes with the DNA of multiple persons on them. Simpson had no means to identify the actual killer other than to have an independent expert examine these things with more sophisticated technologies, or more thoroughly, than they had been examined by the State before trial.

Despite its awareness of the potentially exculpatory nature of the irreplaceable evidence in this case, the State effectively destroyed the evidentiary value of all critical items but the sweat clothes and the victims' fingernail clippings, and likely eroded the evidentiary value of those as well. Most troubling was the State's hiring of a private "forensic artist," Jim McMillian, who had no training handling forensic evidence, to create science-fair style displays of the evidence the State used at trial. (McMillian Depo. at 7, 10, 17.) McMillian brought the evidence to his home, where he lives with his wife. His work space consists of a door covered with brown construction paper and mounted on two cabinets. He stores the exhibits in a regular closet in his house if he works on them over several days. (McMillian Depo. at 32, 34-5, 39-40.) Although he wears gloves, McMillian does not have any training in the proper handling of DNA evidence. (McMillian Depo. at 16-17.) ASA Caliel's concerns about Ms. Johnson's examination of the evidence in the "non-sterile" JSO warehouse, despite all her intended precautions, is retrospectively comic in light of the revelation that long before postconviction proceedings Caliel had sent the evidence home with an untrained "forensic artist."

The most egregious example of the State's artistry is what was done to the murder weapon itself—the axe. McMillian prepared the axe for trial by mounting it on a cardboard display without any protective covering. At trial, it was entered into evidence and sent back to the jury room, where the jurors were allowed to handle it. Upon examining the axe in postconviction, counsel for Simpson found that the axe appeared to contain no traces of blood on

the blade, suggesting that it was wiped clean at some point, though McMillian denies that he would have done so. (McMillian Depo. at 42.)

Similarly, the State directed McMillian to mount the shoes and hat for trial as well. He did so, again, without providing any protective cover over them; thus, they were entirely exposed to handling and the elements and remained so until postconviction counsel went to view them and the Duval County Clerk subsequently wrapped them in protective paper.

As to the extracts from Kimbler's fingernail scrapings, once the state attorney took custody of them from the refrigerated evidence locker for purposes of preparing the displays for trial, they were left unrefrigerated, handled by McMillian, given to the jury, and then stored in the Duval County Clerk's office without refrigeration for years. The extracts had literally no chance of long-term survival, as they were stored in polypropylene tubes, which can cause loss of material due to absorption of it into the plastic. FDLE should have used polyallomer tubes, which were recognized as early as 1998 as preferable for preventing such loss. Thus, despite having access to new, more sensitive test kits that Burley had been hopeful would be able to identify the killer's DNA, Burley found the vials were bone dry. She was unable to obtain any results at all. While her results from testing the clippings impeach some of Badger's findings and, Simpson argues, require a new trial, testing may well have produced far more definitive results by identifying the killer had the clippings been properly preserved by the State after trial.

The sweatclothes fared better, but only slightly. The State knew they carried mixtures of DNA foreign to the victims and Simpson and that additional testing with then-existing technology and certainly future testing with more sensitive advances in technology had the potential of identifying the killer. The State also knew that at least one of the mixtures could include DNA left by Little Archie, which would confirm beyond any doubt not only that

Simpson was telling the truth about the clothes, but that Little Archie is the killer. Thankfully for Simpson, McMillian mounted the clothes under some level of protection, a mylar covering that was taped at the edges. (McMillian Depo. at 47.) Thus, postconviction DNA testing was able to derive some useful results, as detailed in Claim 5. But the State's failure to properly preserve this evidence in a refrigerated, sterile environment that would prevent degradation of biological material has almost certainly adversely affected the defense's ability to obtain information about the other individual(s) who wore the clothes used to convict Simpson.

The State's failure to maintain the evidence continued after trial, once in the custody of the Duval County Clerk and JSO. Between 2007 and 2012, the trial exhibits were stored at the Clerk's Office in a non-climate controlled evidence vault in the old courthouse that provided an environment likely to rapidly degrade any remaining original DNA. As counsel and expert Jan Johnson witnessed, the shoes and hat remained uncovered, completely open to the elements and contamination. More stunning still, the exposed axe somehow found its way into the office of former Assistant Clerk Gail Cole, now deceased, who relayed to counsel in 2011 that it was on a shelf behind her during one phone call. In the presence of counsel and Ms. Johnson during a review of the evidence, Ms. Cole indicated that none of the other items were wrapped properly and proceeded to unwrap many of them, indicating she would rewrap them later. Moreover, until 2014, it was possible for a member of the general public – someone like, say, Little Archie – to gain access to this evidence and handle it. (Devoe Depo. at 108-09.)

The conditions at the JSO warehouse, where all of the evidence was stored pre-trial, except when transferred to a state agency for examination or to the SAO for mounting, were even worse. JSO personnel have revealed in postconviction depositions that rodents were rampant at the warehouse and there was no refrigeration of biological evidence.

The evidence was transferred from the original warehouse when JSO moved to a new facility. No method of tracking the evidence was established, let alone one to establish proper chain of custody. Even at the new facility, the evidence was not kept in a climate controlled environment, let alone a refrigerated one. This includes liquid biological material such as DNA extracts and tubes of blood. Bedding and clothing covered in blood from the murder scene was (and continues to be) stored loose in boxes with broken seals and holes and no internal wrapping at all. The items contain visible hairs that clearly cannot be identified definitively as part of the original evidence or the result of contamination. Ominously, packaging was found that was labelled as containing Simpson's blood, but it had obviously been opened and resealed multiple times. There was no legitimate reason for the State to have any of Simpson's blood, especially in unsecured containers along with evidence of blood stains from the bedroom. While there were ample items in the warehouse that would be subject to testing, the failure to properly maintain them has denied Simpson the right to conduct any meaningful testing of those items.

In short, none of the physical evidence stored at the JSO warehouse is in any condition to be reliably tested. Thus, Simpson had to forego any such testing, limiting himself to the items stored at the Clerk's Office that had not been left entirely exposed to contamination—the sweat clothes and the fingernail clippings/scrapings/extracts.[3]

b. The government destroyed the evidence in bad faith.

As an initial matter, Simpson should not have to prove bad faith with regard to any of the items that had mixtures. The mixtures on the clothes clearly had DNA from someone other than

[3] Seth Miller, Executive Director of the Florida Innocence Project, has been assisting Simpson's the defense team *pro bono*. He indicated that based on his experience, despite the deplorable conditions at the Clerk's Office in which the evidence in this case was stored, the clothing and fingernail scrapings/clippings/extracts might still be suitable for DNA testing.

Simpson or the victims, so the State knew they contained DNA that would be exculpatory to some degree – and extremely so if Little Archie or Smallwood were ever identified as contributors with advances in DNA testing technology. So, too, the mixture found on the bedroom floor that the State knew could not exclude Little Archie or Smallwood. Moreover, in the appeal of the order denying Simpson the right to inspect or test all the relevant evidence, the Supreme Court concluded that postconviction testing "would assist [Simpson] in demonstrating entitlement to postconviction relief" and that Simpson has already demonstrated that this evidence meets the standards for postconviction testing under *Hitchcock v. State*, 866 So. 2d 23, 27 (Fla. 2004), which is that it "would give rise to reasonable probability of acquittal." But whether the State knew these items had exculpatory value obviating the need to show bad faith or were all merely "potentially useful to the defense" and, therefore, requiring bad faith be shown, this is a rare case where there is clear bad faith.

The "failure to follow established procedures [for preservation of the evidence] is probative of bad faith, particularly when the procedures are clear and unambiguous." *United States v. Elliot*, 83 F. Supp. 637, 647 (E.D. Va. 1999). In *Elliot*, the government failed to follow regulations "which, on their face, given the plain meaning and without the need for any legal interpretation, simply [did] not permit the destruction of what was destroyed" in that case. *Id.* Indeed, the *Elliott* court held that the regulations at issue, "if given reasonable scrutiny by a trained law enforcement official, teach that evidence of the type here at issue ought not be destroyed because of its evidentiary value and because of principles of due process of law." *Id.*

Ample Florida law gave very real meaning to the due process right recognized in *Trombetta* and *Youngblood*, as applied by *Elliott.* As far back as 2001, six years before Simpson's trial, section 925.11(d)(2)(4), Florida Statutes, provided:

(4) Preservation of evidence.—

(a) Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law enforcement shall maintain any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested.

(b) In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days **after execution of the sentence**. In all other cases, a governmental entity may dispose of the physical evidence if the term of the sentence imposed in the case has expired and no other provision of law or rule requires that the physical evidence be preserved.

(Emphasis added.) Thus, in the instant case, from 2001 until now, all evidence-holding agencies in Florida were clearly and unambiguously required by law to preserve "any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested." Fla. Stat. § 925.11(4)(a) (2002).

In 2005, still two years before trial, then-Governor Jeb Bush issued an executive order stressing the importance of DNA evidence to exonerate the innocent and prohibiting the destruction of such evidence prior to the execution of the defendant's sentence unless the following conditions were met:

A. The governmental agency in possession of the evidence has sent written notice to the sentenced defendant, any counsel of record, the prosecuting attorney, and the Attorney General.

B. The written notice shall describe with specificity the type of evidence to be destroyed, listing any law enforcement agency, laboratory or clerk's case number, and the location of the evidence.

C. The notifying agency does not receive, within 90 days after sending the notification, either a copy of a petition for post-sentencing DNA testing filed pursuant to Florida Statutes, Section 925.11 or Florida Rule of Criminal Procedure 3.853, or a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the time for filing has expired, or the defendant has made a diligent effort toward the filing of such petition.

D. No other provision of law or rule requires that the physical evidence be preserved or retained.

Executive Order 05-160, Aug. 5, 2005. This provision created a clear affirmative duty on the State to take care to preserve physical evidence for testing. Even had the State taken the affirmative steps outlined in Sections A-C of Governor Bush's order, it could not have destroyed the evidence in this case because under Section D, another law clearly prohibited such destruction—section 925.11.

It is often noted by prosecutors and courts when rejecting a criminal defendant's affirmative defense or justification for failing to meet a statutory deadline for filing that "every person is presumed to know the law and . . . ignorance of the law is no excuse." *Cf. Hilton v. State*, 961 So. 2d 284 (Fla. 2007) (noting, in the context of unreasonable searches and seizures, "the fundamental unfairness of holding citizens to 'the traditional rule that ignorance of the law is no excuse,' while allowing those 'entrusted to enforce' the law to be ignorant of it").

The destruction of evidence in this case was not inadvertent, as in many cases. The State released the most important evidentiary items to an untrained artist, had them mounted on display models, brought them into court, and sent them back to the jury room where the jurors were left to handle them. Some of the most important items were entirely exposed and therefore forever lost to contamination. Even the biological material—swabs, vials, cuttings—were mounted on displays for the jury's benefit. Yet, the State was well aware that such material needed refrigeration in order to be preserved: when FDLE returned tested material to JSO or the State for custody, it marked all biological material clearly with warning signs indicating that refrigeration was necessary.

The State itself took custody of Kimbler's rape kit, including her fingernails, from the Medical Examiner's "refrigerated evidence section" in 2006. (R3:579.) When the evidence was later returned from FDLE, documentation accompanying the evidence read:

> PROCESSED DNA SAMPLES; SHOULD BE REFIRGERATED/FROZEN. It is recommended that these samples be stored in a refrigerator/freezer and isolated from evidence that has not been examined.

(R4:598.) Instead, the State inexplicably chose to direct that the evidence be included in McMillian's displays. Worse, FDLE itself contributed to the evaporation of the fingernail scraping extractions by storing them in plastic vials that analyst Charles Badger knew would lead to that very result. (Badger Postconviction Depo. at 12-13.)

The items that were *not* entered into evidence were stored in an entirely unsterile, unrefrigerated environment, then moved without proper chain of custody to a similarly improper environment, where they were comingled and exposed to humidity, rats, and roaches. Despite refrigeration warning labels prominently displayed on boxes containing biological evidence that the State had not used at trial, these boxes sat in the heat of the warehouse along with all the other boxes – for years.

In short, the destruction of physical and biological evidence in this case was deliberate, not accidental or negligent, and it was done despite laws that placed an affirmative duty on the State to preserve such evidence. Accordingly, Simpson has established a due process violation of the most serious sort—that depriving him of the right to prove his innocence, escape the death penalty, and be released from prison.

6. Defense Counsel Was Ineffective in Not Having the Evidence Tested Before Trial – IAC

As noted above, Simpson directed his counsel to have the evidence the State had tested retested, and his lead trial counsel, Eler, made it appear that this had been done. He led the Court

and the State to believe that this testing had been performed but did not yield results helpful to Simpson. And Eler told both Simpson and co-counsel, Charles Fletcher, that the evidence had been tested and the results were not favorable. It turns out, however, that this was simply not true. The expert appointed by the Court to assist Eler and conduct the testing, Charlotte Word of Cellmark Diagnostics, has confirmed that while she was ready to proceed with testing, Eler never followed through. A review of Eler's and Cellmark's files confirms this.

a. Eler's Failure to Have the Evidence Tested Constituted Deficient Performance.

Eler's failure to have the evidence tested in light of the State's results constituted ineffective assistance of counsel. Simpson and Fletcher (and Simpson's prior counsel Alan Chipperfield and Gonzalo Andux) will testify that Simpson adamantly maintained his innocence throughout pretrial proceedings, and trial counsel's files confirm this. He told counsel (and the police) he had not been to the crime scene near the time of the murders; thus, further testing of the crime scene evidence would not risk placing him there. His DNA had already been identified on the sweatclothes and he admitted they were his, so no additional testing of the clothes, shoes, or hat would advance the State's case in any way, nor diminish the value of his defense – that someone else wore the clothes on the night of the murders, possibly Little Archie, who Simpson knew had taken black clothes from his trailer within the last month. Thus, there was no risk to testing the evidence for the defense and Simpson desperately wanted it done to prove his innocence.

By contrast, there was much to gain from independent testing. FDLE had found several DNA mixtures on the clothes, confirming Simpson's explanation to counsel. Thus, additional testing that revealed the identity of other contributors with a motive and opportunity to kill Big Archie and Kimbler could have entirely removed suspicion from Simpson and certainly

prevented a conviction.[4] Simpson's initial counsel, Chipperfield and Andux, recognized this and retained Cellmark Diagnostics and its then-Laboratory Director, Charlotte Word, to test the physical evidence for DNA and to analyze FDLE's assessment of the evidence prior to trial. (R.3:574-76.) The evidence had already been shipped to Cellmark when Eler took over (R.3:574-76), and Andux had sent Word lab notes, data, and chain of custody documentation so she could begin her review. All Eler had to do was follow through with Word.

Instead, Eler had little contact with her once he was appointed Simpson's counsel in May 2004. Indeed, his first contact with Word was almost a year later, in April 2005. She received a phone message from him to "do all the work" and indicating he would ask for funding. Word and Eler did not actually talk by phone until August 2005.

Word was instructed to review the case files and provide her initial assessment, which she did in January 2006, in the form of a letter to Eler. She explained that she was prepared to analyze the raw DNA data provided (as she had only reviewed the lab notes), review FDLE's standard operating procedures, and consult with defense counsel to prepare them for depositions and trial. She also cautioned that she could not make sense of the State's chain-of-custody documentation. Word never heard back from Eler after sending him the letter.

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[4] Simpson does not intend to imply that he needs to identify another individual in order to have his conviction vacated, nor was that necessary for him to have prevailed at trial. Had Eler been effective in the guilt phase in the ways explicated in this motion, even in the absence of additional testing, there is a reasonable probability the verdict would have been different:

Whether or not a second individual who wore the clothes is ever identified, the fact remains that the State's own testing revealed that someone other than Simpson did in fact wear them, and there is no way to determine when. Thus, had Eler properly attacked the other attempts by the State to demonstrate Simpson's guilt, Simpson would have been no more implicated by the clothes than anyone with opportunity and motive who was not excluded as a contributor to one or more of the DNA mixtures, such as Little Archie.

Nonetheless, had Eler tested the evidence and been able to confirm that they contained Little Archie's or another viable suspect's DNA, a not guilty verdict was a sure thing.

The Court and the State grew increasingly impatient about the delay in testing and finally the Court ordered on April 6, 2006, that the evidence be returned to custody of the State. Trial counsel did not object. (R3:574-76.) At the time, defense counsel still had thousands of dollars budgeted for the services of Word and Cellmark.

As Word will testify at the evidentiary hearing, Eler failed to give her even the basic information required for her to adequately assess whether testing could produce exculpatory results. Most importantly, Eler did not explain to Word the defense theory of the case, nor, even, that Simpson was claiming innocence. Crucially, he did not explain that finding more of Simpson's DNA on the sweat clothes was not inconsistent with the defense because Simpson admitted that they were his – the goal was simply to try to find further evidence of other DNA on the clothes that might implicate Little Archie or another person with motive and opportunity. Still more troubling, Eler told Word that Simpson's DNA had been found in Big Archie's bedroom, placing him at the scene – this was, of course, entirely false. It was in this context alone that Word did not specify the benefits of additional testing and included standard cautionary language in a January 6, 2006,[5] letter to Eler that "additional testing of the evidence may result in DNA profiles that are more helpful to the state's case." Because Simpson knew he had not been at the crime scene near the time of the murders, there was nothing to lose by testing all possible evidence at the scene, as well as found behind the church, to identify the killer.

b. Counsel's deficient performance was prejudicial based on the destruction/degradation of untested DNA evidence and new exculpating test results.

It is impossible to know what the specific outcomes of independent testing would have been had Eler had it done pre-trial, before the State tampered with the evidence and significant

[5] According to Word, the January 5, 2005, date on the letter is inaccurate.

degradation had occurred. But there is no question that Simpson was prejudiced by Eler's failure to do so. Simpson no longer has the option of testing the axe, hat, and shoes because of their exposure to handling by countless individuals and the elements over a period of years. Similarly, items kept at the JSO warehouse have been subjected to comingling, cross-contamination, exposure to rats, and the inability to confirm proper chain of custody. Kimbler's nail scrapings extractions have evaporated. Even the sweatclothes, though covered with Mylar, have no doubt lost their full evidentiary value because of degradation of the DNA over years stored in the non-temperature controlled JSO warehouse and Duval County Clerk's vault.

There is more than ample reason to believe that had an independent lab conducted testing for the defense before trial, additional results would have been obtained that could have exonerated Simpson. Had Word been aware that finding Simpson's DNA on the clothes, hat or shoes would not have adversely affected his defense at trial, and, further, that the identification of another individual's DNA would have served to exonerate Simpson, she would have made various recommendations about areas to test that were most likely to yield results.

For example, FDLE only tested two cuttings from the hat; Word would have recommended testing a swabbing of the inside of the rim of the hat, as well as other areas with which the wearer's hands or head would have had contact, such as the front of the brim or the plastic adjustment strap in the back. She would have recommended further testing of any remaining victim fingernail clippings, scrapings, or extracts with an autosomal STR test kit that could distinguish between Little Archie and Big Archie. Finally, she would have recommended having a crime scene expert review the evidence found at the scene to determine what of it would be useful to test for purposes of identifying DNA from the killer.

Further, FDLE only tested about one-fifth of the sweatshirt neckline, leaving 4/5 of it to be swabbed or scraped and tested by the defense. Other areas likely to carry DNA were never tested at all, such as the elbows, armpits, and wrist areas of the sweatshirt.[6] The pants, too, should have been tested inside the knees and at the back of the legs,[7] areas that were never tested by FDLE. The waistband, which was swabbed by FDLE, could have been scraped in an attempt to recover more biological material.

In an effort to exonerate Simpson under Rule 3.853, as well as to demonstrate the prejudice flowing from Eler's failure to test the evidence pre-trial, Simpson successfully litigated up to the Florida Supreme Court a motion to retest the evidence in this case using the latest available test kits. Because Word is no longer working for Cellmark, and due to the inability of private labs to process samples through CODIS, Word recommended, and the State agreed to, the Court's appointment of DNA analyst Lynne Burley of the Santa Clara District Attorney's Crime Laboratory. Although the lab is a county agency associated with the District Attorney's Office, it occasionally accepts private cases for a fee, as their analysts' time allows.

Burley has now tested the items least likely to be contaminated and most likely to produce results – the sweatclothes and the victims' fingernail scrapings and extracts. The results establish reasonable doubt as to Simpson's culpability. Thus, had Eler had the evidence tested, there is a reasonable probability the results of this case would have been different and Simpson would be a free man.

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[6] Even if the wearer had a t-shirt underneath the sweatshirt, the armpits would have been likely to contain sweat given that the offense occurred on a July day in Florida.

[7] Again, even if the wearer had shorts on underneath, these areas would likely contain DNA. Given the time of year, it was unlikely the wearer would have had pants on under the sweatpants.

First, Burley's testing of a scraping from the sweatpants waistband revealed one mixture that contains DNA from Simpson and at least two other people (with no trace of blood from the victims, thereby eliminating them as likely contributors). Due to the limited genetic information, no conclusions could be made regarding other contributors, including Little Archie or Smallwood. While this conclusion may not seem as exculpatory as definitively identifying a full DNA profile of, say, Little Archie or Smallwood, it nonetheless requires a new trial because it unequivocally impeaches the State's expert trial testimony that Little Archie was excluded from the mixtures identified by FDLE.

FDLE analyst Charles Badger, testified that Little Archie could be excluded from two of the mixtures he detected on the clothes and that while Little Archie could not be excluded from the third mixture, neither could twenty-five percent of the population. (T:1194, 1324-25.) Badger's opinion was based entirely on his assumption that there were only two contributors to each mixture. He conceded that it would not be accurate if there were more than two contributors and that, in fact, under those circumstances, Little Archie could not be excluded from any of the mixtures. Badger was unyielding regarding the accuracy of his two-person presumption. (T:1122-23, 1166-67, 1180, 1188, 1231-32, 1235, 1239-41.)

But it is now clear that not only is Simpson's DNA on the clothes, a fact he explained at trial, but also that at least two other people wore the clothes (given the location of the mixtures) and that Little Archie, in particular, is a potential contributor not only to at least one mixture tested by Burley in postconviction, but also, based on Badger's own testimony, to all of the mixtures identified by FDLE at trial. Because Simpson testified that he gave the clothes to Little Archie shortly before the murders and Little Archie had the motive and opportunity to commit these murders, this new evidence undermines any confidence in Simpson's conviction.

Second, Burley tested Big Archie's and Kimbler's fingernail clippings. While again, the results do not directly implicate any of the major suspects, they do not exclude them from guilt either. Moreover, the results could have been used to impeach Badger's findings. Badger obtained a DNA profile from Big Archie's right hand clippings and failed to identify any DNA foreign to Big Archie. He obtained no results on the left hand clippings. (Badger Rept. 07-25-06), nor did he attempt to test the DNA extracts he created from both sets of clippings.

By contrast, Burley tested both the right and left hand fingernails together and identified partial DNA profiles of *at least two* individuals. These findings could have been used to diminish Badger's credibility by pointing out his failure to test both sets of clippings and erroneously concluding that the absence of foreign DNA obviated any need for further testing.

Eler's failure to test the nail clippings prior to trial – and therefore prior to the degradation that certainly has occurred since trial due to years of improper storage conditions – had another prejudicial effect: back then, the combined clippings may have yielded an adequate amount of DNA to identify the minor contributor(s). We will never know, though, because neither Badger nor Eler tested swabbings from Big Archie's combined clippings. The same problem applies to the extracts of both Kimbler's and Big Archie's nail clippings, which Badger created. In pre-trial testing, Badger detected a small amount of male DNA on Kimbler's clippings during quantitation, and chose to dedicate the limited extract available to Y-STR testing, which was outsourced to LabCorp. But LabCorp identified DNA that was consistent with both Little Archie and Big Archie because the YSTR kit they used could not distinguish between lineal males. Big Archie's extracts were never tested at all.

With the advent of new, more sensitive test kits used by Burley's lab, Burley was hopeful she would be able to test Kimbler's nail scraping extracts to identify the minor contributor –

provided it was not Big Archie, the killer would be identified. Because Burley discovered at least one minor contributor to Big Archie's nail scrapings as well, Simpson would have wanted to test his extracts, too. But Burley found no biological material left to test in the extracts. It had all evaporated thanks to its long-term, unrefrigerated storage in polypropylene tubes used by Badger, which he acknowledges contribute to the loss of viable biological material over time. (Badger Postconviction Depo. at 12.)

Thus, by failing to test Big Archie's and Kimbler's nail clippings pre-trial, Eler effectively deprived Simpson of the opportunity to test them at all.

7. Postconviction DNA Test Results Require a New Trial under Rule 3.853 – NDE

If the Court holds that the State did not violate Simpson's right to due process by destroying critical evidence, and that Eler was not ineffective for failing to test the evidence before trial, it must still vacate Simpson's conviction and order a new trial based on the newly discovered evidence revealed through Lynne Burley's DNA testing using new scientific testing techniques. The Florida Supreme Court, in concluding that Simpson had met his burden of proof for DNA testing under Rule 3.853, relied on the standard set forth in *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004). *Simpson,* No. SC12-605 & SC12-633, Order (June 11, 2013). *Hitchcock* summarizes the standard as follows:

> [Rule 3.853] is intended to provide a defendant with an opportunity for DNA testing of material not previously tested or of previously tested material when the results of previous DNA testing were inconclusive and subsequent developments in DNA testing techniques would likely provide a definitive result, and when a motion for such testing provides a basis upon which a trial court can make the findings expressly set forth in subdivision (c)(5) of rule 3.853.

866 So. 2d at 27-8. Once DNA testing has been conducted based on one or more of these justifications, the Rule 3.851 reviewing court must determine whether,

> [i]n light of the evidence presented at trial, and considering the cumulative effect of all evidence that has been developed through [the Defendant's] postconviction proceedings, [the court] conclude[s] that the totality of the evidence is of "such nature that it would probably produce an acquittal on retrial" because the newly discovered DNA evidence "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones v. State (Jones II)*, 709 So. 2d 512, 521, 526 (Fla. 1998) (quoting *Jones v. State* (*Jones I*), 678 So. 2d 309, 315 (Fla. 1996)).

Hildwin v. State, 141 So. 3d 1178, 1181 (Fla. 2014).

At Simpson's request and consistent with the Florida Supreme Court's order, Lynne Burley conducted DNA testing on the sweatclothes and fingernail scrapings/clippings/extracts using new DNA test kits that were unavailable when Simpson was originally tried. Specifically, she used the AmpF/STR Identifiler Plus and YFiler kits. Thus, should the Court determine that trial counsel was not ineffective because he could not, even with the exercise of due diligence, have obtained the results Burley obtained given the limitations of available test kits pre-trial, Burley's results meet the requirement for newly discovered evidence.

Moreover, for the reasons described above, Burley's finding of foreign DNA under Big Archie's nails and a mixture of at least three contributors on the sweatpants' inside waistband, even when considered in isolation, let alone in light of all the evidence presented at trial *and* the evidence developed in postconviction proceedings, "weakens the case against [Simpson] so as to give rise to a reasonable doubt about his culpability." Accordingly, the Court must vacate his convictions.

8. Defense Counsel Was Ineffective for Failing to Use DNA Expert Charlotte Word.

The State's presentation of the DNA evidence in this case likely had the greatest impact on the jury of all the evidence presented, especially in light of the advent of a "CSI effect," which studies were beginning to show was causing juries to place a disproportionate emphasis on DNA evidence or, in some cases, the lack of it. USA Today, Aug. 5, 2004; Andrew P. Thomas,

"The CSI Effect: Fact or Fiction," Yale Law Journal Pocket Part (Feb. 1, 2006). The State only exacerbated the jury's likely predisposition to place an emphasis on DNA evidence by arguing in closing that at the time of the murder and initial investigation, "wearer's DNA was unheard of. Prosecutors, homicide detectives did not even know about it." But by the time of trial, "DNA is a sure thing. Nuclear STR DNA is the one technology in the world that can identify a human being at the exclusion of every other human being on the planet." Because much of the State's most damning testimony and argument regarding the scientific results in the case were misleading, and even false, had trial counsel used Charlotte Word's expertise to impeach them, there is a reasonable probability the outcome of Mr. Simpson's trial would have been different.

It is indisputable that the State's DNA testing accurately identified Simpson's DNA on the sweatclothes and the sweatpants and shoes contained blood from the victims. But Simpson admitted at trial that the clothes were his (R.17:1387-89.), and his defense, had it been well executed by Eler, was entirely supportable with corroborating evidence, including his testimony: He loaned the clothes to Little Archie in the weeks leading up to the murders. (R.17:1387, R.18:1411.) While the victims' blood on the sweatpants and shoes suggest they were worn by the killer, there was no evidence except Durrance's testimony demonstrating, or even suggesting, that Mr. Simpson wore the clothes the night of the murders, as opposed to weeks or months before. Moreover, the small amount of blood on the clothes suggests that contrary to Durrance's testimony, a single person did not commit these murders. A far more likely scenario than the State's theory was that Smallwood and Little Archie committed the murders together.

Perhaps most important to Simpson's defense was the fact that FDLE identified three DNA mixtures on the clothes that contained DNA from one or more people other than Simpson or the victims. Thus, Simpson was not the only person who wore those clothes. Even more

compelling, one of the mixtures contained DNA consistent with that of Little Archie. Next, DNA from under Kimbler's fingernails was identified as belonging either to Little Archie or Big Archie, but excluded Simpson. Finally, Smallwood could not be excluded from a mixture taken from a swabbing of the bedroom floor that contained Kimbler's DNA. Little Archie had both motive and opportunity—he was at the scene of the crime the very night it happened and he had Smallwood to help him. Thus, the key for the defense was to convince the jury that Little Archie's (or Smallwood's) DNA was on those sweatclothes, too, and that they were therefore the killers.

But FDLE analyst Charles Badger took the air out of any attempts by Eler to suggest Little Archie was the killer by testifying first, that Little Archie could be excluded from two of the three mixtures he detected on the clothes, and second, that while Little Archie could not be excluded from the third mixture, neither could twenty-five percent of the population. (T:1194, 1324-25.) Badger's conclusion about Little Archie being excluded was based on a flawed assumption that there were only two contributors to each mixture. He conceded that Little Archie's exclusion would no longer hold water if there were more than two contributors to the mixtures and that, in fact, under those circumstances, Little Archie could not be excluded from *any* of the mixtures. (T:1122-23, 1166-67, 1180, 1188, 1231-32, 1235, 1239-41.) But Badger was virtually unyielding regarding the accuracy of his two-person presumption.

Had Word been retained by Eler, she would have been able to testify that this assumption was unsupported by science or the evidence. Rather, it simply was not possible to discern the number of contributors to the mixtures. In this way, Word could have revived Little Archie's candidacy as a wearer of the sweatclothes and, therefore, as the killer. Although Eler probed the

issue with Badger on cross, it would have been significantly more effective to present an expert of Word's stature to directly contradict Badger's presumption.

Next, Eler could have used Word to impeach the testimony of Dr. Martin Tracey, who she believes testified far beyond his expertise, as well as inaccurately. Tracey testified for the State about several DNA-related matters. Specifically, he confirmed the reliability of the population statistics Dr. Badger had already offered, and provided various opinions about wearer DNA. Tracey began by explaining the application of the theory of conditional probability to DNA testing. The theory integrates surrounding conditions and contextual information into the exercise of determining the probability that an individual's DNA profile matches a sample. But his application of the theory—which is subjective by its very nature—to Simpson's case was clearly driven by the goals of the prosecution and was therefore unbalanced in favor of the State.

Had Eler made use of Word's expertise, she could have impeached Tracey's analysis, as well as the State's misleading, repeated use of the word "match" to describe a sample that was merely consistent with a known profile.

Next, Tracey was asked by the State what conclusions could be drawn about the mixture found on the leg cuffs of the sweatpants. He testified that all he could say for sure was that the major contributor was consistent with Simpson's DNA and that no conclusions could be drawn about the minor contributor. However, he then went on to opine that in light of

> the normal procedure of laundering clothes, one would expect minor profiles from someone else who had worn that clothing earlier or who had handled that clothing earlier, okay, to degrade or at least diminish in the process of washing and that the major DNA profile would be the DNA from the individual who had worn the clothing most recently.

(T.1331.) Tracey conceded on cross that "it's certainly possible" to have the most recent wearer be the minor contributor, but that it would be more like the exception, not the most "reasonable

scenario." (T.1333-1334.) Tracey also testified that one might assume that the major contributor might also be the most recent wearer because the most recent wearer's sweat might degrade the previous wearer's DNA. (T.1332.)

Had trial counsel, who had already retained Word and received approval for funds by the Court, provided her with adequate background information (including pre-trial depositions, State expert reports, the defense theory of the case, and DNA testing and population statistics), Word could have pointed out to Eler that Tracey's hypotheses are not supported by scientific evidence. She would have testified that there truly is no way to determine the most recent wearer of an item of clothing, whether by assessing the size of the stain or the strength of the profile. And there simply is no basis in science for the theory that bacteria in the sweat of the killer would have eaten any prior DNA, and not DNA present in the sweat itself. Though Eler occasionally got Tracey to concede an issue, though always in the narrowest way possible, these small victories were not nearly as effective as affirmative testimony from an expert of Word's stature would have been.

The prejudice to Simpson's case due to Eler's failure to use a DNA expert like Word is clear. The jury was left to attach all meaning to Simpson's DNA on the sweatclothes and none to the evidence that he was not the only person to wear those clothes—the very heart of his defense. As long as the State could convince the jury that the other contributors to the DNA on the clothes could be ignored because Simpson was the last person to wear the clothes, the defense was going to fail; and that is exactly what the State argued, relying explicitly on Tracey's testimony. (T.1621-1622) ("You heard from Dr. Tracey, to the exclusion of every other person on the face of this earth, Kimberli Kimbler's blood dripping off the axe as this defendant walked out the door. . . Who was the last person to wear these clothes? Excluding every other person on the face

of this earth, that man right there (indicating)."); see also T.1623 ("There is only one person who wore these clothes during the commission of the crime and that is this defendant.").

In light of the CSI effect, the State's misleading testimony and argument that the DNA in this case was a silver bullet rather than a web of uncertainty, Eler's failure to hire an expert like Word constituted ineffective assistance of counsel. Word could have pointed out the flaws and vulnerabilities in Tracey's testimony and in the DNA evidence itself—particularly that the results were no more probative of Simpson wearing the clothes on the night of the murders than they were of his wearing them a month before the murders. In short, there is a reasonable probability that her assistance and testimony would have changed the jury's verdict.

Third, based on her review of various documents from FDLE's file, Word could have testified that "confirmation bias" compromised FDLE's testing strategy and conclusions in such a way as to deprive Simpson of a compelling defense and the jury of the full scientific story of this case. "Forensic evidence leads to false convictions because of 'subtle influencing.'" COMMENT: Confronting the Forensic Confirmation Bias, 33 Yale L. & Pol'y Rev. 457, 459 (Spr. 2015). In the field of DNA analysis, this occurs when, for example,

> "police departments deliver biological material [to crime laboratories] with cover letters ... that inform the analysts of non-DNA evidence [suggesting a] suspect's guilt and then ask the analyst[s] to corroborate that inculpatory evidence." The result is a system in which forensic analysts do not work objectively, but implicitly align their interpretations of evidence with the preexisting theories of both prosecutors and law enforcement officials.

Id. See also Saul M. Kassin, Itiel E. Dror, Jeff Kukucka, *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions,* 2 JOURNAL OF APPLIED RESEARCH IN MEMORY AND COGNITION, Issue 1, 43 (Mar. 2013) (App. 15-66). *See also Strengthening Forensic Science in the United States: A Path Forward,* at 8 n.8, NATL. ACADS. OF SCIENCES (2009) ("NAS

Study")[8] ("The findings of forensic science experts are vulnerable to cognitive and contextual bias.") (citations omitted).

Forensic examiners may be subject to contextual bias simply as a result of direct communications with police (e.g., through transmittal letters accompanying evidence, in person, or by phone) or requests for re-testing by police or prosecutors where non-supportive results have been obtained. Also relevant is the much less subtle factor of target identification, as illustrated by the Madrid bomber case. There, "the latent fingerprint was examined against a pre-existing 'target,' without first being properly analyzed in isolation; the examiners were pre-armed with contextual information, leading them to be suspicious of their target; and the case was high in profile and time-urgent, increasing the need for closure." Kassin, et al. at 43. As a result, the wrong person was identified. *Id.* at 42.

These forms of subtle—and not so subtle—influences plagued Simpson's case, undermining the reliability of the DNA testing and the expert testimony flowing therefrom. But for Mr. Durrance's testimony, Mr. Simpson's DNA on the clothes would have been no more probative of guilt than that of the other non-victim individuals whose DNA was found on the clothes (albeit unidentified). But because Durrance told police Mr. Simpson confessed, Mr. Simpson was generally identified to FDLE as the "subject" and the other profiles submitted were generally described as "elimination standards." This gave implicit weight in the examiner's mind to the discovery of Mr. Simpson's DNA on the clothing, followed by the discounting of the unidentified DNA as unrelated to the crime.

This is illustrated by Mr. Badger's postconviction deposition testimony, in which he explained that when he conducted his initial testing of the sweatpants, he was attempting to

[8] Available at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

get a single source–i.e., to demonstrate that one person (Mr. Simpson) was wearing the article of clothing:

> MR. BADGER: I didn't, to my recollection, decide to go testing other areas or surfaces because there was a lot of staining on these sweatpants. So if I were to sample for wearer [DNA], odds were going to be pretty good I was going to pick up blood stain, as well. And therefore, that's just confounding the issue. So in an attempt to get a single source, for lack of a better term, one person wearing their article of clothing, those are the two areas I focused on.

(Badger Postconviction Depo Part I at 94) Badger also admitted that he stopped his testing on the neckline of the sweatshirt once he identified Mr. Simpson's DNA was present.

> MR. BADGER: Well, the neck was from the inside, so I took the cutting that JROC produced for me under submission 4. It was tested with the intent that that would be potentially the wearer.
>
> MS. RUDENSTINE: Okay.
>
> MR. BADGER: And that yielded – the neck inside cutting, yielded a partial DNA profile, which matched Jason Simpson, as well as additional limited information at one generic marker. So that –
>
> MS. RUDENSTINE: So that eliminated the need to go any further with wearer DNA?
>
> MR. BADGER: In my mind, yes.

Id. at 104-05. An analyst truly intent on determining who wore the sweatshirt the night of the murders, not simply whether *Mr. Simpson* wore the sweatshirt, would have continued checking other areas of the clothes until he had a reasonable certainty that no other DNA samples were available for testing, particularly with the knowledge that there were mixtures on the clothes. The very presence of a mixture established that there was more than one wearer, and an unbiased analyst would not have stopped until all wearers were identified or the material was exhausted. As explained in Claim B, *supra,* the clothes, hat, and shoes in this case were far from well-

explored. Numerous areas likely to have produced wearer DNA on any of the articles were never tested.

Because forensic results (even DNA results) are highly "interpretable," *see id.* at 43; NAS Study at 9, 24, the source and content of information accompanying forensic evidence submitted for testing can pose the most significant risk of contextual bias. The following evidence, largely taken from FDLE's case file, best illustrates the contextual bias factors described above that were present at trial.

- FDLE obtains any facts it considers necessary or relevant for testing solely from the investigating agency or the SAO. Only the submitting agency (JSO in this case) can define an individual as a "subject," (meaning suspect) for purposes of testing. Only samples that are identified as likely belonging to a subject can be entered into CODIS. (Badger Postconviction Depo. Part II at 36-7.) Thus, the submitting agency essentially determines which samples are entered into CODIS and who the analyst will target in his testing.

- FDLE conducts its testing at the direction of the investigating agency and/or the state attorney assigned to the case. FDLE cannot take direction regarding what to test or how to test it from defense counsel. (Scott Postconviction Depo, at 68 – 69.) In fact, while previously defense counsel might be able to call analysts at FDLE to discuss testing results, FDLE has since instituted a policy that analysts can only discuss evidence with the defense in the context of a deposition, where the analyst's testimony is sworn and the discussion is recorded. (Badger Postconviction Depo Part II, at 97–100.) Further, any documents that the defense seeks to obtain from FDLE must be obtained through the discovery process, while the ASA can simply call or email the analyst and ask him/her for any case-related documents or information.

- The defense team had none of the access to direct the testing or even to view FDLE's work product that the state had prior to trial. In notes reflecting a phone call with Public Defender Al Chipperfield, the author wrote, "Can he have a copy of my digital photos? I told him he would need to go through discovery process."

  In postconviction proceedings, the defense sought to have their expert, Janice Johnson, a former FDLE analyst and crime scene expert, admitted to FDLE's lab and FDLE would not allow it, relying on quality control protocols. In an email to undersigned counsel Sonya Rudenstine, counsel for FDLE Phil Lindley indicated that "[o]nly law enforcement personnel are allowed in the FDLE lab," as codified by section 943.33(3) of the Florida Statutes.

- By contrast, on February 11, 2003, Caliel called Mr. Badger to discuss his report results, and "a lab visit by ASA previous to depo/day or night before."

- In an email exchange between Caliel and Badger, Caliel implied to Badger that the defense was avoiding proceeding to trial: "It is amazing how the defense can delay a capital case." Badger responded, "I believe it. . . especially on big death investigation cases."

- As the submitting agency, JSO detectives discussed this case with FDLE analysts. For example, in an interdepartmental correspondence between Detective Bialkoski and his supervisor, Sgt. Parker, Bialkoski requested permission "to personally bring the [requested] axe" to Badger at FDLE because "it would allow [Bialkoski] to personally meet with [Badger] to discuss the case." (App. 41.) Moreover, phone and email messages in Mr. Badger's file reflect ongoing communications by phone and in person between Detectives Darnell, Bialkoski, and Gilbreath and FDLE analysts.

  JSO also not only instructed FDLE regarding what to test, but *for what purpose*, in this case—i.e., to support an arrest and conviction for Simpson. An email from Jacksonville serology supervisor Karen Barnes to Badger on April 15, 2002, indicates: "I met with the investigator on this case (Det. Bialkoski). We discussed the items and he is requesting STR analysis on the following: . . . Ex. 4E Sample from deck - was pheno pos., no further testing due to quantity – *looking to place subject at the house.*

  After Durrance informed JSO that Simpson had confessed to the murders on October 1, 2001, JSO listed Mr. Simpson as the only subject on all evidence submission forms provided to FDLE. Little Archie and Smallwood, who had previously been listed as subjects, were never so listed again, despite their presence at the murder scene the night of the crime, Little Archie's motive, and the presence of DNA foreign to both the victims *and* Simpson on the clothes. (As discussed above, this then dictated the course of Badger's testing: he tested until he found DNA from Simpson and then stopped, rather than continuing to try to definitively determine who else wore the clothes.

- Caliel informed Badger by email that because "the Defense will likely point the finger at Mr. Durrance during trial, I wanted to exclude him as a possible contributor to the DNA mixture[.]" Thus, Durrance was never submitted as a viable suspect and FDLE conducted only the testing requested by the state—i.e., enough to exclude him from mixtures if possible, but not enough to determine whether his DNA might be present elsewhere on the clothes or at the scene.

- Donald Griffis was also presented to Badger as an "elimination DNA standard," not a suspect.

- The State actively enlisted FDLE in facilitating Simpson's arrest and his continued confinement on death row. Notes written by Deane Johnson regarding a phone call with JSO Detective Dwayne Darnell on July 26, 1999, state the following regarding FDLE trace evidence collector Jason Hitt: "Det. Darnell would like your assistance with items in cont. 7 & cont. 8 of sub. 1. The items are a sweatshirt, sweatpants, cap, & Nike shoes *that may belong to the suspect*. *Could you expedite sweeping of them because he wants to show photos of them to the suspect's friends & relatives to see if they can I.D. them as belonging to him*."

  In phone calls from Bialkoski to Badger at FDLE on July 3, 2002, Detective Dale Gilbreath apparently indicated that he was going to "talk to ASA and bring Simpson in on small misdemeanor warrant. J.S.O. will request to hold Simpson til mid Aug. to allow for [DNA] report to be drafted/T&A'D." Gilbreath, who took over the investigation when Bialkoski was demoted to a patrol position, conveyed the same thing by phone to Badger on August 14, 2002. On September 11, 2002, Caliel called Badger to request a copy of his report.

  These combined communications unambiguously conveyed to Badger both that JSO was sure Mr. Simpson committed the murders and that Badger should expedite his analysis so the state would not have to release Simpson before the results were conveyed.

The aforementioned evidence makes clear that 1) Badger and other FDLE analysts in this case worked at the direction of and for state law enforcement, 2) the defense had no control over the items to be tested, or how they should be tested or analyzed; 3) the defense had no access to FDLE labs, even with a qualified expert, while the State and JSO had unfettered access; 4) JSO and the State dictated not only what information FDLE had about the case, but what the outcome should be and what items should be tested to reach that outcome; and 5) FDLE assisted JSO and the State in convicting Simpson by meeting the State for preparation before depositions and testimony, testifying on behalf of the State, and expediting certain procedures to allow for Simpson's arrest and conviction.

Had Eler used Word or retained a confirmation bias expert and provided FDLE's complete file to them, both would have impressed on him the importance of having the evidence tested by an independent lab so that FDLE's results could be verified and untested portions of the

evidence could be scoured for DNA that identified the actual killer (or at least the person who wore the clothes during the murders). Additionally, the expert would have been able to explain to the jury that DNA results are interpretable, not straightforward, especially when mixtures are involved. By explaining that, along with the underpinnings of confirmation bias, the expert could have identified all the bias factors in Simpson's case and explained their impact on the State's testing and interpretation of the evidence.

Given how important DNA evidence is to juries and the fact that the DNA in this case was the only compelling evidence other than Durrance's testimony that purported to connect Simpson to the murders, any reasonable attorney would have used a defense expert to rebut the State's DNA-related testimony and explain how the DNA evidence is not inconsistent with Simpson's defense. By contrast, no reasonable attorney would have terminated the DNA expert after only an initial, uninformed review of the case without having had a single conversation to discuss her assessment. Had defense counsel effectively used Charlotte Word in preparing for and during trial, there is a reasonable probability that Mr. Simpson would have been acquitted.

C. The Jury Was Prevented from Hearing Circumstantial Evidence That Little Archie's Actions Were Far More Inculpating Than Simpson's Conduct.

Simpson's defense was and remains not only that he did not commit these murders, but that the circumstantial evidence points far more directly to Little Archie. As discussed above, the DNA evidence is fully consistent with Simpson's testimony that he loaned the clothes to Little Archie before the murders, and the DNA found under Kimbler's nails likely came from Little Archie. Counsel was successful in putting some additional evidence of Little Archie's involvement before the jury. Specifically, the jury heard that Little Archie did not like that Kimbler was pregnant with Big Archie's child and that Little Archie may have made comments that he wanted to kill the victims and their unborn child. (T:783-85, 808-09, 1473, 1478-81,

1489-92.) It heard that Little Archie and Smallwood were at the victims' house the night of the murders where they shared milk and strawberry shortcake with Big Archie. (781-92.) It learned that Little Archie had "red particulate matter" in his digestive system indicating that he had eaten within an hour of his death. (T:858, 861.) It heard that he told JSO Officer Williams the exact positioning of the bodies, even though the person he claimed told him (his grandfather Troy) denied telling him. (T:546, 821, 1491-92.) And it heard that Little Archie appeared jittery and may not have been wearing a shirt when Guinn saw him at the RaceTrac gas station a few miles from Big Archie's house just after Little Archie and Smallwood had left the night of the murders. (T:1572-75.) While the forgoing evidence was not sufficient in the jury's mind to overcome the State's evidence, the following claims demonstrate both that newly discovered and withheld *Brady* evidence would likely have tipped the scales in favor of a different result and that the jury likely would have acquitted Simpson but for the State's misconduct and his counsel's ineptitude.

9. Postconviction Investigation Has Uncovered Evidence Removing Any Room for Doubt About Little Archie's Motive to Kill the Victims – NDE/*Brady*

After the trial, a private investigator was able to locate Shannon Elliott, who was a close friend of Kimbler and resided in the trailer on Big Archie's property until a few weeks before the murders, when she moved out of state. The investigator's discovery of Elliott occurred largely through happenstance via a mutual acquaintance with whom Simpson's father worked on a tug boat. Elliott had moved to Idaho before the murders and was not a person that the defense would reasonably be expected to look for or be able to find prior to trial.

Elliott will provide substantial testimony supporting the defense theory that Little Archie, and not Simpson, is responsible for the murders. She was personally aware of the hatred that Little Archie had for Big Archie, which would have rebutted the State's evidence and argument that the men had a positive, normal relationship. (T:564-66, 777.) She often witnessed the men

fighting and even saw them in a fist fight on one occasion. This Court was already prepared to allow similar – though even less incriminating – testimony from Susan Hambrick had she not "forgotten" what she told Willia[9] (T:748, 1289-90, 1455-58, 1461-63, 1508-11.)

The problems escalated when Kimbler's pregnancy was discovered a few months before her death (T:850). Elliott heard Little Archie state that he would "make sure this baby dies" and twice threaten to kill Big Archie and the unborn baby. This testimony is not cumulative because, unlike trial testimony alluding to Little Archie's animus, Elliott heard the threat after Kimbler became pregnant, she heard it directly and not from others, and it is direct evidence of motive rather than impeachment or "waffling" testimony. (T:809, 1437, 1479, 1489-91.) Elliott also heard Little Archie demonstrate extreme hostility to Kimbler, repeatedly referring to her as a "piece of shit whore."

One day, Elliott heard Kimbler yell to her for help because Little Archie was threatening her. He threatened to tie her to the back of his car with a chain and drag her down the road. Immediately after this and related threats, Kimbler told Elliott that "if anything ever happens to me you know who did it because he is out there threatening it right now." These statements, all occurring close in time to the murders, fall within the spontaneous statement, excited utterance, or then-existing state of mind exceptions to the hearsay rule. § 90.803, Fla. Stat. (2011).

Elliott also observed Little Archie sneaking into Big Archie's backyard close in time to the murders wearing the same kind of black clothing found at the church. Big Archie had warned her that he was concerned Little Archie would come by to steal drugs or cause trouble and asked

[9] Nearly every witness with information adverse to Little Archie has been extremely reluctant to testify or even speak about him out of tremendous fear for their lives. This clearly happened at trial, especially as to McNeish as discussed below. Simpson's postconviction investigators can attest it continues to be a huge problem. Many people close to him are convinced he was the killer and will not hesitate to kill anyone who opposes him.

her to let him know if that happened. These events would have been relevant and admissible to prove identity and motive.

In addition to Little Archie, Elliott has substantial information about drug dealers who not only had a motive to kill Big Archie, but attempted to do so. Elliott knew that Big Archie was indebted to multiple suppliers because Little Archie on several occasions stole drugs that had been fronted to Big Archie. Big Archie stored his drugs in the laundry room of his house, and Little Archie would sneak in at night to steal them. Big Archie told her, in a statement against his penal interest (§ 90.804, Fla. Stat.), that Little Archie must want him dead because this was going to get him killed by his suppliers. Indeed, while Elliott was living on Big Archie's property, there were two drive-by shootings. Before Elliott moved, one shooting left holes in the trailer that she was living in. On another occasion, a bullet narrowly missed her when it struck a chair in Big Archie's house; she had just vacated the chair so that she could check something in the microwave in Big Archie's house. This testimony alone would have created reasonable doubt. Additionally, testimony that Little Archie had stolen drugs from his father in a way that put Big Archie in grave danger would have been admissible both to show motive and animus between them.

After learning of the murders of Big Archie and Kimbler, Elliott called JSO with information including the existence of a "black book" diary maintained by Kimbler. Kimbler had told Elliott that she used the diary to keep track of drug deals and other private matters. As one of Kimbler's closest friends, she knew the diary would reflect Little Archie's threats. She gave the detective who answered her call directions on where to find the book in Big Archie's bedroom. About a week later, the detective advised that they had located the book.

The book, which has never been produced by the State, was exculpatory and impeaching because it would have documented the threats Little Archie made against Kimbler and revealed Kimbler's (and perhaps Big Archie's) most recent drug deals. It was also important because discovery provided by the State indicated that Kimbler was preparing to testify against Durrance's girlfriend, Amanda Waters, which would give Durrance a motive to harm her. All of these aspects of the book could have been used to attack the State's case and demonstrate that Little Archie is the far more likely killer. Thus, the withholding of this evidence is a clear *Brady* violation Indeed, the fact that the police confirmed they had the book but have continued to withhold it and any report relating to Elliott's calls supports an inference that the State knew it was potentially useful to Simpson, establishing a *Youngblood* violation.

Whether viewed as pure newly discovered evidence or a violation of the requirements of *Brady* and/or *Youngblood*, this evidence requires relief. It would probably produce an acquittal on retrial. To the extent the State provides any evidence to suggest trial counsel or could have been available with the exercise of due diligence, Simpson pleads in the alternative that counsel was ineffective for deficiently failing to locate Elliott and develop her testimony for trial, and prejudice is demonstrated for the reasons stated above.

10. Defense Counsel Failed to Use Available Evidence Demonstrating Little Archie's Motive and Violent State of Mind at the Time of the Murders – IAC

While there does not appear to be any reason to fault counsel for not finding Elliott, counsel still had ample evidence available regarding Little Archie's actions leading up to the murder that likely would have resulted in Simpson's acquittal had it been presented to the jury. The defense called Little Archie's girlfriend, Misty McNeish, and she explained she had known Little Archie since they were 14 and they had a six-year-old daughter together. (T:1483.) She was timid during his testimony and had to be told to speak up. (T:1483.) She testified that she

remembered being interviewed by the police after the murders and "[v]aguely" remembered telling the police about Little Archie's feelings toward Kimbler's baby. (T:1484.) She testified that she did not recall telling the detectives that Little Archie was upset that Kimbler was pregnant and that he said "the baby would never see the light of day." (T:1484.) She acknowledged the detectives may have asked her something about this. (T:1485.) She explained, "Like I told you, I just – I don't remember a lot. Everyone was upset. No one ever said they – about the baby never seeing the light of day. I've never heard that." (T:1485.)

However, in her deposition before trial, she testified that she was "sure" she had heard him say the boy would never be born. (McNeish Depo. 135-36.) Competent counsel would have refreshed her recollection to provide this damning testimony. Even more importantly, counsel would have elicited testimony she provided in deposition about Little Archie's mental state and motive leading up to the murders. She testified in her deposition how she witnessed firsthand the emotionally devastating impact Big Archie's affair and Kimbler's pregnancy had on Little Archie. His mother Rosie was extremely distraught when she learned of the pregnancy. Little Archie and McNeish watched Rosie become more and more despondent, start taking Xanax, lose a lot of weight, and refuse to come out of her room. Rosie started offering Xanax to Little Archie on a daily basis and watched him spiral into a pattern of drinking, taking Xanax, and using other drugs. (McNeish Depo. at 135-38.)

Little Archie's agitation was at its peak leading right up to the murders. Two weeks before the murders, she and Little Archie went to Universal Studios in Orlando. (*Id.* at 122, 130-31.) On the ride back to Jacksonville while he was driving, he got mad at her about her pager going off and punched her in the face, breaking her nose. (*Id.* at 123-24.) He was very jealous. (*Id.* at 124.) She had to get stiches, and Little Archie rented a hotel room for them so her family

would not see the injuries he inflicted on her. (*Id.* at 130-31.) She did not want to stay with him, but had nowhere else to go. (*Id.* at 131.)

The night before the murders, Little Archie was "messed up on Xanax, crazy messed up, I've never seen him like that before." (*Id.* at 131.) She was riding in the car with him, and he started "going head on with cars and wouldn't let me out." (*Id.* at 131, 133.) When he finally let her drive and passed out form the Xanax, she drove to another hotel, left him in the car passed out, and called her sister to come pick her up. (*Id.* at 132.) About two hours later, Little Archie showed up at her sister's house and kicked the door in. (*Id.* at 132.) The police were called and made Little Archie leave. (*Id.* at 132.) This was the very day of the murders. (*Id.*)

In short, her testimony would have shown that Little Archie exhibited both a strong motive and a state of mind that provided the opportunity for such a personal and brutal murder. Moreover, McNeish also had additional first-hand knowledge that the shoes found at the church appeared to belong to Smallwood, who she knew well. (*Id.* at 147.) And she knew that Little Archie's testimony that there was no axe at Big Archie's house was false. (*Id.* at 164.) And Little Archie demonstrated consciousness of guilt when she asked him afterwards if he had killed his father – instead of denying it, he broke her nose again. (*Id.* at 161.)

Finally, the forgoing evidence about how Little Archie treated McNeish, all of which should have been well known to counsel had he read her deposition, demonstrated that she had every reason to fear him and his mother. At the beginning of the trial, counsel advised that they were having trouble locating McNeish. (T:492-93.) The State advised that Rosie Crook, Little Archie's mother, could get in contact with McNeish to make sure that she appeared to testify as a defense witness. (T:493-95.) Despite the fact that the rule had been invoked (T:490) and Rosie Crook had ample incentive to protect her son, defense counsel did not object. Nor did counsel

elicit from McNeish that, after the trial had begun, Little Archie's mother contacted her about testifying. This only served to exacerbate McNeish's fear of testifying against Little Archie's interest – probably leading to the claim of faulty memory when counsel only asked her a passing question and then gave up.

Had counsel acted competently and elicited McNeish's information inculpating Little Archie, the jury likely would have acquitted Simpson. There can be no confidence in this verdict.

11. Defense Counsel Mishandled the Medical Examiner's Opinion Undermining the Evidence That Little Archie Was with Big Archie Within an Hour of His Death – IAC

Key evidence for the defense was Dr. Floro's opinion that Big Archie died within an hour of ingesting milk and red material. Floro told Officer Williams that the red material looked like cherries, although he only described it as "red particulate matter" in his report. (Williams Homicide Continuation Report at 16; Floro Autopsy Report re Archie Crook, Sr. at 3.) This was crucial because Smallwood had reported to Williams that he and Little Archie had cherry pie and milk with Big Archie the night of the murders, and confirmed this in his deposition. (Williams Report at 11; Smallwood Depo. at 95.)

Even though Dr. Floro conducted the autopsy, the State listed Dr. Arruza to testify instead. She testified based solely on her review of Floro's report, contending that the red matter Floro referenced was "likely meat" and probably was not strawberries. (T:860-61.) Not only did this testimony contradict Floro's findings, it undermined the defense argument that Big Archie died within an hour of eating with Little Archie and Smallwood—neither of them mentioned eating meat with Big Archie when they were together the night he was murdered.

First, competent counsel would have deposed Drs. Floro and Arruza, which would have eliminated the surprise element of Arruza's testimony. Eler did not; thus, he had no warning of what was to come. Second, competent counsel would have moved to exclude Dr. Arruza from

testifying at all because she did not have any personal knowledge of the autopsy generally, or the contents of Big Archie's stomach specifically. Had Arruza been excluded, the State would have been forced to call Floro, who was available to testify despite being retired from the ME's office. If the State opted not to pursue the same line of questioning with Floro in light of his likely testimony that Big Archie died within an hour of eating something resembling cherries and milk, competent trial counsel would have called Floro to testify for the defense.

A motion to exclude Dr. Arruza would have been granted. The Sixth Amendment's Confrontation Clause gives the accused "[i]n all criminal prosecutions, . . . the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, the United States Supreme Court held that "testimonial" evidence in the form of a statement given under interrogation may not be admitted into evidence unless the witness responsible for it testifies at trial or, if the witness is unavailable, unless the defendant has had a prior opportunity to cross-examine the witness. 541 U.S. 36, 54 (2004). The court defined "testimony" as "typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51. The court further defined the term as follows:

> "*ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White* v. *Illinois*, 502 U.S. 346, 365, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3.

Id. at 51-2. Without question, an autopsy report and photographs fall within these parameters. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 205, 129 S. Ct. 2527, 2531 (2009) (relying on

Crawford to hold that a lab report reflecting the results of forensic analysis on seized substances in the case constitutes "testimonial hearsay"); *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705 (U.S. 2011) (same as to lab report reflecting results of a blood alcohol level test).

Third, had the Court denied a motion to exclude Arruza and/or had Floro been unavailable, defense counsel, had he deposed Arruza, could have prepared for trial by retaining an independent pathologist to impeach her claim that the red particulate matter was probably meat and was not likely to be strawberries. Dr. Charles Wetli, M.D., former Deputy ME for the MEO of Miami and former Chief ME and Director of Forensic Sciences for Suffolk County, NY. Dr. Wetli was retired as an ME and available as a consulting and/or testifying expert at the time of Simpson's trial.

Dr. Wetli has reviewed Floro's autopsy report and Arruza's testimony. He would have testified that Arruza's testimony that the "red particulate matter" was "probably meat" was not supportable. Unless someone eats raw meat, there would be no reason for meat to present as red in the stomach. Moreover, when combined with digestive stomach acids, even raw meat would not appear red. Finally, meat is "pasty," not particulate. By contrast, cherries and strawberries are both likely to appear as particulate and red, which is contrary to Arruza's testimony that strawberries "present very differently" in the stomach. (T:861.) Consistent with Simpson's defense, Dr. Wetli also would have testified that Big Archie died "very shortly after eating, within an hour."

Barring the availability of any of the remedies discussed above, at the very least, Eler should have persisted in getting Arruza to answer whether the material could have been cherry pie. Although he asked her whether it could be "cherries or strawberries," she only answered that she did not believe it could be strawberries. (T:861.) Eler never followed up. Had Arruza agreed

that it could have been cherry pie, or even just cherries, her testimony would have been consistent with Floro's report and Williams' conversations with Floro and Smallwood, as well as the defense. This would have cleared the way for defense counsel to argue that because Big Archie died within an hour of eating with Smallwood and Little Archie, there is no way the murders could have happened the way Durrance told police they did. Simpson will prove this claim at the evidentiary hearing either through Dr. Arruza, Dr. Floro, and/or Dr. Wetli.

12. Defense Counsel Allowed the State to Use False and Unsupported Argument to Explain Away Little Archie's DNA Under Kimbler's Nails. – *Giglio*/IAC

Perhaps the most important physical evidence in this case was discovered late in the day. In the run up to trial, Caliel discovered that a rape kit taken from Kimbler at the scene had been misplaced all these years and never tested. (R3:579; R7:1233-34.) The State sought a continuance so it could test this evidence, and although Simpson and his counsel made clear he wanted to go to trial as soon as possible, Simpson agreed to the continuance and told the Court, "I feel it is important that it needs to be tested." (R7:1234-36.) Counsel was ineffective for not putting these facts before the jury because they demonstrated both that the State had been extraordinarily cavalier with crucial evidence all these years and, more importantly, Simpson knew he had nothing to fear and exhibited a clear consciousness of innocence.

More prejudicial was counsel's mishandling of the results and the State's false arguments about them. As detailed above, the State chose to only test this material with a test that could not distinguish between father and son. (T:1075.) Even after the results established that the material came from either Big Archie or Little Archie, neither the State nor defense counsel had them tested with an available nuclear test that would have resolved the question. (T:1077.) As argued above, defense counsel was plainly ineffective for not having them immediately retested or at

least arguing to the jury that the State's failure to do so rendered its prosecution of Simpson with no serious investigation of Little Archie highly dubious.

But putting all those issues aside, counsel was plainly ineffective in how he responded to the State's arguments that the DNA came from Big Archie not Little Archie. The State's expert opined that the scrapings could be explained if Big Archie and Kimbler "had had intimate contact" that evening. (T:1075.) While there was clear evidence that they had had intercourse (*see* T:1208-09 (Big Archie's semen found in Kimbler's vagina)), there was no evidence that Big Archie had been scratched during sex or that he and Kimbler, who was over six months pregnant, engaged in rough sex. (T:1208-09.) Competent counsel would have seized on this and even gone through the autopsy photos of Big Archie to demonstrate there was indication he had been scratched by fingernails. The State's theory was highly implausible, and had competent counsel responded to it appropriately, there is every reasonable probability the jury would have acquitted Simpson.

But there is more. After defense counsel at least got the expert to admit on cross that the DNA could also be explained if Little Archie was the killer and Kimbler struggled with him (T:1077), Caliel sought to discount that possibility with argument he knew to be false and that competent counsel would have shown was unsupported by the evidence. Even though Caliel had sought to test the evidence for the very purpose of identifying the killer and certainly would have argued that had Simpson's DNA been found it would be strong evidence of guilt, Caliel took the incredible position at trial that it was not possible for Kimbler to have gotten the killer's DNA under her nails:

> There is no indication that the axe murderer even got close enough to his victims for the victim to get a scratch off. In fact, the evidence contradicts that. **What you know is immediately Kimberli Kimbler was paralyzed by her blow.** She didn't

> scratch her attacker. The DNA on her nails came from her contact with her partner.

(T:1689 (emphasis added).)

But Caliel knew this was false because there was ample evidence, including scratches on her hands and abdomen, that Kimbler did resist her attacker. Indeed, LabCorp's files show that Kimbler's clippings were sent to LabCorp with a case description noting that the "victim sustained defensive wounds during the struggle" and the clippings were being submitted to determine the presence of foreign DNA. Any remaining doubt that the State knew Kimbler had tried to ward off her attacked was removed in the penalty phase when the State completely reversed its position and affirmatively argued that the HAC aggravator applied:

> if Kimbler would have been instantaneously paralyzed by the death blow to the neck, we know that must have occurred at least after the blow to the hand in which she was able to defend herself and suffer a strike to her hand.

(T:1767-68.) Indeed, the Supreme Court credited this aggravating factor in finding the death penalty proportionate in this case. (Exhibit 2 at 25.)

Whether viewed in isolation or cumulatively, the failure of defense counsel to make the forgoing arguments and Caliel's decision to press an argument he knew to be false to secure a conviction undermine any confidence in the verdict and require postconviction relief.

13. Defense Counsel Failed to Investigate and Attack Little Archie's False Alibi - IAC

Little Archie's alibi was that he was at the house of his girlfriend, Heather Smith, the night of the murders. (T:793-94, 823.) Especially in light of all the evidence inculpating Little Archie and the fact that pointing the finger at him was a major theme of the defense, competent defense counsel would have confirmed this alibi by interviewing Smith and her roommate, Stacy Gill. Defense counsel failed to perform this most basic task to Simpson's tremendous prejudice.

Simpson's postconviction investigator located Smith, the woman at whose house Little Archie testified he spent the night of the murders. (T:793-94, 823.) Before he was able to interview her in person, she was murdered. But he has confirmed through specific witnesses[10] who will testify at the evidentiary hearing that when asked what she knew about this case, Smith responded that Little Archie did not spend the night of the murders at her house, but asked her to falsely tell the police that he had if they interviewed her. The investigator also found Smith's roommate at the time of the murders, Stacy Gill. Gill overheard Little Archie ask Smith to provide this false alibi. She was prepared to testify to confirm this and that Little Archie did not spend the night of the murders at their house, but she too is now dead. Simpson's investigator will testify to all this at the evidentiary hearing.

There should be no doubt that the jury would have acquitted Simpson if it had evidence that Little Archie was not at Smith's house the night of the murders as he claimed and that he asked Smith to provide a false alibi. Even though these women are not alive to testify at the evidentiary hearing, their out-of-court statements should be admissible at least for purposes of this motion. Even though they would be hearsay if offered to prove the truth of the matter asserted (i.e., that Little Archie was not at their house and asked Smith to lie), this is not a newly discovered evidence claim. Rather, these statements will be offered at the evidentiary hearing simply to show what Smith and Gill would have said had they been asked by counsel or an investigator prior to Simpson's trial. "The hearsay objection is unavailing when the inquiry is not directed to the truth of the words spoken, but, rather, to whether they were in fact spoken." *Breedlove v. State*, 413 So. 2d 1, 6 (Fla. 1982).

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[10] Given the unique circumstances, their identities are not disclosed in this public-record filing to protect their safety. Simpson intends to seek leave to reveal their identities confidentially under seal unless and until the State can make adequate measures for their protection.

Whether what they told the witnesses who will testify at the evidentiary hearing is, in fact, true is not something Simpson need prove to prevail. The point is to prove that if Simpson's counsel had bothered to interview them, they would have told him that Little Archie was not at their house and asked Smith to provide a false alibi. Counsel then could have called them to testify at trial, when they were very much alive and their testimony that Little Archie was not at their house the night of the murders would not be hearsay. Their testimony that he asked them to lie would not be hearsay either because it was not an assertion of fact at all. Again, it would have been offered to prove that he said it, not that it was true.

To whatever extent they might constitute hearsay for these purposes, it would be a fundamental deprivation of due process to allow a technical rule of evidence that would not have applied at the trial to be used now to defeat a showing that counsel was constitutionally deficient by not interviewing them and offering their testimony. *Chambers*, 410 U.S. at 287 (holding that due process considerations can overcome state hearsay rule where the statements are critical to the defense, and among other things, are reliable, corroborated, and against interest). The statement are inherently reliable because not only did neither woman have a motive to lie, but by disclosing this information, they put themselves at great personal risk, making their statement even more reliable than statements against pecuniary or criminal interest. § 90.804(c), Fla. Stat.

Aside from what Smith and Gill would have said had they been interviewed, counsel was clearly ineffective for failing to attack the State's case by demonstrating that the police never even bothered to check Little Archie's alibi. Whether the State ever really investigated Little Archie as a suspect was a serious issue at trial. For example, after the defense asked questions of Officer Williams on direct suggesting Little Archi was never considered as a suspect, the State elicited the following on cross:

Q Detective Williams, at the beginning of the investigation, there were multiple suspects, correct?

A Yes, sir, there were several people we were considering as possible suspects.

Q And Archie Crook, Jr., was one of those possible suspects, correct?

A Yes, he was.

Q And there were other potential people who may have been suspected at that point in time as well, correct?

A Yes, that's correct.

Q But after speaking to all these witnesses and interviewing Archie Crook, Jr., did eventually you eliminate him as a suspect?

A Yes, sir, he was.

(T:1494.) It would have devastated the State's case had defense counsel responded by eliciting that "all these witnesses" that were interviewed did not include the most basic and logical person, the one who could allegedly corroborate Little Archie's alibi.

The prejudice caused by this failure should be sufficient by itself to undermine confidence in the outcome of this trial, but any doubt is removed when considered in conjunction with the next claim regarding the State's motive to protect Little Archie.

14. Defense Counsel Failed to Effectively Address Little Archie's Whereabouts the Night of the Murders – IAC

Beyond the alibi issue, counsel was also ineffective for failing to use ample available evidence to eviscerate Little Archie's testimony about when he was at Big Archie's house and where he went afterward Little Archie testified that he went with Shawn Smallwood to Big Archie's house the night of the murders at "10:00, 10:30, 11:00." (T:781.) He testified they stayed for an hour and a half and may not have left until after midnight. (T:790-91, 793.) According to Little Archie, they went to see Big Archie because Smallwood needed a check cashed and Big Archie "always would cash a check and … carry it to the bank hisself (sic)."

(T:787.) Big Archie did not cash the check, but Little Archie's aunt and uncle next door cashed it for Smallwood. (T:788.) He testified that they were driving a gray Monte Carlo. (T:823-24.) Again, Little Archie claimed he stayed at Smith's house all night, while Smallwood went to stay at Little Archie's mother's house. (T:793-94, 814.)

Defense counsel had ample evidence with which he could have impeached Little Archie's version of these events as Little Archie gave different times for when he and Smallwood arrived, different accounts of how long they stayed, different versions of what they did before and after, and different stories about where they went afterwards. Between accounts given to various police officers, the deposition and trial testimony of witnesses who saw them that night,[11] and the deposition testimony of Little Archie and Smallwood themselves, the men arrived at Big Archie's at all manner of times, with Little Archie finally settling for his vague testimony at trial that it was between 10 and 11.

Instead, trial counsel seemed fixated on whether or not Little Archie and Smallwood went to a Hess gas station after leaving Big Archie's house, even though no evidence was presented to the jury that he ever said he went to a Hess station or that anyone say him there. Instead, he raised Hess for the first time in cross-examining Little Archie when Little Archie explained where it was in relation to the RaceTrac (where the jury he heard he actually went and was seen after the murders), but denied remembering going to Hess that evening. (T:813-14, 823.) In the course of that questioning, counsel demonstrated he was so unprepared that he thought Heather Smith's name was "Henrietta," (T:823.) Again, Heath Smith was a critical person in this case that had been identified from the very starts as being able to corroborate whether Little Archie's

[11] For example, Big Archie's cousin and neighbor Chris Howard was clear in his deposition that he saw Little Archie there around 10:30 or 11:00 that night, but testified at trial it was 9:00 or 10:00. (*Cf.* Depo. at 75 *with* T:551.)

alibi was correct, but counsel never even deposed her to Simpson's tremendous prejudice. The only other mention of Hess in the evidence was when counsel had Thompson, a defense witness counsel should have been fully prepared to handle, explain the difference in locations of the Hess and RaceTrac, twice because counsel admitted he just did not understand. (T:1498, 1504.) The only mention about Hess at all was the State's suggestion in closing that the fact it was a RaceTrac, not Hess where Little Archie was seen undermined the defense case somehow. (T:1629.)

Among the most critical evidence defense counsel should have known about (because it was in his files) and used did, indeed, involve a different gas station that the RaceTrac, but it was not a Hess station. Specifically, JSO Detective Gonzalez reported to Office Williams that he observed Little Archie at 10:55 the night of the murders driving a tan Mercury Cougar at a Lil Champ. Little Archie never would have been explain this in light of his testimony that he and Smallwood left Big Archie's and went home for the night in a gray Monte Carlo. (T:824.)

Physical evidence that competent counsel would have presented also contradicted Little Archie's testimony. While he testified that his father smoked a marijuana joint with them that night (T:790), Floro's report indicated that no cannabinoids were found in Big Archie's blood.

Had the jury been shown all this evidence and inconsistencies, it probably would have been enough – even without testimony from Smith and Gill that the alibi was a pure fabrication – would have been enough to create reasonable doubt for the jury that Simpson was the killer because the evidence against Little Archie was so much more incriminating..

15. The State Withheld, and Trial Counsel Failed to Investigate, the Fact that Little Archie Was Assisting JSO in its Investigation of Michael Durrance and Was Granted Immunity as to the Crook/Kimbler Murders for His Continued Cooperation – IAC/*Brady*/NDA/*Youngblood*

Despite all the evidence pointing to Little Archie, neither the State nor JSO pursued Little Archie as a serious suspect; indeed, much seemed to be done to protect him from emerging as one. JSO did not interview Heather Smith or her roommate, Stacy Gill, to see if Little Archie's alibi checked out. The State ignored the fact that Little Archie knew details of the crime that he could not have known unless he had participated in it. The State was aware of the fact that it was unlikely that someone wearing the recovered clothes committed the murders alone because of the dearth of blood on them, yet the State continued to insist at trial that only one person, Simpson, committed the murders in those clothes – ignoring the more likely probability that Shawn Smallwood and Little Archie committed the murders, with the wearer of the clothes playing a lesser role. The list of reasons to have pursued Little Archie as the primary suspect is endless.

But Little Archie was, instead, protected. The reason was never disclosed to Simpson: Little Archie was serving as a confidential source to JSO and FDLE at the time of the murders and thereafter, for which he was receiving favorable treatment by both agencies. Records obtained by postconviction counsel that have never been provided by the State (either before trial or in these postconviction proceedings, despite repeated requests), contain *Brady* evidence that Little Archie was acting as a confidential source for JSO in 2001, and likely as far back as 1998 or 1999. These records include depositions of JSO Detective Chuck Bates and FDLE Agent Mark Brutnell identifying Little Archie as "Confidential Source Number 5" in their multi-year investigation into Durrance's drug trafficking offenses, for which he was eventually convicted.

And a January 2000 wiretap application drafted by JSO and FDLE personnel and authorized by State Attorney Harry Shorstein, lists the Crook/Kimbler murder among various

other offenses used to justify the wiretap against Durrance. It included the allegation that "Durrance and Crook had become extremely hostile towards each other in the months before Crook's murder." This information is attributed later in the wiretap application as having been provided by "Source Number Five."

Little Archie's cooperation with law enforcement against Durrance (and perhaps others) benefited him in ways never disclosed by the State to trial counsel. The most significant benefit he received was immunity from prosecution for the Crook/Kimbler murders, a deal worked out by James Williams of JSO and Little Archie's lawyer. Little Archie referenced it in his August 26, 2003, deposition. No such agreement has ever been provided by the State or JSO to trial counsel or postconviction counsel. Aside from a serious *Brady* violation, the fact that Eler knew that Little Archie believe he had immunity was something any competent counsel would have pounced on at trial even if he did not know the particulars.

Little Archie's cooperation with law enforcement had other results as well that could have been exploited by trial counsel. For example, Little Archie was arrested for aggravated battery against his McNeish on the very day he learned of his father's murder. A mere phone call from his attorney, Butch Berry, resulted in Little Archie's release. In August 1999, just a month after the Crook/Kimbler murders, Little Archie and Smallwood were pulled over in Little Archie's car. The officer's report indicates that a stolen gun was found in the glove compartment and the car reeked of marijuana, but Little Archie was not even not named in the arrest report, which merely references a "passenger," and only Smallwood was arrested. Other records indicate Little Archie was investigated or arrested for serious offenses during the time he was cooperating, but was never prosecuted by state authorities.

The withholding of Little Archie's relationship with law enforcement as a confidential source, as well as his immunity agreement in this case, is a clear *Brady* violation. *E.g., Hendrix v. State*, 908 So. 2d 412 (Fla. 2005); *Gorham v. State*, 597 So. 2d 782 (Fla. 1992); *United States v. Kojayan*, 8 F.3d 1315, 1322 (9th Cir.1993); *Bagley v. Lumpkin*, 798 F.2d 1297, 1302 (9th Cir.1986). *See also* Fla. R. Crim. P. 3.220(c)(2) (requiring State to disclose confidential informant status of any witness who testifies at trial). And contrary to the suggestion of at least one assistant state attorney in response to post-conviction requests for confidential informant information, the *Brady* duties clearly extend to the post-conviction process. *Steidl v. Fermon*, 494 F.3d 623, 630 (7th Cir. 2007); *High v. Head*, 209 F.3d 1257, 1264 n. 8 (11th Cir.2000); *Jackson v. Johnson*, 194 F.3d 641, 649-49 (5th Cir.1999). Thus, the State is involved in an ongoing violation of its *Brady* obligation.

The withheld evidence would have been invaluable to the defense, as counsel would have been able to argue to the jury that Little Archie's cooperation with law enforcement in Durrance's case, as well as his immunity agreement in Simpson's case, were the reason law enforcement had not pursued him as a suspect and the State had failed to prosecute him – despite his being the one person who had the clear motive and opportunity to conduct these heinous crimes and who had expressly threatened to do shortly before the murders.

To the extent any confidential informant, immunity, or related deal was disclosed to the defense, and in light of Little Archie's acknowledgement of such agreement in his deposition, Simpson pleads in the alternative that counsel was ineffective for not putting that evidence to the jury to show that the State had ample reasons not to pursue Little Archie, the most obvious suspect in this case. The prejudice resulting from that deficiency is recounted above.

A final piece of evidence came to postconviction counsel's attention only recently. After learning that Little Archie, who was supposed to be serving a lengthy federal prison sentence for trafficking in methamphetamine, was free and in communication with witnesses, counsel looked discovered that he had succeeded in getting his federal sentence reduced in part because he claimed to have assisted not only the federal authorities with drug trafficking cases, but the State in this very case. Specifically, in a sentencing memorandum filed on August 18, 2014, in Case No. 3:14-cr-00089-J-32JRK, in the Middle District of Florida, Little Archie boasted he had "assisted in the investigation of the homicides, and contributed to the eventual conviction" of the defendant, who "has been sentenced to death for those crimes." And he managed to explain how his assistance benefitted him by leading to earlier release from a prior sentence that ended up only leading him into more trouble with drugs and post-traumatic stress disorder:

> During a prior period of incarceration, [Little Archie] sought the intense treatment incarceration can provide, but was stymied by early release. In that instance, ironically, he was released early because he assisted authorities in the prosecution of those ultimately convicted for the murder of his father.

This newly discovered evidence is powerful not just because it demonstrates that Little Archie was secretly working with the State to convict Simpson, but because it raises the disturbing question of what that assistance was exactly. Little Archie's testimony at trial did not directly inculpate Simpson at all. It only assisted the State in putting Simpson on death row by rebutting the defense that Little Archie was the more likely killer. Combined with all the forgoing evidence, it is now clear that Little Archie was working closely with the State on a variety of matters and the State had a vested interest in protecting him. A crucial piece of evidence to assist the defense understand the nature of that cooperation and the State's incentives to discount Little Archie as a suspect is the polygraph examination that Little Archie referenced in his deposition and again in this federal sentencing motion. After he gave a polygraph, the State

released him right after the murders and never treated him as a suspect again. This is clearly evidence the State knew was subject to *Youngblood* even if it was not sufficiently exculpatory to be *Brady* material. But Simpson will apparently never be able to learn what he said in that polygraph because the State has refused to produce it after multiple requests and suggests it has been destroyed. A polygraph that includes answers that led the State to discount such a prime suspect was something Due Process and Florida law required the State to maintain and submit to the repository even if it did not believe it was directly exculpatory.

Finally, the newly discovered federal sentencing memorandum demonstrates yet another change in Little Archie's story about the night of the murders. While he testified that he and Smallwood went to Big Archie's house that night so Smallwood could get cash a check (i.e., get cash from Big Archie), Little Archie has told the federal government he went there because Big Archie "called him to ask for money."

Had the jury heard all these things that Little Archie now claims, it is highly probably it would have realized that the evidence points far more strongly at Little Archie and acquitted Simpson.

16. Defense Counsel Failed to Demonstrate the Extent of Little Archie's Reaction to the Murders – IAC

Counsel did not put on or adequately present and argue available evidence, including testimony from Little Archie himself and police records indicating that Little Archie knew key details about the murders before anyone could have told him, including that he knew Big Archie was dead, that he knew the locations and kinds of wounds suffered by the victims, and that he knew that Big Archie had been hit first as he slept and then Kimbler tried to get away and was hit second. Nor did counsel effectively present and argue evidence that Little Archie's first reaction upon supposedly learning for the first time of his father's death that this meant he would at least

get Big Archie's house and car. Indeed e had counsel adequately interviewed Brenda Crook, who was called as defense witness, he would have known to elicit from her the fact that right after the murders, Little Archie was sitting in Big Archie's bedroom with his foot on the bed on which his father had just been brutally murdered – in the same position as Kimbler was found – and asked why everyone was so upset because Big Archie was nothing but a "crackhead." This evidence would have demonstrated that Little Archie's tears at trial about the murder of his "daddy" were crocodile tears. All of his conduct before, during, and after the murders points to one logical conclusion, this jury was led to put the wrong man on death row for these crimes.

D. The State Used False Evidence and Improper Argument and Withheld Material Evidence to Inculpate Simpson.

In its answer to Simpson's first amended 3.851 motion, the State argued that the following evidence supported the conviction in addition to Durrance's testimony and the DNA evidence discussed above: (1) the shoes were "about the same size" as Simpson's shoes, (2) "[t]he phone number where Simpson was the last number recorded on the victim's pager," (3) the police "observed Simpson's freshly cut hand," (4) "Simpson's story about how his hand was injured conflicted with other evidence," (5) "Simpson demonstrated consciousness of guilt by lying when he denied that the clothing, hat, and shoes were his," (6) "Simpson demonstrated consciousness of guilt by lying when he denied knowing the victims," (7) "Simpson exhibits his consciousness of guilt when he abruptly left the police interview after being asked whether he knew" Big Archie, and (8) "Simpson indicated that he knew that the victims died from being cut to death." (Resp. at 11-14.)

With the exception of the State's claim about the shoe size, these points are addressed in the following claims to demonstrate that not only is the State exaggerating their incriminating effect, but that the use of this evidence to convict him violated his constitutional rights. The

shoes found with the clothes were size ten, but Simpson buys size nine and a half, and the jury was shown that even that size is big for his feet. (T:1399-1400, 1406-07.) The State sought to impeach Simpson by placing his shoes next to the shoes in evidence to show that the exterior dimensions appeared the same. (T:1417-18, 1642.) Little Archie testified his size is "[e]ight and a half, nine." (T:799-800.) Importantly, the Florida Supreme Court did not even address that when it listed the evidence it concluded supported the conviction.[12]

Before addressing the claims related to the inculpatory evidence the State cited in its response, Simpson addresses perhaps the most prejudicial and unfair trick the State pulled to him look guilty.

17. Defense Counsel Allowed the State to Falsely Undermine Simpson's Defense That Little Archie Took the Sweatclothes a Few Weeks Before the Murders – *Giglio*/IAC

Given the DNA evidence, one of the most important tasks for the defense in this case was to explain why clothes containing Simpson's DNA were found next door to the crime scene. Simpson provided a timeline of events to explain that in the space of a little over a month, he was released from jail to work as a confidential informant, he immediately rented a trailer where he lived for a couple weeks when he was not at his mother's house watching television, Little Archie picked him up at his mother's house during this period and they went to his trailer where

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[12] The Court identified the following being sufficient evidence, in combination with Durrance's testimony and the DNA evidence discussed above, to support the conviction:

> Simpson's initial denial of knowing the victims and his immediate departure from the police interview after being asked whether he knew Archie Crook, Sr.; his denial that the clothing, hat, and shoes were his; his freshly inured hand and conflicting story about how he got the injury; and the telephone number of his mother's home, where he stayed, as the last number on the victim's pager.

(Ex. 2 at 23.)

Little Archie took the clothes, and Simpson moved in with his mother full time for around the last two weeks before the murder. (T:1377-90, 1423-24.)

Caliel thoroughly and effectively impeached Simpson with questions, representations, and innuendo that Simpson was released much earlier, in March 1999, and that Simpson's testimony was therefore not credible. Caliel first advised the Court that Simpson had been released from jail in March 1999. (T771.) He introduced the March release date to the jury by asking Little Archie whether he had been to Simpson's house before or after March 1999. (T:804.) More importantly, here is how he impeached Simpson on the topic:

> Q Now, it's your testimony that after you're released from jail in March of '99, that you were living at this trailer off 118th Street?
>
> A Are you saying March?
>
> Q Yes, March, sir.
>
> A I don't know the exact date. I know – I know prior -- after I got released from getting time served I rented a room in a trailer off 118th Street.
>
> Q You weren't living with your mother from the time of your release until July of '99?
>
> A The whole time? No, sir. I did rent a room for a couple of weeks at a trailer.
>
> Q For a couple of weeks right after your arrest?
>
> A No, right after –
>
> Q Right after your release from jail?
>
> A Yes, from getting time served, yes, sir.
>
> Q So if that was in March of 1999, then this incident that you're talking about with little Archie would have been back in April, isn't that true, where he was over at the trailer?
>
> A No, sir.

Q Well, if you only lived at the trailer for a couple of weeks after your release from jail, then how could a couple of weeks after your release from jail equate to June and July?

A Sir --

Q Can you explain that to me.

A It's been a long time ago. I don't remember exactly.

Q But you're sure that you lived only at the trailer at 118th Street for about three weeks after you were released from jail?

A It could have been longer. I'm not sure, sir.

Q But let's be clear. You were living with your mother in June and July of 1999?

A I lived with my mother about two weeks, two weeks prior to the -- to the murders happening.

(T:1422-24.)

Caliel's repeated direct and indirect representations that Simpson was released in March 1999 was false, and the State knew it well. While the agreement and disposition of the Duval robbery charges involving Johnson were resolved in March 1999, Simpson had a detainer from a violation of probation charge in Columbia County. Thus, he was moved from Duval County jail to a Columbia County jail. Assistant State Attorney Melissa Nelson, who was the second chair prosecutor in this case, was not only closely involved with Simpson's plea deal in Duval and subsequent transfer to Columbia County, but she played an active role in negotiating with the state attorney's office and court in Columbia County to obtain his release so that he could assist law enforcement back in Jacksonville under the plea agreement. She had direct and personal knowledge that he was not released from jail until June 9, 1999. The docket sheet for that case makes clear he was arrested on the day he was released from Duval and not released from Columbia County until June . (Columbia County Docket Sheet, Case No. 121993CF000738.)

Similarly, Detective Hinson testified at his deposition that the agreement for Simpson's cooperation was reached on March 29, 1999, but that he was not released until June 1999. (Hinson Depo. 83, 86. (stating that he began to work with Simpson in June 1999 because he "was getting out of jail").) He further testified that he had dropped Simpson off at the "small house right off of 118th Street" on or about June 16 and that he knew that was exactly where Simpson was living when he called on June 21 to report Little Archie's visit. (Hinson Depo. 107 ("The time I remember was he was living in a small house right off of 118th Street … and he said that Archie had come to his house…. Now, he may have went to his mom's house looking for him, but that's the house I remember Jason telling me he was at because he was living there before he went back to live with his momma.").) And Little Archie even admitted in his deposition that Simpson was living on 118th Street and not at his mother's house shortly before the time of the murders. (Little Archie Depo. 236, 238.)

All of this information was available for defense counsel to correct the State's misstatements. Competent counsel would have presented the public records confirming Simpson's timeline, as well as eliciting the testimony from the depositions.

The State's false argument and counsel's failure to correct it could hardly have been more prejudicial. Caliel argued to the jury that Simpson was released in March 1999 no less than five times during closing. (T:1604, 1618, 1619, 1643, 1675.) And these were not passing references. Caliel emphasized in the strongest terms how important this timeline was:

> [L]adies and gentlemen, I think it's important, and I want to give you a verbal timeline of events in this particular case because I think **this timeline is vitally important** as you sit down and you review the testimony and the evidence in this case. Because the timeline speaks volumes about when people knew evidence existed, what they knew, when they knew it, how they knew it, and how everything in this case can be taken into context.
>
> In March of 1999, this defendant was released from the Duval County Jail. He had cut his deal. He was working with the police and he was released on time

served, and he continued to work with the police from March, April, May, June, up until June 21st.

(T1618-19 (emphasis added).) And it did not end there.

> And, finally, and **the most important inconsistency in his testimony**, ladies and gentlemen, this whole story about the trailer and the clothes and Little Archie coming over to get those clothes. Go back to your timeline, ladies and gentlemen. March, '99, he was released from Duval County Jail and on direct examination he said, definitively, it was in the first two or three weeks after I got out of jail that I was staying at that trailer off 1118th Street. And it's at this point in time that he has this alleged contact with Little Archie at that trailer and where Little Archie just happens to take clothes.
>
> There's a problem with that, ladies and gentlemen. Because that wasn't weeks before. He tried to make one thing and back it up with something else in the evidence. That wasn't on June 21st when he contacted Detective Hinson back in 1999 and told him that Archie wanted me to hit a lick. That's not what we're talking about on June 21. We're talking about April and when directly confronted about this blatant inconsistency on the witness stand, he then has to hedge back, well, it's been a long time. It's been a long time. Because he knows that April is not June.
>
> He can't make that happen through some miracle of testimony.

(T:1643-44 (emphasis added).)

And it did not end with Caliel's first closing argument for the State. Nelson, the person who arranged for Simpson's release in June 1999, argued:

> But let's assume for a moment that [Little Archie] wears these clothes. …. [T]he reason their hypothetical fails is because remember what this defendant told you. Little Archie had worn that same pair of clothes **months earlier** when he, quote/unquote, hit a lick, and that is a robbery ….
>
> He wants you to believe that three weeks after he was released from jail **in March** Archie Crook, Jr., borrowed a pair of sweat clothes from him, put them on his body, used them to commit a lick, a robbery, a car theft, took them off, kept these dirty, unlaundered snot stained clothes, either in his car, at his mama's house, somewhere else, **at least for a couple of months**, put them on again in July, went through the woods, axed people to death, blow after blow after blow after blow after blow after blow.

(T:1679, 1681-82 (emphases added).)

The State's argument regarding the "vitally important timeline" and its argument about the "most important inconsistency" in Simpson's testimony could not have been more false and could not have been more material. Because there is a reasonable possibility that this false testimony and argument affected the verdict, relief is required both for a clear *Giglio* violation and IAC.

18. Defense Counsel Let the State Put on False Evidence and Argument to Support Its Theory Simpson Entered Through the North Rear Door.

As developed in Claims 1 and 3 above, Durrance's testimony that Simpson had confessed to the killings had a major problem – it required the jury to believe that Simpson entered through either the kitchen window (Durrance's original story from when he first went to the police through his deposition) or the laundry room window (his new story at trial). But the crime scene photos taken the morning after the murders demonstrate that either scenario was physically impossible. To get around this, the State concocted a third story – claiming Simpson entered through the north rear door, which opens to a hallway that goes past the laundry room into the kitchen and, therefore, at least jives with the side of the house Durrance referenced. (T:1596-97.)

The problem with this story is that it was impossible as both the State and defense counsel knew from Terry Thompson's deposition. Thompson testified unequivocally and after being shown the floorplan of the house that (1) it was definitely the north rear door that he knocked on the night of the murders immediately after seeing Little Archie and Smallwood at the RaceTrac and (2) the door was definitely locked. (Thompson Depo. at 6, 8, 18-19.) There being no evidence that Simpson had a key to either lock or unlock that door, it was as impossible for him to have entered through that door as through the windows. Indeed, the State's story about how "tragic" it was that Little Archie gave him the opportunity to murder Big Archie is built on the fact that Simpson could not have entered if it were locked. The State even emphasized

Thompson's testimony that the deadbolt required a key to lock or unlock it from inside or out. (T:1501-02, 1596.)

The "tragedy" about the north rear door was not, as the State argued, that Little Archie gave Simpson the opportunity to enter the house by leaving it unlocked, but that the jury was never told that Little Archie lied because just a few minutes after he left, Thompson tried that door and found it locked. Not only would this have disproven the State's theory of the case as to how Simpson allegedly committed the murders, but it was strong evidence that somebody with a key committed the murders. That is because between the time Thompson determined the door was locked around midnight the night of the murders and the next morning when the police arrived, the door had been unlocked. Again, there was no evidence that Simpson had a key (and the State's closing argument was built on the assumption that he did not), but Little Archie sure did as the jury heard and the State and defense counsel knew coming into trial based on his deposition. (T:812; Little Archie Depo. at 40.)

The State therefore based its theory of the case around a fact it knew was not true, in violation of *Giglio*, and defense counsel was ineffective for failing to demonstrate that. There can be no doubt that this was highly prejudicial as evidenced by the State's closing argument:

> And then Little Archie and Shawn left just before midnight and they went out the back door.
>
> Ladies and gentlemen, why is it important the manner in which they left? Because little Archie told you when he left Kim was asleep in the bed and his father was sort of dozing on the couch still. But that he let himself out the back door here. They got in their car and they left, but nobody followed behind them to lock that back door. And you will see from the photographs, ladies and gentlemen, that that back door has what you call a double-key entry deadbolt. Somebody has to lock it with a key from the inside to secure that deadbolt. Little Archie and Shawn could not do that when they left. They left that door unlocked. They left that door unlocked when they went out the back door and, unbeknownst to them, it would be the last time they would see Archie and Kim alive.

> And even more tragic is by not locking that door behind them they left access, access that this defendant took advantage of that night when he went in through the kitchen.

(T:1596-97.) Had the jury been show the truth that the door was locked after Little Archie left, there is every reasonable probability Simpson would have been acquitted.

19. Simpson's Mother's Number Was Not the Last One to Page Big Archie – *Giglio*/*Brady*/IAC

The State heavily argued that a key piece of circumstantial evidence was that the phone number for Simpson's mother's house, where he was living at the time of the murders, was "the last pager number on the victim's pager when the bodies were recovered." (T:1635.) The Florida Supreme Court relied on this alleged evidence in its opinion. (Ex. 2 at 23.) Big Archie's pager was, therefore, a crucial piece of evidence, and the State's argument dramatically emphasizes how important it is to know the numbers that paged Big Archie in the last few weeks of his life. While a number tied to Simpson should not be that incriminating because Simpson was directed by law enforcement to get close to Big Archie to provide information about his cocaine trafficking, but it had plenty of potential for exculpatory evidence. When was the last time Little Archie paged his father and did he use any of the secret codes they had together? Did anyone else with a motive to kill Big Archie page him in his final days? Was Officer Williams even telling the truth when he testified that he tried the "first" number on the list and Simpson's mother answered? What was the date and time of that page? All of these are key questions that can only be answered by reviewing the pager. Yet the State not only never gave defense counsel access to the pager, but it disposed of it so Simpson would never know the true facts.

The pattern is just too great to ignore with the State destroying or disposing of all kinds of evidence that was likely exculpatory – triggering a *Brady* violation regardless of intent – or at the very least – very useful for the defense – triggering a *Youngblood* claim. Critical DNA

evidence was rendered impossible to test. Little Archie's polygraph examination was destroyed Kimbler's diary. And now Big Archie's pager. This is too much to write off as simple negligence and is strong evidence of bad faith.

Indeed, it is clear that he State knew the pager was, in fact, exculpatory and Williams' testimony almost certainly false. He testified that he called the "first number" and Simpson's mother answered. (T:735-36.) Again, while that would not be particularly damning evidence because Simpson's role as a confidential informant entailed him paging Big Archie, it is now clearly false. When he wrote down the number he was calling at the time, we now know that he listed the prefix as 693 based on the notes JSO produced to the repository. But in the typed report disclosed to defense counsel, the prefix was listed as 793. Regardless, neither of those prefixes were Simpson's mother's phone. And Caliel clearly knew the number on the report was wrong, because his records turned over to the depository demonstrate he subpoenaed phone records for the prefix 783. This led him to discover that not even this number was correct; it belonged to someone names Susan Larsch. He, at least, was closer because her actual prefix was 786.

Aside from the clear prosecutorial misconduct in violation of *Giglio*, *Brady*, and *Youngblood*, defense counsel was ineffective in responding to the testimony abo ut the pager. While counsel had no way of knowing Williams' contemporaneous notes and Caliel's subsequent subpoena listed other numbers that did not belong to Simpson's mother, counsel had the police report that listed another wrong number. Competent counsel would have presented evidence of her actual number and impeached Williams on this point. Competent counsel also would have demanded the pager from the beginning in discovery to not only see all the numbers that had page Big Archie, but the dates and times. A page the evening of July 15, 1999, before the murders would be highly relevant. If there was a page from Simpson's mother's house, it

would be exculpatory if it arrived after the murders taking place (a killer would not page someone he knows is dead) and if it was more than an hour or two before the murders it would have little to no relevance at all given that Simpson was required to page Big Archie in his roll as a confidential informant. And once the State disclosed that it did not have the pager, competent counsel would have moved to exclude any reference to the pager from trial or, barring that, impeached Williams in devastating fashion not just about the wrong number, but the lack of any information about dates and times.

Whether views as a claim of prosecutorial misconduct or ineffective assistance of counsel, the misuse of the pager evidence clearly prejudiced Simpson,.

20. Defense Counsel Should Have Sought to Exclude Evidence of the Cut on Simpson's Hand, and Previously Concealed Exculpatory Evidence Shows the State Took Advantage by Presenting False Testimony It Was an Oozing Gash – *Giglio*/*Brady*/IAC

The State made a lot of hay out of the cut on Simpson's hand and contends that both the nature of the cut and Simpson's supposed conflicting explanations are evidence of guilt. Competent counsel never would have allowed the cut to even be an issue by moving to suppress any evidence about it. There was no competent evidence whatsoever that the killer cut his hand; it was pure speculation. The prejudicial nature of testimony about the cut was obvious from the start, and a motion to suppress would have been granted because that prejudice clearly outweighed whatever minor probative value it had. § 90.403, Fla. Stat.

The State used the cut on Simpson's hand to make him look guilty in a way that was clearly false based on evidence disclosed by the State for the first time post-trial and the other that competent counsel would have impeached. First, the State portrayed this as no ordinary cut, but an "oozing gash" that would be consistent with cutting it on an axe. But the only people to call it "oozing" were Caliel in opening and Nelson in closing; no witness testified it was oozing.

(T:504, 1688.) To the contrary, Simpson flatly denied it was "oozing" or "gaping" or anything but a simple scratch hitting the electric panel in his mother's garage during a power outage that was actually documented by JEA. (T:1392-93.) The only evidence to the contrary was Hinson's testimony that he observed "a large gash on his finger." (T:656.) But the State withheld evidence tending to show that this was false testimony. Among JSO's records at the repository are Hinson's handwritten notes from the day he saw Simpson, and he plainly described the injury as a "small cut." This was clear *Brady* material, and its materiality is best seen from the both the State and Supreme Court's reliance on evidence about the injury as supporting Simpson's convictions. Hinson's false testimony and the State's argument exaggerating it even further are clear *Giglio* violations as well. There can be no confidence that the verdict would have been the same had the jury seen that Simpson was telling the truth about the degree of the small cut and that the State was materially exaggerating.

21. The State Falsely Argued That Hinson Did Not Call Simpson's Mother's House the Morning After the Murders – *Giglio*

The State further made Simpson look guilty by falsely and prejudicially accused Simpson of lying about receiving a call from Hinson at his mother's house the day after the murders. This was an important issue because Simpson testified that his mother woke him that day and said that Hinson had called. (T:1394.) Simpson testified that he called Hinson back because of the phone call, that he did not remember receiving any pages from Hinson, and that his pager may simply not have been turned on. (T:1394, 1422.)

Hinson's trial testimony was equivocal as to whether he called Simpson. He testified that the morning after the murder he "was paging" Simpson because he did not "believe [Simpson] had a cell phone" and was "not sure if I was calling him at his house or trying to page him." (T:653-54, 668.) But prior to trial, Hinson had testified in his deposition that he attempted to

contact Simpson "by paging him and attempting to call his [mother's] home," but that his mother did not answer. (Hinson Depo. 6 (emphasis added).) He confirmed he "was trying to contact Simpson by way of his pager, as well as calling his home phone number." (Hinson Depo. 8.) Thus, there was no evidence to rebut Simpson's testimony that Hinson called his mother's house and the deposition testimony confirmed that Simpson was telling the truth.

That did not stop the State from falsely arguing to the contrary to support an argument that Simpson got caught in a lie in his testimony about Hinson calling him:

> [Detective Hinson] stated that he continued to page this defendant over and over, trying to get in contact with him, he went to the crime scene, he spoke to the detectives, still paging this defendant, and it was only four hours later at nearly noon, and remember this ladies and gentlemen, that this defendant returned his page. **Not the other way around, not that Detective Hinson called him at his mother's house.** This defendant returned the detective's page and they arranged to meet.

(T:1597-98 (emphasis added).) He returned to this claim a second time:

> But he returned the page, ladies and gentlemen, he tried to explain, well, that pager wasn't always on. Well, if it wasn't always on, then **how did he know to call Detective Hinson back and to return that page like he did around noon**? Why is this important? …. The problem is he got caught in a group of lies in doing so.

(:1639 (emphasis added).) The materiality of this false testimony and argument cannot be understated – a new trial is required.

Even if this Court concludes that a claim under *Giglio* is undermined because defense counsel had access to Hinson's deposition, which it should not given the State's clear knowledge of its argument was false and made after the evidence closed, Simpson pleads in the alternative that counsel was ineffective for failing to nail Hinson down based on his deposition testimony that he both paged and called Simpson at his mother's house. Whether viewed as a *Giglio* claim or an IAC claim, the failure to present the truth to the jury was highly prejudicial, and there can be no confidence in this verdict.

22. Defense Counsel Allowed the State to Present False Testimony and Argument That Simpson Did Not Become Less Cooperative With Hinson After the Cheek Swabs – *Giglio*/*IAC*

In its closing argument, on appeal, and in postconviction proceeding, the State has contended that Simpson demonstrated some kind of "consciousness of guilt" when he stopped cooperating with law enforcement after Hinson took his cheek swab for DNA shortly after the murders. But the State knew this was a false argument and defense counsel was ineffective for failing to demonstrate that. Hinson testified that after he obtained the cheek swabs from Simpson on July 21, 1999, Mr. Simpson stopped cooperating with him altogether and he "no longer had any cooperation from this defendant." (T:690.) This was false testimony because Simpson not only continued to cooperate with law enforcement generally, but he provided evidence leading to the wire-tap of Durrance, which led to his arrest and conviction – the very cooperation that led Durrance to want to testify against Simpson in this case. Among other things, he gave. Durrance's address and signed an affidavit in support of the wire-tap. The presentation of this false testimony was prejudicial because Caliel seized on it in closing as evidence that Mr. Simpson was "scared" he was going to get caught. (T1604.)

There was no change in Simpson's level of cooperation before or after the cheek swabs. While Hinson complained that he had trouble getting in touch with Simpson after the cheek swabs, that ignores two important facts. First, Hinson expressed that he experienced the same difficulties getting in touch with Simpson before the murders and the morning after the murders, well before the cheek swabs. Second, Hinson was a homicide detective, and Simpson's work as a confidential informant focused on drug dealings and auto thefts. Indeed, when Simpson called Hinson on June 19, 1999, to report that Little Archie had just been at his trailer wanting to go "hit a lick," Hinson told him to contact the narcotics officers. Simpson followed up with Waugh and had clear direction that Waugh and those folks were the ones he should be reporting to.

Had counsel developed this information before the jury and this Court, it never could have been used to support the verdict. To whatever extent this argument supported the verdict, it was only the result of the violations of Simpson's right to effective counsel and to avoid prosecutorial misconduct.

23. Defense Counsel Should Have Shown That Simpson Was, in Fact, Late to Work Before Being Accused of the Murders – IAC

Similar to its claim that Simpson stopped cooperating after the cheek swabs, The State argued Simpson exhibits "consciousness of guilt" by saying he had to leave a police interview immediately after being accused of murdering Big Archie. (T:950, 1415, 1617.) Competent counsel would have successfully headed this argument off by demonstrating that Simpson told he police before they mentioned even Big Archie that he was in a hurry and was going to be late for work and that he was in fact late. JSO police reports confirmed the former, and the latter was documents by Simpson's work records, which had been obtained by prior counsel and were sitting unused in defense counsel's files at trial. This evidence, which easily could have been produced at trial would have confirmed that Simpson was not leaving just because Big Archie's name was mentioned. To whatever extent this argument supported the verdict, it was only the result of the violations of Simpson's right to effective counsel and to avoid prosecutorial misconduct.

24. The Key JSO Officers Had Just Framed Another Innocent Man, Brenton Butler – *Brady*/IAC

Where a critical component of the case is the credibility of the witnesses, impeachment "becomes central to the trial." *Kelly v. State*, 198 So. 3d 1077, 1078–79 (Fla. 5th DCA 2016). A law enforcement officer's credibility, like any witness, is equally at issue at trial and the failure to adequately impeach a law enforcement officer can warrant reversal of a conviction. *Milke v. Ryan*, 711 F. 3d 998, 1012 (9th Cir. 2013) (granting conditional writ of habeas corpus setting

aside convictions and sentence and ordering state to provide defendant with all law enforcement officer's personnel records because of officer's prior misconduct allegations and impeachment evidence).

A well-known juvenile defendant, Brenton Butler, was investigated, arrested, confessed, charged, tried, and acquitted following an investigation conducted by the same detectives involved in the investigation and prosecution of Simpson. The First District Court of Appeal, in *Serrano v. State*, aptly described the circumstances faced by Brenton Butler prior to his acquittal at trial:

> Before Curtis was charged, a fifteen-year-old juvenile, Brenton Butler, was charged with killing the same woman during an armed robbery. Butler was identified as the killer by the deceased woman's husband, an eyewitness. Butler was induced to waive his *Miranda* rights after the police violated section 39.037(2), Florida Statutes, by failing to call Butler's parents, as here; and Butler later confessed to the murder. At trial, Butler's confession was deemed voluntary over objection, admitted as evidence, and presented to a jury that had the good judgment to acquit him. In all probability, a guilty verdict would have resulted in the destruction of Butler's meaningful life. However, to the credit of the jury, and not of the judiciary, a great injustice was avoided, as revealed by subsequent events. After Butler's acquittal, the real perpetrator of the murder was identified, tried, and found guilty of the murder on irrefutable hard forensic evidence.

15 So. 3d 629, 641 (Fla. 1st DCA 2009).

An Internal Affairs Investigation was launched and Assistant State Attorney Brad King, appointed as a special prosecutor, brought a presentment to the Grand Jury against several of the officers. They were not indicted, but several of them were later sued by Brenton Butler and settled out of court.

The IA investigation yielded numerous findings of misconduct and sanctions against various officers who worked on Simpson's case, including Detectives J.H. Williams, D. Gilbreath, D.E. Darnell, M.P. Bialkoski, H.S. McKean, Sgt. J.A. Joiner, Officer M.E. Glover, and Hugh A. Eason. Members of the Fourth Judicial Circuit's SAO were part of the investigation.

The charges against the officers included failure to cooperate with in IA investigation, failure to tell the truth, failure to conform to work standards, failure to take appropriate action, incompetence, and failure to know and abide by the law. Several of the officers were demoted or took early retirement. In light of the nature of the charges against these officers—charges that all implicate the officers' truthfulness, effectiveness, and willingness to follow the law or regulations—the personnel, IA, FDLE, and other records now in the possession of Simpson's counsel could have been used by trial counsel to impeach the officers who handled Simpson's investigation. Both investigations involved a defendant claiming innocence and both involved claims that the officers had hidden, failed to gather, or lied about aspects of their investigation.

Trial counsel for Mr. Simpson was not only aware of Butler's prosecution, false confession, and acquittal, as well as the allegations against the officers involved, he was actually directly involved in the case. Indeed, Refik Eler represented Juan Curtis, the defendant who was prosecuted for the same murder after Mr. Butler was acquitted. Even more stunning, Eler had a clear conflict of interest because his defense strategy for Defendant Curtis was to admit Mr. Butler's confession into evidence "to raise a reasonable doubt by presenting evidence that Butler was the one who committed the crime[.]" *Curtis v. State*, 876 So. 2d 13, 16 (Fla. 1st DCA 2004). Part and parcel of that strategy was to herald the officers who arrested Butler, not to impeach them.

By contrast, and in a twist of irony, the State sought to prove at Curtis' trial that Butler's confession was coerced and the investigation against him was shoddy—in short, they tried to show that the officers had arrested and bullied an innocent teenager with no experience with the criminal justice system into confession to a murder he did not commit. Thus, the State sought to impeach the credibility and capacity of the very officers who Eler was charged with impeaching

in Simpson's case. But despite his knowledge of the disciplinary proceedings and sanctions lodged against the officers, despite knowing that some had been suspended, given reprimands, demoted, or had retired, Eler did not use any of the records from the Butler case that were part of his file as *Curtis*' attorney. Indeed, he did nothing to impeach the officers who testified in Simpson's case with their disciplinary histories. He did not even utter Brenton Butler's name. Whether due to incompetence or the clear conflict of interest that Curtis' and Simpson's cases posed for Eler, he was ineffective for failing to use available and compelling evidence to impeach the credibility of the officers who investigated, arrested, and helped prosecute Simpson, an innocent man. Eler was also ineffective for failing to inform Simpson of his conflict as soon as he was asked to represent Curtis, several years into his representation of Simpson.

The prejudice is indisputable. Simpson testified at trial to a defense that was consistent with the evidence, but for various mischaracterizations of the evidence by law enforcement. Detective Hinson's misrepresentations are well documented in this motion and include his escalation of Simpson's cut to a huge gash, and his insistence that Simpson was avoiding him the day after the murder. Detective Bialkoski's call to Badger that he was looking to have evidence tested for Simpson's DNA because he was looking to "place subject at the house" would, if presented by Eler, have taken on an entirely loaded meaning in the context of the Butler case. Eler could have presented available discrepancies between the officer's reports and notes to further highlight their whitewashing of the truth. Simpson, not the officers, might have been believed when he testified that he left the police station in the middle of questioning because he had to go to work, not because he was guilty. Perhaps most egregious, JSO officers implicated in the Butler case were the ones who reached out to George Durrance and obtained his statement

against Simpson, despite their knowledge that he was untrustworthy and was acting purely out of self-interest.

The list goes on and on. The JSO officers built a case of guilt against Simpson based on tiny, innocently explained, exaggerated, sometimes fabricated accusations and Simpson could only combat them with the truth; but the jury was far more likely to believe the officers than him. In that context, Eler's failure to use available impeachment evidence to attack their credibility constituted clear ineffective assistance of counsel—in simple terms, had he used it, Simpson would be a free man.

It is not lost on Simpson that the State, too, had a duty to Simpson at trial—the duty to provide the above-described exculpatory evidence to defense counse. While on the one hand it was likely unnecessary because Eler had unfettered access to the records, to the extent that Eler did not have complete access, the State violated *Brady* in failing to provide them. *See Milke v. Ryan*; *Brady,* 373 U.S. at 87; *Giglio,* 405 U.S. at 153–55. Favorable evidence that must be turned over includes both exculpatory and impeachment material that is relevant either to guilt or punishment. *See United States v. Bagley,* 473 U.S. 667, 674-76 (1985); *Giglio,* 405 U.S. at 154.

The State's *Brady* violations on this matter and others have continued into postconviction proceedings. Indeed, Simpson had to litigate his access to the Butler records because they have been under seal. JSO and SAO have fought his entitlement to them at every turn. The State also continues to refuse to provide records substantiating Little Archie's status as a confidential source to JSO, despite Simpson's possession of testimony by JSO detectives acknowledging that very status. JSO and the State have been unable or unwilling to produce Big Archie's pager, Little Archie's alleged polygraph report, Kimbler's black book, and, most recently missing pages of reports and other records to which Simpson is entitled under Rule 3.852 that defense counsel

have requested from the State with specificity. Instead of providing them, the State has merely instructed defense counsel to have the repository look through the entire SAO case file, which is thousands of pages long, to try to locate them. This is an unfair and burdensome request to place on the repository staff and is SAO's responsibility. Simpson reiterates that the State has an ongoing duty to provide *Brady* information and public records under Rule 3.852. To the extent that it continues to withhold such evidence, that alone should be grounds for a new trial.

25. The State Got Away With Flagrantly Improper Arguments in Closing – *Giglio*/IAC

In a unanimous opinion on direct appeal, the Supreme Court noted that the State had made several "clearly improper comments vouching for Durrance's credibility" during closing argument of the guilty phase and that these comments "impermissibly placed the prestige of the government behind the witness or indicated that information not presented to the jury supported the witness's testimony." Exhibit 2 at 21 n.7. The only reason given by the Court for why it did not reverse Simpson's conviction was that his trial counsel failed to object. *Id.* This failure to object was unreasonable and prejudicially ineffective assistance of counsel. *See Hodge v. Hurley*, 426 F.3d 368 (6th Cir. 2005) (prosecutor comment on the credibility of a witness patently improper and failure to object to such comments were prejudicial ineffective assistance of counsel; failure to object to comments on witness credibility less susceptible to trial strategy argument than decisions not to object to inadmissible evidence already heard by jury); *see also Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999) (prosecutor may not express opinion on credibility of witnesses).

The ineffective assistance of counsel claims are procedurally appropriate for a post-conviction relief motion and are not barred. Simpson is not asserting improper argument by the State as the ground for relief; rather, he is asserting that counsel was ineffective by not objecting

to the improper and misleading comments and argument. An initial post-conviction motion is an appropriate vehicle to raise ineffective assistance of counsel. *E.g., Blanco v. Wainwright,* 507 So. 2d 1377, 1384 (Fla. 1987). The Supreme Court only ruled that Simpson had not shown fundamental error; it did not determine the merits of Simpson's ineffective assistance of counsel clai Indeed, the initial determination of those claims rests with this court. A review of the State's closing argument and rebuttal demonstrates both that competent counsel would have ..objected to many improper arguments by the State that must have swayed this jury.

Among the most improper bolstering remarks were claims that Durrance was "honest and forthright," was "telling the truth," was "smart" and knew he had to provided "credible" information. (T:1607-08.) The State asserted that it did not initially believe that Durrance was credible because he had a motive to lie and that "law enforcement and the State Attorney's Office would not take at face value, *without more,* the testimony of Mike Durrance." (T:1614.) The only implication is that once the DNA results came back, "law enforcement and the State Attorney's Office" personally believed Durrance[13] and therefore so should the jury. *See Hodge*, 426 F.3d at 378-79 (granting new trial based on similar improper comments because this line of argument "such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury" and "carries imprimatur of Government and may induce jury to believe Government's judgment rather than its own view of evidence" and "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence") (quoting *United States v. Young*, 470 U.S. 1, 18 (1985)).

[13] Ironically, as shown in Claim 1, this was not only an improper impression to convey, but a false one.

Beyond that and even more blatant, the State argued, "We've had this case for sometime. We've had the luxury of pretrialing with witnesses, meeting them, reviewing depositions, calling them when we had another question, and in a week's time we threw them all up on the stand for you and hoped that we covered everything." (T:1690.) This clearly implied that the State was confident in Simpson's guilt based on all kinds of evidence and investigation it had performed before trial. It also sent the direct message to the jury that the State had other evidence of guilt that was not presented. *Id.*; *see also Ruiz*, 743 So. 2d at 4 ("The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. The same power and force allow him … to impress on the jury that the government's vast investigatory network, apart from … the trial knows that the accused is guilty.") (quotation marks and citation omitted).

In addition to improperly bolstering its own evidence, the State asserted that Simpson's testimony was "simply unbelievable" (T:1637) and he was a "liar." (T:1654.) *See Hodge* 426 F.3d at 377 (assertion that defendant was "lying to extricate himself from what he's done" was improper and supported a new trial). The State argued, "If you come forward with information, let's say like the rumor has it that the outlaw biker game [sic] did this thing, you know that doesn't carry much weight." (T:1608.) The State also argued that Hinson stopped working with Simpson because he was suspicious that Simpson was the murderer. (T:1600, 1604.) Again, the message sent by such testimony is that the State, through its detectives, believed Simpson was guilty, so too should the jury.

In addition to improperly vouching for Durrance's credibility over that of Simpson, the State improperly suggested that the burden of proof had shifted to Simpson by arguing that he "wants you engage in speculation without proof and possibilities without evidence." (T:1688.)

See Paul v. State, 980 So. 2d 1282, 1283 (Fla. 4th DCA 2008) ("When arguing to the jury, the State may not make comments that mislead the jury as to burden of proof." State improperly shifted burden to defendant by insinuating defendant need to prove prosecution witness lying). *Cf. Sandstrom v. Montana*, 442 U.S. 510 (1979) (reversing conviction on basis jury instruction might have been interpreted as shifting burden to defendant). Counsel was doubly ineffective because not only did this argument directly invite the jury to place the burden of proof on Simpson, but it highlighted counsel's failure to offer the evidence identified earlier that supported Simpson's defense.

The State also argued that the jury should consider that Simpson was a bad person based on his past conduct in direct violation of clear principle behind section 90.404's prohibition on character and propensity evidence: "And I'm sure that you're going to hear all of these attacks on Mike Durrance and how bad he is and **how bad of a person he is** and he has an interest in the case, but, remember, ladies and gentlemen, that in doing so, those same things apply to this defendant." (T:1636 (emphasis added).)

Legally improper arguments aside, the State made a shocking number of factual arguments that were simply not supported by the evidence or any reasonable inference drawn therefrom. Counsel was ineffective for being asleep at the switch and not objecting to any of these statements or at least directly rebutting them during defense closing. *See Hodge*, 426 F.3d 368, 383 (failure to object to prosecution's misrepresentation of evidence contributed to recognition of ineffective assistance of counsel claim). The State's unsupported assertions include the following:

a) Caliel argued that Durrance was "facing conspiracy to traffic in over 200 kilograms of cocaine" and was "looking at life" as a possible sentence. (T:1606.) There was no evidence to support either assertion.

b) Caliel created an imaginary dialog between Simpson and Detectives Bialkoski and Eason: "Oh, yeah, yeah, I -- I knew Archie Crook, Sr., and then immediately, his eyes to his watch. He stands up and says I got to go to work. The detectives ask, can you please just stay, can you stay and talk to us, we just want to talk to you about this? You can't keep me here. I'm leaving. You can't keep me here. I'm not afraid of you. I don't scare easy." (T:1617.) But Detective Bialkoski did not testify, and although Detective Eason testified that they asked Simpson to stay, he did not explain their demeanor. Simpson, on the other hand, testified that the Detective Bialkoski was in his face yelling at him and trying to scare him. (T:1428.) The State offered no evidence to rebut this testimony.

c) Caliel argued that Simpson's DNA on the clothes proved that he was the "last person to wear these clothes … excluding every other person on the face of this earth." (T:1622.) Again, other DNA was found on the clothes. (T:1331.) More importantly, the State's own experts conceded that it was not scientifically possible to tell who was the last person to wear the clothes and that it is impossible to tell when DNA was left on the clothes. (T:1330-31.)

d) Nelson opened the State's rebuttal argument by talking about a quote and analysis by a forensic scientist named Paul Kirk and proceeded to essentially offer expert testimony about DNA. (T:1675-76.) Kirk never testified and there was no evidence to

support this argument. This was pure testimony from the assistant state attorney disguised as argument.

e) Nelson further argued that at the time of the murder and initial investigation, "wearer's DNA was unheard of. Prosecutors, homicide detectives did not even know about it." (T:1677.) But by the time of trial, "DNA is a sure thing. Nuclear STR DNA is the one technology in the world that can identify a human being at the exclusion of every other human being on the planet." (T:1677.) This "testimony" by the State during closing went well beyond any testimony offered by its expert.

f) Nelson argued that one of the alleles found in the DNA mixture from the sweatshirt "tells none of you anything about the identity of anyone that may have at some time in the past touched that sweat clothing." (T:1678.) But the State's own expert testified that the allele had to have come from someone other than Simpson and that it could have come from Little Archie. (T:1176-77.)

g) Nelson argued that Simpson had to be the last wearer of the sweatshirt "[n]ot only because his sweat scarred those clothes with his identity, but because his sweat degraded whatever was left there before him." (T:1678.) But there was no evidence that Simpson's DNA on the shirt came from sweat or that his DNA showed that he was the last person to wear the clothes.

h) Nelson asserted that the night of the murder the weather was "Florida 100 degrees plus humidity heat." (R.19:1680.) But no evidence was offered about the weather that night.[14]

[14] According to the Weather Underground website, the low temperature that evening was 78 degrees with humidity ranging from 52 to 89 percent.

i) Nelson argued, "But make no mistake, there is no unidentified forensic evidence belonging to anybody else inside of this murder scene and there is no unidentified blood on any of this clothing." (T:1688.) This was patently untrue. Even the State's expert agreed that the DNA mixtures found on the clothing could have come from somebody other than the victims or Simpson. (T:1120-21.) Of the nineteen stains tested on the sweatpants, only six could be identified (four from Kimbler and two from Big Archie). Ample evidence of blood and hairs from the crime scene was either not tested at all or was tested without usable results. Additionally, a blood stain in the house had a DNA mixture that could not exclude Smallwood. Also fingerprints on a drug scale and bags in the bedroom did not match the victims or Simpson. And three fingerprints taken off the doorknob could not be matched.

The only argument objected to by defense counsel was at the very end of the State's rebuttal, when the State made the blatantly improper argument that it was prosecuting the case "on behalf of the citizens of the State of Florida" and a guilty verdict "is deserved by the citizens of this state." (T:1691-92.) The Court sustained the objection and gave a curative instruction but denied a mistrial. (T:1693.) While it denied a mistrial based on that single improper argument, surely the Court would have stopped all of these other improper arguments and granted a mistrial had the defense not been asleep at the switch.

Had counsel been alert and objected to all of the other improper and unsupported arguments, the Court should have granted a mistrial. Alternatively, had defense counsel rebutted all of these baseless arguments in their own closing, the jury likely would have acquitted Simpson.

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http://www.wunderground.com/history/airport/KNIP/1999/7/15/DailyHistory.html?req_city=NA&req_state=NA&req_statename=NA

E. Defense Counsel Failed to Display Minimal Competence at Key Points of the Trial.

26. Defense Counsel Presented an Incoherent Closing – IAC

Despite the wealth of material to work with in light of all of the misstatement by the State during its closing, defense counsel was prejudicially ineffective by offering an incredibly disjointed and nearly incoherent closing argument.

It began with an odd attack on Durrance. Even though there was no evidence in this case that Durrance had ever killed anyone, counsel referred to him as a "killer." (T:1650.) Despite the fact that the defense theory, from its opening statement, was that Little Archie had the motive and opportunity to kill both Big Archie and Kimbler (T:519,521), defense counsel argued that it was really Durrance who killed Big Archie. (T:1651.)

Then, in the next breath, counsel inconsistently told the jury that Little Archie was the killer. (T:1664.) Defense counsel advised that Simpson did not need to testify at all but did because "he wanted each and every one of you to hear the truth and the truth is Archie Crook, Jr., killed Kim Kimbler and his own father." (T:1656.) Throughout the rest of the argument, counsel mostly argued that Little Archie was the killer.

Counsel went out of his way to bolster the State's DNA evidence expert, Badger, calling him "the best DNA mind in Florida." (T:1659.) Counsel also referred to the sweatshirt containing "epithelial DNA that matches" to Little Archie. (T:1658.) There was no testimony about "epithelial DNA," which is DNA from the skin. There was, of course, testimony about a DNA mixture on the shirt that could not *exclude* Little Archie (T:1192-94.), but by overstating the conclusion that the evidence actually matched Little Archie, counsel lost any possible credibility with the jury.

Similarly, counsel argued that Little Archie had testified that he cashed a check the afternoon of the murder at Big Archie's neighbor Chris Howard's house. (T:1662.) He argued that this was inconsistent with Howard's testimony. (T:1662.) But Little Archie had offered no such testimony, once again killing any credibility counsel could have had with the jury.

Counsel tried to bolster Simpson's credibility by noting that after the murders, the police asked him to get close to the Crook family to learn about their possible involvement in the murder. Counsel argued, "Maybe that was why he went and saw Durrance, *if he did*." (T:1666.) But this argument only undermined Simpson's credibility because Simpson admitted to going to see Durrance after the murder and, in any event, Durrance is not part of the Crook family.

Counsel argued that Simpson called Detective Hinson around noon on the day after the murder and told him that Little Archie was "wanting to do a lick." (T:1667.) There was no such testimony. Again, the only testimony about "hitting a lick" was that Little Archie told Simpson he was going to do that *three weeks before* the murders. (R.14:1651.) Counsel was clearly clueless.

Counsel argued that the evidence showed that Little Archie and Smallwood exited the front door of Big Archie's house and left it unlocked the night of the murder. (T:1670.) He also argued that Little Archie came in through the front door with an axe to commit the murder. (T:1671.) But the evidence was that a stack of clothes blocked the front door altogether (T:585), and it was a back door that was found unlocked the next day. (T:584, 791-92.)

He argued that after killing Big Archie and Kimbler, Little Archie went out the back door and "meets Smallwood and/or Durrance at the church with the money or drugs." (T:1671.) But there was no evidence to support this theory at all, and it only made more compelling the State's

arguments about the defense offering nothing but speculation without evidence. It also lent credibility to Durrance's testimony that Simpson told him he was going to rob Big Archie.

Counsel failed to address the fact that the State had offered no motive for Simpson to kill Kimbler or that the alleged motive for killing Big Archie (to stop him from telling other criminals that Simpson was a confidential informant) made little sense because Simpson was already aware that Little Archie knew he was an informant. Whatever motive Simpson had to kill Big Archie would have applied at least as much for him to kill Little Archie.

Defense counsel's "out of the blue" claim that Durrance committed the murders and his about face claim that Little Archie committed the murders were the beginning of a confusing argument that undercut any defense credibility for the jury. His numerous assertions of nonexistent facts were not only confusing but added heft to the State's argument that the defense offered nothing but speculation. Defense counsel's inconsistent and unsupported closing argument did nothing to plant reasonable doubt regarding Simpson's guilt; rather, it planted doubt as to Simpson's innocence.

All of these shortcomings were the result of Eler simply not preparing. Indeed, at the last minute, he even tried to get Fletcher to do the closing, even though Fletcher had not been preparing for it, had less experience, and was mainly penalty phase counsel.

27. Defense Counsel Failed to Seek an Interview of Juror Cody Before the Jury Was Discharged at the Conclusion of the Guilt Phase – IAC

Juror Cody repudiated her guilty verdict between the guilt phase and penalty phase. The Court denied relief because the jury had already reported its verdict and been excused, and the Supreme Court of Florida affirmed. Simpson incorporates this claim here to ensure that it is preserved for federal review.

But this issue also demonstrates ineffective assistance of counsel because defense counsel should have objected to Juror Cody being allowed to participate in the penalty phase before the issue of her verdict was resolved. As a result of this failure, Juror Cody heard all of the penalty phase evidence, including defense counsel's "accepting" the guilty verdict and a pastor's testimony incorrectly suggesting that Simpson may have confessed to the crimes. This evidence and argument had to have tainted Juror Cody's view on the matter when interviewed after the penalty phase.

More importantly, apart from any constitutional error regarding the ruling that Juror Cody's recantation came too late, defense counsel was ineffective for not raising the issue before the jury was excused. Although it is not reflected in the trial transcripts at the time the jury was polled (and therefore was unknown to the supreme court or appellate counsel), Juror Cody noticeably looked down while the verdict was read and hesitated quite dramatically before stating that it was her verdict when the jury was polled. Assistant State Attorney Nelson has even admitted that this pause led her to expect that Juror Cody was going to deny that it was her verdict. Counsel should have immediately asked for Juror Cody to be questioned. Given Juror Cody's subsequent statements, it is clear that she would have expressed doubt and raised the issue of being told that the jury could only consider physical evidence.

28. Defense Counsel Was Ineffective During Jury Selection and in Handling Juror Lee's Disclosure He Knew Troy Lamar Crook – IAC

Simpson hereby incorporates and preserves Claims 23 (failure to conduct meaningful voir dire) and 26 (failure to address juror misconduct) form his first amended petition. As stated in his September 4, 2013, Motion to Interview Jurors, his counsel required the opportunity to interview the jurors and alternates from his trial in order to establish the prejudice prong of these clai Simpson respectfully maintains the Court erred in denying that motion by order dated

January 3, 2014, and while he preserves that ruling for appellate review, he concedes that it prevents him from prevailing on these claims unless and until reversed.

F. The Cumulative Prejudice From the Forgoing Claims Requires Relief.

Though not a separate claim, Simpson closes his attacks on his convictions by reminding the Court that the claims must be viewed cumulatively. *E.g, Williams v. Taylor*, 529 U.S.362, 398-99 (2000); *Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996).

G. The State Concedes Simpson's Sentences Are Unconstitutional.

29. The Sentences Resulted From a Clear *Ring* Violation

Since the time Simpson preserved his claim that his sentences violated the Constitution under *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), the Supreme Court of the United States decided *Hurst v. Florida*, 136 S. Ct. 616 (2016), followed by the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The State has now conceded that Simpson's sentences violate the rule of law announced in these decisions, that the error was not harmless the facts of this case, and that Simpson is at least entitled to a new penalty phase trial.

In light of these concessions, the remaining claims Simpson stated to challenge his sentences in his amended 3.851 motion are now moot, and there is no reason to develop or explain this claim in more detail. In reliance on the State's concession, Simpson leaves it at that and does not restate his other prior claims challenging the penalty phase.

WHEREFORE, the Court should vacate Simpson's convictions and death sentences.

Certification of Counsel

We certify that we have discussed the contents of this motion with the defendant, that we have complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

Respectfully submitted,

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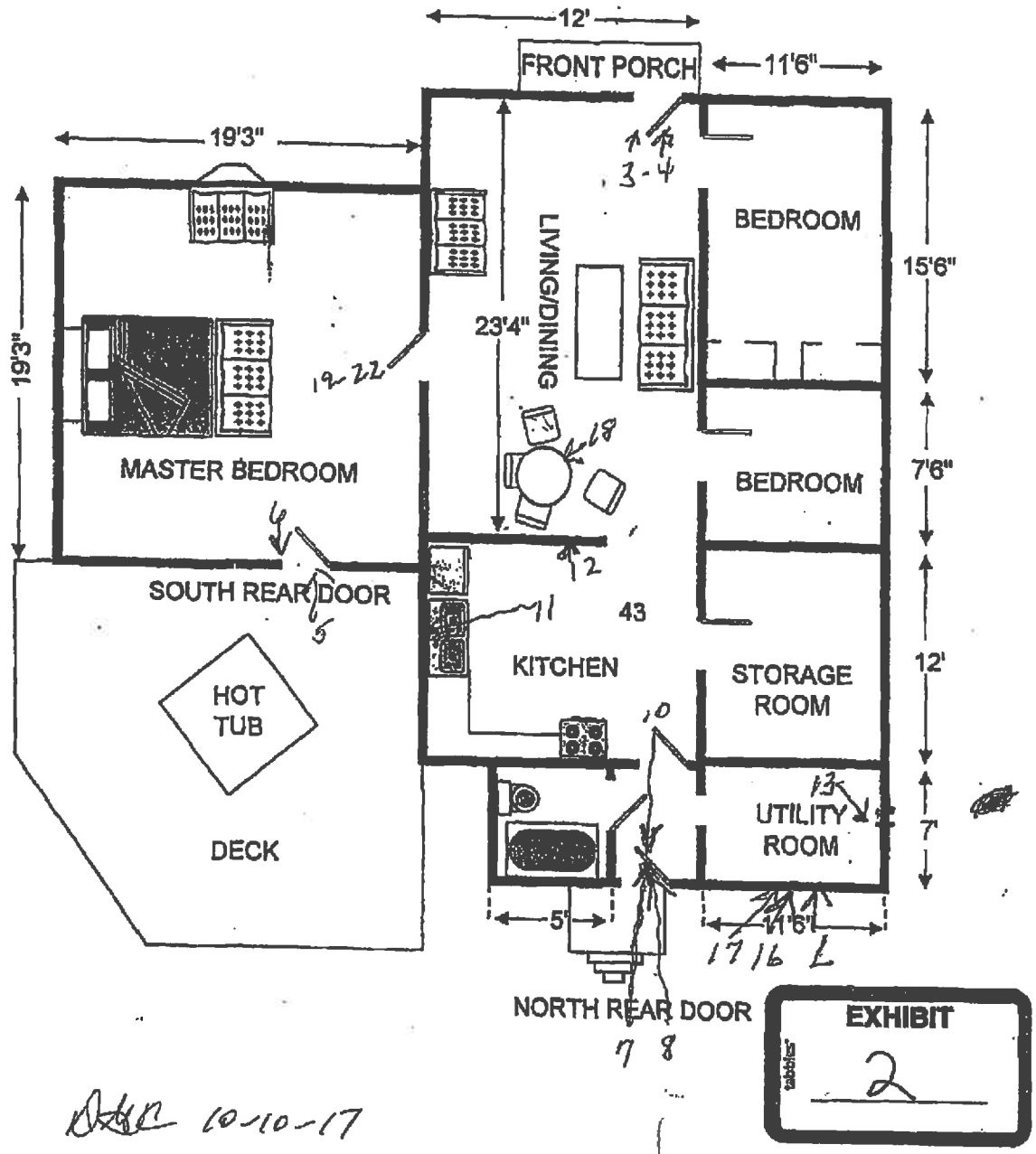
Attorneys for Defendant

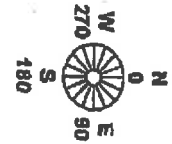
CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **Vivian Singleton**, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, vivian.singleton@myfloridalegal.com and **Meredith Charbula**, Assistant Attorney General, Office of the Attorney General PL-01, The Capitol, Tallahassee, FL 32399-1050, mcharbula@coj.net, and **Mark Caliel**, Assistant State Attorney, Office of the State Attorney, 311 West Monroe Street, Jacksonville, FL 32202, mcaliel@coj.net, by email on this 14th day of March, 2017.

/s/ John S. Mills
John S. Mills
Florida Bar No. 0107719

DIAGRAM SHOWING FLOOR PLAN AT 1621 DERITO DR.





Filed for Identification
Defense
Exhibit XX Date 11-3-17
Case 2002-CF-11026

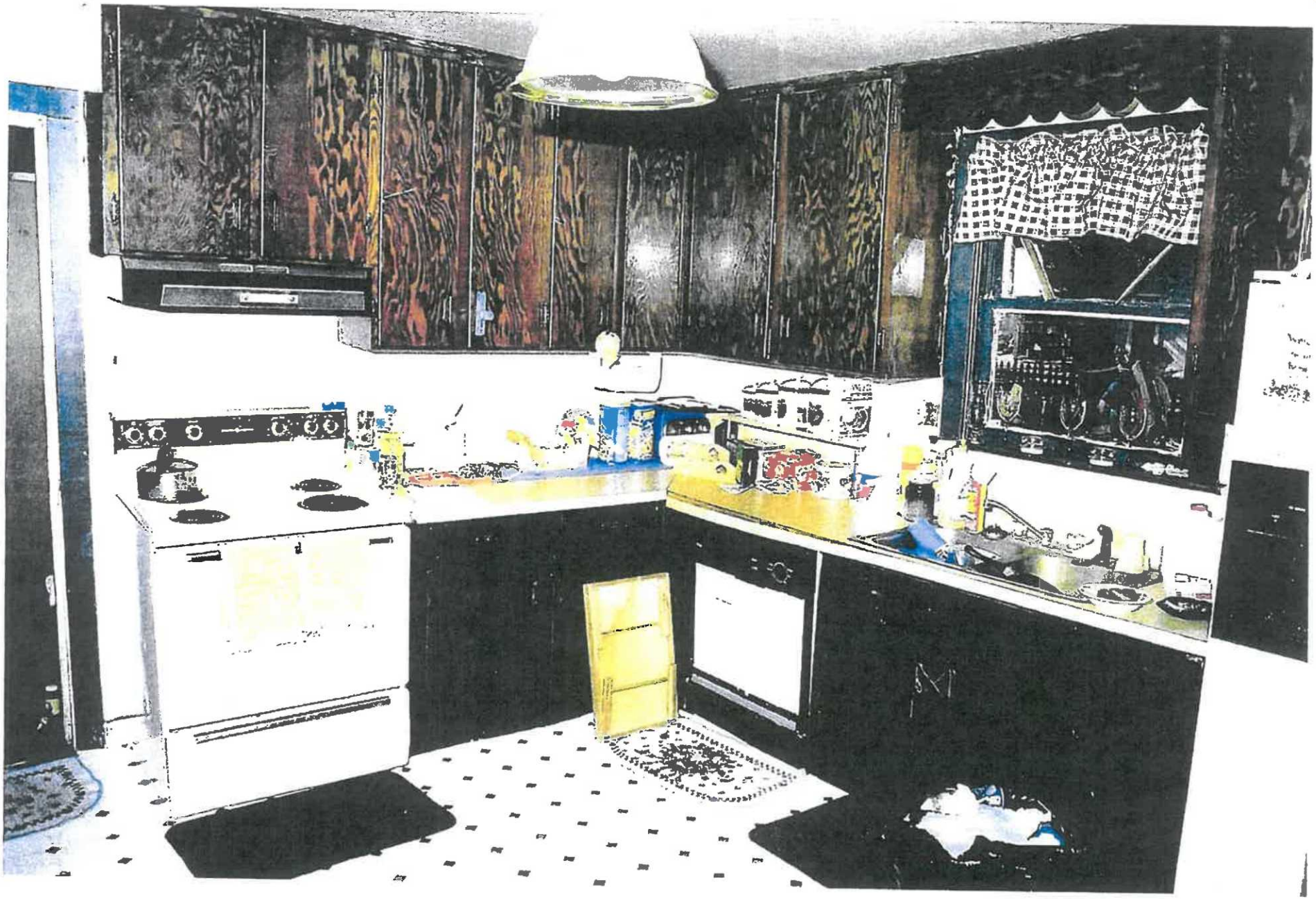
Filed In Evidence as
Defendant's
Exhibit 68 Date 11/14/17
Case 2002-CF-11026

Incident 550851	
Address: 1621 DERITO DR.	
Page 5 OF 32	NOT TO SCALE
Created: 7/17/09	Time: 1:08:28 PM
Drawn By: D. G. CHASE #5576	

EXHIBIT
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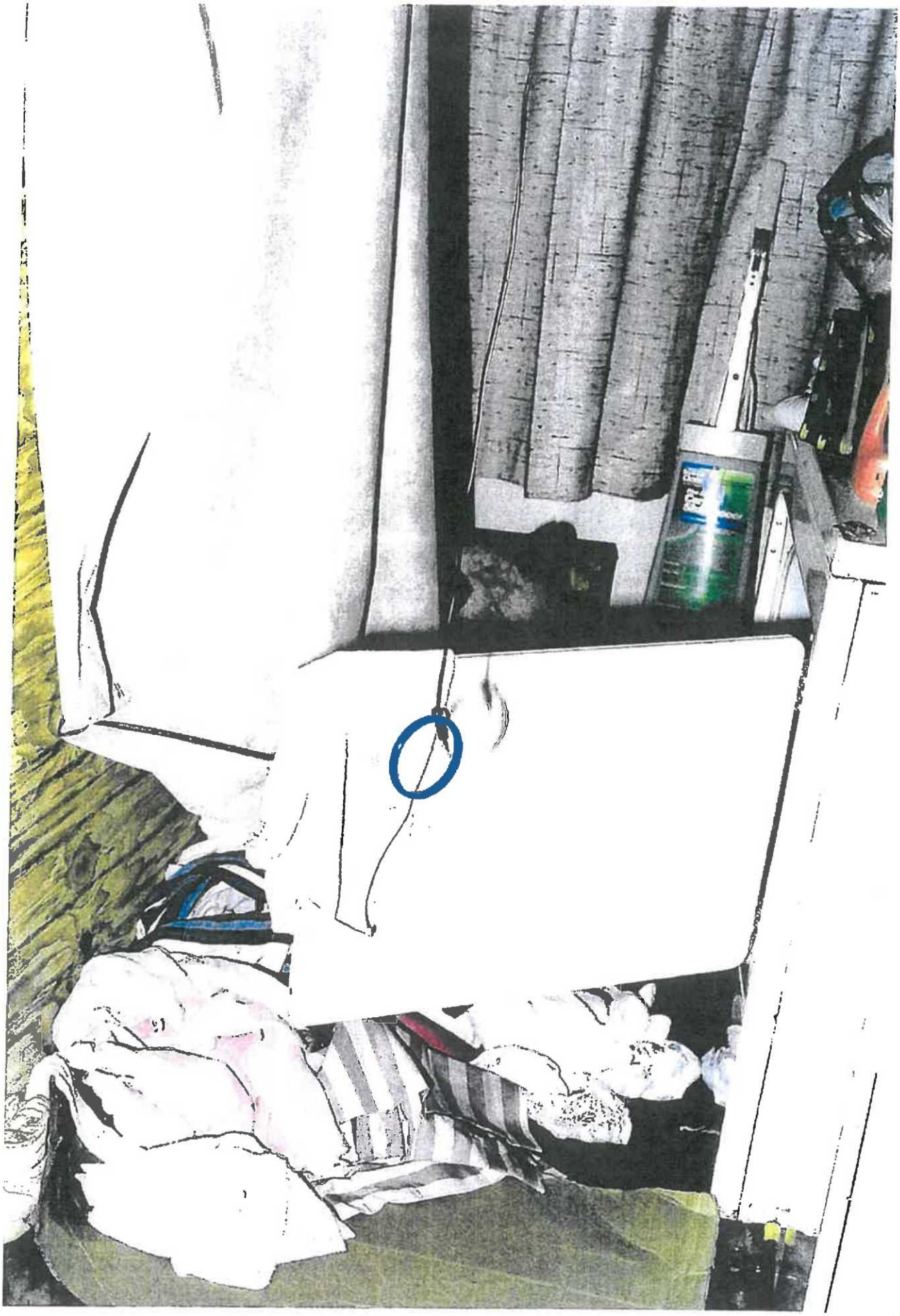
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DHC 10-10-17



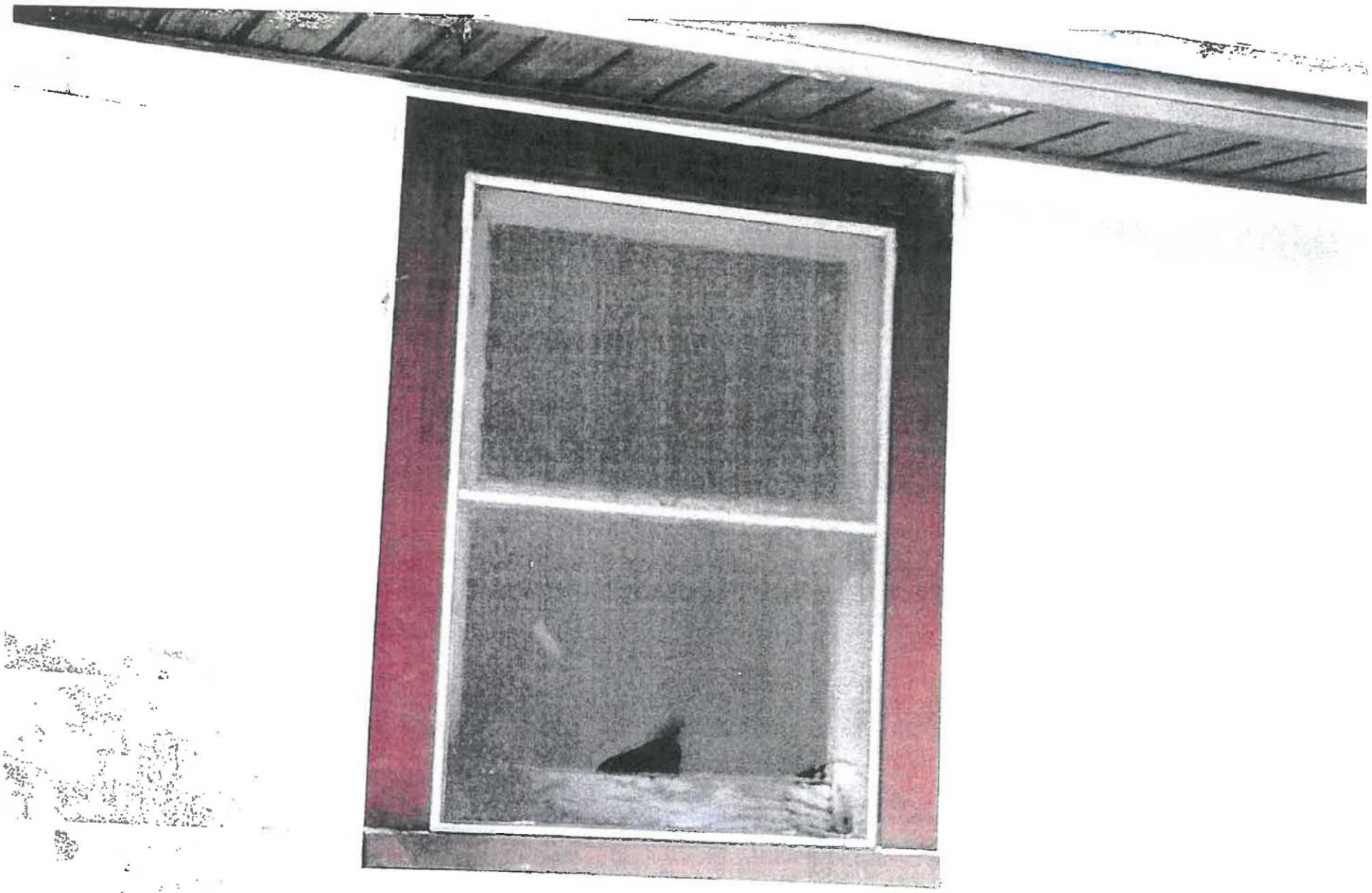
13






Carpet Shampooer
Carpet Shampooer

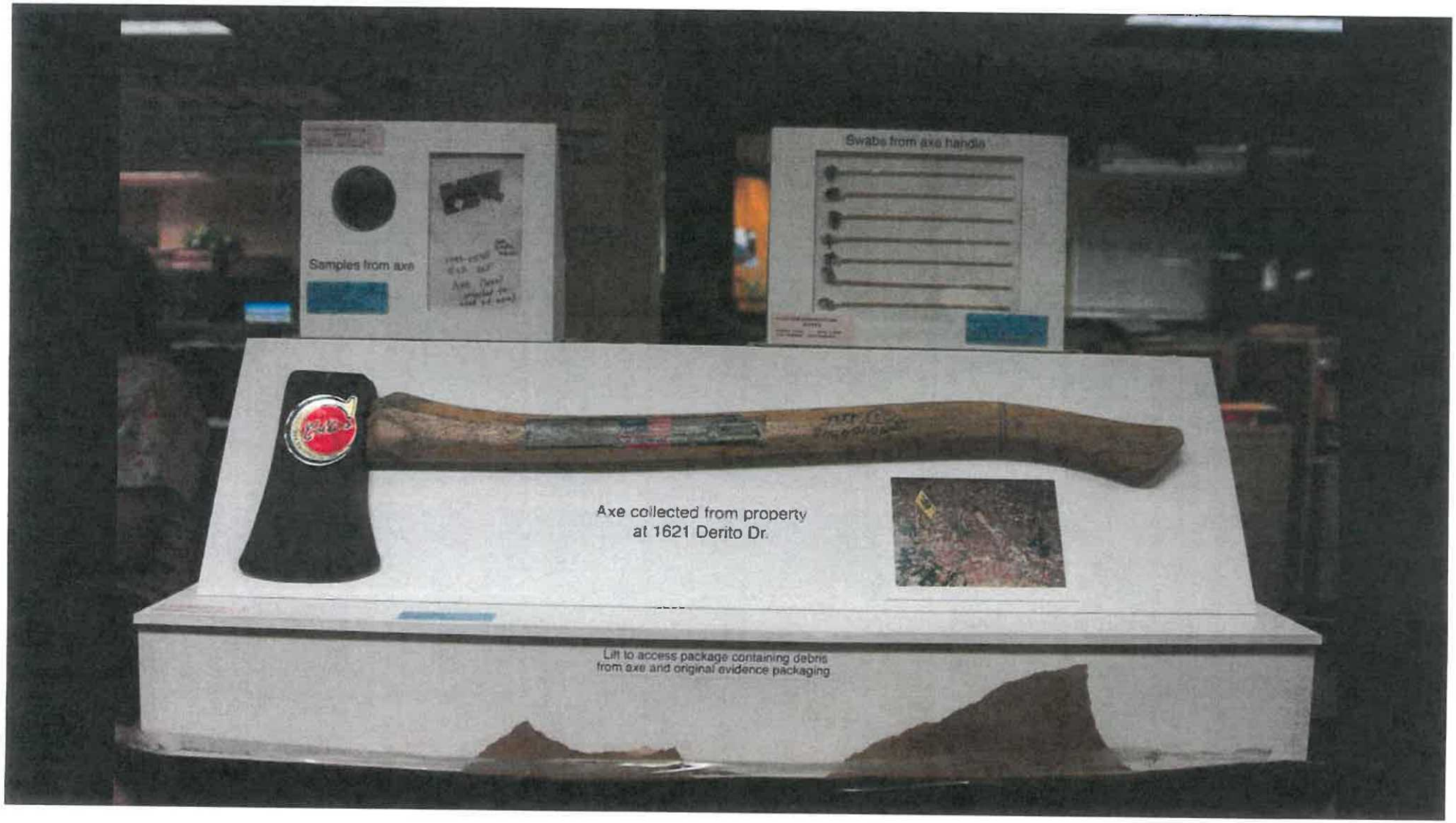




L1



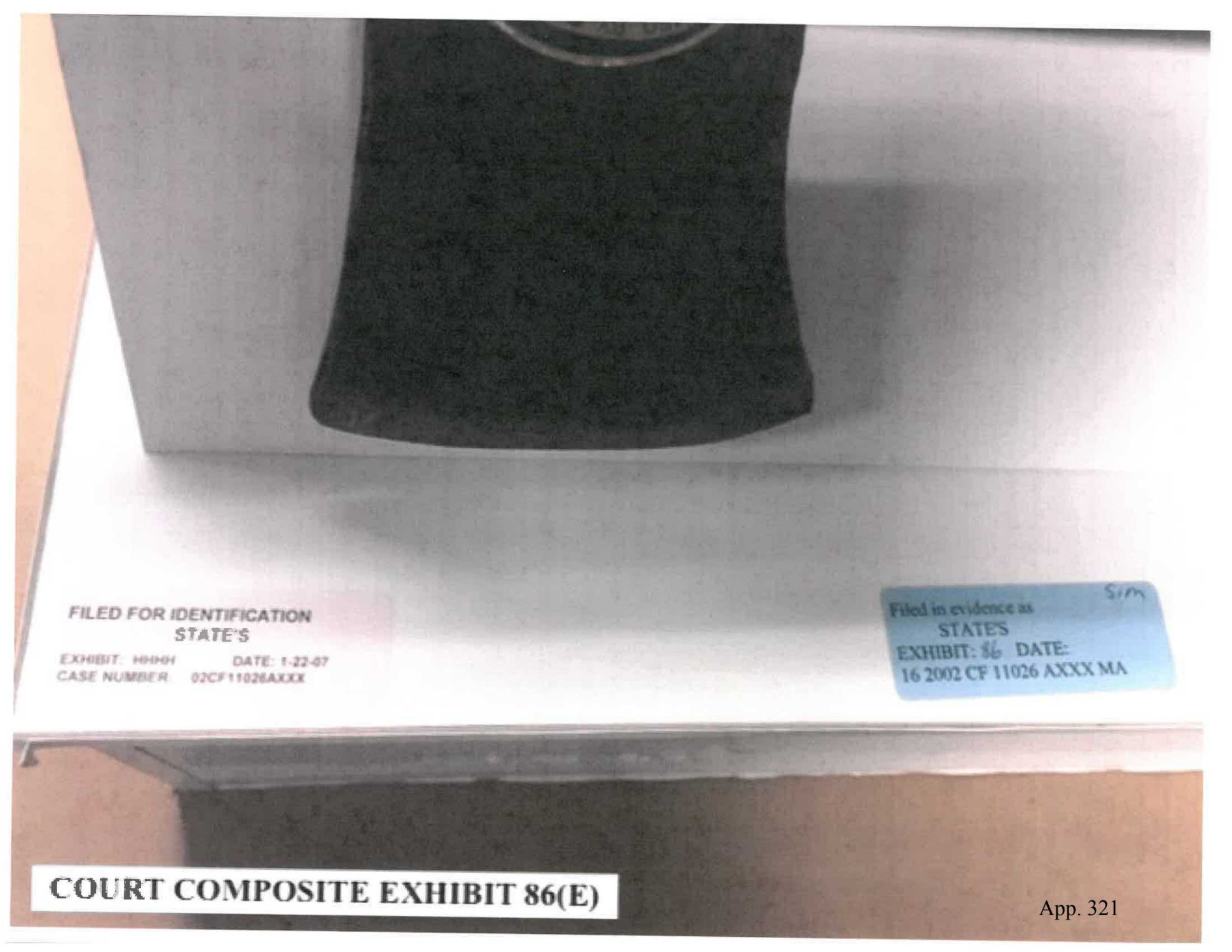

COURT COMPOSITE EXHIBIT 86(C)
DEATH CASE
DEATH CASE
Axe collected from property
at 1621 Derito Dr.
Lift to access package containing debris
from axe and original evidence packaging


Samples from axe
Swabs from axe handle
Axe collected from property
at 1621 Derito Dr.
Lift to access package containing debris
from axe and original evidence packaging

70



72

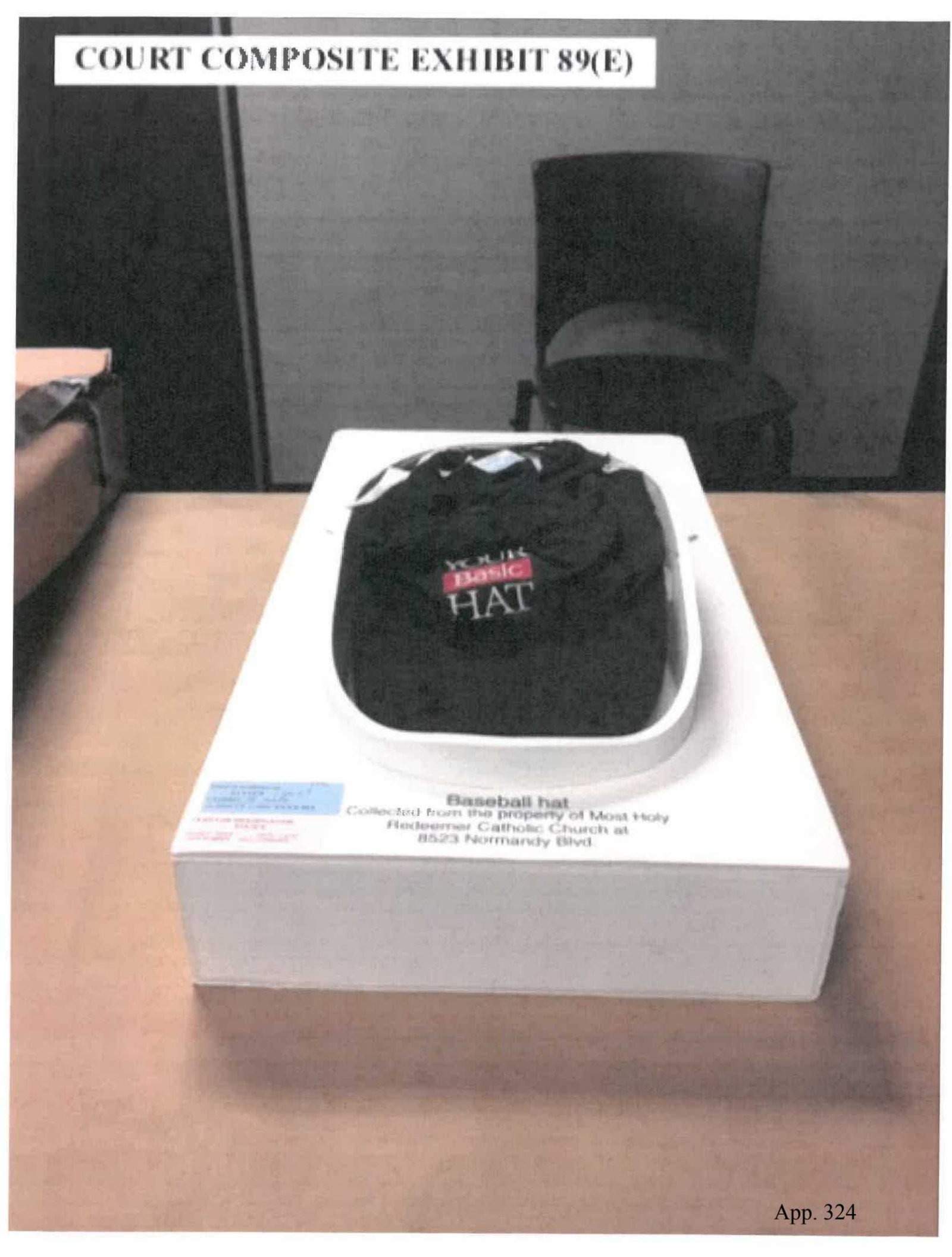


COURT COMPOSITE EXHIBIT 86(E)


COURT COMPOSITE EXHIBIT 86(I)

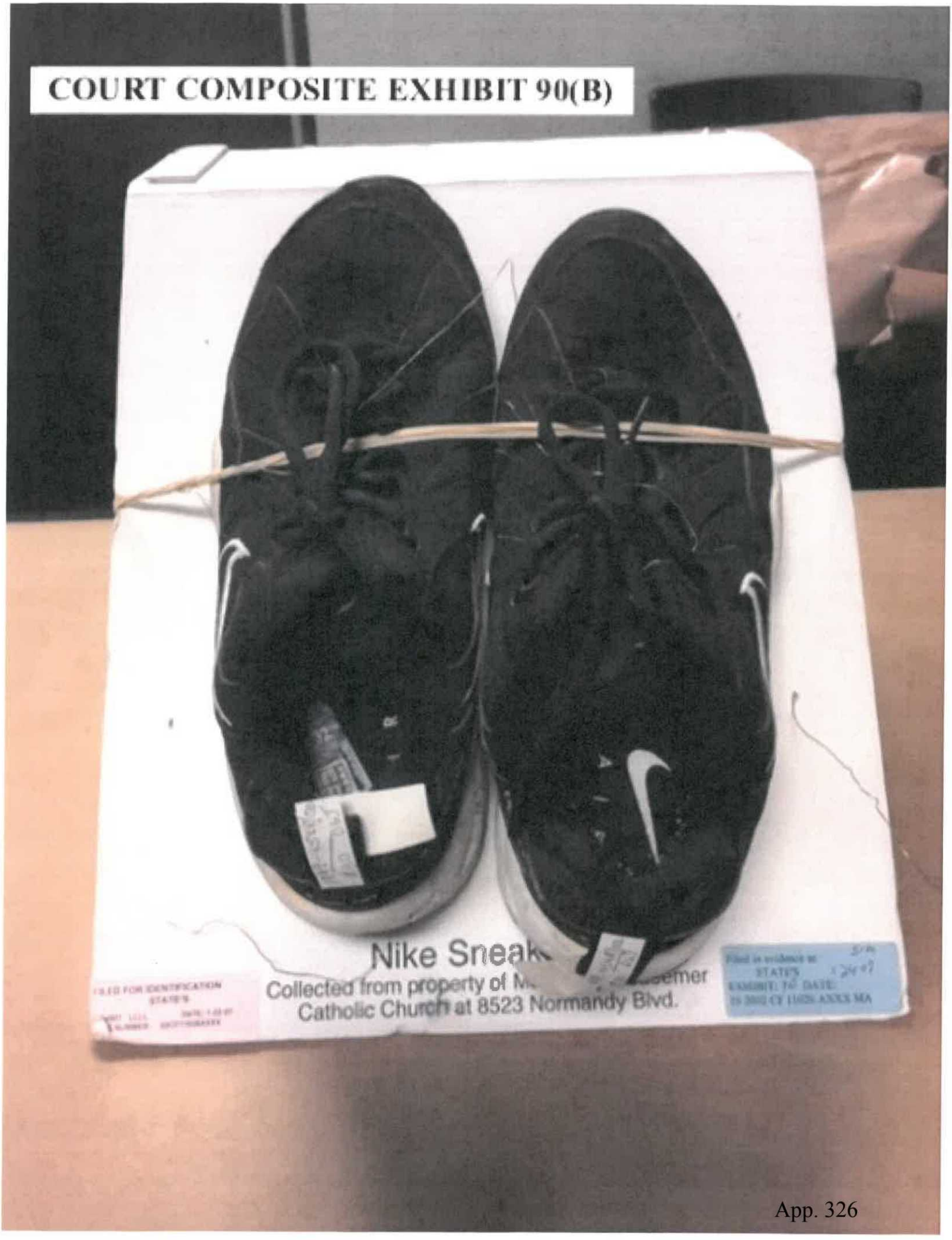


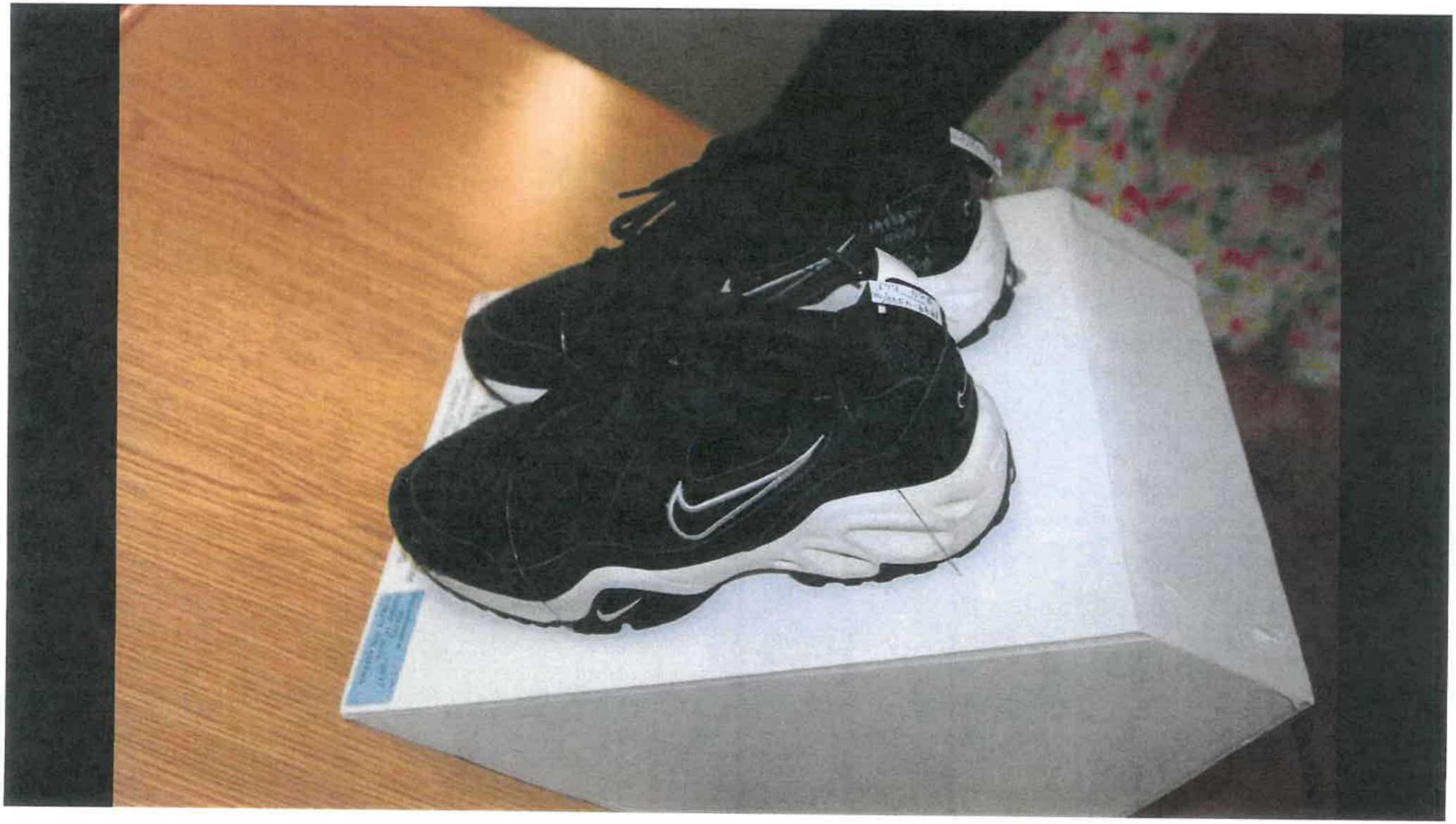
Court Composite Exhibit 89(C)


COURT COMPOSITE EXHIBIT 89(E)
Basic
HAT
Baseball hat
Collected from the property of Most Holy
Redeemer Catholic Church at
8523 Normandy Blvd.

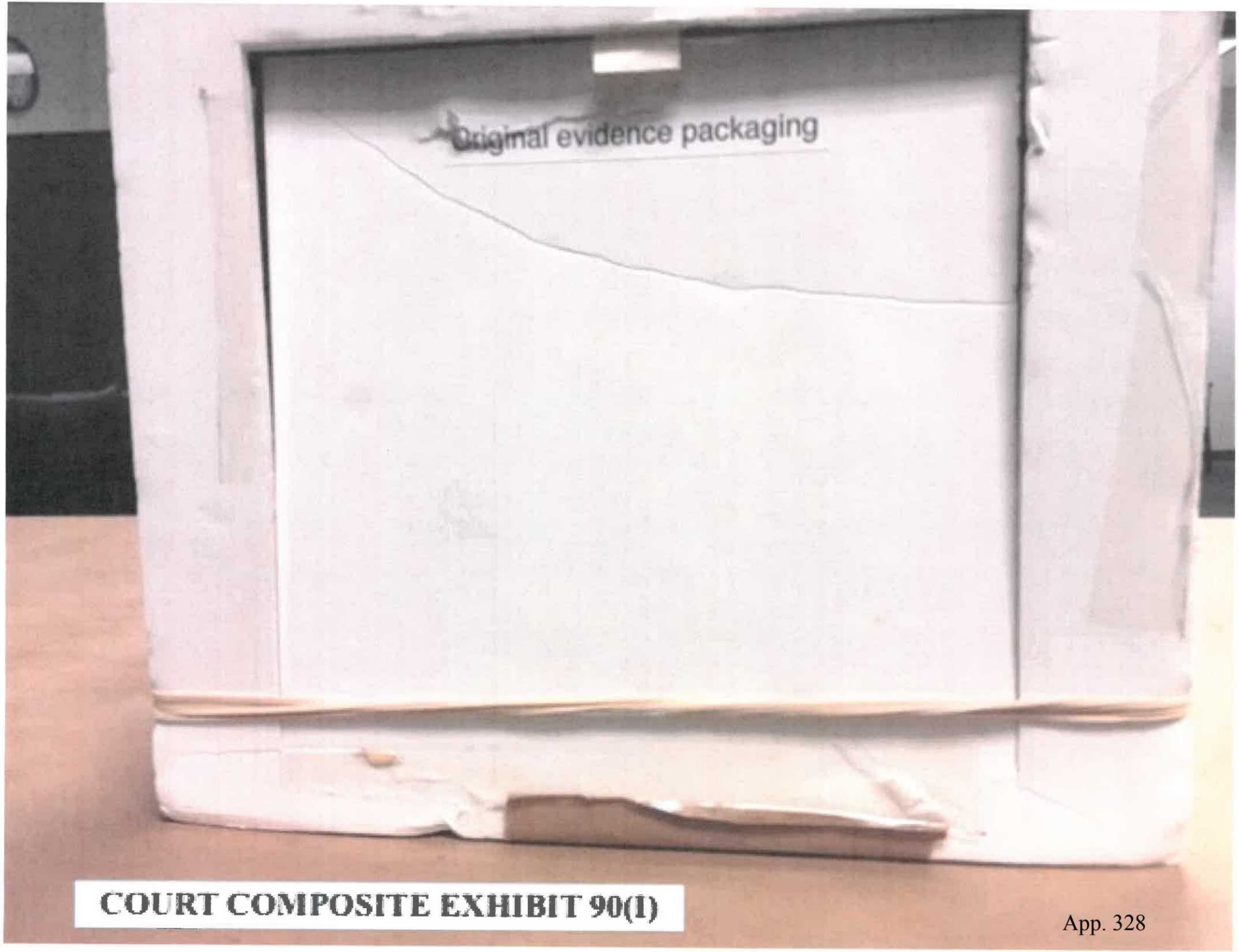


39


COURT COMPOSITE EXHIBIT 90(B)
Nike Sneak
Collected from property of M
Catholic Church at 8523 Normandy Blvd.



104

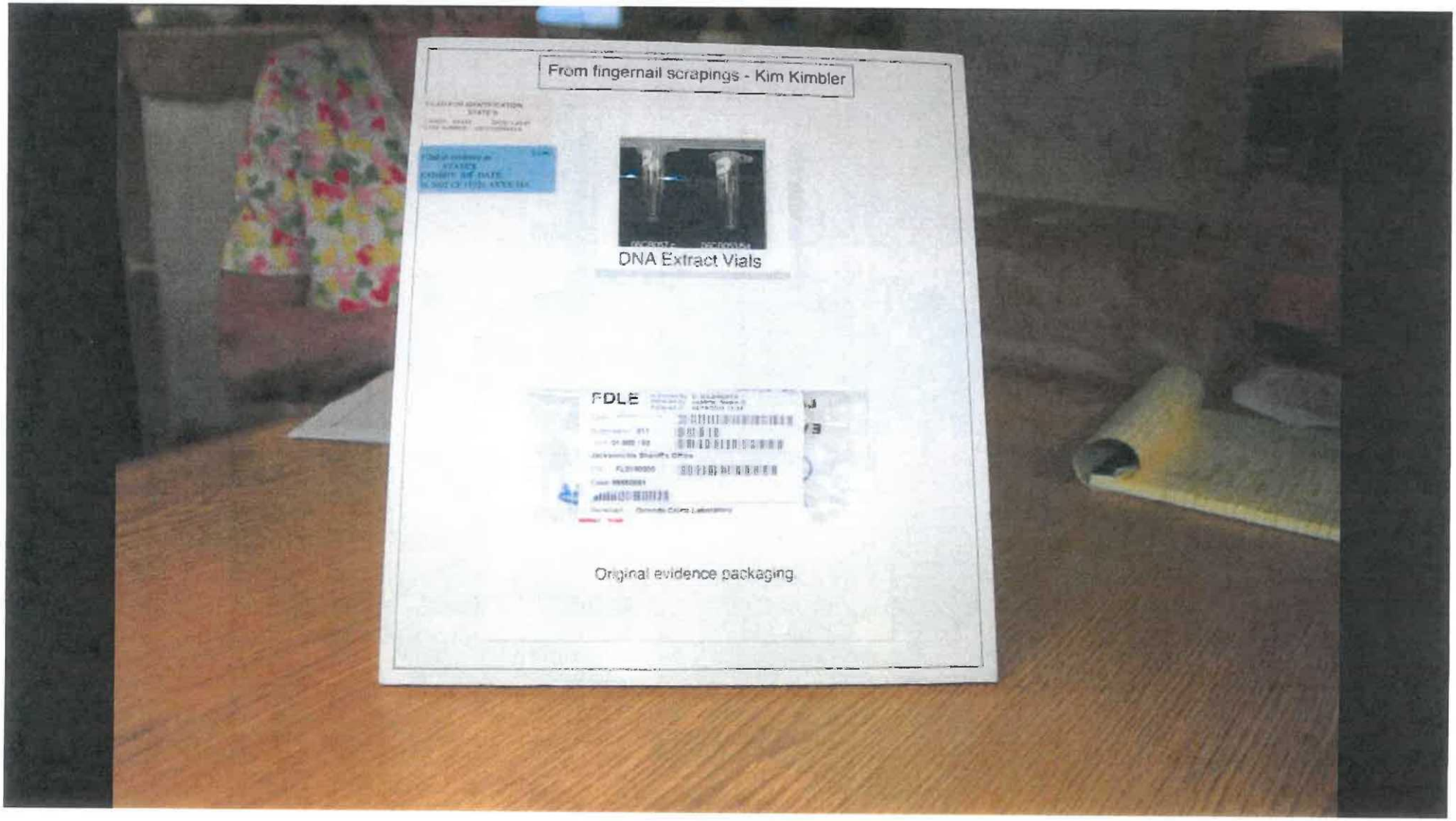


COURT COMPOSITE EXHIBIT 90(I)


Sweatpants - item #29-B
Sweat pants recovered from the property of
Mont Holy Redeemer Catholic Church
8523 Normandy Blvd

33

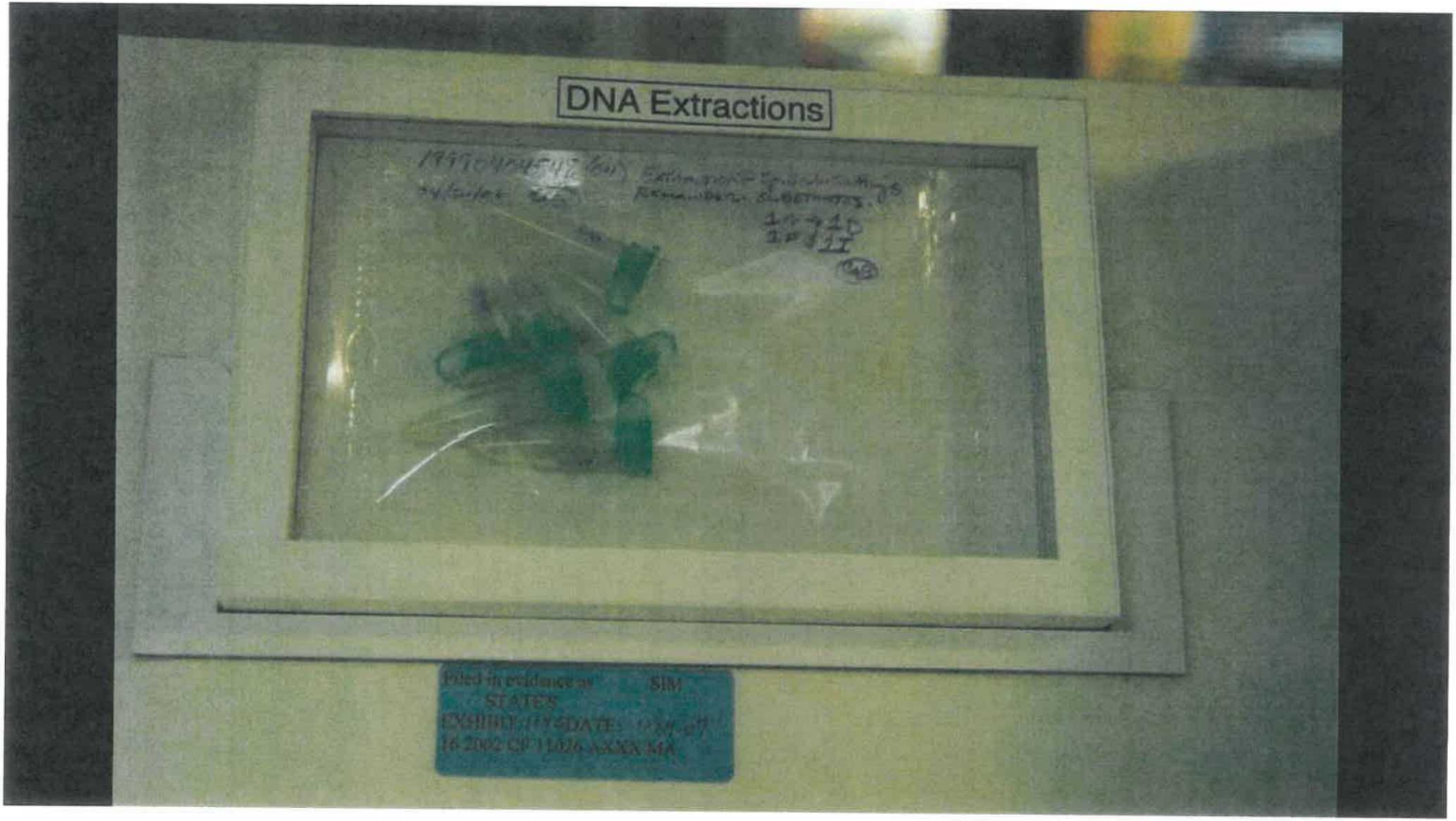



From fingernail scrapings - Kim Kimbler
DNA Extract Vials
FDLE
Original evidence packaging

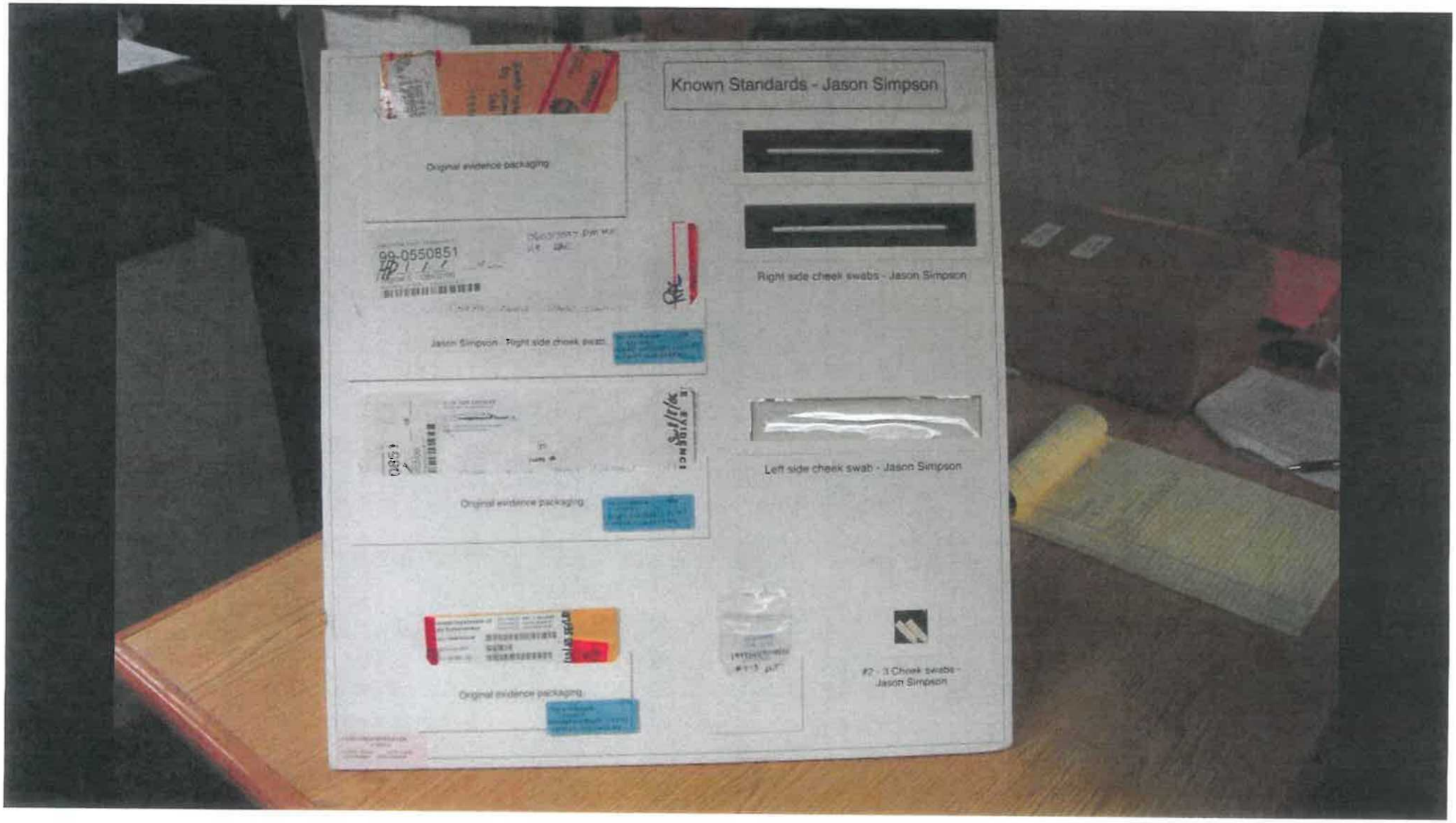
81


From fingernail scrapings - Kim Kimbler
FICATION
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DATE: 1-22-07
11026AXXX
S/M
TE:
XXXX MA
06CB057.c
06CB053/54
DNA Extract Vials

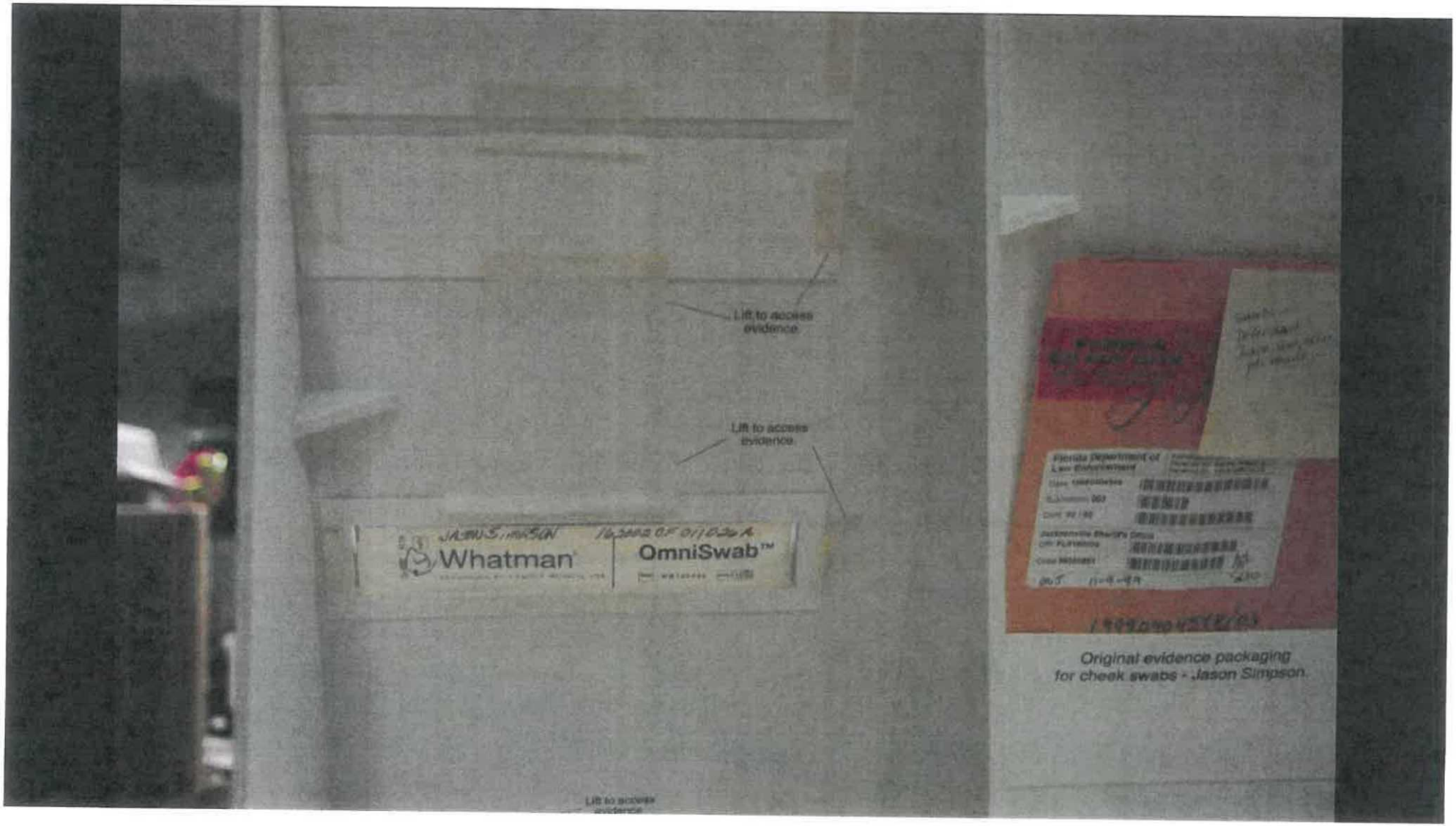
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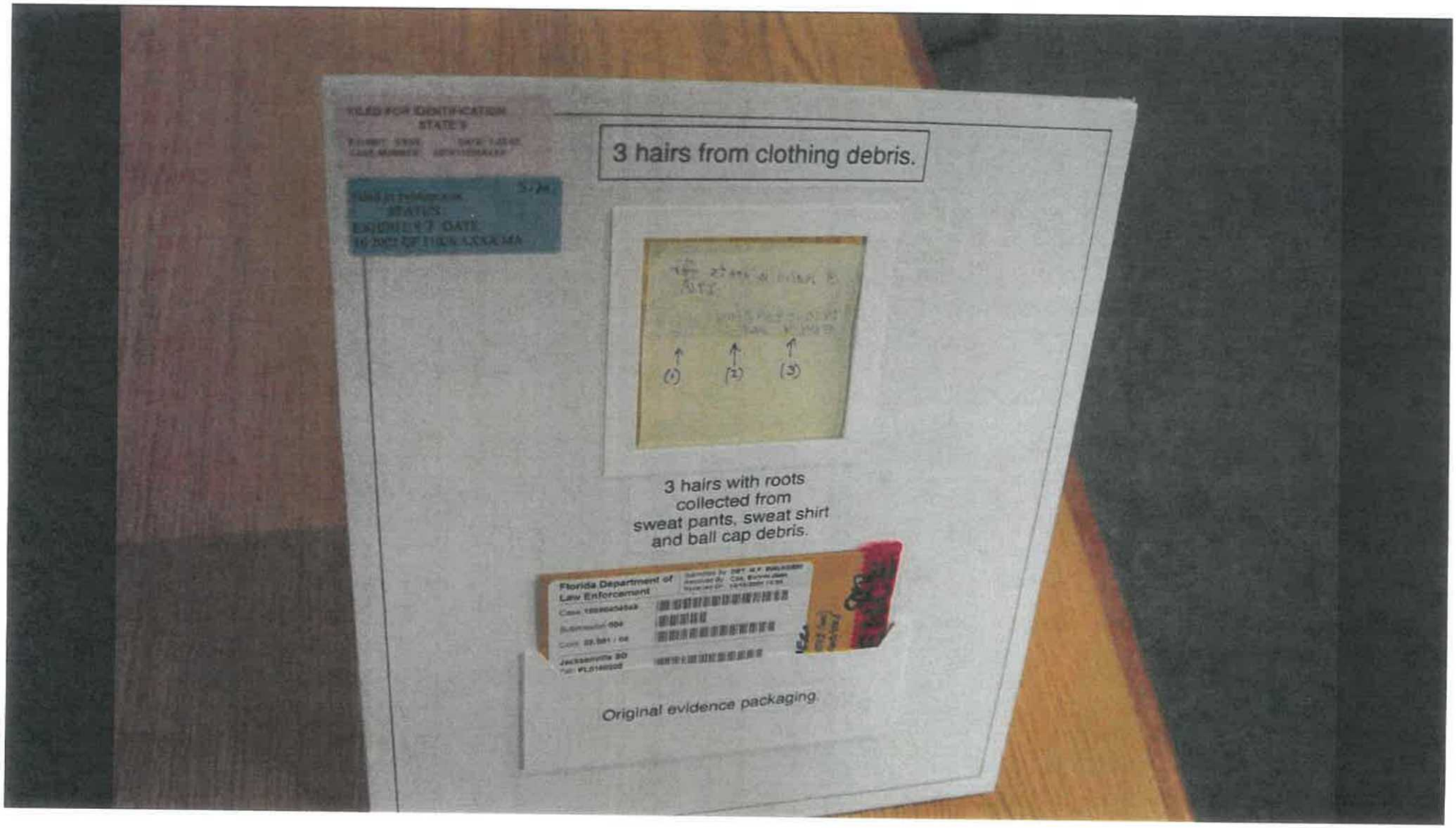
120


Known Standards - Jason Simpson
Original evidence packaging
99-0550851
Jason Simpson - Right side cheek swab
Right side cheek swabs - Jason Simpson
Original evidence packaging
Left side cheek swab - Jason Simpson
Original evidence packaging
#2 - 3 Cheek swabs - Jason Simpson

87


Lift to access evidence
Lift to access evidence
Whatman
OmniSwab™
Florida Department of Law Enforcement
Original evidence packaging for cheek swabs - Jason Simpson.

93


3 hairs from clothing debris.
3 hairs with roots collected from sweat pants, sweat shirt and ball cap debris.
Florida Department of Law Enforcement
Original evidence packaging.

/ 23 23

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Filed for Identification Defense
Exhibit 08 Date 2-5-18 215
Case 2002-CF-11026

BILL: CS/CS/SB 44

SPONSOR: Criminal Justice Committee, Judiciary Committee, and Senator Villalobos

SUBJECT: DNA Evidence

DATE: January 22, 2004 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Lang	JU	Fav/CS
2.	Cellon	Cannon	CJ	Fav/CS
3.			GO	
4.			ACJ	
5.			AP	
6.			RC	

I. Summary:

This bill extends, by two years, the time period within which persons who were convicted at trial and sentenced may petition, under specified circumstances, for post-conviction DNA (deoxyribonucleic acid) testing of evidence that could exonerate them or otherwise reduce their sentence.

The bill provides a deadline of October 1, 2005, for such petitions that would otherwise be time-barred by the operation of the law. This bill also has the effect of requiring governmental entities to preserve physical evidence in their possession for four years before it can be destroyed without having to provide notice.

The bill is effective upon becoming a law with application of its provisions retroactive to October 1, 2003.

II. Present Situation:

With the advent of advanced forensic technology and highly publicized capital cases involving exonerations of convicted defendants, the use of DNA testing is at the forefront of major criminal justice legislative reform in many states. To date, over 36 states, including Florida, have enacted laws to allow post-conviction DNA testing to exonerate or otherwise reduce the sentence of convicted persons under specified circumstances.[1] The criteria vary from state to state as to who may petition, what the petition must allege, whether representation is provided, how payment for DNA testing is made, and when evidence must be preserved.

[1] Two congressional bills are pending relating in part to post-conviction DNA testing. HR 3214 EH (Advancing Justice Through DNA Technology Act of 2003) has passed the House and is in the Senate as of 11/2003.

When the Florida Legislature first addressed this issue in 2001, it gave a person convicted at trial and sentenced a statutory right to petition for post-conviction DNA testing of physical evidence collected at the time of the crime based on the assertion that the DNA test results could exonerate that person or alternatively reduce the sentence. *See* ch. 2001-97, L.O.F.; ss. 925.11 and 943.3251, F.S. In order to petition, the person must: 1) be a person convicted at trial and sentenced, 2) show that his or her identity was a genuinely disputed issue in the case and why, 3) claim to be innocent, and 4) meet the reasonable probability standard that the person would have been acquitted or received a lesser sentence if the DNA testing had been done at the time of trial or done at the time of the petition under the evolving forensic DNA testing technologies.

If the trial court determines that the facts are sufficiently alleged, the state attorney is required to respond within 30 days pursuant to court order. If the court decides to hold a hearing, the court may appoint counsel for an indigent, if necessary. The trial court must make a determination based on a finding of whether:

- the physical evidence that may contain DNA still exists;
- the results of DNA testing of that evidence would have been admissible at trial and whether there is reliable proof that the evidence has not been materially altered and would be admissible at a future hearing; and
- a reasonable probability exists that the defendant would have been acquitted of the crime charged if DNA test results had been admitted at trial.

If the court denies the petition for DNA testing, a motion for rehearing must be filed within 15 days of the order and the 30-day period of appeal is tolled until the court rules on the motion. Otherwise, either party has 30 days to file an appeal of the ruling. The order denying relief must include notice of these time limitations. If the court grants the petition for DNA testing, the defendant is assessed the cost of the DNA testing unless the court finds that the defendant is otherwise indigent. The Florida Department of Law Enforcement (FDLE) performs the DNA test pursuant to court order. *See* s. 943.3251, F.S. The results of the DNA testing are provided to the court, the defendant and the prosecuting authority.

Current Time Limitations

A two-year period for filing such petitions was created in s. 925.11(1)(b), F.S. Florida is one of nine states, out of the 36 states, which provide for post-conviction DNA testing to impose a time limitation on petitioning for post-conviction DNA testing.

The time limitation is measured from *the later of the following dates* based on the law's effective date of October 1, 2001:

- Two years from the date the judgment and sentence became final;
- Two years from the date the conviction was affirmed on direct appeal;
- Two years from the date collateral counsel was appointed (applicable solely in death penalty cases); or
- October 1, 2003.

The first three events captured the persons convicted at trial and sentenced whose cases were still pending in the system for which the applicable event would be triggered on or after October 1, 2001 (the effective date of the act). The October 1, 2003, date provided a window of opportunity to capture two other groups of convicted persons:

1) Those convicted persons whose claims would have been entirely time-barred because two or more years before October 1, 2001 (the effective date), had already elapsed since the applicable triggering event had occurred (that is, anytime before October 1, 1999), and

2) Those convicted persons whose claims would have less than a full two year period to have notice of their right and time to perfect a petition for post-conviction DNA testing because the applicable event was triggered between October 1, 1999 and September 30, 2001 (the day before the effective date of the act).

The law also provides a catch-all exception to the two-year time limitation whereby if the facts upon which the petition is founded was unknown or could not have been known with the exercise of due diligence, then a person convicted at trial and sentenced could petition at any time for post-conviction DNA testing. This language mirrors the language of Rule 3.850 (b)(1), Fl.R.Crim.P., commonly known as the "due diligence/newly discovered evidence" exception.

Preservation of Physical Evidence

Section 925.11(4), F.S., provides for preservation of physical evidence collected at the time of the crime for which post-conviction DNA testing may be requested. With the exception of death penalty cases, physical evidence in the possession of governmental entities must be maintained for at least the time limitations set forth in s. 925.11(1)(b), F.S.[2] Under the statute, evidence in death penalty cases must be maintained for 60 days after the execution of the sentence.

Section 925.11(4)(c), F.S., provides the conditions under which the physical evidence may be disposed of prior to the time limitations set forth in paragraph (1)(b) of s. 925.11, F.S. All of the conditions set forth therein must be met. Prior to the disposition of the evidence, notice must be provided to the defendant and any counsel of record, the prosecuting authority, and the Attorney General. If the notifying governmental entity does not receive, within 90 days after notification, either a copy of a petition for post-conviction DNA testing or a request not to dispose of the evidence because a petition will be filed, the evidence may be disposed of, unless some other provision of law or rule requires its preservation or retention. (Note that until July 1, 2003, s. 43.195, F.S., provided that the clerks of court could dispose of items of physical evidence which have been held as exhibits in excess of three years in cases on which no appeal is pending or can be made. As of July 1, 2003, that section, renumbered as s. 28.213, F.S., includes cases in which no appeal or collateral attack is pending or can be made.)

It should be pointed out that physical evidence in many older cases may have long since been destroyed as a matter of routine purging. If, however, the evidence existed and was under the control of a governmental entity at the time of the enactment of s. 925.11, F.S., it is highly unlikely that it has been destroyed. Given the advent of new testing DNA methods, governmental agencies are keenly aware of the potential usefulness of this evidence. Especially in the most

[2] See s. 925.11(4), F.S.

serious cases, law enforcement actually has an interest in preserving the evidence until the inmate has served his or her sentence to completion. This is so because there is always the possibility a case could come back for a re-trial on some issue. It would reflect poorly on the agency in the eyes of the electorate to have that evidence unavailable for a re-trial of a serious case.

Innocence Projects

Post-conviction DNA testing was primarily publicized through the efforts of attorney Barry C. Scheck and Peter Neufeld who began studying and litigating the forensic evidence testing in 1988. Their efforts resulted in the establishment of the Innocence Project in 1992 at the Benjamin N. Cardozo School of Law. Since then a number of Innocence Projects have been established nationwide including at Shepard Broad Law Center in Nova Southeastern University in Florida and at Florida State University. Many of these projects are run by pro-bono organizations. These projects form the backbone of The Innocence Network which incorporates law schools, journalism schools, and public defender offices to assist inmates trying to prove their innocence whether or not the cases involve biological evidence which can be subjected to DNA testing.

The labor-and time-intensive review[3] process to investigate inmates' claims of innocence made to the Innocence Projects and the approaching two-year time limitation prompted the filing of two emergency petitions[4] before the Florida Supreme Court in September 2003. The petition filed by the Criminal Procedural Rules Committee of the Florida Bar sought to change the October 1, 2003, deadline in Rule 3.853 to October 1, 2004, to "extend the rapidly approaching deadline of October 1, 2003." *Emergency Petition by the Florida Criminal Procedure Rules Committee for an Amendment to the Florida Rules of Criminal Procedure, Case No. SC03-1630.* The Florida Innocence Project and the Florida Innocence Initiative filed an Emergency Petition (*Case No. SC03-1654)* asking the Court to suspend the destruction of physical evidence, at least so long as the Court considered the matters raised by the Emergency Petitions.

On September 30, 2003, the Florida Supreme Court issued an order temporarily suspending the October 1, 2003, deadline in the Florida Rule of Criminal Procedure Rule 3.853 governing motions for post-conviction DNA testing.[5] Rule 3.853 was adopted by the Florida Supreme Court in 2001. *See* ch. 2001-97, L.O.F; s. 925.11, F.S.[6] Oral arguments were heard on November 7, 2003, but no opinion on the merits has been issued to date.

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[3]Time estimates by the Innocence Project range from three to five years for investigating the claims and determining whether such convicted persons have a viable claim to assert for post-conviction DNA testing of evidence that could exonerate them or otherwise reduce their sentence.

[4] The petition filed by the Florida Bar Rules of Criminal Procedure Committee sought a one-year extension to the time limitations in Rule 3.853. The petition filed by a consortia of Florida Innocence Project participants and affected inmates sought a writ of mandamus to prevent the destruction of biological evidence in possession of governmental entities.

[5] *See Amendments to Florida Rule of Criminal Procedure* 3.853(d)(a)(A), Case No. SC03-1630 (September 30, 2003).

[6] Section 925.11, F.S., was enacted in 2001 while an emergency rule petition was pending in the Florida Supreme Court in February 2001. The Florida Bar Criminal Procedures Rules Committee had filed the petition to request an amendment to the rules of criminal procedure that would provide a procedure for post-conviction DNA testing. Subsequent to the adoption of the legislation, the Florida Supreme Court adopted Rule 3.853. *See Amendment to Florida Rules of Criminal Procedure Creating Rule 3*.853, 807 So.2d 633 (Fla. 2001). Rule 3.853 provides procedures for obtaining DNA testing under section 925.11, F.S..

In its September 30 Order, the Court stated:

> To allow this Court an opportunity to fully consider the petitions, the deadline of October 1, 2003, set forth in rule 3.853(d)(1)(A), is hereby suspended until further order of this Court. Further, as petitioners point out, operation of the same deadline in section 925.11(1)(b)1., Florida Statutes (2002), may result in the non-preservation of physical evidence for DNA testing under section 925.11(4)(b). Because such a result would render these proceedings moot and in effect preclude this Court, should it determine it has jurisdiction, from the "complete exercise" thereof, the deadline in section 925.11(1)(b)1. is hereby held in abeyance while this Court considers its jurisdiction and other matters before it. ... No other provision of the rule or statute is affected by this order. *Order Setting Oral Argument, SC03-1630,* September 30, 2003.

Rights to Appeal, Generally

Under current law, a defendant who has been convicted has certain rights to appeal on direct appeal or on matters that are collateral to the conviction. Article V, Section 4(b) of the Florida Constitution has been construed to convey a constitutional protection of this right. *Amendments to the Florida Rules of Appellate Procedure,* 696 So.2d 1103 (Fla. 1996).

Direct Appeals after Trial

Matters which are raised on direct appeal include evidentiary rulings made by the trial court during the course of the defendant's trial, and other matters objected to during the course of the trial such as the jury instructions, prosecutorial misconduct, and procedural rulings made by the trial court. The Legislature codified the "contemporaneous objection" rule, a procedural bar that prevented defendants from raising issues on appeal which had not been objected to at the trial level. The rule allowed trial court judges to consider rulings carefully, perhaps correcting potential mistakes at the trial level.

Section 924.051(3), F.S., was enacted as part of the Criminal Appeal Reform Act of 1996 and reads as follows: "(3) An appeal may not be taken from a judgment or order of a trial court unless prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error."

The Florida Supreme Court found in *State v. Jefferson,* 758 So.2d 661 (Fla. 2000), that the foregoing provision did not constitute a jurisdictional bar to appellate review in criminal cases, but rather that the Legislature acted within its power to "place reasonable conditions" upon this right to appeal (quoting from *Amendments to the Florida Rules of Appellate Procedure,* id., at 1104-1105.).

Collateral Review

Postconviction proceedings, also known as collateral review, usually involve claims that the defendant's trial counsel was ineffective, claims of newly discovered evidence and claims that the prosecution failed to disclose exculpatory evidence. Procedurally, collateral review is

generally governed by Florida Rule of Criminal Procedure 3.850. A rule 3.850 motion must be filed in the trial court where the defendant was tried and sentenced. According to rule 3.850, unless the record in the case conclusively shows that the defendant is entitled to no relief, the trial court must order the state attorney to respond to the motion and may then hold an evidentiary hearing. *Fla. R. Crim P. 3.850(d).* If the trial court denies the motion for postconviction relief with or without holding an evidentiary hearing, the defendant is then entitled to an appeal of this denial to the District Court of Appeal that has jurisdiction over the circuit court where the motion was filed.

A rule 3.850 motion must be filed within two years of the defendant's judgment and sentence becoming final unless the motion alleges that the facts on which the claim is based were unknown to the defendant and could not have been ascertained by the exercise of due diligence. *Fla. R. Crim. P. 3.850(b).* In order to grant a new trial based on newly discovered evidence, the trial court must first find that the evidence was unknown and could not have been known at the time of trial through due diligence. Also, the trial court must find that the evidence is of such a nature that it would probably produce an acquittal on retrial. *Torres-Arboleda v. Dugger,* 636 So.2d 1321 (Fla. 1994); *Jones v. State,* 709 So.2d 512 (Fla. 1998).

Motions for postconviction relief based on newly discovered evidence must be raised within two years of the discovery of such evidence. *Adams v. State,* 543 So.2d 1244 (Fla.1989) . The Florida Supreme Court has held that the two year time limit for filing a 3.850 motion based on newly discovered evidence begins to run on a defendant's postconviction request for DNA testing when the testing method became available. For example, in *Sireci v. State,* 773 So.2d 34 (Fla. 2000), the Florida Supreme Court held that the defendant's postconviction claim filed on his 1976 conviction, which was filed in 1993, was time barred because "DNA typing was recognized in this state as a valid test as early as 1988." See also, *Ziegler v. State,* 654 So.2d 1162 (Fla. 1995).

Appeal or Review After a Plea of Guilty or Nolo Contendere

When a defendant pleads guilty or nolo contendere (no contest), having elected not to take his or her case to trial, appeal rights are limited. Section 924.07(3), F.S., states: "A defendant who pleads guilty with no express reservation of the right to appeal a legally dispositive issue, or a defendant who pleads nolo contendere with no express reservation of the right to appeal a legally dispositive issue, shall have no right to direct appeal."

In *Robinson v. State,* 373 So.2d 898 (Fla. 1979), the Court was asked to review the constitutionality of the foregoing statutory language. The Court upheld the statute as applied in the Robinson case, making it clear that once a defendant pleads guilty the only issues that may be appealed are actions that took place contemporaneous with the plea. The Court stated: "There is an exclusive and limited class of issues which occur contemporaneously with the entry of the plea that may be the proper subject of an appeal. To our knowledge, they would include only the following: (1) subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea." These principles continue to control.

Section 924.051(4), F.S., enacted as part of the Criminal Appeal Reform Act of 1996, states: "(4) If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty without expressly reserving the right to

appeal a legally dispositive issue, the defendant may not appeal the judgment or sentence." The Florida Supreme Court was asked to review this statute in *Leonard v. State,* 760 So.2d 114 (Fla. 2000), and noting its similarity to the statute reviewed in *Robinson*, found that the enactment of that statute basically codified the rule in *Robinson*.

In the *Leonard* case the Court states the rule to be followed by the lower courts: "[t]he district courts should affirm summarily … when the court determines that an appeal does not present: (1) a legally dispositive issue that was expressly reserved for appellate review pursuant to section 924.051(4); (2) an issue concerning whether the trial court lacked subject matter jurisdiction as set forth in *Robinson*; or (3) a preserved sentencing error or a sentencing error that constitutes fundamental error as set forth in our opinion in *Maddox*, 760 So.2d 89 (Fla. 2000)." (*Maddox v. State* explains that a claim that the sentence imposed exceeds the maximum sentence allowed by statute constitutes a fundamental error that can be raised on appeal, even when the defendant had pled guilty. *Id.* at 101.)

The general policy of the Florida Supreme Court, and the Court's interpretation of the policy of the Legislature, is that where a defendant enters a plea of nolo contendere and reserves the right to appeal the trial court's crucial ruling on legal issues that are dispositive of the case, it avoids an unnecessary trial and helps narrow the issues much like stipulations to the facts or law can do in a trial situation. *See State v. Ashby,* 245 So.2d 225 (Fla. 1971); *Brown v. State,* 376 So.2d 382 (Fla. 1979). When the parties stipulate that an issue is dispositive, in that the state cannot or will not proceed with the prosecution of the case if the case is remanded because the crucial trial court ruling is reversed, the state may not argue otherwise on appeal. *Phuagnong v. State,* 714 So.2d 527 (Fla. 1st DCA 1998). The First District Court of Appeal further held that no stipulation is necessary under certain circumstances, such as where the trial court ruled upon the constitutionality of the statute under which the defendant is charged. In a case where that lower court ruling is not upheld on appeal, it is not merely tactically infeasible for the state to go forward, it is legally impossible. *Griffin v. State,* 753 So.2d 676 (Fla. 2000).

Postconviction Proceedings in Capital Cases

After a defendant has been sentenced to death, the defendant is entitled to challenge the conviction and sentence in three distinct stages. First, the public defender or private counsel is required to file a direct appeal to the Florida Supreme Court. An appeal of the Florida Supreme Court's decision on the direct appeal is to the United States Supreme Court by petition for writ of certiorari.

Second, if the U.S. Supreme Court rejects the appeal, state collateral postconviction proceedings or collateral review begin. The Capital Collateral Regional Counsel (CCRC) or attorneys appointed from the Registry represent most defendants in capital collateral postconviction proceedings.

State collateral postconviction proceedings are controlled by Rules 3.850, 3.851 and 3.852, Fla. R.Crim.P. Unlike a direct appeal, which challenges the legal errors apparent from the trial transcripts or record on appeal, a collateral postconviction proceeding is designed to raise claims which are "collateral" to what transpired in the trial court. Consequently, such postconviction proceedings usually involve the three categories of claims mentioned previously: ineffective assistance of trial counsel; Brady violations, i.e., a due process denial from the prosecution's

suppression of material, exculpatory evidence; and newly discovered evidence, for example, post-trial recantation by a principal witness.

Since the consideration of these claims often require new fact finding, collateral postconviction motions are filed in the trial court which sentenced the defendant to death. Appeals from the grant or denial of postconviction relief are to the Florida Supreme Court.

The third, and what is intended to be the final stage is federal habeas corpus, a proceeding controlled by 28 U.S.C. s. 2254(a). Federal habeas allows a defendant to petition the federal district court to review whether the conviction or sentence violates or was obtained in violation of federal law. Federal habeas is almost exclusively limited to consideration of claims previously asserted in direct appeal or in state postconviction proceedings. Appeals of federal habeas are to the Federal Eleventh Circuit Court of Appeal and then to the United States Supreme Court.

Finally, once the Governor signs a death warrant, a defendant will typically file a second or successive collateral postconviction motion and a second federal habeas petition along with motions to stay the execution.

Rule 3.850(f), Fla.R.Crim.P, restricts successive collateral postconviction motions as follows: "A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules."

The Florida Supreme Court has held that the restriction against such successive motions on grounds previously raised is applied "only when the grounds raised were previously adjudicated on their merits, and not where the previous motion was summarily denied or dismissed for legal insufficiency." *McCrae v. State,* 437 So. 2d 1388, 1390 (Fla.1983); See also *Ranaldson v. State,* 672 So. 2d 564, 565 (Fla. 1st DCA. 1996). However, when the Court finds that the defendant could have and should have raised his or her claims in the original motion, Rule 3.850(f) works as a "procedural default." *See* e.g., *Pope v. State,* 702 So. 2d 221, 223 (Fla. 1997).

Time limitations, amending motions in capital cases. Rule 3.851 applies to all motions and petitions for any type of postconviction or collateral relief by prisoners who have been sentenced to death. Rule 3.851(b)(1) provides that a Rule 3.850 motion must be filed within one year after the judgment and sentence in a death case become final. Rule 3.851(3), states that the one year time limitation in Rule 3.851(b)(1) assumes that the defendant will have counsel assigned and working on the postconviction motion within 30 days after the judgment and sentence become final. "Further, this time limitation shall not preclude the right to amend or to supplement pending pleadings pursuant to these rules."

III. Effect of Proposed Changes:

This bill amends s. 925.11, F.S., and has the effect of extending the current two-year time limitation during which time a person convicted at trial and sentenced must file a petition for post-conviction DNA testing of evidence to a four-year time limitation. The bill extends the

previous deadline of October 1, 2003, to October 1, 2005, for any petition that would otherwise be time-barred. This bill provides that the act becomes effective upon becoming law.

Extending the filing deadlines should result in the time necessary for the thorough investigation of claims of innocence and the filing of well-pled petitions for post-sentencing DNA testing resulting therefrom.

By virtue of extending the filing deadline, the requirements related to preservation of evidence set forth in s. 925.11(4), F.S., are necessarily likewise extended.

The bill is effective upon becoming a law and the application of its provisions is retroactive to October 1, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Legislature has the exclusive power to enact substantive laws while Article V, Section 2 of the Florida Constitution gives the Florida Supreme Court the power to "adopt rules for the practice and procedure in all courts, including the time for seeking appellate review." This bill may be challenged on a claim that it violates the separation of powers doctrine. *Art. II, Sect. 3, Fla. Const.* In January of 2000, the Legislature passed the Death Penalty Reform Act (DPRA) of 2000. The bill advanced the start of the postconviction process in capital cases to have it begin while the case was on direct appeal. The bill also imposed other time limitations at key points of the postconviction process. The bill made conforming changes to the laws governing public records in capital cases. The bill also eliminated successive postconviction motions and prohibited amending a postconviction motion after the expiration of the time limitation. The bill repealed the rules of criminal procedure applying to capital postconviction motions.

In *Allen v. State*, 756 So.2d 52 (Fla. 2000), the Florida Supreme Court held that the Death Penalty Reform Act of 2000 was an "unconstitutional encroachment" on the Court's "exclusive power to 'adopt rules for the practice and procedure in all courts.'" *Id.* at 54. The court rejected the State's argument that the deadlines for filing postconviction motions in the DPRA were comparable to statutes of limitations in civil cases which the court had previously considered substantive. *Id.* at 61. The court held that rule 3.850 of

the Florida Rules of Criminal Procedure is a "procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus" under the Florida Constitution. *Id.* at 61, *Art. I, Sect. 13, Fla. Const.* According to the court, "[d]ue to the constitutional and quasi-criminal nature of habeas corpus proceedings and the fact that such proceedings are the primary avenue through which convicted defendants are able to challenge the validity of a conviction and sentence, we hold that article V, section 2(a) of the Florida Constitution grants this Court the exclusive authority to set deadlines for postconviction motions." *Id.* at 62.

The provisions of this bill may be distinguishable from those of the DPRA due to the fact that this bill creates a new substantive right to DNA testing in limited circumstances while the DPRA restricted postconviction rights which were otherwise available through existing provisions of the state constitution. The Legislature may limit substantive rights that it has created. *City of Lake Mary v. Seminole County,* 419 So.2d 737 (Fla. 5th DCA 1982)(upholding limited right of appeal in annexation proceedings and stating, "[i]f the Legislature has the power to create a right of appeal in the circuit court where none previously existed, it is incongruous to assert that it cannot limit the scope of that review."); *Department of Transp. v. Fortune Federal Sav. and Loan Ass'n,* 532 So.2d 1267, 1270 (Fla. 1988)("It is only by the will of the legislature that business damages may be awarded in certain situations which are properly limited by the legislature. In other words, the legislature has created a right to business damages, so it may also limit that right."); *Fernandez v. Florida Ins. Guaranty Ass'n, Inc.,* 383 So.2d 974, 976 (Fla. 3rd DCA 1980)(holding that because absent the legislative creation of the Florida Insurance Guaranty Association, "there would be no effective remedy to recovery on any claims whatever against insolvent insurers, there can be no constitutional infirmity in the legislature's decision to limit those newly-created rights and, in effect, not to establish an additional one.")

As previously stated, the bill *expands* certain time limitations for seeking postconviction review, in that motions for testing of physical evidence for DNA may be filed either by October 1, 2005, or within 4 years of a judgment and sentence becoming final. For those whose review has been time-barred, this bill opens a new window of opportunity.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Two population pools of persons convicted at trial and sentenced are affected by this bill: those currently in the custody of the Department of Corrections (DOC) and those who have previously been released or were never actually in DOC custody. It is unknown at this time how many convicted persons could be potentially affected by the extension of the time limitation in the post-conviction DNA testing statute. According to the Florida Department of Corrections, of the 363 offenders released during 2002-2003, 76 of those offenders were released due to having their sentences or judgments vacated by the courts.

DOC was unable to provide the *reasons* for the court action. It is unknown at this time how many cases, if any, are being held in abeyance pending the resolution of the s. 925.11, F.S., time limitation issues by the Court or the Legislature.

According to OPPAGA, no agreed upon methodology exists for estimating the number of potentially innocent people wrongfully convicted of crimes. Estimates have ranged from 0.3 percent – 5 percent statewide to 10 percent nationwide. Furthermore according to OPPAGA, even for those who may be wrongfully convicted, DNA evidence may not necessarily be a component for proving innocence and even if it is, DNA evidence may not actually exist or be available for testing which would significantly narrow the pool of convicted persons who may petition for relief.

C. Government Sector Impact:

Petitions generated by this bill will have an indeterminate impact on trial courts, state attorneys, the Department of Corrections, and the Florida Department of Law Enforcement. It is unknown at this time what type of DNA analysis is currently performed by the Florida Department of Law Enforcement and the extent of backlog, if any, on DNA testing and particularly, post-conviction DNA testing orders. It is unknown how much expense is incurred on behalf of indigent defendants for post-conviction DNA testing.

It is also unknown at this time how much expense is incurred on behalf of indigent defendants to investigate and determine viable claims for filing post-conviction petitions for DNA testing.

There may also be an indeterminate increase in costs incurred by the extension as affecting storage and preservation of evidence in the custody of local and state governmental entities and nongovernmental entities including but not limited to Florida Department of Law Enforcement, police departments, clerks of the court, courts, state attorneys' offices, public and private labs, hospital facilities, private counsels' offices, capital collateral offices, and public defenders' offices.

VI. Technical Deficiencies:

None.

VII. Related Issues:

DNA Testing
It is not known whether the development of a new, scientifically more reliable method of DNA testing that is approved or used would alone qualify under the 'unknown fact' exception to the statute of limitations period for post-conviction DNA testing in s. 925.11. Rule 3.853 of the Florida Rules of Criminal Procedures appears to provide relief by allowing evidence to be tested by methods not available at the time of trial. This exception is most relevant for persons whose cases predate the existence or availability of DNA testing technologies at the time of trial. The term "DNA testing" is not defined in s. 925.11, F.S., or in any other statutory section. Florida statutes do define "DNA analysis" in s. 760.40, F.S., to mean the "medical and biological

examination and analysis of a person to identify the presence and composition of genes in that person's body. The definition also includes "DNA typing and genetic testing." Florida law prohibits DNA analysis without the informed consent of a person. The results are the exclusive and confidential property of the person tested. Exceptions to the prohibition exist. DNA analysis may be performed for criminal prosecution, for a determination of paternity, and for acquisition of DNA material from persons convicted of certain offenses (s. 943.325, F.S.).

Although methodologies and technologies are evolving, four main types of forensic DNA testing exist:

- *RFLP (restriction fragment length polymorphism) analysis* requires larger amounts of DNA and the DNA must not be degraded. This analysis is not suitable for old crime-scene evidence or for a small amount of DNA evidence.

- *PCR (polymerase chain reaction) analysis* often requires less DNA than RFLP testing and the DNA may be partially degraded. However, PCR still requires a sample size and degradation limitations. PCR tests are extremely sensitive to contaminating DNA at the crime scene and within the test laboratory which can influence results, particularly in the absence of proper handling techniques or controls. During PCR, contaminants may be amplified up to a billion times their original concentration. Even within PCR analysis a number of tests exist that differ in reliability and effectiveness.

- *STR (short tandem repeat) analysis* is used to evaluate specific regions (loci) within nuclear DNA. Variability in STR regions can be used to distinguish one DNA profile from another. The Federal Bureau of Investigation (FBI) uses a standard set of 13 specific STR regions for its software program, CODIS, that supports local, state, and national databases of DNA profiles from convicted offenders, unsolved crime scene evidence, and missing persons. The odds that two individuals will have the same 13-loci DNA profile is about one in one billion.

- *Mitochondrial DNA analysis* (mtDNA) can be used to examine the DNA from samples that cannot be analyzed by RFLP or STR. Nuclear DNA must be extracted from samples for use in RFLP, PCR, and STR; however, mtDNA analysis uses DNA extracted from another cellular organelle called a mitochondrion. While older biological samples that lack nucleated cellular material, such as hair, bones, and teeth, cannot be analyzed with STR and RFLP, they can be analyzed with mtDNA. In the investigation of cases that have gone unsolved for many years, mtDNA is deemed valuable.

See http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml#6.

Post-conviction DNA testing statutes potentially implicate the right of access to the courts under s. 21 of article. I of the Florida Constitution. The Florida Supreme Court order issued on September 30, 2003, specifically held in abeyance the application of the two-year period for retention of physical evidence in s. 925.11(4), F.S., until the matters before the Court are decided.

Arguably, the unilateral destruction of potentially exculpatory physical evidence without notice to the defendant after the running of the four-year filing deadline created by the bill could place

an undue burden on and potentially render illusory a convicted person's statutory right to petition under the "due diligence/newly discovered evidence" exception of the law which allows a person to petition at any time for post-conviction DNA testing. *See* s. 925.11(1)(b)2., F.S. This bill does not address or resolve this matter.

It should be noted, however, that it is equally likely that no one will actually be adversely effected by this apparent omission. Governmental agencies that are in possession of physical evidence from which DNA could be extracted and tested have been on notice since the original bill went into effect in October 2001, that the evidence should be safeguarded against destruction. This requirement has not changed. Evidence that was destroyed, whether inadvertently, mistakenly, or even purposely through the normal course of agency business, before the effective date of s. 925.11, F.S., cannot be resurrected or reconstructed.

Section 925.11(1)(b)2., F.S., provides an avenue by which a petitioner, if he or she can persuade the Court that the "newly discovered" evidence raised could not have been discovered before the normal filing deadline if "due diligence" was utilized, can raise the issue of actual innocence *after the statutory deadlines have passed.* The Legislature must balance the rights of the accused, the rights of the victims or their families, the constraints upon governmental agencies responsible for evidence in criminal cases, while trusting that the courts will judiciously and wisely apply this statutorily provided opportunity of last resort.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.