

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**

CORRECTED INITIAL BRIEF OF APPELLANT JASON SIMPSON

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RECEIVED, 05/08/2019 03:16:38 PM, Clerk, Supreme Court

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PRELIMINARY STATEMENT REGARDING RECORDS ON APPEAL

Pursuant to Fla. R. App. P. 9.142(a)(1)(B), the record in this appeal excludes materials filed in the lower tribunal in this case that were previously transmitted to this Court in a prior record. There were two prior records: (1) the record from Case No. SC07-798, which was Simpson's direct appeal, and (2) the record from Case No. SC12-633, which was Simpson's appeal from an order denying relief under Fla. R. Crim. P. 3.853. Pursuant to Rule 9.142(a)(1)(C), in disposing of this appeal, this Court takes judicial notice of those records and the briefs filed in those proceedings in addition to considering the record prepared for this appeal.

For ease of reference, this brief uses the following abbreviations when citing the proceedings or filings below with the blank representing the page number:

T:___ Transcript of the original trial transmitted in Case No. SC07-798.

R1:___ Record on appeal transmitted in Case No. SC07-798

R2:___ Record on appeal transmitted in Case No. SC12-633

R3:___ Record on appeal transmitted in this case (Including transcript of evidentiary hearing. The record contains two versions of the transcript, and the correct version begins at R3:10052.)

App. ___ Appendix accompanying this brief

DA In. Br. Initial brief from direct appeal, Case No. SC07-798

DA An. Br. Answer brief from direct appeal, Case No. SC07-798

Copies of the trial court's order and selected exhibits are also included in the accompanying appendix for the convenience of the Court.

STATEMENT OF THE CASE AND OF THE FACTS

Jason Simpson appeals a final order following an evidentiary hearing on his initial Rule 3.851 motion to set aside his 2007 capital convictions for the 1999 axe murders of Archie Crook, Sr. (“Big Archie”), a drug dealer against whom Simpson was working as a confidential informant (“CI”) for the Jacksonville Sheriff’s Office (“JSO”), and Big Archie’s pregnant girlfriend, Kimberli Kimbler. The trial court granted a new penalty phase trial, but upheld the convictions.

Though the State concedes that Simpson had no motive and that the last person known to have seen the victims – Big Archie’s son (“Little Archie”) – did, Simpson was convicted based on (1) since-recanted testimony that he confessed to Michael Durrance, a convicted murderer against whom he was also working as a CI for JSO, (2) DNA belonging to Simpson and one or more unidentified individuals (possibly including Little Archie) found on clothing that had some drops of the victims’ blood, and (3) circumstantial evidence allegedly developed during JSO’s investigation that made Simpson appear suspicious but is materially contradicted by the JSO detectives’ contemporaneous notes produced in postconviction discovery. Simpson raises claims of prosecutorial misconduct, ineffective assistance of counsel (“IAC”), and newly discovered evidence (“NDE”).

Following a six-day guilt phase and three-day penalty phase resulting in adverse verdicts and a judgment imposing the death penalty for the first-degree mur-

ders of Big Archie and Kimbler (R1:791-92, 820-21, 901-06), this Court affirmed in *Simpson v. State*, 3 So. 3d 1135 (Fla.), *cert. denied*, 558 U.S. 839 (2009). Simpson's appellate counsel, Frank J. Tassone, Jr., and Rick A. Sichta, chose not to address, much less challenge the sufficiency of the evidence supporting the convictions, and the Court only provided a very broad summary of the evidence in fulfilling its independent obligation to review the sufficiency of the evidence. *Id.* at 1147-48.

An understanding of the evidence at trial is necessary to understand the claims addressed herein, especially in assessing issues of prejudice. The key trial facts are addressed in Part I.A of the argument below, and a non-argumentative statement of those facts appears in Simpson's petition alleging ineffective assistance of appellate counsel filed herewith. Simpson respectfully submits that the Court will be able to understand and dispose of Simpson's claims more efficiently by considering that petition before this brief.¹

In finding the evidence sufficient, the Court pointed to what is referred to herein as the three legs of the State's case. First, the Court noted that the State pre-

¹ That petition argues that appellate counsel were ineffective in not briefing the sufficiency of the evidence, missing the opportunity to show this Court that the jury's verdict must have been the result of pervasive, but unobjected-to improper arguments by the State. Though counsel did argue that a handful of comments by the State amounted to fundamental error, the petition argues that they failed to point to many more that were far more egregious and prejudicial. Should the Court grant the relief sought in that petition, this appeal will become moot.

sented Durrance's testimony that Simpson had confessed, which "constituted direct evidence of Simpson's guilt." *Id.* at 1147. The Court emphasized that because this direct evidence meant "this case is not entirely circumstantial, ... the special standard of review applicable solely to circumstantial cases does not apply." *Id.* Second, the Court identified the following DNA evidence:

Simpson'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 [Big Archie's] house, and matched material found on the barbed wire fence right outside the back door to the house. Simpson's hairs were found among the sweatshirt, sweatpants, and hat.

Id. Third, the Court pointed to other circumstantial evidence related to the investigation that it concluded "suggested Simpson's guilt," including:

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 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.

Id. at 1147-48.

Appellate counsel raised six claims on direct appeal, four of which involved a juror who told the court between the guilt and penalty phases "that the guilty verdict was not her verdict." *Id.* at 1140. This Court rejected these claims because the juror had confirmed the verdict was hers when the jury was polled at the end of the

guilt phase and the reasons she gave for trying to retract her verdict inhered in the deliberations. *Id.* at 1141-44.

Appellate counsel also challenged the trial court's failure to allow Simpson to offer evidence that Little Archie and others had worn clothing similar to that found near the murder scene. *Id.* at 1145. The Court rejected this argument because trial counsel never sought a ruling on the motion, the trial court had indicated it would be inclined to admit the evidence if a proper predicate were laid at trial, and trial counsel never proffered the evidence. *Id.* at 1145-46.

Finally, appellate counsel contended that certain prosecutorial comments during closing argument, to which trial counsel did not object, amounted to fundamental error. *Id.* at 1146. The Court noted that some of those comments were "clearly improper" and "impermissibly 'place[d] the prestige of the government behind the witness or indicate[d] that information not presented to the jury support[ed] the witness's testimony,' " but affirmed because they "were brief and in no way do they constitute fundamental error." *Id.* at 1146-47 & n.7 (alteration in original) (quoting *Spann v. State*, 985 So. 2d 1059, 1067 (Fla. 2008)).

New counsel appeared for Simpson after the appeal and timely filed his initial Rule 3.851 motion. (R2:157-165, 174-214.) This Court granted Simpson interim relief in three proceedings regarding his right to obtain information necessary for his postconviction claims. *See Simpson v. State*, 103 So. 3d 142 (table), No.

SC12-763, 2012 WL 4464750 (Fla. Sept. 21, 2012) (granting Simpson's petition seeking disqualification of judge who presided over the trial and early post-conviction proceedings); *Simpson v. State*, 117 So. 3d 412 (table), Nos. SC12-605, SC12-633, 2013 WL 2663541, at *1 (Fla. June 11, 2013) (consolidated proceedings quashing that judge's ruling that Simpson was not entitled to inspect or have DNA tests performed on the clothes and other physical evidence tied to murders).

After those rulings, Senior Judge Michael Weatherby was assigned to preside over Simpson's proceedings. (R3:40.) Simpson moved to interview certain jurors in support of his IAC claims relating to jury selection and potential juror misconduct, but the trial court denied the motion. (R3:131-48, 832-43.)

The court later allowed Simpson to file the operative second amended initial rule 3.851 motion, which contained 28 claims challenging his convictions and an unopposed claim at least seeking a new penalty phase under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). (R3:1237-38, 1242-1367, 1644-45.)

After Simpson's counsel approached Melissa Nelson, the recently elected state attorney who had previously served as second chair to lead prosecutor Mark Caliel at Simpson's trial, to suggest that a fair postconviction review by her office would show that Simpson is entitled to a new trial, Nelson recused herself out of concern for how her constituents would view a decision to agree to a new trial. (R3:2300-02, 10666-67.) The Governor appointed another state attorney's office

(“SAO”) to defend these postconviction proceedings. (R3:1666-68.) In its subsequent answer, the State conceded that the trial court was bound to set aside Simpson’s death sentences under *Hurst*, which it characterized as “current case law from the Florida Supreme Court,” but opposed the remaining claims, which were all aimed at the convictions. (R3:1669-1747.)

The State conceded Simpson was entitled to an evidentiary hearing on some of his claims, and the trial court granted an evidentiary hearing on nearly all the claims. (R3:1764-66.) Before that hearing, Simpson moved for leave to add new claims 30 and 31 based on evidence developed during discovery.² (R3:1963-71.) The Court did not rule on the motion before the hearing, but disposed of both claims on the merits in its final order. (R3:13453-59.)

During the twelve-day postconviction evidentiary hearing, Simpson called 37 witnesses live or by deposition (R3:10052-13322), offered nearly 200 exhibits (R3:1986-3036, 3041-3328, 3339-3544, 3547-4742, 4771-4977, 6436-6485, 6489-7171, 8652-55, 9841-43, 10052-13332; CDs separately transmitted containing Defendant’s Exhibits 218 and 202, and Court’s Exhibits 86, 89, 90, and 104), and entered into written and oral stipulations with the State on several issues of fact

² The substance of each claim is detailed in the relevant argument section. Additionally, one-sentence descriptions of each claim may be found in the table of contents to the petition. Similar descriptions of claims 30 and 31 can be found in the motion for leave to file them.

(R3:6509-12, 10058-63). To prevent an incredibly long brief from being even longer, the relevant facts adduced at the evidentiary hearing are detailed in the corresponding argument section.

Following the evidentiary hearing, the parties filed written closing arguments. (R3:9880-10051.) The court issued a 178-page final order that granted Simpson a new penalty phase, but denied a new trial on guilt. (R3:13331-13509.)

SUMMARY OF ARGUMENT

Simpson is an innocent man on death row asserting fully supported claims of prosecutorial misconduct, IAC, and NDE that fatally undermine, if not entirely disprove, every piece of evidence against him. The overwhelming majority of trial court rulings challenged on appeal are on questions of law to which no deference to the trial court is afforded. The few factual findings that Simpson challenges on appeal were not supported by the evidence.

I. Before addressing Simpson's specific claims, three introductory points are in order. **A.** A critical review of the State's evidence at trial shows that, even if the Court disagrees with Simpson's argument in the accompanying habeas petition that there was insufficient evidence to support the convictions, the question is sufficiently close that the bar for proving prejudice here is low. The State never could prove any reason why Simpson would kill the victims, and because he was working as a CI against Big Archie, he had a strong disincentive to kill them.

Moreover, each leg of the State's case was tenuous. **1.** Durrance's testimony was implausible, and he had clear incentives to lie – he even admitted he was willing to lie under oath to help the State convict Simpson. If the jury rejected his testimony, the remaining evidence – all circumstantial – would have been insufficient as a matter of law. **2.** The strongest inferences the DNA evidence could support were that Simpson and others the State could not identify had worn the clothes at unknown times and that someone was wearing the clothes during the murders. Moreover, there was evidence that Little Archie had taken the clothes from Simpson before the murders, that Little Archie had threatened to kill the victims, that Little Archie and his friend Shawn Smallwood were the last people seen with the victims, and that Little Archie could not be excluded from two mixtures of DNA found on the clothes. **3.** The remaining circumstantial evidence – Simpson's brief initial denials of knowing the victims or owning the clothes, an injury to Simpson's hand after the murders, and the suggestion that the last person to page Big Archie called from Simpson's mother's house – was all fully consistent with innocence. Simpson was working as a CI against Big Archie so JSO knew Simpson knew him and would be paging him. The moment detectives clarified who they were talking about, Simpson admitted the obvious. He had no reason to think his clothes were at the church and even the State's witnesses could not recognize them in the photos shown to Simpson.

B. The trial court erred throughout its order in refusing to consider cumulative prejudice even though several claims were denied solely on the basis of prejudice. But the law is clear that the court must identify all potentially meritorious claims first, and then apply the appropriate test for prejudice to the evidence as it would have been presented absent constitutional violations and with any NDE. **C.** Another common error in the court's order is a series of findings that counsel's failings were the result of strategic decisions. Simpson has taken care to respect and embrace the reasonable trial strategies selected by counsel, and he instead challenges their execution. Most IAC claims involve counsel's failure to conduct an adequate pretrial investigation, even in the face of a solid initial workup by prior counsel who alerted trial counsel of the many things that still needed to be done.

II. Perhaps the quickest way to dispose of this case is to look at the State's closing argument where counsel were ineffective for failing to object or respond to a litany of arguments that were not only improper, but often based on outright misrepresentations in violation of *Giglio*. **A.** Appellate counsel raised a handful of the least offensive comments on direct appeal, mostly comments indicating the prosecutors believed Durrance was truthful, and while this Court agreed they were improper, it affirmed because counsel had not established fundamental error. But had counsel objected not only to these, but to many other, far more improper arguments, the result likely would have been different. These comments ranged from

asking the jury to consider “how bad of a person” Simpson is to accusing Simpson (without evidence) of conspiring with his attorneys to fabricate his defense to asserting a host of scientific conclusions contrary to the State’s own expert’s testimony to shifting the burden of proof to Simpson. Counsel had a duty to object to such improper comments, and there is no strategic reason to stay quiet.

B. The State also made false representations in its cross-examination of Simpson and in closing that Simpson had been released from jail to start working as a CI in March 1999. The State used that as its only “evidence” to argue that Simpson was lying when he testified that Little Archie came to his trailer and borrowed his clothes. The State well knew that Simpson was released in June, a date that fits his timeline perfectly. Counsel was also ineffective for failing to show this.

C. The State similarly used knowingly false argument to rebut DNA evidence supporting Simpson’s defense that material under Kimbler’s fingernails came from either Big Archie or Little Archie. The State’s expert conceded that if the DNA came from Little Archie, the likely explanation would be that he was the killer. The State argued against this inference by asserting that Kimbler could not have scratched her attacker because she was paralyzed by the first blow. Not only did the State’s own evidence contradict this by establishing she had defensive wounds on her hands, but once the State obtained its convictions, it successfully

argued to the jury and this Court that the death penalty was appropriate because Kimbler had been alive trying to ward off her attacker as she was being struck.

III. Several claims merit relief because they fatally undermine Durrance's testimony that Simpson confessed. **A.** Undisputed evidence established that Durrance has admitted that he lied and explained how and why he made up the various details of Simpson's fabricated confession. Though Durrance refused to testify at the hearing, his hearsay statements were admissible because they were against his interest and confirmed by ample circumstances showing the source of the details he made up. **B.** Moreover, the State committed *Giglio* and *Brady* violations because a host of materials in the State's possession uncovered in postconviction discovery showed that Caliel admitted he did not believe Durrance. Those materials also showed that Durrance's account at trial was contrary to the crime scene evidence and to prior statements to JSO concealed by the State. Finally, the materials reflect that the State not only knew that Durrance had no credibility, but it believed he had committed several other murders because he admitted to at least being an accessory after the fact in an unsolved Jacksonville murder and JSO was assisting Palm Beach authorities who already had probable cause that he committed another murder there. The State also knew that Durrance's claim that he had not been given any benefits or been promised anything by the State in exchange for his testimony was false because Caliel helped Durrance get a prison transfer closer to home and

promised to testify in support of a sentence reduction motion. The State had significantly reduced its sentencing demands in an earlier trafficking case in consideration for Durrance's assistance. **C.** Counsel was ineffective for failing to find much of the foregoing information, which was all public record. **D.** Finally, the State knew and counsel failed to show not only that the killer could not have entered through a kitchen window as Durrance claimed, but also that the State's alternative theory that he came in through an unlocked door was contrary to the evidence. There were no signs of forced entry, the house was locked, and Simpson did not have a key – Little Archie did.

IV. The State's DNA evidence was even more tenuous. **A.** The State's misconduct **(1)** prevented Simpson from learning that Little Archie was working as a CI against Durrance, a classic *Brady* violation, and **(2)** failed to preserve key physical evidence known to contain unidentified DNA probative of the identity of the killer, in violation of an unambiguous Florida statute. **B.** The limited postconviction DNA testing that was possible identified almost 30 new mixtures of DNA on the clothes, ten of which had at least two contributors, contained no blood, and were taken from an interior sample, thus minimizing the possibility that either of the victims were among the contributors. Little Archie and Smallwood could not be excluded from all but three of those wearer's DNA mixtures, dramatically undermining the State's expert testimony and argument that because Simpson's DNA

was prevalent on the clothes, and there was scant evidence of additional wearers, Simpson was the last person to wear the clothes and, thus, the killer.

C. Counsel was ineffective in several ways for failing to effectively pursue their strategies for countering the DNA evidence. **(1)** Due to their failure to understand and explain the circumstances to the DNA expert appointed to assist the defense, they failed to have the evidence tested before trial or to allow the expert to assist them in effectively responding to the State's DNA evidence. **(2)** They failed to discover or use readily available evidence that would have much more clearly supported their defense that Little Archie was the more likely killer than the evidence they presented, including **(a)** finding Shannon Elliott who had ample information inculcating Little Archie, including his serious, recent threats to kill Kimbler, **(b)** eliciting from Misty McNeish critical information she disclosed in her deposition that further inculpated Little Archie, including that he had threatened to kill the victims and, when she asked if he had killed his father, he did not deny it, but punched her instead, **(c)** failing to prove up their promise to the jury that Little Archie knew the position of the bodies before anyone could have told him, and **(d)** failing to show that Little Archie's alibi of being at Heather Smith's house the night of the murder and, indeed, his entire timeline from that night was fabricated.

D. Finally, dramatic new postconviction testimony from Little Archie and his cousin Terry Thompson corroborated critical details of Simpson's account of Little

Archie taking his clothes and confirmed that Little Archie kept black clothes in a bag at Big Archie's house for a group of robbers to use, including Simpson.

V. The jury and this Court were misled by the State's misconduct and counsel's IAC into finding the remaining evidence inculpatory of Simpson. **A.** The State knew that the last number to page Big Archie was not tied to Simpson, but that the last three were tied to Little Archie and Smallwood, instead. It concealed notes proving that its witness testified falsely on this issue. **B.** The JSO detective's trial testimony describing the injury to Simpson's hand and Simpson's explanation is flatly inconsistent with his contemporaneous notes that were not provided until postconviction review, and the notes support Simpson's account. **C.** Finally, the State knew and counsel failed to show that Simpson not only was telling the truth when he left his interview with JSO to go to work, but had informed them of his obligation before any questions were asked about the murders.

VI. Two final points merit attention. **A.** Once the Court identifies the claims on which it agrees Simpson has proven the initial elements, it should conduct a final cumulative prejudice analysis under the most defense-friendly standard applicable, which should be the *Giglio* standard that imposes the burden on the State to disprove prejudice beyond a reasonable doubt. Even if the Court were to reject all *Giglio* claims, Simpson is still entitled to relief because there is at least a reasonable probability that the result would have been different absent *Brady* violations

and IAC and in light of the NDE. **B.** This brief does not challenge the denial of every claim or the denial of every theory within the claims argued herein. Though the other claims are meritorious, to brief them would require another 100 pages and distract the Court from the more clearly meritorious claims addressed herein.

ARGUMENT

Though perhaps guilty of gilding the lily with so many claims that deconstruct and destroy each item of evidence offered against him, Jason Simpson is simply not guilty of these murders. Every aspect of the case against him was constitutionally tainted. The record now proves that facts not presented to the jury establish – or would at least create a reasonable possibility that the jury would have concluded – that each piece of evidence offered by the State should be rejected and that Simpson is actually innocent. The State relied on evidence and argument it knew to be false and withheld material exculpatory evidence. Defense counsel failed to undertake basic trial preparation or to understand the evidence being offered against their client. In opposing Simpson’s attempts to set aside his convictions, the State emphasized from the start, “Actual innocence is not a judicially cognizable claim in Florida.” (R2:405 (citing *Tompkins v. State*, 994 So. 2d 1072, 1088-90 (Fla. 2008)).) But Simpson has asserted and proven several claims long cognizable under Florida and federal law.

Simpson asserts claims of prosecutorial misconduct based on two seminal United States Supreme Court decisions. First, the State is constitutionally prohibited from using facts that it knows are not true. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972).

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” than 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). Thus, of all of Simpson's claims, the *Giglio* claims carry the most defense-friendly prejudice standard, shifting the burden to the State to prove beyond a reasonable doubt that Simpson would have been found guilty absent this misconduct (again, considering the cumulative effect of the evidence at trial, all newly discovered evidence, and the way the case would have been tried absent *Brady* and IAC violation).

Second, the State has a constitutional obligation to disclose all known evidence favorable to the defense that tends to either exculpate the defendant or impeach the State's evidence. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).

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).

Turning to the IAC claims, the constitution requires the State to provide a defendant with counsel who renders reasonably effective representation. *Strickland v. Washington*, 466 U.S. 668, 686-91 (1984). To obtain relief for IAC, the defendant must meet a two-part test:

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).

Finally, the defendant must establish two elements to set aside a conviction based on NDE:

First, the evidence must not have been 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. 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.

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

Because the trial court denied Simpson's postconviction motion after an evidentiary hearing, this Court reviews the denial of all of the foregoing claims under the same mixed standard of review, "deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit

court's legal conclusions de novo.” *Deparvine v. State*, 146 So. 3d 1071, 1082 (Fla. 2014); *Hurst v. State*, 18 So. 3d 975, 988, 991, 996 (Fla. 2009); *Beasley v. State*, 18 So. 3d 473, 482 (Fla. 2009). “Despite this deference to a trial court’s factual findings, the appellate court’s obligation to independently review mixed questions of fact and law of constitutional magnitude is ... an extremely important appellate principle.” *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999).

The trial court made several rulings on whether out-of-court statements constituted hearsay, and if so, whether they satisfied an exception to the prohibition on hearsay evidence. The former inquiry is reviewed de novo, while the latter is reviewed for an abuse of discretion, at least where the trial court applied the proper test under the hearsay rules. *Tundidor v. State*, 221 So. 3d 587, 598-99 (Fla. 2017); *Pasha v. State*, 225 So. 3d 688, 707-08 (Fla. 2017).

Part I addresses three introductory points, two regarding prejudice as to all claims and one regarding the IAC claims, in particular. Part II shows why the trial court erred in rejecting Simpson’s *Giglio* and IAC claims based on false assertions and improper arguments by the State to which counsel unreasonably failed to object. Simpson then argues his claims undermining Durrance’s testimony and the State’s theory of the case in Part III, his claims undermining the State’s DNA evidence in Part IV, and his claims undermining the remaining circumstantial evi-

dence in Part V. Part VI concludes by returning to the need for cumulative review for prejudice before briefly addressing Simpson's remaining claims.

I. INTRODUCTORY POINTS

A. The Bar for Showing Prejudice Should Be Low.

Because all of the claims include some variation of a prejudice showing, a critical review of the sufficiency and strength of the State's evidence is the best place to start. Even if the evidence were sufficient to support the conviction as this Court found on direct appeal,³ a fair review of that evidence shows that the bar for establishing prejudice is much lower in this case than most this Court will see.

As lead prosecutor Caliel admitted during the evidentiary hearing, the State "really couldn't ascertain what a motive was" for Simpson to kill the victims, and he expressed relief that motive is not an element of the crimes because the State "could never prove" one for Simpson. (R3:10998, 11007.) Not only did Simpson lack a motive to kill the victims, he had strong reasons not to. He had just been released from jail to work as a CI while serving probation. Big Archie was one of the people the State asked him to target, so he knew the State was watching both him

³ In his accompanying petition for writ of habeas corpus, Simpson demonstrates why appellate counsel was ineffective for not briefing the sufficiency of the evidence, why the Court – unaided by any argument by counsel – erred in finding the evidence was sufficient, and why the verdict was instead the result of pervasive improper arguments that neither trial nor appellate counsel challenged.

and Big Archie closely. In any event, unable to show any motive, the State instead tried to build a case based on a wobbly three-legged stool.

1. **Durrance's Testimony**

Durrance's testimony that Simpson confessed was the first. As this Court emphasized on direct appeal and the State conceded at the evidentiary hearing, this was the only direct evidence of guilt. *Simpson*, 3 So. 3d at 1147. (R3:10634.) It was direct evidence only to the extent that if the jury believed that Durrance was telling the truth, that would establish Simpson's guilt. *Wright v. State*, 221 So. 3d 512, 523 (Fla. 2017). A fair review of the trial transcript reveals that even if the evidence was sufficient to have allowed a reasonable jury to believe Durrance's testimony that Simpson confessed, it was a very close question. Simpson not only had no motive to commit the murders, but had strong reason not to confess anything to Durrance, against whom he was working for JSO as a CI. (T:651.)

Durrance's narrative made no sense, either. He claimed Simpson went to commit the murders without a weapon, happened to find an axe lying around in the backyard, climbed through a window with the axe, and then murdered the victims in their bed. (T:876-82.) Durrance initially told the police that Simpson entered through the kitchen window, but changed it to the laundry room at trial because defense counsel was ready to and did prove that nobody could have entered the kitchen window. (T:902-08, 955.)

Durrance did not come forward with his story until after he was arrested and charged with conspiracy to traffic cocaine almost two years after the murders and after learning that Simpson was a confidential source in the wiretap application that ultimately led to his arrest. (T:885-88.) He admitted not only that he was testifying with the hope of having his trafficking sentence reduced, but also that he was willing to lie under oath to help get that reduction. (T:888-91, 898.)

This latter admission, in particular, renders Durrance's testimony the slimmest of reeds on which to rest Simpson's capital convictions. Even if it did not prevent his testimony from being competent, substantial evidence, it came dangerously close to disqualifying him. *See* § 90.605(1), Fla. Stat. (2007) (requiring witnesses to take an oath to tell the truth); § 90.603(2), Fla. Stat. (2007) (requiring a witness be disqualified if he is "[i]ncapable of understanding the duty of a witness to tell the truth"). How can a witness's admission he does not feel bound by his oath to tell the truth be any different than refusing to take the oath or being found mentally incapable of understanding the obligation to tell the truth, clear grounds for striking a witness's testimony? *Willis v. Romano*, 972 So. 2d 294, 295 (Fla. 5th DCA 2008); *see also Wingo v. State*, 158 So. 3d 743, 745 (Fla. 2d DCA 2015) (noting that a "witness is presumed competent to testify until a party places competency at issue" and that part of the competency question is whether the witness is able "to understand the duty to tell the truth"); *State v. Keyes*, 322 A.2d 615, 618

(N.H. 1974) (disqualifying witness as incompetent were it is uncontroverted that witness felt no moral obligation to tell the truth when under oath).

Durrance's story was also inconsistent with the crime scene in a few ways, and he had clear motives to fabricate the story. Caliel even told the jury that the State could not accept Durrance's account at face value for the foregoing reasons and also because Durrance had, in Caliel's words, "admitted that, in essence, he had a motive himself to have [Big Archie] killed over [a] drug dispute, over this alleged hit that [Big Archie] may have been putting out on him."⁴ (T:1614.) It would not have taken much more impeachment evidence to tip the scales to the point that no reasonable jury could have believed Durrance.

Thus, any claim that would create a reasonable possibility that the jury would have rejected Durrance's testimony would establish prejudice. Without this direct evidence, the remaining evidence, all of which was circumstantial, could not

⁴ Durrance testified that he had been involved in a dispute with Big Archie over a drug deal. Over a year before the murders, Durrance had fronted around two kilos of cocaine worth about \$40,000 to Big Archie by leaving it with Little Archie. (T:866-67.) Little Archie told Durrance that someone stole the drugs, and Big Archie did not pay Durrance for them. (T:866-67, 921.) Durrance testified that he got his money back around six months before the murder by making Big Archie pay up front for the next delivery (from proceeds Big Archie borrowed from a friend), but after he was paid, Durrance supplied Big Archie with fake cocaine. (T:867-68; *see also* T:819 (Little Archie's testimony that the fake cocaine deal occurred shortly before the murders).) Big Archie was angry over being "ripped off" by Durrance, and Durrance heard from several sources that Big Archie wanted him dead. (T:869-70, 921-22.)

have supported the conviction. Specifically, the State would have had to meet the difficult burden this Court has long applied to purely circumstantial cases:

“[W]here a conviction is based wholly upon circumstantial evidence, a special standard of review applies.” *Reynolds*, 934 So. 2d at 1145 (quoting *Darling v. State*, 808 So. 2d 145, 155 (Fla. 2002)). “The special standard requires that the circumstances lead ‘to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of, and be consistent with, guilt. They must be inconsistent with innocence.’ ” *Lindsey v. State*, 14 So. 3d 211, 215 (Fla. 2009) (quoting *Frank v. State*, 163 So. 223 (1935)).

.... [S]uspicion alone is not enough. As we have stated:

Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, [] is not sufficient to sustain [a] conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Ballard v. State, 923 So. 2d 475, 482 (Fla. 2006)] (quoting *Davis v. State*, 90 So. 2d 629, 631-32 (Fla. 1956)).

Dausch v. State, 141 So. 3d 513, 517-18 (Fla. 2014). The other two legs of the State’s case did not come close to meeting this standard.

2. The DNA Evidence

The second leg of the State’s case centered on DNA test results indicating that Simpson had worn the clothes found by the church, on which there was only a

small amount of blood on the pants and shoes, but none on the hat and shirt. Although the State could not have prevailed without the jury believing Durrance's testimony, the DNA evidence was equally "pivotal," in Caliel's words, and Durrance's testimony had value primarily "in conjunction with the DNA evidence." (R3:10991, 11013.) Indeed, JSO Det. Bialkoski admitted that Durrance's report of Simpson's apparent confession alone did not even establish probable cause for Simpson's arrest. (R3:12650.) Thus, without the DNA evidence, Simpson never would have been prosecuted, much less convicted. As defense trial counsel conceded below in emphasizing the importance of the DNA evidence, "besides Durrance that was all they pretty much had." (R3:10167-68.)

Two aspects to the State's DNA evidence are material: **(a)** Simpson's defense that he had possessed and worn the clothes found near the scene, which contained DNA consistent with Simpson and at least one other, unidentified person, but that Little Archie had taken them from the floor of Simpson's trailer before the murders; and **(b)** the results of the State's testing of the clothes as well as the crime scene, which were entirely consistent with Simpson's defense.

(a) Defense counsel told the jury in opening statement that the evidence would show that Little Archie had a motive to kill the victims, that he had taken black sweatclothes from Simpson a few weeks before the murders, that Little Archie and his friend Shawn Smallwood were the last people known to see the vic-

tims alive, and after the murders, Little Archie let it slip that he knew the position of the bodies. (T:517-21.)

The evidence the defense presented of Little Archie's motive was that (1) before Kimbler was pregnant, Little Archie's aunt heard him threaten to "kill all three of them if they ever had a baby," but Big Archie told her Little Archie "was just running his mouth" and "not to pay attention to him," (2) Little Archie's brother had heard "through the grapevine" that Little Archie may have made similar threats, though the brother never heard them, and (3) Little Archie's girlfriend Misty McNeish had told police that he had made such a threat, though she denied it at trial. (T:1473, 1479, 1483-85, 1489-90.)

Simpson testified that a few weeks before the murders, he had been released from jail to work for JSO as a CI and rented a trailer on 118th Street. (T:1380.) Shortly thereafter (but still before the murders), Little Archie came to the trailer to borrow black clothing. While Simpson was in the shower, Little Archie took the black sweatclothes from the floor and found the business card of a detective Simpson was working with, which he left out for Simpson to find when he got out of the shower. (T:1380-87.)

Little Archie testified that Smallwood had been killed in a motorcycle accident after the murders. (T:782.) He and Smallwood had visited Big Archie the night of the murders, July 15, 1999, and spent about an hour and a half there while

they shared a joint and snack with Big Archie. (T:789-91.) He testified that they left the house late that evening and went to the home of a girlfriend, Heather Smith, where he spent the night. (T:791, 793.)

Little Archie admitted telling JSO Officer James 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,” which is exactly how his grandfather had discovered the bodies the morning of July 16, 1999. (T:539, 821.) Williams testified that Little Archie told him he had learned this from his grandfather, but the grandfather denied it at trial. (T:546, 1489, 1491-92.)

Little Archie denied having committed the murders or having any reason to want the victims dead. (T:806.) He did not remember ever saying that Kimbler’s baby “wouldn’t see the light of day” or that he would kill all three of them, though he admitted he could have said that. (T:808-09.) He denied ever going to Simpson’s trailer, finding the detective’s business card while Simpson was in the shower, or taking any clothes from Simpson. (T:817-18.)

(b) As for crime scene evidence, Little Archie’s grandfather called JSO as soon as he found the bodies early the morning of July 16, 1999. (T:531-40.) JSO detectives and technicians spent the day processing the scene, taking pictures, and collecting evidence in the house and backyard. (T:555-56, 578.) Blood was everywhere in the bedroom where the victims were found, including blood on the floor

that an evidence technician speculated may have come from an injury to the killer. (T:590-98, 625-27.) Investigators found two torn pieces of black cloth on a barbed wire fence that separated one part of the backyard from another and an axe and pair of socks right next to the back fence, which separated Big Archie's property from a neighboring church. (T:560-63, 580, 607-11, 629, 1592; St. Exs. 1, 17, 20, 21, 23-26.) Four days later, on the morning of July 20, a young man mowing the lawn at the church found a black sweatshirt, black sweatpants, black tennis shoes, and a black baseball cap in a pile by an air conditioning unit between the church and Big Archie's fence, and JSO came and collected them. (T:698-99, 729-30.)

Over a seven-year period following the murders, the State had FDLE DNA analyst Charles Badger and others test four blood stains from the bedroom floor; cuttings and swabbings from the sweatshirt, sweatpants, hat, and shoes; two of nineteen hairs recovered from the trace debris from the clothes; blood stains from the back deck; a bloody magazine; the axe; the socks; scrapings from Big Archie's and Kimbler's fingernails; extracts from Kimbler's nail clippings; and a swab of Kimbler's vagina. (T:961, 1144-83, 1207-09, 1214.) The results ultimately were compared against DNA samples taken from the victims, Simpson, Durrance, Little Archie, and Smallwood. (T:1130-31.)

None of the evidence found at the crime scene – including fingerprints, footprints, hair fibers, and blood – was tied to Simpson. By contrast, a swabbing of

blood from the bedroom floor produced a DNA mixture for which Kimbler was the primary contributor and from which Smallwood could not be excluded as a contributor. (T:1148-49.)

More importantly, Shawn Weiss of LabCorp tested DNA extracts generated from Kimbler's fingernail clippings and identified a mixture for which she was the primary contributor and the secondary contributor was consistent in every way with both Big Archie and Little Archie, but dispositively excluded Simpson. (T:1075.) Because the test kit could not distinguish between Little Archie and Big Archie's DNA (T:1075), and based on FDLE's finding that DNA consistent with Big Archie was present in Kimbler's vagina (T:1208-09), the State had Weiss speculate, without objection, that Big Archie's DNA had been deposited on Kimbler's nails during "intimate contact" the evening before they were killed. (T:1075.) But Weiss admitted on cross that the DNA could have been deposited by Little Archie if he were the killer and he and Kimbler struggled during her murder. (T:1077.)

Though the clothes were not found until several days later at the church next door, fiber analysis confirmed that they matched the torn pieces found on the fence the morning after the murders, and some drops of the victims' blood were found on the sweatpants. (R3:14072-73.) Contrary to this Court's description of the evidence on direct appeal, 3 So. 3d at 147, no blood was found on the sweatshirt. (R3:11994,

13278.) The shoes found with the clothes had a few drops of blood from the victims, but the hat did not. (R3:1065, 11993, 13891; T:1183-84, 1252-53.) Though counsel never argued the issue, a reasonable jury should have questioned how a lone killer could have worn these clothes while swinging that axe blow after blow without getting any blood on his arms, torso, or head. Nonetheless, one reasonable inference may be that someone wearing those clothes was at least present in the bedroom during the murders.

As for who wore those items, no evidence tied to Simpson was found on either the hat, which presumably rubbed against the wearer's forehead, or the shoes. Testing did reveal his DNA on the sweatclothes, including a crusty stain on the outside of the shoulder and two of nineteen hairs recovered from trace evidence raked off the clothes. (T:1211-12.) But the State's own experts conceded it was not scientifically possible to determine when any of the DNA was left on the clothes. (T:1223-24, 1331, 1333-34.)

Critically, the State's pretrial results identified two mixtures on the clothes from which Little Archie could not be excluded, one on a stain from a sweatpants cutting and the second on a cutting from the neck of the sweatshirt. As to the first, Kimbler was the primary contributor and Simpson and Little Archie both possessed the same single allele foreign to Kimbler's profile. (T:1176-77.) As to the second, Badger concluded that Simpson was the primary contributor, Big Archie

and Smallwood could be excluded as the secondary contributor, and again, Little Archie possessed the one allele that was foreign to Simpson's profile in the mixture. (T:1191-94, 1211; *see also* T:1251 (Badger conceding, reluctantly, on cross that it is "a fair statement" that Little Archie cannot be excluded from the secondary profile).)

In addition to the neck cutting, two DNA mixtures were identified for which the partial primary profile was determined to be consistent with Simpson's DNA: (1) a swabbing of the sweatpants waistband and (2) combined swabbings of the sweatpants leg cuffs. (T:1186-89, 1192-94, 1241.) Neither Little Archie nor Smallwood could be excluded from the mixture on the leg cuff swabbing. (T:1190-94, 1251.) He excluded Little Archie and Smallwood as potential contributors to the mixture found on the waistband, but only by assuming that there were only two contributors to the mixture. (T:1186-88.) The State never offered any evidence to support that assumption.

(c) Viewing the two foregoing aspects of the DNA evidence in this case together, the State's DNA case was tenuous. Although ample physical evidence was recovered from the scene, none was tied to Simpson. But DNA found under Kimbler's fingernails was tied either to Big Archie or Little Archie, and Little Archie had threatened to kill the victims and was present in the house the night of the murders. And Smallwood, who was with Little Archie that night, could not be

excluded from a mixture of DNA in drops of blood found on the floor that an evidence technician suspected could have come from the killer. The only DNA evidence tied to Simpson was on the clothing, but so was DNA from at least one other unidentified person and maybe more.

That none of the State's testing identified the additional contributor(s) or excluded Little Archie or Smallwood as possible wearers of the clothing all but dispels any inference that it was Simpson who wore them during the murders. An equally possible and more likely inference is that someone with a motive wore them and either discarded them at the church without JSO finding them or planted them after the fact. If that person knew the clothes came from Simpson, he could have been confident the clothes would be tied to Simpson, even if he knew nothing about wearer's DNA, because there was a visible stain on the shoulder. (T:1195-98; see also T:1622 (Caliel describing the stain as "white crusty mucous").)

In short, while the DNA evidence supported inferences that (1) Simpson had worn the clothes at some point in time and (2) somebody present during the murders was wearing the pants and shoes, they do not support stacking those inferences to reach the conclusion that Simpson was present during the murder, much less that he committed them. *Miller v. State*, 770 So. 2d 1144, 1149 (Fla. 2000). They would equally support the inference that one of the other contributors to the mixtures committed the murders, and neither Little Archie nor Smallwood can be

excluded as possible contributors. Evidence that merely shows that the defendant had come into contact with the murder weapon or murder scene at some uncertain time has repeatedly been found to be insufficient to support a conviction. *Dausch*, 141 So. 3d at 518-19; *Lindsey*, 14 So. 3d at 215-16; *Ballard*, 923 So. 2d at 482-85; *Miranda v. State*, 113 So. 3d 51, 56-57 (Fla. 2d DCA 2013); *Hill v. State*, 973 So. 2d 655, 656 (Fla. 2d DCA 2008).

Thus, Simpson can establish prejudice on his claims undermining the DNA evidence by establishing any claims that would raise a reasonable possibility that the jury would have concluded that unidentified DNA found at the crime scene or on the clothes could have come from Little Archie or Smallwood, that Simpson was telling the truth when he testified that Little Archie had taken the clothes before the murders, or that Little Archie and Smallwood were otherwise more likely than Simpson to have committed the murder.

3. Remaining Circumstantial Evidence

The third and final leg of the State's case was an amalgamation of circumstantial evidence allegedly developed during JSO's investigation that collectively makes Simpson appear suspicious. This Court noted this evidence in its opinion as supporting the conviction. *Simpson*, 3 So. 3d at 1147-48. But a review of this evidence reveals that it is less incriminating of Simpson than the circumstantial evidence casting suspicion on Little Archie and Smallwood.

First, though there was evidence of what this Court described as “Simpson’s initial denial of knowing the victims” during two police interviews, *id.* at 1147, in both instances when the detectives clarified who were they were asking about, he immediately confirmed he knew them. (T:949, 1343, 1427-28, 1442-43.) As for his “immediate departure from the police interview after being asked whether he knew” Big Archie, *id.* at 1147-48, the State offered no evidence to rebut Simpson’s explanation, which was that the detective had started being rude and threatening and Simpson was late to work. (T:1413-14.) In any event, Simpson had been working as a CI for JSO against Big Archie so everybody knew that Simpson knew him.

The Court also pointed to Simpson’s “denial that the clothing, hat, and shoes were his.” *Id.* at 1148. This relates to photographs of the pile of clothes, hat, and shoes as they were found at the church a few days after the murders. As an initial matter, there has never been any evidence that the hat or shoes were ever belonged to or even came into contact with Simpson. Indeed, if Simpson wore that hat, he would have had to find a way to leave no sweat or oil from his skin on the inside of the hat while swinging an axe blow after blow, in “Florida 100 degrees plus humidity heat” according to the State. (T:1680.) As for the clothes, JSO Det. Dale Gilbreath admitted that the exhibits shown to the jury were blow-ups and the photographs he had shown Simpson were much smaller, that he could not tell whether they were inside out even looking at the blowups, and that he thought that these

black clothes looked blue in one of the photos. (T:1358-60.) And Heather Velez, the State's expert fiber analyst who had spent hours examining the clothes, admitted that she could not identify them from the photos, either. (T:1283-84.) Thus, as counsel argued at trial, it was far from incriminating that Simpson denied owning these generic clothes that he was told were worn by the killer based on these photos. (T:1669.) Why would someone who did not commit the murders or leave the clothes behind a church believe those clothes were his from photos like these?

The Court also pointed to evidence of Simpson's "freshly injured hand and conflicting story about how he got the injury." *Simpson*, 3 So. 3d at 1148. Because there was no actual evidence – as opposed to rank speculation by the crime scene team – that the killer was injured, an injury on Simpson's hand was not very probative. The only conflict as to the hand was that the JSO Detective Robbie Hinson testified that it was a "large gash on his finger," while Simpson characterized it as just a "scratch." (T:504, 656, 1392-93.) As for Simpson's "story" about the injury, the only conflict was even less material – Hinson testified that Simpson originally said he cut his hand on an electrical panel in his mother's garage "during the night," while Simpson testified it was early morning. (T:657.) The material aspect was the explanation for the injury, and Simpson corroborated his account at trial with a witness from the power company to confirm his mother lost power that morning. (T:1391-92, 1464-69.)

Finally, this Court referenced evidence that showed “the telephone number of [Simpson’s] mother’s home, where he stayed, as the last number on [Big Archie’s] pager.” *Simpson*, 3 So. 3d at 1148. But there was nothing suspicious about that – Simpson was supposed to be getting close to Big Archie as a CI assisting JSO develop evidence against this drug dealer.

In short, the remaining circumstantial evidence was far weaker than the DNA evidence and weaker than the circumstantial evidence against Little Archie, who had motive and opportunity and knew the position of bodies, even though his grandfather denied telling him that. In any event, this Court did find the evidence allegedly developed by JSO to support the conviction, so any postconviction claim that helps dispute or explain that evidence should warrant relief.

B. The Trial Court Refused to Consider Cumulative Prejudice.

One final point about prejudice before diving into the substantive claims: The law is well settled that prejudice must be assessed cumulatively such that the court considers the evidence actually presented at trial along with (1) all newly discovered evidence, (2) how the case would have been presented to the jury absent prosecutorial misconduct, and (3) how the case would have been presented absent ineffective assistance of counsel. *Suggs v. State*, 923 So. 2d 419, 441-42 (Fla. 2005); *Mordenti v. State*, 894 So. 2d 161, 174-75 (Fla. 2004); *Smith v. Sec’y, Dep’t*

of Corr., 572 F.3d 1327, 1334 (11th Cir. 2009); *State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996).

Although the trial court opined that Simpson failed to prove prejudice in discussing several claims, it refused to consider cumulative prejudice because it concluded all of the claims were “without merit or procedurally barred.” (R3:13504-05.) Thus, all of the findings of no prejudice are of no moment if the Court agrees that Simpson has proven the initial prongs of at least two of his claims. Indeed, as noted in the argument to come, the trial court denied some claims solely based on prejudice grounds.

For these reasons, although the applicable tests for prejudice for each claim and the nature of the prejudice resulting from each claim will be addressed separately in this brief, the best approach for the Court is to first go through all of Simpson’s claims to determine which ones it agrees he has established the initial prongs. What prosecutorial misconduct has Simpson proven? What deficiencies in defense counsel’s performance has Simpson established? What new evidence has Simpson shown that could not have been known at the time of trial by the use of diligence? The Court should then conduct the relevant prejudice analysis considering all of those predicates together with the evidence presented at trial under the most “defense-friendly” test for prejudice applicable. Thus, if the Court finds one or more *Giglio* violations, in determining whether the State has proven no preju-

dice beyond a reasonable doubt, it should consider those violations in conjunction with all *Brady* or IAC violations Simpson has proven as well as any NDE. And if it finds no *Giglio* violations, but finds *Brady* and/or IAC violations, then it should determine whether Simpson has shown a reasonable probability of a not guilty verdict based on those violations plus any NDE.

C. Simpson Accepts Counsel's Reasonable Trial Strategies and Focuses Instead on Their Failure to Prepare for Trial and Execute Those Strategies.

A common theme behind the trial court's rejection of most of Simpson's IAC claims is its repeated conclusions that defense counsel made strategic decisions not to call certain witnesses, ask certain questions, or engage certain experts. The specific rulings are addressed in the relevant argument sections to follow, but two global points should be understood from the outset: **(1)** the overarching strategies selected by defense counsel are not only accepted, but embraced by Simpson's IAC claims, and **(2)** the evidence below established beyond doubt that the failure of Simpson's trial counsel to complete an adequate investigation and prepare for trial was the cause of most of the failings addressed in this brief.

1. Veteran public defenders Alan Chipperfield and Gonzalo Andux were appointed to represent Simpson shortly after his arrest in 2002. They had to withdraw due to a conflict of interest in 2004, and the court appointed Refik Eler and Charles Fletcher to take over. (R1:249-50; R3:10100-01, 13209-10.) All four attor-

neys, as well as Eler's investigator Michael Hurst, confirmed that Simpson had adamantly maintained his innocence throughout their representation. (R3:10101, 10497, 10512, 13213, 13271.) Chipperfield and Andux confirmed that he admitted from the beginning that the clothes were his, or at least that he had possession of and had worn them before loaning them to Little Archie. (R3:13213, 13271-72.) None of the lawyers ever said that they disbelieved anything Simpson told them or were concerned that he was not being truthful with them.

None of Simpson's claims herein are inconsistent with the major case strategies that Eler and Fletcher chose to pursue at trial. The specific strategies they chose to pursue to counter each of the three legs of the State's case form the basis for most of Simpson's claims and were confirmed both by counsel's trial arguments and their testimony at the postconviction evidentiary hearing.

They hoped to combat Durrance's testimony that Simpson confessed by showing that (1) Durrance was biased and not credible because he was seeking leniency from the State for his own crimes, wanted retribution against Simpson for assisting the State in obtaining an order to tap Durrance's phones, and had his own motive to kill the victims and (2) the details of the alleged confession as presented by Durrance were contradicted by the evidence. (T:519-20, 1650-55, 1658, 1666-67; R3:10152-56.) Their strategies for undermining the DNA evidence was to show that (1) the test results were consistent with Little Archie or Smallwood

wearing the clothes during the murders, (2) Little Archie had taken the clothes from Simpson a few weeks before the murders, and (3) other evidence showed that Little Archie and Smallwood had far more motive and opportunity to commit the murders than Simpson. (T:517-25, 1649-50, 1670-72, 1655-65; R3:10145-49, 10230-31.) Finally, they sought to counter the remaining circumstantial evidence by showing weaknesses in JSO's investigation and by impeaching the JSO witnesses who offered that evidence both through cross-examination and by having Simpson testify to provide his innocent explanations. (T:949-50, 1283-84, 1343, 1358-60, 1392-92, 1413-14, 1428, 1442-43, 1464-69, 1650, 1655, 1667-69; R3:10177-78, 10182-83, 10542-43.)

2. Simpson's IAC claims do not question the validity of any of the foregoing strategies. To the contrary, they embrace those eminently reasonable theories and show how counsel was ineffective in pursuing them. Counsel's most unreasonable and damaging deficiency was their failure to conduct a thorough pretrial investigation before making the decision whether to present evidence or how to adequately impeach the State's witnesses. Yet time and again, the trial court relied on its conclusions that counsel made strategic decisions to remain ignorant about potential witnesses and evidence and not present evidence they had that supported the foregoing theories because their strategy was "to focus on flaws and lack of ev-

idence in the State’s evidence and shoddy police work to show reasonable doubt.” (R3:13362; *accord, e.g.*, R3:13385, 13389, 13399, 13401, 13435.)

This Court has called pretrial investigation the “most critical stage of a lawyer’s preparation.” *Fitzpatrick*, 118 So. 3d at 753 (citations omitted). Although scrutiny of counsel’s strategic choices is generally deferential under *Strickland*’s deficient performance prong, sound strategic decisions can only be made after a thorough pretrial investigation of law and facts. *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003); *Howell v. State*, 877 So. 2d 697, 703 (Fla. 2004); *Jennings v. State*, 123 So. 3d 1101, 1118 (Fla. 2013).

While counsel need not present every shred of available evidence, the law requires that, at a minimum, counsel have a reasonable basis justifying the strategic decision not to present it. *E.g.*, *Darling v. State*, 966 So. 2d 366, 382 (Fla. 2007); *Howell*, 877 So. 2d at 703-04. But counsel cannot rely on claims of trial strategy to refute allegations of deficient performance when insufficient investigation and preparation or a basic misapprehension of the case caused counsel’s lapse. *Simmons v. State*, 105 So. 3d 475, 508 (Fla. 2012); *Downs v. State*, 227 So. 3d 694, 696 (Fla. 5th DCA 2017).

Such lapses also support IAC claims where counsel has failed to retain an expert who could have undercut the State’s case. *Hinton v. Alabama*, 571 U.S. 263, 275-76 (2014); *Ibar v. State*, 190 So. 3d 1012, 1021 (Fla. 2016). Or where counsel

fails to adequately consult and educate a retained expert. *State v. Morrison*, 236 So. 3d 204, 220 (Fla. 2017), *cert. denied*, 139 S. Ct. 91 (2018); *State v. Bevel*, 221 So. 3d 1168, 1180-82 (Fla. 2017); *State v. Bright*, 200 So. 3d 710, 730-31 (Fla. 2016); *Douglas v. State*, 141 So. 3d 107, 119-20 (Fla. 2012).

Finally, a strategic decision simply to cross-examine the State's witnesses, rather than presenting affirmative defense witnesses, is also an unreasonable strategy if based on anything less than a thorough investigation. *State v. Plummer*, 228 So. 3d 661, 667 (Fla. 1st DCA 2017). The United States Supreme Court has made clear that even where trial counsel has elicited significant evidence to support a defense theory, that alone cannot defeat a claim of ineffectiveness for failing to elicit additional evidence. *Sears v. Upton*, 561 U.S. 945, 954-55 (2010).

The specific details of the various failures at issue are detailed in the respective argument sections below, but a review of the big picture should assist the Court. None of Simpson's claims challenge the initial investigation and trial preparation by Chipperfield and Andux, who were engaged in a thorough and professional work up until their office was disqualified. And even then, they did not simply wash their hands of the case and hand over the files to Eler and Fletcher. They organized everything they had done, prepared a detailed memorandum explaining what was in the files they were handing over, gathered all of their handwritten notes and annotated synopses of police reports with their impressions of the

State's case and ways to undermine it, provided a detailed chronology of events in Simpson's life and the case, and even assembled lists detailing the many investigative steps that still need to be pursued. (R3:3550-54, 3584-87, 3588, 3590-91, 3595-3604, 3626-69, 13216-17, 13222, 13230-32, 13239-40, 13272, 13275.)

These documents and the lawyers' testimony demonstrate that counsel had notice of many leads and deficiencies in the State's case that required further pre-trial investigation. Eler had a typed list in his files labeled "Items noted in client and/or attorney notes that need to be handled" and appears to include the things that Chipperfield's notes indicated remained to be done, although Chipperfield did not recall typing it up and Eler did not recognize it from memory at the evidentiary hearing. (R3:3555-56, 6509, 10380-83, 13217-18.) Regardless of who drafted that list, it detailed the need to find documents, interview witnesses, and follow up on depositions taken by Chipperfield and Andux that form the basis for many of Simpson's IAC claims because counsel failed to follow up.

Counsel agreed early on that Eler could focus on preparing for and taking the lead in the guilt phase, while Fletcher would do the same for the penalty phase. (R3:10101, 10510-11.) Nonetheless, providing additional evidence that Eler was simply not prepared, just a few weeks before trial, they decided that Fletcher would handle the two most important witnesses in the guilt phase, cross-examining Durrance, the State's most important witness, and handling the direct of Simpson, the

most important defense witness. (R3:10152, 10167, 10238, 10241-42, 10522-23.) Fletcher could not recall doing anything to prepare for Durrance other than relying on what Eler had done; Fletcher did not even attend Durrance's deposition. (R3:2371-2448, 10523.) Eler also handled opening statement and closing argument. (T:517-26, 1649-75; R3:10443.) Thus, the deficiencies in trial preparation and performance raised in this appeal focus largely on Eler's failure to undertake basic and obvious work necessary to effectively represent Simpson at trial.⁵

II. IMPROPER ARGUMENT CLAIMS

As will be seen in Parts III, IV, and V of this brief, it became apparent throughout Simpson's trial that defense counsel were not prepared or effective advocates for their client as to each leg of the State's case and nearly every material witness. But the Court can save itself considerable time by starting with the post-conviction claims that arise from what happened at the end of the trial. Increasingly emboldened by the failure of the defense or trial court to rein it in, the State de-

⁵ If the Court's institutional memory is being jogged by the evidence of Eler's failure to prepare for trial, there is a good reason. This has been a common pattern for Eler in other cases, and this Court has not hesitated to reverse death sentences based on the prejudice resulting from its implementation. *Morrison*, 236 So. 3d at 220-22; *Shellito v. State*, 121 So. 3d 445, 455-56 (Fla. 2013); *see also Douglas*, 141 So. 3d at 119-20 (finding Eler's preparation was deficient, but denying relief for lack of prejudice). After Eler answered a few brief questions about the rulings in *Shellito* and *Morrison* during the evidentiary hearing, the trial court refused to allow further questioning or even a proffer regarding Eler's performance in other cases, so the record does not indicate whether there are any more findings of deficient performance by Eler. (R3:10352-53.)

livered a closing argument and rebuttal rife not just with overreach and impropriety, but utter falsehoods on the most material issues. Counsel sat idly by and did nothing to respond, and they had no excuse.

A handful of probably the least offensive of the State's improper arguments were raised on direct appeal, where this Court expressed concern but affirmed because appellate counsel had been unable to show fundamental error in the absence of objections by the trial court. 3 So. 3d at 1146-47. In the accompanying habeas petition, Simpson argues that appellate counsel was ineffective for failing to (1) raise any of the much more egregious comments addressed herein or (2) provide argument as to why the guilty verdict could not have been obtained without the assistance of the State's improper arguments. But even if the Court disagrees that these comments would meet the strict fundamental error standard, it should grant relief on the following claims because counsel was ineffective for failing to object, some of the comments even rose to the level of *Giglio* violations, and there is at least a reasonable probability that a mistrial would have been granted or the jury would have acquitted Simpson had counsel done their job and objected.

A. Counsel Allowed the State to Mislead the Jury With a Host of Improper Arguments. (Claim 25)

Claim 25 asserts that counsel was ineffective for failing to challenge improper arguments by the State throughout closing argument. (R3:1355-61.) To support the first leg of its case, the State made numerous improper remarks vouch-

ing for the credibility of Durrance. A handful of remarks that Durrance was honest and credible were raised on direct appeal, even though counsel did not object to any of them. (DA In. Br. at 58-60 (citing T:1607-08, 1637).) This Court expressed concerns about these remarks, which it characterized as “clearly improper comments vouching for Durrance’s credibility”⁶ during closing argument of the guilt phase and warned that they “impermissibly placed the prestige of the government behind the witness or indicated that information not presented to the jury supported the witness’s testimony.” *Simpson*, 3 So. 3d at 1146 n.7 (quoting *Spann v. State*, 985 So. 2d 1059, 1067 (Fla. 2008) (alteration marks omitted)). The Court nonetheless affirmed because trial counsel had not objected and appellate counsel failed to prove fundamental error. *Id.* at 1146-47. But those comments were only the tip of the iceberg, and this Court was not asked to consider far more egregious comments. After reviewing all of the additional, more egregious improper comments raised on postconviction review, the Court should conclude that they warrant relief and the trial court erred in summarily refusing to consider them.

(1) Not only had the State improperly bolstered Durrance’s credibility, but it also denigrated Simpson, attacking both his character, which is never proper,

⁶ Worse, as shown in Part III.B, the State knew Durrance was not credible and Caliel, in particular, did not believe him.

and accusing him of fabricating his testimony, which is improper where the accusation is not based on any evidence, as was the case here. First, Caliel told the jury:

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.) See, e.g., *Petruschke v. State*, 125 So. 3d 274, 280 (Fla. 4th DCA 2013) (reversing for new trial where prosecutor attacked defendant's character); *Pacifico v. State*, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994) (same); see also *Martinez v. State*, 761 So. 2d 1074, 1082-83 (Fla. 2000) (holding that similar character attacks were improper and supported reversal of capital conviction when considered along with other improper arguments).

Worse than his personal opinions that Durrance was credible that troubled the Court on direct appeal, Caliel repeatedly expressed his personal opinions that Simpson's testimony was "simply unbelievable," that Simpson's attempt to explain his actions after the murders was "a group of lies," and Simpson's testimony on cross-examination was rife with "inconsistencies and the lies."⁷ (T:1637, 1640, 1642.) He even said that he witnessed during a deposition that Simpson had con-

⁷ While appellate counsel raised challenges on direct appeal to comments by Caliel that Simpson had lied to police when he denied knowing the victims or owning the clothes (DA In. Br. at 59-60 (citing T:1617, 1636, 1642)), those were arguably comments on the evidence and did not involve accusations that Simpson was lying at trial where he did not deny knowing the victims or owning the clothes.

spired with counsel to fabricate his DNA defense based on depositions that Caliel, Simpson, and the lawyers had seen, but the jury did not:

I saw it in the deposition. And that's where the true color of his testimony came out. He had gone through with his attorneys and by himself and read through all the testimony, all the evidence in this case, and this clearly demonstrates, despite the fact that he got caught in a bald-faced lie, clearly demonstrates that he was trying to make everything fit the best that he could.

(T:1641.) He concluded his denigration of Simpson and the defense with the dramatic claim – “His words proven to be lies.” (T:1646.)

While it is certainly fair and appropriate for the State to make arguments why the jury should not believe a defendant's testimony or even call the defendant a “liar” when those arguments are supported by record evidence, Caliel had no evidence to support his dramatic accusation that Simpson “concoct[ed] the story” about Little Archie coming to his trailer to borrow clothes right after Simpson's release from jail.⁸ (T:1644-45.) The only “fact” he cited for this claim was that Simpson was released from jail to start working as a CI in March 1999, which conflicted with his testimony that Little Archie took his clothes right after he was released, which was just a few weeks before the July 1999 murders. As shown in Part II.B below, the State knew that its unsupported insistence throughout trial that Simpson

⁸ Thus, the cases on which the State relied below are not the least contrary to Simpson's position. (R3:10046-47 (citing *Murphy v. Int'l Robotic Sys.*, 766 So. 2d 1010, 1028-29 (Fla. 2000); *Shellito v. State*, 701 So. 2d 837, 841-42 (Fla. 1997); *Davis v. State*, 698 So. 2d 1182, 1190 (Fla. 1997); *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987)).)

was released in March was outright false and he was, in fact, released in June consistent with his account. But for present purposes, the point is that these were improper attacks on Simpson's character without any evidentiary support.

On rebuttal, Nelson made a series of "arguments" to bolster the State's DNA evidence that were 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, all of which were made during the State's rebuttal argument, meaning an objection was the only way to cure them. *See, e.g., Pacifico*, 642 So. 2d at 1184 ("It is impermissible for a prosecutor to comment in closing argument upon matters outside the record."); *Hodge v. Hurley*, 426 F.3d 368, 383-87 (6th Cir. 2005) (failure to object to prosecution's misrepresentation of evidence supported IAC claim).

She began by reading a long quotation from a criminologist named Paul Kirk asserting that "[p]hysical evidence cannot be wrong" and "[i]t is impossible for the criminal to act without leaving behind traces of his presence," even though there was no evidence to support any of this and Kirk did not testify. (T:1675-76.) She went on to assert with no evidentiary support that the "accepted scientific" views of wearer's DNA, which was "unheard" of at the time of the 1999 murders, had become a "sure thing" by the time of trial. (T:1676-77.)

She asserted that the DNA test results in this case not only showed that Simpson had worn the clothes at some point, which was fair comment on the evidence, but also that they established that he was the only person “at the exclusion of every other human being on the planet” who could have worn them during the murders. (T:1677.) Seizing on the State’s experts’ opinions that DNA can be left on clothing by sweat and that sweat can “eat” DNA that had been left by previous wearers (T:1127, 1332), Nelson told the jury that Simpson had to be the last wearer “[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 the State’s own experts had conceded that it was not scientifically possible to tell who was the last person to wear the clothes, that a minor contributor to the mixtures could have worn the clothes after Simpson, and that it was not possible to tell when DNA was left on the clothes. (T:1223-24, 1331, 1333-34.) This was no minor nuance that the State simply overlooked. In preparing for trial, Caliel tried to anticipate Simpson’s defense and knew this would be an important issue because he knew the experts would testify there is no way to determine when Simpson’s DNA was left on the clothes. (R3:2838, 10999.) Worse, there was no evidence that Simpson’s DNA on the clothes came from sweat, as opposed to friction with his skin, snot from his nose, or saliva from his mouth.

There was not even any evidence about the temperature or humidity either at times that Simpson was wearing the clothing or even at the time of the murders. Nor was there any evidence that whoever wore the clothes during the murders was not wearing other clothes underneath such that they would have had to have stripped to leave the clothes behind the church and flee naked. None of that stopped Nelson from making up facts to fit her theory. She argued that the night of the murders, it was “Florida 100 degrees plus humidity heat. Whoever committed this murder, ... was perspiring.”⁹ (T:1680.)

To rebut Simpson’s defense, Nelson told the jury to “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 just not true. The clothing contained mixtures of wearer’s DNA where there were not only contributors who could not be identified, but Little Archie and Smallwood could not be excluded. As for what was found inside the house, there was DNA in a bloodstain on the floor that could not have come from Simpson, but could have come from Smallwood, and it was the State’s witness who speculated

⁹ There is no reason to presume these were the weather conditions even though the murders took place in July. According to the Weather Underground website, the temperature that night was 78 degrees with humidity as low as 52 percent. See <https://www.wunderground.com/history/airport/KNIP/1999/7%20/15/DailyHistoy.html?req%20city=%20NA%20&req%20state=NA&req%20statename=NA&hdf=1> (last visited April 11, 2019).

blood on the floor may have come from an injury to one of the killers. Unidentified fingerprints (some of them bloody) were found on the doors, unidentified shoe prints were found in the kitchen, unidentified hair fibers were found in the bedroom, and unidentified blood was found all over the bedroom and the ground and a magazine in the straight path out the door toward where the axe was found.

She also argued that the 15 allele belonging to an unknown contributor to one of the mixtures “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 conceded 75% of the population could be excluded from having contributed that allele, but Little Archie could not. (T:1176-77, 1335.)

Nelson amplified the prejudice of these arguments by trying to shift the burden of proof to Simpson: “This defendant is asking you to 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 the burden of proof.”).

Finally, the State propped up the third and weakest leg of its case by emphasizing how confident it was in Simpson’s guilt based on its investigation. Caliel urged the jury to consider the fact that Det. Hinson “was taken aback” by Simpson’s actions the day after the murder and “had a feeling” that Simpson was involved. (T:1600-04.) He went on to argue that JSO and the SAO collectively had

refused to take Durrance's claim that Simpson confessed "at face value, without more," but believed him once the DNA test results came back. (T:1614-15.) And Nelson only doubled down on this improper tactic on rebuttal:

We've had this case for sometime. We've had the luxury of pre-trialing 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.)

There were no strategic reasons to let the State make these comments without objection. Indeed, when Eler apparently woke up near the end and finally made his first and only objection at the end of Nelson's argument, it was to argue that she was trying to shift the burden of proof by arguing that "we today on behalf of the citizens of the State of Florida ask you to render a verdict which recognizes the truth." (T:1691.) The court sustained the objection and instructed the jury to disregard the comment. (T:1693.) Had counsel objected and sought a mistrial when Nelson made all the far more egregious comments discussed above, a mistrial would have been required. And even if it had been denied, there is certainly a reasonable probability that the jury was swayed by these arguments in reaching its verdict. Indeed, Juror Cody told the Court that she had been misled to initially find Simpson guilty because she thought she could only consider the physical evidence, which was the topic of most of Nelson's improper arguments.

These comments did far more to impermissibly place the prestige of the State behind a witness and imply far stronger insinuations that information not presented to the jury supported the witness's testimony than the few comments this Court considered on direct appeal. They directly implied that the State was confident in Simpson's guilt based on all kinds of evidence and investigation it had performed before trial. They also sent the direct message to the jury that the State had other evidence of guilt that was not presented. *See 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. That 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.") (citation omitted); *Pait v. State*, 112 So. 2d 380, 384-85 (Fla. 1959) ("It is not appropriate to undertake to give the jury the benefit of the composite judgment of the State Attorney's staff allegedly reached on the basis of investigations and discussions taking place before the trial.").

(2) The trial court rejected Simpson's challenges to counsel's failure to object to all of these improper comments on the sole ground that this Court had held that all these comments did not rise to the level of fundamental error, which precluded a finding that the failure to object meets the prejudice requirement for ineffective assistance claims. (R3:13495.) That is just not true. As indicated above, only Caliel's handful of comments that he found Durrance to be honest, forthright,

smart, and credible were addressed on direct appeal, and none of the more egregious comments discussed above were even mentioned in Simpson's direct appeal brief. Even if prejudice could not be shown for failing to object to those few comments addressed in the direct appeal, they can still be considered for determining the cumulative prejudice of all the improper comments that counsel failed to challenge.

And even if all the comments had been raised on appeal and rejected under the fundamental error standard, that does not mean that the failure to object was not prejudicial. As the opinion on direct appeal makes clear, a finding of no fundamental error only means that the jury might have found the defendant guilty without the improper argument. The standard for IAC prejudice is the exact opposite – there is prejudice if there is a reasonable possibility the deficiency affected the verdict. *E.g.*, *Simmons v. State*, 105 So. 3d 475, 487-88 (Fla. 2012); *Gaskin v. State*, 822 So. 2d 1243, 1247 n.3 (Fla. 2002); *Porter v. McCollum*, 558 U.S. 30, 44 (2009); *Strickland*, 466 U.S. at 693. This Court's decisions suggesting a contrary result are, therefore, erroneous and should be receded from to whatever extent the Court finds the issue presented here. *Wright v. State*, 213 So. 3d 881, 911 (Fla. 2017); *Lowe v. State*, 2 So. 3d 21, 38 (Fla. 2009); *Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003).

Whether the Court considers the few comments addressed in the direct appeal or limits its review to the far more pervasive and egregious comments that were not, there is at least a reasonable probability of a different result. Far less egregious compilations of the forgoing improper comments have resulted in new trials and admonitions to the State in decisions that would have required the trial court to grant a mistrial had counsel simply objected. *E.g.*, *Petruschke*, 125 So. 3d at 280; *Gore v. State*, 719 So. 2d 1197, 1200-03 (Fla. 1998); *Toler v. State*, 95 So. 3d 913, 916-18 (Fla. 1st DCA 2012); *Pacifico*, 642 So. 2d at 1184-85.

Finally, there was no strategic reason to allow the State to make these arguments, as the State suggested below. (R3:10044.) Simpson’s counsel had “the duty to object to improper comments by the State and to move for a mistrial where required.” *Eure v. State*, 764 So. 2d 798, 801 (Fla. 2d DCA 2000).

If the prosecutor makes clearly inappropriate comments during closing argument, defense counsel has an affirmative duty to contemporaneously object, both to preserve the issue for appellate review, and, for an equally or perhaps more important reason, to give the trial judge a chance to remedy the potential harm by instructing the jury and avoiding its repetition in that trial.

Rodriguez, 210 So. 3d at 753. The prejudice of failing to object is not just that the jury may be misled, but the missed opportunity to have the trial judge “affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments.” *Id.* (quoting *Edwards v. State*, 428 So. 2d 357, 359 (Fla. 3d DCA 1983)).

B. The State Knowingly Misrepresented Simpson's Release Date to Mislead the Jury Into Disbelieving His Account for How Little Archie Took His Clothes. (Claim 17)

Claim 17 asserts that the State attacked Simpson's testimony about Little Archie borrowing his clothes by falsely challenging his timeline of events and that counsel was ineffective in failing to respond with readily available evidence that would have shown the State's position was false. (R3:1524-29.) Specifically, Simpson explained that right after he was released from jail to work as a CI for JSO, he moved into a trailer on 118th Street and, shortly thereafter, Little Archie came over and asked to borrow black clothing so he could go steal a car. (T:1380-87.) Simpson told him he could take some clothes laying on the floor while Simpson took a shower. (T:1387.) When Simpson got out of the shower, Little Archie had already left with Simpson's black clothes and also had opened Simpson's dresser and found a business card of the detective for whom Simpson was working as a CI, which Little Archie left sitting on the dresser. (T:1387.)

The only basis the State used to challenge this testimony was to fabricate an inconsistency and argue that proved Simpson was lying. Caliel started his attack on cross by suggesting that Simpson fabricated his account by having Simpson confirm he was aware of the evidence against him, had discussed it with his attorneys, and had heard the State's testimony before he testified. (T:1419.) After unsuccessfully trying to trip Simpson up on his explanation for the cut on his hand (T:1419-

22), Caliel falsely suggested that Simpson had testified that he was released from jail in March 1999. (T:1422.) Simpson never once suggested this, and there was no evidence offered at trial to support Caliel's suggestion. The only times that March 1999 was even mentioned to that point were unsupported suggestions by Caliel, including one in front of the jury. (T:771, 800, 804.)

When Caliel suggested the March release date, Simpson questioned that date and testified that while he did not remember the date when he was released from jail over seven years before, he knew that he rented a room in the trailer right after his release. (T:1422-23.) After Caliel had Simpson confirm that he rented the room for only a "couple of weeks" after his release, he attacked Simpson's timeline by asking, "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?" (T:1423.) When Simpson denied the incident with Little Archie was in April, Caliel asked Simpson to explain "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?" (T:1423.) His counsel having not prepared him with evidence of when he was released, Simpson replied, "It's been a long time ago. I don't remember exactly." (T:1423.) Caliel then asked whether Simpson was "sure" he stayed at the trailer at 118th Street for only about three weeks after his release, and Simpson could only admit, "It could have been

longer. I'm not sure, sir." (T:1424.) And when Caliel asked Simpson to clarify how long he stayed at his mother's house between the time he left the trailer and the murders, Simpson stated "about two weeks." (T:1424.)

Still having never produced a shred of evidence of Simpson's actual release date, Caliel emphasized his unsupported claim that Simpson was released in March 1999 throughout his closing argument, mentioning that date no less than five times. (T:1604, 1618, 1619, 1643, 1681-82.) He told the jury the timeline was "vitally important." (T:1618-19.) He argued that to understand "the most important inconsistency in [Simpson's] testimony," the jury needed to "[g]o back to your timeline" to see that Simpson was released in March 1999 and that 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." (T:1643.)

Referring to testimony by Hinson that Simpson had called him on June 21, 1999, to say that Little Archie had wanted to commit a crime (T:651-52), Caliel argued that Simpson's testimony that he only stayed in the trailer for two or three weeks meant that the meeting at the trailer would have been in April 1999 and, therefore, could not have been the time he called Hinson. (T:1643-44.) And Caliel seized on the failure of the defense to ever counter his (false) suggestions – "when directly confronted about this blatant inconsistency on the witness stand, he then has to hedge back, well, it's been a long time." (T:1644.) After Eler failed to ad-

dress the timeline in closing, Nelson drove Caliel's point home, arguing that Simpson's release in March threw off the timeline he proposed and disproved his contention that the clothes found behind the church were the clothes that Little Archie had taken from him. (T:1679, 1681-82.)

The undisputed evidence, however, shows and the State ultimately conceded in postconviction proceedings that Simpson's timeline was correct. The postconviction testimony of Judge Tim Collins (who was an assistant state attorney in 1999), Nelson, and Hinson as well as records that were in the State's possession – indeed, in the possession of the paralegal assisting Caliel with this prosecution – unequivocally showed that Simpson had entered a guilty plea on his Duval robbery charges in March 1999, was transferred from Duval County jail to Columbia County jail in April 1999 on a violation of probation arrest warrant, and was not released from jail to start working as a CI until June 9, 1999. (R3:2449, 2471-72, 2485-95, 2499-2533, 10645-60, 10765-67, 12406-10.) The State had to stipulate to this in light of postconviction discovery. (R3:10058-59.)

That day matches Simpson's timeline perfectly. The June 21 call documented by Hinson as an interaction between Simpson and Little Archie was within two weeks of Simpson's release. Moreover, Hinson's police report and postconviction testimony confirmed that Simpson had told him that Little Archie had come by his trailer that day. (R3:2565, 12413.) And three weeks after his release puts the date

of Simpson moving to his mother's house at the very end of June or beginning of July, which was about two weeks before the murders, fitting the back end of Simpson's timeline. But for the State's heavy reliance on its false representation that Simpson was released in March 1999, the jury likely would have found Simpson's testimony at least created reasonable doubt as it explained how the only DNA connecting him was present near the murder scene.

Falsely impeaching the defendant in this manner requires a new trial. For example, the Fourth District reversed in one case where a prosecutor attempted to insinuate that the defendant was lying when he said he had only been convicted of one crime previously, got the defendant to admit uncertainty on cross-examination, and highlighted the issue again in closing argument, even though the court found all had been done in good faith. That court explained:

When the State finally obtained a copy of the appropriate record in order to furnish it to the court at appellant's sentencing, it became quite apparent the prosecutor had (no doubt in good faith, but improperly) forced appellant to incorrectly concede he may have been convicted twice. It seems to us that before a prosecutor sets about to aggressively cross-examine a witness about his criminal record, implying as was done here, that the defendant had additional convictions, he must be prepared to produce the record to back up the implication and not leave the jury with innuendoes or worse which improperly prejudice the defendant.

Dukes v. State, 356 So. 2d 873, 875 (Fla. 4th DCA 1978); accord *Marsh v. State*, 202 So. 2d 222, 224-25 (Fla. 3d DCA 1967); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) ("improper suggestions, insinuations, and, especially, assertions

of personal knowledge [by the prosecuting attorney] are apt to carry much weight against the accused when they should properly carry none”); *Johnson v. State*, 44 So. 3d 51, 54, 73 (Fla. 2010) (reversing denial of *Giglio* claim in 3.851 motion because State had made “misleading argument” and noting that “experience teaches that the means become the end and that irregular and untruthful arguments lead to unreliable results”).

Simply put, “[i]t is impermissible for the state to insinuate impeaching facts while questioning a defense witness without evidence to back up those facts.” *Shimko v. State*, 883 So. 2d 341, 343 (Fla. 4th DCA 2004). This Court has previously found that the State engaged in improper argument where the state attorney “insinuated impeaching facts that were not supported by any evidence and that were not corroborated by actual impeachment.” *Braddy v. State*, 111 So. 3d 810, 853 (Fla. 2012). Relief was not given in *Braddy* because the improper impeachment concerned “only a minor aspect of” the State’s case, *id.*, but the same cannot be said here, given the number of references to this information in closing argument and Caliel’s argument that Simpson’s release was “vitally important” and the “most important inconsistency” in Simpson’s defense. Indeed, the State well knew this was the key to convicting Simpson as Caliel’s supervisor circulated a memo praising Caliel’s performance after the trial by noting that Simpson had tried to

blame Little Archie, but the “[j]ury didn’t believe him after Mark’s cross-examination.” (R3:7103.)

Whether Caliel and Nelson ever looked at all the readily available documentation at their fingertips to discover their representations were false is of no moment because other prosecutors in their office knew the true facts. *Giglio*, 405 U.S. at 154. Indeed, the very reason Simpson was released on June 9 was because the SAO (through Collins) had Columbia County prosecutors secure Simpson’s release so he could return to Jacksonville to work as a CI. *See id.* (“The prosecutor’s office is an entity and as such it is the spokesman for the Government To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.”).

True, counsel had or could have easily obtained evidence to confirm Simpson’s testimony and destroy Caliel’s timeline, but that only means that, in addition to *Giglio*, Simpson is entitled to relief for IAC. *See Bryant v. State*, 420 S.E.2d 801, 804 (Ga. Ct. App. 1992) (concluding counsel was “unquestionably deficient” for failing to object to prosecutor’s misrepresentation to jury regarding defendant’s criminal history); *see also Mills v. Scully*, 826 F.2d 1192, 1195 (2d Cir. 1987) (“Even where defense counsel is aware of the falsity, there may be a deprivation of

due process if the prosecutor reinforces the deception by capitalizing on it in closing argument.”).

The trial court rejected relief based on its conclusion that false statements of fact by the State in its cross-examination and in closing argument cannot violate *Giglio* because they “are not evidence,” relying on *Huggins v. State*, 161 So. 3d 335, 353 (Fla. 2014), and *Spencer v. State*, 842 So. 2d 52, 70-71 (Fla. 2003). (R3:13461.) While these cases stand for the proposition that claims of improper statements in closing argument generally cannot be raised on postconviction review since they could have been challenged on direct appeal, they do not extend that principle to arguments that assert facts the State knows to be false.¹⁰ Obtaining a criminal conviction based on assertions of fact the State knows are false is a quintessential *Giglio* violation.

The court alternatively rejected relief under *Giglio* based on its finding that the misrepresentations were not material because “Little Archie testified at trial that he recalled taking Defendant home prior to the murders” and the date of that

¹⁰ In *Huggins*, this Court found that the challenged remarks were based on testimony presented to the jury that was not false and to the extent the prosecutor’s characterization of those remarks was improper, the claim was procedurally barred because it should have been raised on direct appeal. 161 So. 3d at 349. In *Spencer*, this Court affirmatively applied the *Giglio* test to representations made during closing and denied relief because they did were not false. 842 So. 2d at 71. Similarly, this Court applied the *Giglio* test to misrepresentations in the State’s closing argument in *Wickham v. State*, 124 So. 3d 841, 853 (Fla. 2013), and denied relief because they were not material.

visit was immaterial because all that mattered was that it was before the murders. (R3:13461-62.) As an initial matter, the court erred in not putting the burden of disproving materiality on the State and in not conducting cumulative review for prejudice. Moreover, the record does not support either conclusion. As explained in more detail in Part IV.D, Little Archie denied going to Simpson's trailer on 118th Street and admitted only to going to Simpson's mother house, and Simpson's testimony was that Little Archie took the clothes at the trailer. It was not until his postconviction deposition that Little Archie admitted he went to the trailer.

More importantly for present purposes, the court's conclusion that the timing was immaterial is contradicted by Caliel's argument. The **only** basis the State offered for rejecting Simpson's explanation was the timing. The State made a dramatic and repeated point that the reason the jury should find Simpson was not telling the truth was that the visit to the trailer would have been in April, not June. The State even argued that the "blatant inconsistency" in timing proved that the visit could not have coincided with the June 21 call with Hinson.¹¹ (T:1643-44.)

The trial court denied relief on Simpson's alternative IAC claim by concluding that counsel followed a reasonable "strategy" in not correcting the State's mis-

¹¹ For this reason, the trial court also missed the mark with its subsequent statement that "while the State may have insinuated Little Archie's visit occurred in March, April, or May 1999, Detective Hinson's testimony supports Defendant's statement that it occurred in June 1999." (R3:13463.)

statement because it would have required them to “impeach” Simpson and prove the details of his release. (R3:13462-63.) Nonsense. All the defense needed to do was object and show the Court that the State was making false representations of fact. The cure was to tell the jury that Simpson was released to start working as a CI on June 9. There would be no reason to tell the jury anything else. And there would be no reason to “impeach” Simpson on the date; they would be rehabilitating him after the State’s fraudulent attempt at impeachment. Simpson admitted he could not recall the date, so his counsel providing him with the actual date to refresh his memory would not have undermined his credibility.

Counsel had no strategic reason to let Caliel’s assertions go unchecked, knowing it was crucial for the defense to verify Simpson’s explanation for why his clothes were found behind the church. They just could not believe Caliel would make such a false representation so they never checked their own records or otherwise sought to obtain records that would have confirmed the true facts. (R3:3600, 10235, 10293-95, 10381-82, 13222-24.) After Caliel’s aggressive cross-examination of Simpson relying on an incorrect representation of the facts, the State would have lost all credibility with the jury if the jury learned that the State well knew he was released in June.

C. The State Knowingly Misrepresented Kimbler's Injuries to Mislead the Jury Into Disbelieving the DNA Under Her Fingernails Could Have Come From Her Killer. (Claim 12)

Claim 12 charges the State with using knowingly false argument to explain away the DNA found under Kimbler's fingernails, which belonged to either Big Archie or Little Archie. (R3:1510-12.) This evidence had been collected in a rape kit taken from Kimbler at the scene, but the State had apparently forgotten about it and did not realize it was available for testing until shortly before the original trial date. (R1:579, 1233-34.) The State sought a continuance of the trial so DNA tests could be run to see who Kimbler had scratched, and Simpson agreed because the test results were important to solving the murders. (R1:1234-36.)

The State elected to use a test that could not distinguish between male linear relatives, even though other available tests would have. (T:1075-77.) The results indicated that the material under her nails came from either Big Archie or Little Archie, with the State's expert conceding on cross-examination that one possible explanation for these results could be that Kimbler had been struggling with Little Archie before being killed. (T:1074-75, 1077.) The State sought to undermine this damning evidence not by pointing to any evidence before the jury, but by making the following claim in closing:

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.

(T:1689.)

It knew this was false. Not only had the State obtained a continuance of Simpson's trial on the predicate that the test results would help show who killed Kimbler, but in its directions to the lab, it explained that Kimbler had suffered defensive wounds during a struggle with the killer and that the killer's DNA might be in the scrapings under her nails. (R3:4714, 12006-08.) The autopsy photos showed several injuries to Kimbler's hands and the medical examiner's report detailed injuries to her fingers. (R3:1998, 6574.)

The State's duplicity revealed itself during the penalty phase, when Caliel argued why the heinous, atrocious, or cruel aggravating circumstance was present. He relied on testimony by the medical examiner's office that Kimbler had defensive wounds on her hands and that there was no way to know which of the many axe blows hit her first, and then argued that "if Ms. 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." (T:1767.) And in the State's memorandum to the court in support of the death penalty, the State provided the following narrative of what it understood the evidence to establish:

The Defendant repeatedly struck her with the axe, as she attempted to defend herself, as indicated by defensive wounds on her arm and hands. She was struck with such great force that a blow to her upper arm fractured bones that punctured her skin. The Defendant then

overcame Ms. Kimbler with blows to the head and neck, breaking her neck and severing her spinal cord.

(R3:6589.) The State knew that Kimbler was not paralyzed, if at all, until after she had tried to ward off her attacker with her hands.

Moreover, as a result of the State's own arguments, it is now a fact established as the law of this case that "[d]efensive wounds found on both victims showed that they attempted to fend off [their killer]." *Simpson*, 3 So. 3d at 1138. Having persuaded this Court to reach that conclusion to uphold Simpson's sentences on direct appeal, the State cannot deny that fact now.

In short, the State used knowingly false arguments to not only undermine Simpson's testimony that Little Archie had taken the clothes found at the murder scene from Simpson a few weeks prior, but also to counter its own evidence suggesting Little Archie was the one to kill Kimbler. There is at least a reasonable probability that the jury was swayed by these arguments, and the trial court did not deny this was a material issue.

The court instead denied *Giglio* relief based on its illogical finding that the State's conflicting positions each asserted a "reasonable inference" based on the medical examiner's testimony that the blow to Kimbler's neck killed her instantly. (R3:13429-30.) The court did not explain how the State is absolved from obtaining the conviction based on the inference that this means she was paralyzed before she could defend herself and then obtaining a death sentence that Simpson be executed

based on the opposite inference from the same evidence. At any rate, the evidence quoted in the trial court's order shows that it would not be reasonable to infer the first blow paralyzed Kimbler. In the quoted testimony, the medical examiner testifies on direct examination by the State that Kimbler had defensive wounds on her third finger and elsewhere, and she testified on cross that the blow to the neck instantaneously killed Kimbler. (T:849, 859-60.) She did not testify that any blow paralyzed Kimbler. The **only** inference from these facts is that Kimbler fought back her attacker before the blow to her neck because a dead or paralyzed person cannot defend themselves.

Even if the foregoing did not establish that the State knowingly made a false representation, at the very least it shows that counsel was ineffective for not rebutting the State's argument with this evidence. In rejecting IAC relief on this claim, the court only addressed aspects of the claim not addressed here. (R3:13424-28.) The court did not address Simpson's argument that counsel should have objected to the State's false assertion that Kimbler was paralyzed by the first blow and, therefore, could not have attacked her killer.

III. CLAIMS UNDERMINING DURRANCE'S TESTIMONY AND THE STATE'S THEORY OF THE CASE

Subpart A addresses Durrance's post-trial admissions that he lied and Simpson never confessed. Simpson's claim that the State's reliance on Durrance's testimony was infected by *Giglio* and *Brady* violations are addressed in subpart B.

Subpart C details counsel's ineffective attempts to discover and use available evidence to impeach Durrance. Finally, subpart D argues that the defense allowed the State to put on false evidence and argument that the killer entered the house through the north rear door in an effort to make up for Durrance's clear lie that Simpson had entered through a window.

A. Durrance Has Admitted He Lied. (Claim 4)

Claim 4 alleges that Durrance admitted he lied at trial when he testified that Simpson confessed and that he was promised nothing by the State for providing evidence against Simpson. (R3:1464-66.) The evidence on this point was undisputed. Monica Jordan, a postconviction investigator for Simpson's team, first interviewed Durrance on July 7, 2010, in Columbia Correctional Institution where he confirmed that his testimony against Simpson was not true and indicated that he was willing to sign an affidavit. (R3:10693, 10698.) Jordan returned with postconviction counsel John Mills on October 25, 2010, and Durrance told them both that Simpson never confessed to him. (R3:10699-700.) He explained that he had lied at trial because he had a vendetta against Simpson after learning through discovery in his trafficking case that Simpson had been an informant against him. (R3:10700.) The inspiration for his story that Simpson had entered Big Archie's house through a window was a prior home-invasion robbery where the perpetrators had entered through a window. (R3:10700-01.) And he advised that the "wet work" quote he

had attributed to Simpson had actually come from a Dean Koontz novel. (R3:10701-03.) Durrance also told Jordan that Caliel had “fed him information in preparation for his testimony” by providing him police reports. (R3:10706.)

Durrance advised that his testimony that Caliel had not promised him anything in exchange for his testimony was also false because, while Caliel obviously had no ability to promise how the court would rule, he did promise to support a reduction in exchange for Durrance’s testimony. (R3:10703-04.) Caliel went so far as to tell Durrance that “he wouldn’t need to worry about a 3.850” to vacate the conviction and sentence on his trafficking charges if he testified against Simpson. (R3:10719.)

But Durrance would not sign an affidavit in October because his challenge to his own subsequent murder conviction and some other legal matters were pending; he was nervous that signing the affidavit could have adverse ramifications. (R3:10706.) When Jordan and Mills next saw him on July 7, 2011, he declined to sign an affidavit out of fear of retaliation by the victims’ families because he learned that his prior conversation had been overheard by an inmate friend of the Crook family named Bobby Mercer, and the victims’ family had thereafter encouraged Durrance not to recant. (R3:10707-08, 10720-21.) At his video deposition before the evidentiary hearing, he refused to answer any questions when Mills asked whether he had been truthful at trial in testifying that Simpson had confessed and

that Caliel had not promised him anything. (R3:10686-89.) He also refused to answer any questions by the State and confirmed he would refuse to testify even if ordered to do so by the Court. (R3:10689-90.)

The trial court denied relief on three grounds: **(1)** “there was sufficient evidence to convict Defendant outside of Durrance’s testimony,” **(2)** the court did not “find it credible that Durrance recanted” in light of “inconsistent statements” he made to Jordan and to JSO officers who interviewed him since trial, and **(3)** Durrance did not recant under oath. (R3:13367.)

(1) This Court’s opinion on direct appeal and Simpson’s argument in Part I.A above make clear that the convictions cannot stand absent Durrance’s testimony, which was the only direct evidence of guilt. The rest of the State’s evidence was purely circumstantial; the State could not eliminate Simpson’s reasonable hypothesis of innocence that someone else had taken his clothes and wore them during the murders, most likely somebody like Little Archie who had a motive and was the last person known to have been with the victims. The jury would have had to have engaged in rank speculation and improper inference stacking to convict based on the circumstantial evidence.

(2) Nor do Durrance’s postconviction statements to JSO officers support the trial court’s rulings. As an initial matter, Simpson correctly objected to the admission of these out-of-court statements because they were hearsay statements that

did not meet any exceptions to make them admissible. (R3:12592, 12599.) The court overruled these objections even though it agreed these were hearsay statements and neither it nor the State ever identified an exception that would make it admissible. It merely concluded that since Simpson had been offering ample out-of-court statements – all of which he argued were either used for non-hearsay purposes or subject to a hearsay exception – the court should consider hearsay submitted by the State. (R3:12592, 12599.) This is not a lawful reason for considering, much less basing a decision on inadmissible evidence.

But even if the statements were admissible, they were not inconsistent with Simpson's evidence and, when viewed in light of other undisputed evidence, only demonstrate that Durrance was lying to the investigators. First, Detective Gary Stucki testified that when he visited Durrance in 2009, just after Durrance had been convicted of another murder (a third murder with ties to this case discussed elsewhere) and sentenced to life in prison, Durrance stated that "Simpson's lawyer has offered to represent me in my appeal if I recant my testimony against him." (R3:12616-17, 12620-21.) As the State conceded, Simpson's counsel had not even begun to represent him when this statement was made and the State was not intending to suggest that counsel had made such an offer. (R3:12618.) Indeed, Durrance had not only lost his direct appeal by the time he recanted to Jordan and

Mills in October 2010, but he was represented by the public defender in that appeal. *Durrance v. State*, 44 So. 3d 217, 218 (Fla. 4th DCA 2010).¹²

Second, Officer Vic Barker testified that during an October 2014 interview with Durrance regarding JSO's investigation of another murder, Durrance asked him to relay a message to Caliel that Durrance had been "totally honest" in testifying at Simpson's trial. (R3:12602.) Durrance told Officer Barker that he had refused to sign a waiver to allow Simpson's counsel to speak with his attorneys and that, although he had "thought about recanting his statement" because he felt "the State had double-crossed him," he assured Officer Barker "that he wasn't going to recant his statement." (R3:12602.) Not only did Jordan's undisputed testimony¹³ establish that Durrance did, in fact, admit his testimony was false on multiple occasions, but it also established that he, in fact, signed the waiver to allow Simpson's counsel to speak with his attorney. (R3:10704-05.) Indeed, the waivers signed by him were admitted into evidence. (R3:2464-65.)¹⁴ Thus, the only aspect of Dur-

¹² Ironically, the issue on appeal involved the State's alleged failure to timely disclose its intent to use Durrance's admission **in this case** that he would lie under oath to get out of prison. *Id.* at 220.

¹³ Notably, the trial court made no finding and the State has never suggested that Jordan was not telling the truth about what Durrance had told her and Mills. That would have required a finding not only that she had a reason to and did lie, but also that Mills had elicited testimony he knew to be false.

¹⁴ The releases waived any and all privileges and authorized Simpson's defense team to speak with David Barksdale and Eler. The record in this case indi-

rance's hearsay statements that was not demonstrably false was that he decided not to testify under oath, which was the primary reason the trial court denied relief.

(3) The trial court cited this Court's opinions in *Mansfield v. State*, 204 So. 3d 14, 16-17 (Fla. 2016), *Duckett v. State*, 148 So. 3d 1163, 1170 (Fla. 2014), and *Robinson v. State*, 707 So. 2d 688, 691 (Fla. 1998), as holding that a witness must recant under oath for it to count as newly discovered evidence. (R3:13365-67.) Though the subject witnesses did not testify and relief was denied in each of those cases, the opinions are not only easily distinguished, but establish tests that are easily met here.

In *Mansfield* and *Duckett*, this Court held that a witness's out-of-court admissions that he lied at trial must sufficiently weaken the State's case such that they would probably produce an acquittal if the case was retried, and it affirmed denial of relief because (1) the State could have kept the out-of-court recantations out by simply not calling the witnesses at a new trial and (2) there was sufficient other evidence to lead to a conviction. But that is not the case here because the State could not have obtained a conviction without Durrance's testimony that Simpson confessed.

cates that Eler had represented Durrance before Simpson's trial and Durrance waived any conflict through his new attorney Barksdale. (T:6-8.)

In *Robinson*, this Court merely found that the trial court did not abuse its discretion in concluding that the out-of-court recantation at issue failed to satisfy the hearsay exception for statements against interest in section 90.804(2)(c), Fla. Stat. 707 So. 2d at 691-92. Thus, *Robinson* makes clear that an out-of-court recantation can require relief, directly contrary to the trial court's holding. Because the trial court did not purport to even consider whether Simpson had satisfied the requirements of section 90.804(2)(c), there is no evidentiary ruling to which this Court should afford any deference. Regardless, no reasonable court could find that Simpson failed to meet this test under the unique facts of this case. That test provides that when the declarant is unavailable as a witness, which is undisputed here (R3:5725-26, 6349-55), his hearsay statements are nonetheless admissible "to exculpate the accused" if **(a)** they tend to "expose the declarant to criminal liability" and **(b)** "corroborating circumstances" show their "trustworthiness." § 90.804(2)(c), Fla. Stat. (2018).

(a) Durrance's statements exposed him to criminal liability for perjury in a capital case, for which there has been no statute of limitations since 1997.¹⁵ § 775.15(6), Fla. Stat. (2007); Ch. 97-90, § 1, Laws of Fla. Moreover, Durrance's actions and words remove any doubt that he understood his statements exposed

¹⁵ The Court found the recant in *Robinson* did not expose the declarant to criminal liability because, at that time, there was a three-year statute of limitations. 707 So. 2d at 692 & n.8

him to potential liability. That was the reason he declined to sign an affidavit at the October 2010 interview. Even four years later, he was still concerned about the prospect of criminal liability for other offenses notwithstanding his life sentence for first-degree murder. And, of course, he remained silent in these proceedings when asked whether his trial testimony was true – what stronger indication is there that a man is concerned that his statements could expose him to criminal liability?

Incarceration aside, a perjury conviction carries consequences that can prevent a prisoner from having any credibility in other potential litigation or grievance proceedings. Indeed, Durrance cited not only his pending appeal as a reason he was not willing to sign an affidavit at the October 2010 interview, but also his other pending issues. (R3:6371, 6413, 6421.) And if Simpson’s conviction is overturned based on Durrance’s statements, there is evidence (detailed in Part II.C) and motivation for the State to prosecute Durrance for the murder of Keith Cauley.

(b) Durrance’s overall recantation and the details of his statements to Jordan and Mills are corroborated by ample circumstances established in the record. As a general matter, Durrance’s original testimony was already highly suspect in that he admitted he was willing to lie under oath. (T:891, 898.) And Caliel admitted that the State “really couldn’t ascertain what a motive was” for Simpson to kill the victims and it “could never prove” one. (R3:10998, 11007.) Instead, Simpson had powerful reasons **not** to harm Big Archie, as previously noted. In contrast, as

both Caliel and Eler explained, Durrance had a motive not only to lie to hurt Simpson and get a sentence reduction, but also to kill Big Archie. (R3:2838, 10152-54, 10996-98, 11007.) Simpson had provided JSO with substantial information against Durrance before the alleged confession and continued to provide information against him well after that time. (R3:2651-54, 10928-29, 12406, 12513-15.) Finally, as explained in part III.B and C below, material details of the alleged confession are refuted by the physical evidence and Durrance had no credibility with law enforcement or the SAO. General circumstances aside, all six material details in Durrance's out-of-court recantation are corroborated by other evidence.

(i) Durrance's explanation that he had a vendetta against Simpson based on the wiretap application was corroborated by Steven Weinbaum, his attorney in the trafficking case. Weinbaum testified at the evidentiary hearing that not only had he obtained the wiretap application by July 9, 2001 (when he moved to suppress it), but also that Durrance had figured out who the sources were after listening to recordings from the wire, which included calls with Simpson. (R3:4805, 6390-91, 12517-18; *see also* R3:10928 (confirming Simpson was "Source Eleven").) Indeed, just a few days before Durrance first claimed Simpson confessed, Weinbaum deposed JSO Officer Charles Bates and discovered that JSO believed that other information in the wiretap application made the detective suspect that Durrance was responsible for the Crook-Kimbler murders. (R3:6845-46, 13186-

88.) Bates also testified that there was additional information of Durrance's involvement in these murders that was being developed beyond what was in the application, but the State would not disclose any details because of the ongoing investigation. (R3:6846-47.) In the same time period, others whom Durrance learned were cooperating against him were the subject of violent threats and shootings that JSO detectives and the SAO ascribed to Durrance. (R3:12357-58, 12534-35, 13191-92.) Thus, not only did he have a motive for revenge, but he was, in fact, out for revenge against those who, like Simpson, helped put him in prison.

(ii) Durrance's statement that he was inspired by a prior home-invasion robbery to claim Simpson admitted to entering Big Archie's house through a window is corroborated by the same wiretap application. It indicates that Simpson told JSO that Durrance had crawled through a window during a robbery. (R3:2652.) As shown in detail in Part III.B below, the crime scene photos and floorplan of Big Archie's house demonstrate that the killers could not have entered either window that Durrance claimed Simpson confessed to entering to commit the murders.

(iii) After Durrance reported getting the "wet work" quote from a Dean Koontz novel, Jordan googled the term and found it in a 1999 Koontz novel called *False Memory*. (R3:6366.) At the hearing, she read a quote from the book in which a character states that when "wet work was required he always used intermediaries to deliver the death blows, sparing himself the risk of suspicion." (R3:6367.) As

explained further in Part III.B below, three different officers took notes or filed reports of Durrance's initial interview in 2010 and none mentioned "wet work." (R3:4869-73, 4878-79, 6448-50.) It was not until over a year later that Durrance came up with this descriptive term, along with several more new colorful, but clearly fabricated details. (R3:2586.) While the trial court scoffed that this was a common phrase, neither Mark Brutnell (a 22-year veteran detective with FDLE) nor Bates (a 23-year veteran detective from JSO now working at FDLE who has specific experience learning slang terms used by criminals from wiretaps) had ever heard it. (R3:7610-12, 7625, 9456-57, 9485-86.)

(iv) Durrance's claim that Caliel "fed him" the police reports to prepare for his testimony is corroborated by a comparison of the various reports and notes and how Durrance's testimony evolved. As shown in detail in Part III.B below, the State provided Simpson with only one of the three different reports of that first interview. The two concealed reports contained a number of details that were not only contrary to Durrance's ultimate testimony, but omitted from the one report the State chose to provide Simpson, including that (1) Eason followed up to ask why Simpson would climb through the kitchen window, (2) Simpson had rented a car and fled to a shopping center with a pet store, (3) Simpson had been to Big Archie's house three times that night – once before the murders and then again after the murders when he supposedly circled back to steal more money and drugs,

(4) JSO had taken blood and semen samples from Simpson, and (5) Simpson had left his clothes at a church. (*Compare* R3:4869-73, 4878-79 (including those details), *with* R3:6449-50 (omitting them)). In short, Durrance’s testimony appears rehearsed to match the report provided to Simpson – a report prepared by someone who was not even at the interview – and omits the details in the reports that were withheld – reports prepared by the person who took notes during the interview and the person conducting the interview.

(v) Durrance’s statement to Jordan that, contrary to the testimony Caliel elicited at trial (T:887-90), Caliel had promised to support a sentence reduction if Durrance testified against Simpson has been corroborated by Caliel himself (as further detailed in Part III.B below), as well as by Weinbaum who found the promise to be “very unusual.” (R3:10746, 10877-78, 11153.) It is also corroborated by the postconviction testimony and a 2006 letter from Laura Starrett, the former assistant state attorney who had prosecuted Durrance for trafficking, sent to the state attorney before trial reflecting her displeasure that Caliel had told her he was considering trying to reduce Durrance’s sentence in exchange for testimony against Simpson. (R3:4818-19, 12354-56.)

(vi) Durrance’s statements about being afraid of retaliation because his prior conversation with Jordan and Mills had been overheard by Mercer are corroborated by Jordan’s testimony that the prior conversation had taken place in a

prison visitation park as opposed to a private room. (R3:6386.) Little Archie's cousin Terry Thompson even confirmed during the evidentiary hearing that there was an inmate named Bobby Mercer who was a friend of the Crook family that would tell them "what's going on" if he knew. (R3:6386, 7790.)

In short, while even in-court postconviction recants rarely merit relief and out-of-court recants must overcome the additional obstacle of section 90.804, the extraordinary facts in this case establish that Durrance's out-of-court recantation would be admissible at a retrial and would lead to an acquittal. Indeed, if section 90.804 did not apply, the statements would be admissible under *Chambers v. Mississippi*, 410 U.S. 284 (1973). No reasonable notion of due process can tolerate a capital conviction resting on the testimony of someone who not only admitted he lied, but provided verified details for why and how he fabricated the testimony.

B. The State Knew and Concealed Evidence Tending to Show Durrance's Testimony Was False. (Claim 1)

Claim 1 accuses the State of **(1)** presenting Durrance's testimony even though it knew it was false in violation of *Giglio* and **(2)** withholding evidence that would have undermined whatever credibility Durrance had in violation of *Brady*. (R3:1267-73.)

(1) The *Giglio* violations asserted in Claim 1 involve two different aspects of Durrance's testimony – **(a)** his testimony that Simpson confessed and **(b)** his denial that the State had given him any benefits or promises for his testimony.

Though the evidence of a *Giglio* violation may be even stronger as to the latter aspect because Caliel admitted facts establishing the violation, the former is logically addressed first because the jury could not have convicted Simpson without believing not only that Durrance was testifying truthfully, but also that Simpson’s alleged confession matched the facts of the murders.¹⁶ Otherwise, the confession would not be direct evidence of guilt even if the jury found Durrance truthfully conveyed what Simpson told him.¹⁷

(a) In a nutshell, the evidence presented below established that **(i)** Caliel did not believe Durrance’s testimony, **(ii)** the State knew Durrance’s testimony was contrary to the crime scene evidence, and **(iii)** the State knew Durrance’s testimony was contrary to what he had told detectives.

(i) Postconviction discovery revealed a June 25, 2006, letter in which former prosecutor Starrett warned the state attorney that Caliel was preparing to violate the State’s duty to ensure its prosecutors do not “put a witness on the stand

¹⁶ Much of the following evidence and argument supporting this subclaim will also support the *Brady* and IAC claims addressed in subparts (2) and (3) below. Thus, the discussion in this section lays the foundation for those claims even if the Court ultimately affirms the trial court’s findings of no *Giglio* violation on this point.

¹⁷ Whether a defendant “confessing” to committing a murder in a way that was impossible – *e.g.*, a confession to shooting victims who were actually stabbed – could constitute circumstantial evidence of guilt is not an issue the Court need decide. Even if it is, the conviction in this case could not stand absent direct evidence, as this Court’s opinion in the direct appeal made clear.

whose credibility they question.” (R3:4818-19.) She explained that Caliel himself had admitted to her “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 [sic] homicide.” (R3:4818.) Caliel was not alone as Starrett related that George Bateh, the head of the SAO’s homicide division, “was adamant that he would never be able to use Durrance in a murder prosecution because of his credibility problems.” (R3:4818.) Contrary to suggestions by the State throughout these proceedings, this is a material and egregious form of prosecutorial misconduct. *See, e.g.*, ABA Std. for Crim. Justice 3-1.4(b) (“The prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true”). R. Reg. Fla. Bar 4-3.8 cmt. (adopting ABA standards). In any event, Caliel injected his opinion on Durrance’s credibility in the arguments that this Court found were improper in the direct appeal, as discussed in Part II.A above.

By the time of the evidentiary hearing over a decade after she wrote the letter, Starrett could not remember any “specific words” Caliel used to convey that he did not believe Durrance’s account, but was sure that he at least indirectly conveyed that belief in their very informal conversation and that her 2006 letter accurately reflected her understanding of that conversation at the time. (R3:12360-61, 12372-73.) Her memory was obviously more reliable when she wrote the letter in

2006 than when she testified in 2018. In any event, the statement in her letter was further corroborated by Andux and Chipperfield, who testified without hesitation and based off of their contemporaneous notes that Caliel had expressed similar views to them before the trial. Caliel told Chipperfield that “deep down, I feel Durrance probably hired Jason to do this and that Jason was just a contractor” in light of evidence of an ongoing dispute between Big Archie and Durrance over a drug deal.¹⁸ (R3:13249-50.) He told Andux the same thing. (R3:13275.)

The trial court made no finding that Starrett, Andux, and Chipperfield were not credible in their testimony and did not even address Andux and Chipperfield’s testimony on this point,¹⁹ and in any event, there is no basis to disbelieve these disinterested witnesses. Instead, the trial court simply relied on the fact that Starrett admitted that she could not remember Caliel directly stating his belief that Durrance was not truthful (R3:13344), ignoring the facts that she confirmed that he had at least indirectly conveyed this belief as well as Andux and Chipperfield’s testimony that he directly told them the same thing.

¹⁸ As detailed in Part III.B.2 below, well before Caliel put Durrance on the stand to testify against Simpson, the State was ready to arrest Durrance for the February 1999 murder of the drug dealer at the center of this dispute, Michael Schmedes.

¹⁹ The court accepted and relied on Chipperfield’s testimony regarding other aspects of what Caliel told him with regard to Caliel’s decision to send a detective to interview Durrance without telling Durrance’s counsel, who had indicated that Durrance would exercise his right to remain silent. (R3:13356-57.)

(ii) Simpson did not rely solely on the testimony about Caliel’s subjective beliefs. He provided ample evidence – photos and maps of the crime scene prepared by JSO evidence technicians, police reports and notes of interviews with Durrance, and testimony from the trial, depositions, and the evidentiary hearing – collectively demonstrating that regardless of what Caliel may have subjectively believed, the State knew Durrance’s account at trial was contrary to the crime scene evidence. The law is clear that a prosecutor may not stick his head in the sand when there is ample evidence showing one of the State’s key witnesses is lying. *See United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991) (reversing conviction where prosecution “consciously avoided recognizing the obvious – that is, that [a key prosecution witness] was not telling the truth”); *United States v. Freeman*, 650 F.3d 673, 380 (7th Cir. 2011) (“[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.”).

The trial court concluded that, while Simpson had shown “minor inconsistencies” between Durrance’s trial testimony and evidence in the State’s possession, the crime scene evidence overall “corroborated” Durrance’s testimony. (R3:13342-43.) The factual bases for these conclusions are not supported by the evidence, and in any event, the legal determinations that the inconsistencies in Durrance’s testi-

mony were immaterial and the crime scene evidence corroborated Durrance's testimony were erroneous.

JSO's investigation of the crime scene conclusively refuted one of the most material details of Durrance's tale at trial. In October 2001, when he first claimed that Simpson had confessed, his story was that Simpson had admitted to sneaking into Big Archie's house through the kitchen window. (T:955.) At his deposition over three years later, he testified that Simpson had "crawled through the back window and the kitchen window." (R3:2416.) And at trial two years after that (over five years after first claiming Simpson entered through the kitchen window), he testified on direct that it was the laundry room window. (T:879.) When Eler reminded him of his deposition testimony and asked which was true, the kitchen or laundry room window, Durrance responded,

A. Both. 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.

Q. Okay. So you'd have to first crawl through the laundry room window, right?

A. Right.

Q. Then you'd have to open up the kitchen room window, right, and you know that because you've been there, right?

A. Correct.

(T:904.)

The State knew this testimony was false, however, because not only was it impossible for Simpson to have come through either window, there is no window between the laundry room and kitchen. First, as defense counsel was able to show at trial, the crime scene photos of a window in the kitchen showed that it was locked and blocked by undisturbed glasses such that nobody could have climbed through it. (R3:3041-72, 6190-91, 6194-95; T:620-21.) Had counsel reviewed the remaining crime scene photos and the floorplan prepared by JSO crime scene technicians,²⁰ he would have seen – as the State’s witnesses (both the lead evidence technician and lead detective who were at the scene) confirmed at the evidentiary hearing – that (1) it was also impossible for anyone to have climbed through either of the windows in the laundry room, (2) there was no window between the laundry room and the kitchen, and (3) the only thing even resembling a second window in the kitchen was a pass-through from the kitchen to the living room, and nobody could have come through it because it was also blocked by various items and, in any event, was right next to an open doorway so there would be no reason to climb through it. (R3:3073, 3092, 3096, 3098, 3100, 3102, 3104, 11514-24, 12894-95; *see also* App. 310-16.)

This was not lost on Caliel. He admitted at the evidentiary hearing that he knew that it was impossible for anyone to have entered through the kitchen win-

²⁰ Part III.C addresses Simpson’s claim that this amounted to IAC.

dow and that there were no signs of forced entry. (R3:11033-34.) And since he had all the crime scene photos and diagrams, he must have also known nobody came through the laundry room window and there was no window between the kitchen and laundry room. Removing any doubt that Caliel knew the confession was false at least as to this crucial detail, he came up with an entirely new theory at trial for how the killer had entered Big Archie's home. Specifically, he argued that Little Archie and Smallwood had left the north rear door unlocked that evening and that it was "tragic" that "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.) Though he knew this was also false as demonstrated in Part III.D below, it was at least consistent with Durrance's claim that Simpson went through the kitchen – the floorplan shows that someone coming through the north rear door would go through the kitchen to get to the bedroom where the victims were murdered. (R3:3073; App. 310.)

How the killer(s) entered a house with no signs of forced entry is not a minor detail, it is a major detail as made clear by Caliel's attempts to explain away Durrance's falsehood with the "tragic" (but fabricated) story of Simpson entering through a door Little Archie left unlocked. The truth that Caliel knew, but hid from the jury with his false arguments and evidence, was that not only did he have no

explanation for why Simpson would have killed these victims in the first place, he had no explanation for how he could have entered the house to do so.

Another conflict between the alleged confession and the crime scene evidence was Durrance's claim that Simpson had smoked "a lot of cigarettes" while waiting in Big Archie's backyard before climbing through the window. Though the defense inexplicably did not address this claim at trial or deposition, the various police reports show that the State was well aware of this detail. (R3:4869, 4878, 6449.) Caliel was not only aware of this detail, but also of the fact that even though the JSO crime scene team had thoroughly searched the backyard, resulting in the discovery of the axe, socks, and cloth fibers, it found no cigarette butts. (R3:11022, 11033.) The materiality of this conflict is magnified because had Durrance's account been true, not only would cigarette butts have been found, but they could have been tested for DNA as they would have contained the smoker's saliva.

(iii) In addition to the conflicts with the crime scene evidence, the State also knew that Durrance's trial testimony was materially inconsistent with – and, in several important regards, directly contrary to – the ever-changing tales he told JSO investigators, as reflected in police reports and notes, most of which were provided to Simpson for the first time in postconviction discovery. The trial court concluded that Durrance's various accounts to JSO and Caliel were "largely consistent" on the "important details" of the murders. (R3:13341-43.)

A review of these materials reveals pervasive and material inconsistencies. These inconsistencies are especially important in light of a point Caliel ironically emphasized at trial when he asked Durrance whether he had been “as accurate and truthful ... as possible” when he and his attorney Weinbaum first met with JSO detectives to disclose Simpson’s alleged confession. (T:938-39.) Lest the importance of the complete accuracy of that initial disclosure be lost on the jury, Caliel had Durrance concede that it would have hurt his chances of getting any leniency from the State if his initial account turned out to be “false or misleading.” (T:939.)

The first documented time that Durrance claimed Simpson was the killer was in an October 1, 2001, interview conducted by JSO Det. Hugh Allen Eason, which was also attended by JSO Det. Jim Davis and JSO Officer Vic Barker, as well as Durrance’s attorney Weinbaum. (R3:4868, 12571-73.) Barker’s role was to take contemporaneous notes for the lead investigator to incorporate into his report. (R3:12574.) Weinbaum set the ground rules for the interview, which were that Eason could question Durrance about the Crook-Kimbler murders, another double murder referenced as the “Crews Alford” murders, and a robbery called the “Padgett case,” but could not ask any questions about the West Palm Beach murder of Michael Schmedes or the murder of Keith Cauley. (R3:4868, 12576-77.) The disclosure of Durrance’s knowledge and involvement in these other murders is im-

portant and addressed later, but the focus for now is on Durrance's account of how Simpson supposedly killed Big Archie and Kimbler.

Barker's notes reveal that Durrance claimed that Simpson²¹ had waited in Big Archie's backyard smoking a lot of cigarettes, then entered the dark house through the kitchen window with an axe he found in the backyard, killed the victims, and left the house as the victims were still "gurgling." (R3:4869.) As noted above, JSO photos from the crime scene disclosed it was impossible for Simpson to have entered through the kitchen window, and Barker's notes show that Eason questioned him about the kitchen window, but that Durrance "could not explain why Jason Simpson entered through the kitchen window." (R3:6449.)

Durrance claimed that after the murders, Simpson "fled through the woods (strip mall or something ... pet store in it,)" to a car he had rented and parked on Normandy Boulevard. (R3:4870.) None of these details were disclosed to the de-

²¹ Barker's notes indicate that it was only later in the interview that Durrance claimed Simpson was the killer, and many of his notes suggest that Durrance initially suggested that it was Little Archie. (See R3:4869 ("Little Archie got Big Archie. He stayed in the victim's (Crook and Kimbal [sic]) back yard, and smoked a lot of cigarettes while he waited"), 4870 (noting that Durrance said Little Archie wanted Durrance to know that he had saved Durrance's life, which Durrance felt was a "future investment" so Little Archie could ask for "money or something").) At the evidentiary hearing, Barker suggested he might have recorded these details wrong, and other notes indicate Durrance said that Simpson was the alleged killer. (R3:12578.) But he also admitted that given the seventeen year lapse in time, he did not have any independent recollection and had to rely entirely on his notes and had no idea what he meant when he wrote, "Little Archie got Big Archie." (R3:12578-81.)

fense, and they are contrary to Durrance's testimony at trial that all Simpson told him after the murders was that Simpson "went out the back." (T:880.)

Barker further recorded that Durrance said that Simpson had been to Big Archie's house more than once that night. He claimed Simpson was upset at Kimbler because she "ran him off" earlier in the night, so "he came back to kill them and steal money & drugs." (R3:4871.) He further claimed that after the murders, Simpson "circled back around to get more money and drugs." (R3:4871.) This was again contrary to Durrance's trial testimony, and Caliel knew there was no evidence that anything had been stolen. (R3:10998-99, 11008.)

Barker recorded that Durrance told him, "Jason got paid 10,000.00 to kill him," which was a direct quote. (R3:4871, 12586.) This was contrary to Durrance's trial testimony that Simpson had declined Big Archie's supposed offer to pay him \$10,000 to kill Durrance. (R3:4871; T:873-74.)

Barker's notes reveal that Durrance also claimed that Simpson told him the police had taken Simpson's blood and semen. (R3:4873.) But JSO had only taken a cheek swab at the time, and the State had to get an order from the court to obtain further samples from Simpson when it decided to test the rape kit long after Simpson was charged and shortly before his original trial. (T:661; R1:580-81, 1236.)

Barker's notes reveal that before Durrance repeated his assertion that Simpson had entered through the kitchen window, Durrance drew a diagram of Big

Archie's house. (R3:4870.) Barker had no recollection of the diagram or who, if anyone, kept it. (R3:12582.) Eason also documented the fact that Durrance provided him a diagram, but similarly had no idea what he did with the diagram. (R3:6449, 13130.) The State clearly had a duty to preserve a document like this, and its spoliation supports an inference that the State knew the diagram contradicted its case.²² *E.g., League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015); *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006). An adverse inference is especially warranted in light of all the other inconsistencies, most of which were concealed from the defense pretrial.

Eason conducted the interview and testified that he did not believe he took any notes because he was relying on Barker to do that (R3:13129), and in any event the State has never produced any notes from him. He did include his own description of the interview, however, as part of a longer report he prepared for the Cauley murder investigation – a report that was not provided to Simpson until after postconviction counsel deposed him for the first time shortly before the evidentiary hearing. (R3:6436-69, 13131, 13133.)

²² The trial court ignored Simpson's spoliation arguments and refused to consider the diagram because it found Simpson's suggestions that it would have helped the defense to be purely speculative. (R3:13355.) The only reason Simpson's suggestion are at all speculative is because the State failed to preserve this crucial piece of evidence.

Eason's report was largely consistent with Barker's notes with one rather notable exception: Eason reported, "Michael Durrance said that Jason Simpson said that he (Jason) left his clothes that he wore, during the murder, behind a church." (R3:6449.) This was directly contrary to Durrance's testimony at trial:

Q. Did [Simpson] happen to mention what he may have done with the clothing that he would have been wearing?

A. No, sir.

(T:880; *see also* R3:2417 (Durrance providing same testimony in pretrial deposition).) So the State was well aware that Durrance was lying one way or the other. He either lied in that initial interview with Eason, which Caliel emphasized to the jury would have rendered everything else he said unhelpful (T:938-39), or at trial.

One might ask why would it benefit the State for Durrance to change this key detail and deny that Simpson told him anything about the clothes. It ultimately does not matter because the point is that this proves the State knew Durrance was not telling the truth. But there is at least one reason the State was better off for him to deny knowing about the clothes – knowing about the clothes would have undermined the State's biggest argument for why Durrance's testimony was credible. As Caliel explained at the evidentiary hearing:

I thought the strength in our case was the combination of the DNA evidence along with the timing of Mr. Durrance's disclosure, which was before the DNA had been tested. That there was 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.

(R3:10991.)

The trial court quoted this testimony as one of the main reasons it found Caliel believed Durrance was telling the truth despite the various inconsistencies between his testimony and the evidence in the State's possession. (R3:13341-42.) But Caliel also knew that (1) not only could he not prove a motive for Simpson to have committed these murders, but that the defense had a basis to argue that Durrance did (R3:10996, 11005), (2) he himself suspected Durrance was involved in the murders (as he told Starrett, Chipperfield, and Andux as noted above), (3) the clothes were not found until several days after the murders even though JSO had searched the area, and (4) the sweatshirt had a visible white, crusty stain on the shoulder that would be perfect for DNA testing. (T:1195-98; *see also* T:1622 (Caliel describing the stain as "white crusty mucous").) In short, if Durrance stuck with his story that Simpson told him he left the clothes behind the church, it would make the story even less believable and further suggest that the clothes were planted there a few days afterwards so that Simpson's DNA would ultimately be found.

Indeed, Durrance's early claim about the clothes would have destroyed Caliel's closing argument. After emphasizing the (false, as shown below) evidence

that the State had not given Durrance any benefits or promises and, instead, had sought a 50 year sentence on his trafficking charges, Caliel argued:

You might want to ask yourselves, well, why did the State treat him like this, if this information was valid. Because, ladies and gentlemen, at the time there was no corroboration. At the time we had the word of a seven-time convicted felon, a drug dealer, a person who knew these individuals, a person who admitted that, in essence, he had a motive himself to have the victims killed over this drug dispute, over this alleged hit that the victim may have been putting out on him. So law enforcement and the State Attorney's Office would not take at face value, without more, the testimony of Mike Durrance. And, ladies and gentlemen, an important thing that you have to remember during the course of listening to my argument and the defense's argument in this case is that you cannot focus just on one piece of evidence in any criminal investigation. You have to focus on everything in the totality, each and every bit of information, and at this point in time they didn't have anything more than Mike Durrance's word. But they had a start. It was sort of a kick in the pants to them to say, hey, we better start looking at Jason Simpson again. And how do they go about doing that?

Well, they went about doing that by trying to get Mr. Simpson to come and talk to them again. But, remember, in October of 2001 **when Mike Durrance told the detectives the same thing he told you on that witness stand**, that Jason Simpson is the person who committed this crime, the DNA evidence had not even been worked. Charles Badger never even received the clothes until months later. **Mr. Durrance had no idea the clothing was even involved in this case. Remember when he was questioning him? Did he ever tell you what he wore? He said he never did. When he told the police what had happened, he didn't even mention any clothes because this defendant hadn't told him about that. He didn't even mention the clothes.**

(T:1613-15 (emphases added).) The State knew these assertions were false because Durrance had told detectives about the clothes.

The State well knew – as documented by Barker and Eason in reports withheld from the defense – that Durrance was lying about material detail after material detail. The only report of the interview provided to the defense was a report prepared by JSO Det. Bialkoski in January 2002. (R3:4877-80.) He was not present during the interview and prepared his report based on what Eason and Barker had told him happened. (R3:12573, 12628, 12642-43.) His report reflects only a few of the inconsistencies noted above, but says nothing about Eason following up to question why Simpson would have used the kitchen window; nothing about Simpson saying he had rented a car and fled through woods to a shopping center with a pet store; nothing about Simpson making multiple visits that day, getting run off by Kimbler earlier in the evening, or circling back after the murders to steal more drugs and money; nothing about Simpson saying JSO had taken blood and semen samples; nothing about Durrance providing a diagram of the house; and nothing about Simpson saying he left his clothes by the church. (R3:6449-50.) In short, the State knew it was providing a materially incomplete and false account of Durrance’s first interview.

There is one critical detail common to all three accounts of that first interview – none of them say anything about the signature quote Durrance attributed to Simpson about “wet work.” The first time that phrase is documented was a report by JSO Det. Dale Gilbreath, which revealed that on October 16, 2002, Durrance

provided Gilbreath and Caliel a new description of the confession than documented from the initial interview a year earlier. (R3:2586.) This was a gruesome detail that had been invented after the initial interview. Other clearly newly invented, colorful flourishes absent from the initial interview were that Simpson confessed after the two men had been drinking at Durrance's house, that Durrance "said he really did not want to know what happened, but because he was drinking he finally asked Simpson if he did the murder," and "Simpson said he killed Kim because the bitch kicked him out of the house" and "had called him a free loader." (R3:2586.)

All of the forgoing not only should remove any doubt that Durrance's recantation would be admissible as corroborated by ample other evidence as argued above, but makes clear that the State obtained these conviction and put Simpson on death row based on evidence it knew to be riddled with falsehoods. As *Giglio* and its progeny teach, the Constitution prohibits this kind of prosecutorial misconduct, and this Court has a special duty to ensure that Florida citizens are not convicted as the result of such abuse. But once again, this is not all. It gets worse.

(b) The second aspect of the *Giglio* violations asserted in Claim 1 involves Caliel's attempts to bolster Durrance's credibility and head off impeachment by having Durrance testify that the State never offered or gave him a benefit in exchange for his testimony. (R3:1457-59; T:887-90.) He had Durrance confirm the SAO "never offered anything" and never provided him "any favorable consid-

eration” for claiming that Simpson confessed. (T:887.) To drive the point home on redirect after Durrance said he hoped he would get a reduction in his sentence for testifying against Simpson, Caliel asked, “Again, but no promises have been made to you at all by anybody?” (T:937-38.) Durrance responded, “Not at all.” (T:938.)

Caliel knew this was false because, as he was forced to admit at the evidentiary hearing, he himself had promised that if Durrance testified against Simpson, he would personally support Durrance’s attempt to get a reduction of his trafficking sentence by testifying on Durrance’s behalf. (R3:10746, 10762.) As Weinbaum explained, it is “[v]ery unusual for a State Attorney to make a promise like that to a criminal defendant, especially one like Mike Durrance.” (R3:10746.) It was even more striking in light of the vehement complaints to the state attorney by Starrett, the former prosecutor who had obtained Durrance’s trafficking conviction and original sentence, that Caliel intended to not only put a witness on the stand whose credibility he questioned, but to seek a reduction in Durrance’s sentence even though he did not believe Durrance was being truthful. (R3:4819.)

This promise to testify as a witness for Durrance in favor of a sentence reduction was not the only benefit Caliel admitted providing Durrance; he also helped grant Durrance’s request to be transferred to a prison closer to his family, a benefit Caliel tried to diminish by noting that he “needed him closer anyway.” (R3:6510-11 at ¶ 12, 10877, 10885.) *See Bell v. Bell*, 512 F.3d 223, 232-33 (6th

Cir. 2008) (noting State should have disclosed notes that showed witness “requested preferential treatment—in the form of a facility transfer or work release—in return for his assistance”). But it gets still worse.

Caliel further had Durrance testify that the State had not given him any assistance with his original sentence. Specifically, Durrance testified that the State had sought a 50-year sentence and that his cooperation against Simpson “didn’t help” him in the sentencing proceedings. (T:888-89, 922-23, 925.) Cali elicted that Durrance had “solved” a “missing person” case by giving “information leading to the body of Keith [Cauley]” and that his sentencing judge had been provided “some sort of letter” documenting that cooperation, but even that had not helped him with his sentence because Starrett still sought 50 years and, in Cali el’s words, “wasn’t real impressed” with his cooperation. (T:924-25.) This testimony sought to build Durrance’s credibility by showing he was testifying against Simpson even though he had never been given any benefit for the information and had little reason to expect leniency.

Whether Cali el knew that all of this was at least as false as the testimony that Cali el had not offered or given Durrance any benefits is irrelevant because others in his office well knew that this testimony was just not true. *See Giglio*, 405 U.S. at 154 (knowledge of one prosecutor not involved in case is imputed to lead prosecutor on case because “whether the nondisclosure was a result of negligence or de-

sign, it is the responsibility of the prosecutor”); *Gorham v. State*, 597 So. 2d 782, 784 (Fla. 1992) (“the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers”).

As revealed by the transcript of Durrance’s original sentencing hearing, which was never disclosed to Simpson but uncovered by postconviction counsel’s investigation, Durrance in fact received favorable treatment from the State for his assistance in “pending homicide investigations,” specifically including these murders. (R3:2332-45.) Moreover, the State had never recommended a 50-year sentence as Durrance claimed. Instead, it originally sought life, but reduced that demand to 45 years in light of Durrance’s assistance, and the court directly took the assistance Durrance provided into account in imposing only a 32-year sentence. (R3:2350-51, 2362, 12356.)

The transcript also references the “some sort of letter” Durrance had referenced. Specifically, the court had received a letter from Lieutenant Richard Graham, the head of JSO’s homicide division, that was sealed because “it had to do with pending homicide investigations,” but provided the court with what Weinbaum called “very compelling reasons” to afford Durrance some amount of leniency. (R3:2332-33.) Weinbaum touted the letter as something extraordinary for a homicide lieutenant to do. (R3:2335.) He explained that after Durrance was con-

victed of the trafficking offense, he had gone to Graham to tell him “fair is fair” and the right thing to do would be to submit a letter showing Durrance had provided helpful information. (R3:2337.) Indeed, Graham explained in the letter that he was writing the court “to fulfill my **agreement** with Mr. Weinbaum and Mr. Durrance.” (R3:4737 (emphasis added).) Graham confirmed at the evidentiary hearing not only that he had personally reached this agreement with Durrance, but also that the agreement had “the blessing of the assigned State Attorney.” (R3:11346-48.) He also confirmed that the SAO had assured him “off the record” that it would recommend leniency if Durrance provided “some worthwhile information,” a point Weinbaum conveyed to Durrance along with his belief that providing information to the State was the only way Durrance could avoid a life sentence. (R3:10734-35.)

Apart from what appeared on the face of the transcript and Graham’s letter to the sentencing court, neither of which were disclosed to the defense pretrial, Weinbaum and Starrett confirmed that they had substantial conversations with the court off the record about the information Durrance provided about the Crook-Kimbler records because the State did not want the public record to reveal information about an ongoing investigation. (R3:6405, 12353-54.)

Citing *Wyatt v. State*, 71 So. 3d 86, 106-07 (Fla. 2011), the trial court concluded the State had not provided any benefits or made any deal with Durrance. (R3:13347.) While the record in *Wyatt* failed to prove that there was any agree-

ment or benefits, all the undisputed evidence set forth above shows that there were many benefits and clear agreements by the State in this case, from Caliel organizing the transfer at Durrance's request to Caliel's promise to testify in support of a sentence reduction to Graham's deal to write the letter in the trafficking case to the State's agreement to lower its sentencing demand in the trafficking case in consideration for Durrance's assistance in this and other cases.

The postconviction court also concluded that Caliel's testimony on Durrance's behalf was not that important because he did not "make any recommendations" for a sentence reduction and only offered to appear as a fact witness to tell about Durrance's cooperation. (R3:13346.) While the State was free to explain to the jury why these benefits were minor in Caliel's eyes and did not undermine Durrance's testimony, it was not free to knowingly present false evidence that "no promises have been made to [Durrance] at all by anybody." (T:937-38.)

2. The *Brady* violations asserted in Claim 1 accuse the State not only of failing to disclose substantial impeachment evidence tending to undermine Durrance's account and showing that the State believed Durrance had committed other murders, but also that Durrance had a reputation in the law enforcement community for having "absolutely zero credibility." (R3:1454-56, 1460.)

Much of this evidence was discussed above. For example, Barker's notes and Eason's report contained ample grounds to challenge Durrance's story about

the confession. The State's failure to disclose these materials before trial was especially prejudicial because it prevented any meaningful opportunity for Simpson to examine Barker and Eason about that first interview while it was still relatively fresh in their memories.²³ Regardless, even if the Court finds that they do not conclusively establish the State put on false evidence, they would have been extremely helpful to the defense in convincing the jury to reject Durrance's account.

Similarly, to the extent the Court might be reluctant to infer from the State's failure to preserve the diagram Durrance drew at the initial interview that the diagram affirmatively disproved his testimony, it should at least recognize that had its existence been disclosed to the defense, the defense would have been entitled to argue that the jury should infer, and the jury should receive an instruction that it could infer, that the diagram would have supported the defense. *Golden Yachts, Inc.*, 920 So. 2d at 781; *Am. Hosp. Mgmt. Co. of Minn. v. Hettiger*, 904 So. 3d 547, 550-51 (Fla. 4th DCA 2005).

Starrett's letter would have revealed that the lead homicide prosecutor recognized that the State not only knew, but was "adamant" that it "would never be able to use Durrance in a murder prosecution because of his credibility problems."

²³ The court scolded Simpson's counsel for continuing to ask questions about what Barker meant by various notations, but recognized that these questions "may have made a difference" had they been asked years earlier when the events were fresher. (R3:12579-85.)

(R3:4818.) Though the letter was hearsay, Starrett could have been called as a witness to testify that Bateh had said this, and that testimony would constitute admissible hearsay. *See* § 90.803(18), Fla. Stat. (2007) (hearsay statement is admissible against a party if it was made by an agent of the party in the scope of his agency).

Caliel's promises to Durrance, Durrance's sentencing transcript, and Graham's letter all constituted further important evidence to impeach Durrance's testimony that counsel would have put to good use had the State disclosed it because it showed that the State had elicited false testimony from Durrance that he had not received any benefits or promises.²⁴ (R3:10247-49, 10251-52, 10536-39.) Counsel would have impeached Durrance with any benefits evidence including sentence reductions and prison transfers, but indicated that he "wasn't aware of any benefits." (R3:10536-39.) It was the State's clear duty to disclose all of this information, as Nelson ultimately conceded. (R3:10634-39.)

In addition to revealing that JSO had made a deal with Durrance in exchange for his assistance and that JSO suspected him of several homicides, Graham's letter to the court in Durrance's trafficking case revealed that Durrance had "absolutely

²⁴ It is no defense to Simpson's *Brady* and *Giglio* claims that his counsel could have discovered some of this information; that would only yield another ineffective assistance claim. A defense lawyer giving a prosecutor the benefit of the doubt and assuming he knows what he is talking about cannot justify allowing the prosecution to put on and emphasize false evidence. *DeMarco v. United States*, 928 F.2d 1074, 1076-77 (11th Cir. 1991).

zero credibility with law enforcement.” (R3:4736, 11344.) Again, Graham was the head of the JSO homicide division, so he had ample reason to know law Durrance’s reputation within the law enforcement community. Had this letter been disclosed to the defense, counsel would have tried to show the jury that Durrance had no credibility with JSO, though he was not sure how this would be admissible. (R3:10254-58.)

A bit of legal research would have answered that question. A witness’s reputation for untruthfulness is admissible under section 90.609, Florida Statutes (2007), so long as a foundation is laid that the person testifying as to the witness’s reputation has sufficiently broad knowledge of that reputation and will testify based on something more than “mere personal opinion, fleeting encounters, or rumor.” *Lott v. State*, 695 So. 2d 1239, 1242 (Fla. 1997). The JSO detectives had spent months and months investigating Durrance including listening to his phone calls and trying to confirm the details of information he provided. (R3:10904, 13168-71.) They had ample basis for knowing his reputation.

Graham’s letter was written in the scope of his employment and was therefore admissible despite being hearsay. § 90.803(18), Fla. Stat. Or counsel could have simply called Graham to testify live about his opinions. (R3:11344-69.) The testimony at the evidentiary hearing established that Graham was not alone in this view, as assistant state attorney Starrett and FDLE agent Brutnell would have con-

firmed that their deep involvement in investigating Durrance led them to distrust him. (R3:4818-19, 10904-07, 10938, 10944, 12352, 12354-55, 12362.)

Additionally, undisputed evidence at the evidentiary hearing showed that before he claimed in October 2001 that Simpson had confessed, Durrance knew that he was under active investigation and suspicion by the State of numerous murders, including the murders in this case. With regard to the missing person case that Caliel suggested to the jury during Simpson's trial that Durrance had "solved" for JSO without receiving any leniency in his trafficking sentence, as discussed above, Durrance had not only shown JSO the location of the body, but also admitted to helping the Cauley murderer dispose of the body, even providing the murderer with an axe,²⁵ which State witnesses recognized was the very definition of accessory after the fact. (R3:6445-46, 10914-18, 12474-83, 12492, 12531-47, 13134-37, 13142-44, 13172-73, 13192-95.)

Graham's letter, which Durrance's attorney Weinbaum had obtained in the trafficking case, even warned that JSO's homicide department felt there was a "great likelihood" that Durrance "may have been personally involved in the actual

²⁵ The murder weapon in this case, of course, was an axe. Durrance testified at trial that even though he supposedly was in the lawn care business, he did not remember ever owning an axe. (T:911.)

murder” of Cauley, not just disposing of the body.²⁶ (R3:4737.) Eason’s report documented that Weinbaum laid down the ground rules of the first interview to include no questioning about the Cauley case because, as he told the detectives, “he was afraid that Michael Durrance would say something to cause us to charge him with accessory after the fact in this case.” (R3:6448.)

Indeed, just a few days before Durrance first claimed Simpson confessed, Weinbaum deposed JSO Officer Charles Bates and discovered that JSO believed that other information in the wiretap application (information obtained from Little Archie showing that Durrance had a motive to kill Big Archie over a drug debt, the murder for which Durrance was subsequently convicted and is serving a life sentence) made the detective suspect that Durrance was responsible for the Crook-Kimbler murders. (R3:2609, 2637-39, 6845-46, 13186-88.) Bates also testified in that deposition that there was additional information of Durrance’s involvement in these murders that was being developed beyond what was in the application, but the State would not disclose any details because of the ongoing investigation. (R3:6845-47.) And Weinbaum testified at the evidentiary hearing that the SAO had

²⁶ Starrett’s letter also conveyed these details and asserted that after listening to Durrance’s proffer with Weinbaum, she and assistant state attorney Jay Taylor both “felt very strongly that Durrance was not being truthful and was actually involved in the homicides he was discussing.” (R3:4818.)

also told him that they believed Durrance was involved in four or five homicides in the Jacksonville area. (R3:10728-29.)

Withheld police reports further demonstrate that JSO had been actively assisting Palm Beach authorities investigating Durrance for the murder of a drug dealer named Michael Schmedes and already believed they had probable cause and were ready to arrest Durrance for that murder by March 2001, based in part on physical evidence tying him to the scene and in part on information developed by JSO from Little Archie regarding a fake cocaine transaction between Durrance and Big Archie that was the basis for Durrance's testimony in Simpson's trial that Big Archie had sought to have Durrance killed. (R3:4813, 12493-97, 12534, 13168-73.) Both Weinbaum and Durrance himself learned from the State that Durrance was a suspect in the Schmedes murder. (R3:10752-54, 10763, 10923.)

Starrett's letter would have also alerted the defense that the State considered Durrance to be "a suspect in numerous homicides" and "would order others to commit these killings but not be present himself." (R3:4818.) Her letter further revealed that the police had "numerous leads," including "a taped jailhouse confession" that has never been produced to Simpson even in postconviction discovery, that Durrance was involved in the Palm Beach murder. (R3:4818.)

Not only was none of this disclosed by the State, but Caliel affirmatively sought to conceal from the defense any information about Durrance's uncharged

criminal activity and even advised Detective Hinson to refuse to answer questions about the Cauley investigation in a pretrial deposition in this case. (R1:673-74, 1512; R3:2253-54.)

Counsel confirmed that had he known of the foregoing, he would have used evidence that the State had suspected but not charged Durrance with these crimes to impeach Durrance's motives and bias. (R3:10259.) Durrance had a powerful incentive to assist the State in its prosecution of Simpson for first-degree murder in the hope it would lead the State to lay off its investigation of his role in the Cauley and Schmedes murders. Indeed, Caliel confirmed that he knew that a State witness who is under investigation for another offense is "subject to cross-examination for bias and things of that nature." (R3:11141, 11155-56.) Nelson agreed that if Durrance was being investigated for any crimes and had been made aware of it, that should have been disclosed because it provided an incentive for him to assist the State against Simpson. (R3:10640-41, 10674-75.)

The State also wrongfully withheld the application it submitted to get a court order allowing it to tap Durrance's phones, which directly led to Durrance's trafficking arrest and conviction. The application demonstrated that Simpson had told JSO that Durrance had committed a home-invasion robbery by entering a window. (R3:2652.) Counsel then could have argued that Durrance, having read the application, used the same accusation against Simpson in fabricating his testimony that

Simpson climbed through a window to kill the victims.²⁷ Such information would have been devastating impeachment in the hands of effective counsel when combined with the fact that it was not possible for Simpson to have climbed through any window at Big Archie's. The application also reveals that Simpson told the police in 1998 that Durrance had solicited Simpson to murder Mike Gonzalez and then threatened to kill Simpson and his mother if he ever told the police, showing just how unlikely it was that Simpson would have later confessed murder to Durrance. (R3:2653-54.) Counsel would have used the application for these purposes had they seen it. (R3:10157-62, 10164-67, 10531.)

The wiretap application was also important *Brady* material as to other confidential sources. In an attempt to rebut the defense's suggestion that Durrance was testifying against Simpson in retaliation for providing evidence against him in the trafficking case, Caliel had Durrance confirm that he had identified all twelve confidential sources who provided information in the wiretap application and there were also a number of witnesses who testified against him at trial though Simpson did not. (T:933.) Caliel again noted in closing that Simpson was only one of twelve sources in the affidavit. (T:1607.)

But the State had substantial information and belief that Durrance had not only identified the other witnesses against him, but had been retaliating against

²⁷ As noted in Part III.A.3.b.ii, Durrance has confirmed this was so.

them. Starrett, JSO Detectives Hinson and Bates, and FDLE agent Mark Brutnell (who had been working with JSO in investigating Durrance) testified at the evidentiary hearing that that they had information in 2001 that two of the witnesses Durrance knew were going to testify against him, including one (not Simpson) who was a confidential source in the wiretap affidavit, were the subject of violent threats and shootings that Starrett and Bates ascribed to Durrance. (R3:10929-30, 12357-58, 12534-35, 13191-92.) As Starrett described in her letter,

Immediately prior to our [trafficking] trial, two incidents occurred which demonstrate how dangerous Durrance and his associates are. Armed men tried to force their way into the home of one of my witnesses. When the assailants failed to get in his house, they shot repeatedly through the witness's front door. A bullet grazed the witness, but fortunately he was not seriously injured. Even more frightening was an incident that occurred at the home of the parents of one of my witnesses. Unknown persons drove by their home, shooting the house repeatedly with a high power rifle. A threatening note was also left at their house.

Without meaning to sound melodramatic, this is one of the few instances I recall where everyone associated with the case is convinced our informants will be in danger if Durrance is allowed out any time in the near future.

(R3:4819.) Had this been disclosed to the defense, counsel would have been able to show Durrance had a pattern of retaliation and effectively rebutted Caliel's insinuations about the other witnesses against Durrance.

The trial court held that Starrett's letter was not *Brady* material because she was a "private citizen" at the time she wrote the letter. (R3:13352.) But that is ir-

relevant. Whether she was a private citizen or not, her letter discloses information that strongly impeaches the State's star witness. The court also held, without any explanation, that even if she had been an assistant state attorney when she wrote it, "it would not have been *Brady* material as Defendant now suggests," citing a decision from this Court holding that an internal memorandum between prosecutors was not *Brady* material. (R3:13352 (citing *Duest v. State*, 12 So. 3d 734, 744-46 (Fla. 2009)).) But the memo in *Duest* only said, "The case is borderline on sufficiency of evidence, which is totally circumstantial." 12 So. 3d at 745. This Court held that was not *Brady* material because it contained only a general opinion and did not contain anything that was either admissible or could lead to the discovery of admissible evidence. *Id.* at 746. As shown above, Starrett's letter was rife with admissible material and would have led to the discovery of substantial admissible evidence about the Cauley case and the other murders JSO believed Durrance had committed. And unlike an opinion about the strength of the State's case, which would never be admissible, the opinions disclosed in Starrett's letter were admissible opinions on Durrance's credibility.

The court similarly held Graham's letter was not *Brady* material because the murders in this case "are not specifically mentioned" and the letter was prompted by Durrance's cooperation in the Cauley case. (R3:13352-53.) But as explained

above, the letter was relevant to multiple issues in this case, including the Cauley case which the State itself raised with Durrance at trial.

The court rejected Simpson's arguments as to the remaining *Brady* materials regarding Durrance on the ground that they were not raised in Simpson's second amended Rule 3.851 petition. (R3:13353.) The evidence underlying these claims was presented throughout the evidentiary hearing without any objection that it was not relevant to any claims that Simpson had pled, and in any event, they all constitute the admissible evidence that defense counsel would have discovered had the Starrett and Graham letters, which are identified in Claim 1, been disclosed. The trial court's view that every detail that would have been uncovered had to be pled is unsupported by any case law and would have required a petition at least twice as long as the 120-page petition Simpson filed. The foregoing arguments were directly relevant to the substance of Claim 1, were the subject of extensive discovery and testimony at the evidentiary hearing, and the State suffered no prejudice.

Finally for present purposes,²⁸ the court made an alternative, blanket conclusion that Simpson failed to show a reasonable probability that this information

²⁸ The trial court also rejected arguments about evidence Simpson contends shows that the State ignored Durrance's attorney's invocation of his right to remain silent and interviewed Durrance without that attorney's knowledge, after which Durrance waived his rights and provided information about this case. (R3:13355-58.) Though he stands by these claims, Simpson will let this issue go to avoid the need for further extended discussion on these *Giglio* and *Brady* claims.

would have made a difference had it been disclosed and that there was “overwhelming evidence to convict Defendant.” (R3:13354.) These legal conclusions carry no weight; the central relevance of these materials by themselves has been thoroughly explained, and the notion that the evidence against Simpson was overwhelming is unreasonable. Moreover, as noted at the outset of this argument, the trial court refused to conduct a cumulative prejudice review and, therefore, never even considered the impact that disclosure of this information would have had in combination with the other evidence the jury would have heard absent the State’s misconduct or IAC plus the newly discovered evidence.

C. Counsel Was Ineffective in Failing to Discover and Use Impeachment Evidence. (Claim 3)

Claim 3 accuses counsel of being ineffective in failing to discover and/or use much of the information underlying Claim 1, discussed in the previous subpart. (R3:1275-77.) Counsel’s failure to obtain Durrance’s sentencing transcript to learn the truth about Durrance’s original sentence and the consideration he received for assisting JSO was especially egregious because Eler’s file demonstrates he knew he should obtain the transcript. (R3:3592.) Eler likely would have discovered much of the other information related above had he followed items 15, 16, and 17 on the typed to-do list in his file, which documented the need to depose Bates, Barker,

and Graham and to follow up on questions certified during Hinson's deposition.²⁹ (R3:3555.) Eler had no idea at the evidentiary hearing whether he even looked into doing any of these things and offered no strategic reason for remaining ignorant on these issues other than speculation that he would not have investigated something "[i]f it digs up bad evidence against Simpson." (R3:10391-97.)

Beyond that information discussed above and regardless of the State's duties of disclosure, counsel was ineffective for failing to discover and use readily available information to effectively impeach Durrance by showing that **(1)** the killer(s) could not have entered a laundry room window and **(2)** a lone killer could not have committed the murder wearing the clothes found by the church.

(1) The crime scene evidence discussed above demonstrating that nobody could have entered the laundry room window and that there was no window between the laundry room and the kitchen had all been disclosed to the defense. Just as the defense used the crime scene photos to effectively show that Simpson could not have entered the kitchen window as Durrance initially claimed, it could have used the other photos and the floorplan to show with equal effectiveness that Dur-

²⁹ When Andux started asking Hinson about information Durrance provided about the Cauley murder, Hinson replied that he knew "there's ties that come into this," but expressed concern about discussing that case because it was still a "pending investigation." (R3:2253.) Caliel advised Hinson to decline to answer and agreed with Andux to just certify the issue to get a ruling from the court as to whether JSO would have to divulge information about Durrance's role in the Cauley investigation. (R3:2254.)

rance's new story that Simpson first entered through a laundry room window and then went through another window to get to the kitchen was every bit as false.

The trial court denied relief on this claim by finding that counsel effectively challenged Durrance's initial story. (R3:13360-61.) But this only highlights why Simpson is entitled to relief. By failing to make the same showing as to the story Durrance actually provided to the jury, the defense left the jury with the false impression that Durrance's story at trial matched the crime scene evidence and either Durrance had misspoken in the first interview or Bialkoski misheard him.

(2) The crime scene evidence also disproved another key element of Durrance's testimony – that Simpson acted alone. The State embraced this detail, arguing that Simpson committed the murder by himself wearing the clothes found at the church. (*See, e.g.*, T:1590-92 (opening of State's closing argument with dramatic presentation of State's theory about how the victims "were viciously attacked by one man, and that man sits right there"); T:1612 (emphasizing Durrance's testimony Simpson confessed to committing murders without help).)

Common sense tells us that it was not possible for the person who wielded the axe to have worn these clothes, and if someone was wearing the clothes during the murder, they must not have been the one to strike the blows. There was not a drop of blood found on the shirt, not even on the sleeves that would have been on the arm swinging the axe, blow after bloody blow. Nor was there a drop of blood

on the hat. How could someone wearing that shirt and hat pull that axe out of the first victim after the first blow and then swing it up and down again and again and then do the same to the second victim without getting blood all over their shirt and hat? Even the shoes and pants only had some drops of blood. Competent counsel would have retained a crime reconstruction expert. As postconviction defense expert Jan Johnson opined after reviewing JSO's photographs, more than one person must have participated in the murders with one swinging the axe and another, who would have been wearing the sweatclothes with so little blood on them, keeping Kimbler from escaping. (R3:11717-20, 11723-50, 11821-27.)

Counsel's only explanation for not consulting an expert was that he did not "want to probe into an area which could increase more evidence against my client." (R3:10219.) The trial court seized on this testimony to conclude that the decision not to retain an expert and to instead rely on impeaching the State's witnesses on this point was reasonable. (R3:13362.) The evidence does not support this conclusion for at least two reasons.

First, there was simply no reason to believe that an expert would have increased the evidence against Simpson on this point. Simpson maintained his innocence throughout his interactions with counsel so there was never any reason to fear that having an expert help uncover the truth would do anything but help the defense. But even if an evaluation of the crime scene by a retained expert somehow

yielded evidence that Simpson was the killer, that is no reason not to at least find out. As Eler conceded at the evidentiary hearing, he could have just made the decision not to use the expert at trial after all, which he knew would have avoided any obligation to disclose her adverse opinion to the State. (R3:10220.) In other words, there could be no harm by retaining the expert.

Second, although having an expert explain why, as a matter of crime scene reconstruction science, a lone killer could not have worn these clothes would have been devastating to the State's case, Eler's testimony below established that he could have pursued the same strategy even without an expert. He recognized not only that it was more than likely, as a matter of common sense, that there were multiple perpetrators, but also that this point "fit like a glove" with the defense strategy of suggesting that Little Archie and Smallwood committed the murders. (R3:10148-50.) He recognized that the significant amount of blood found all over the bedroom, the lack of blood on the sweatshirt or hat, the blood on the floor that could not exclude Smallwood, and the positioning of the bodies all made it more likely than not that more than one person committed these murders. (R3:10128, 10130-35, 10142-43, 10148-50, 10195-201, 4514-15.) He could not recall whether he had "planted the seed" for this theory, and he thought he had gone through the mechanics of how it would be impossible for someone to swing the axe to hit the

two victims so many times with so much blood without getting any on their shirt or hat. (R3:10149, 10196-97.)

But a review of Eler's closing argument shows that, instead, he argued, with no evidentiary support whatsoever, that Little Archie and Smallwood left out the front door that night after eating with Big Archie, that Smallwood later dropped Little Archie off to rob Big Archie, and that Little Archie entered through the front door and killed the victims by himself before meeting Smallwood and Durrance at the church. (T:1670-71.) Not only did this argument go against all the evidence that there was more than one killer (thereby lending support to the State's theory that Simpson committed the murders alone), but it was also contrary to the clear evidence the jury heard and saw that nobody could have exited or entered through the front door because it was impassable. (T:585.)

The trial court also rejected this claim by finding that there was no reasonable probability that proving the murders could not have been committed by a lone killer could have changed the result because Simpson's DNA was on the shirt. (R3:13362-63.) This conclusion is unsupported not only because the court failed to consider cumulative prejudice with Simpson's other claims, but also because the combination of the DNA evidence and the conclusion that there had to be at least two killers and the person swinging the axe could not have worn the shirt would prove Simpson could not have committed the murders as alleged. All it shows is

that Simpson's DNA must have been left on the shirt before the murders, and that Smallwood likely wore the shirt during the murders and restrained Kimbler while Little Archie first hacked his father to death with multiple bloody axe blows before turning to do the same to Kimbler.

D. The State Knew and Counsel Failed to Show That the State's Alternative Explanation for How Simpson Could Have Entered the House Was Also False. (Claim 18)

Claim 18 charges the State with a *Giglio* violation for its claim that Simpson entered the premises through the north rear door and counsel with being ineffective in failing to show the jury this was impossible. (R3:1342-44.) As detailed in Part III.B.1.a.ii above, Durrance testified that Simpson had entered through a window, which was impossible, and Caliel came up with an entirely new theory of the case by arguing that by leaving the north rear door unlocked that evening, Little Archie "tragically" allowed Simpson to have access to the house. (T:1596-97.) This argument had partial support in the evidence because Little Archie testified that when he and Smallwood left that night, the north rear door was unlocked and Big Archie and Kimbler were going to sleep. (T:791.)

Despite that, Caliel was well aware that immediately after seeing Little Archie at the RaceTrac gas station, which was immediately after Little Archie and Smallwood had left Big Archie's house, Little Archie's cousin Thompson went to Big Archie's house and found the north rear door was locked. Thompson testified

to these facts at his pretrial deposition, which Caliel attended. (R3:3285, 3289, 3291, 3301-02.) This was doubly important because not only was there no sign of forced entry in the house, but the door had a double deadbolt that required a key to lock or unlock from inside or out, as Thompson testified at trial. (T:1501-02.) Little Archie admitted he had a key (T:812), and there was never any suggestion, much less evidence, that Simpson had a key.

But even though the defense called Thompson as a defense witness and had him testify about knocking on the door that night, counsel never asked him whether he tried the lock. (T:1497-98.) Had he done so, Thompson would have confirmed that he had and it was locked, just as he did in his deposition. (R3:11385.) But the defense never even interviewed Thompson or did anything to prepare him as a defense witness and was patently ineffective for failing to elicit this crucial detail. *See Collier v. Turpin*, 177 F.3d 1184, 1201, 1204 (11th Cir. 1999) (finding counsel ineffective for calling witnesses to testify on a critical issue, but then eliciting “very little relevant evidence” and “no more than a hollow shell of the testimony necessary” for the jury’s consideration). As he admitted at the evidentiary hearing, eliciting this testimony would have “punch[e]d a hole” in the State’s case. (R3:10305-07.) Indeed, the fact that the door was locked also strongly suggests that either the victims were already dead when Little Archie left before being seen

at the RaceTrac or that Little Archie returned later that night as he was the only person that the evidence showed had a key.

IV. CLAIMS UNDERMINING THE STATE'S DNA EVIDENCE

The claims in subpart A show how prosecutorial misconduct – often enabled by counsel being asleep at the switch – compromised Simpson's ability to prevail on the strategies defense counsel elected to pursue at trial. Subpart B addresses postconviction DNA testing. Subpart C argues the claims that trial counsel's failure to adequately prepare for trial prevented their strategies from succeeding. Finally, subpart D addresses newly discovered testimony by Little Archie and Smallwood that further supported the defense theory.

A. Prosecutorial Misconduct Compromised Simpson's Trial and Postconviction Defenses to the DNA Evidence.

As argued in Part II, the State misled the jury with a litany of false statements and improper arguments to which counsel unreasonably failed to object. Most of those instances of prosecutorial misconduct focused on the DNA test results and Simpson's explanation that Little Archie took his clothes. But prosecutorial misconduct also unconstitutionally undermined (1) Simpson's defense that Little Archie was more likely than Simpson to have killed the victims and (2) Simpson's ability to test the evidence to determine whether Little Archie left his DNA behind in the crime scene or on the clothes.

1. The State Concealed the Fact That Little Archie Was a Confidential Informant Against Durrance. (Claim 15)

Claim 15 alleged, among other grounds that were not borne out by the evidence, that the State violated *Brady* obligations by not disclosing that Little Archie had been serving as a confidential informant against Durrance. (R3:1331-35.) At the evidentiary hearing, Brutnell confirmed that Little Archie was confidential “Source Number Five” in the application that led to the wiretap that led to Durrance’s conviction on trafficking charges. (R3:10927-28.) Bates confirmed that Little Archie was serving as a confidential informant. (R3:13178.) In listing Little Archie as a witness against Durrance in the trafficking case, the State listed his address as “c/o Chuck Bates.” (R3:6480-82, 6641.)

Bates and Brutnell were the affiants on the application and represented to the court that Little Archie had provided information they “believed to be reliable” and had “verified by other investigative techniques.” (R3:2635-36.) It detailed Little Archie’s account that Durrance had threatened to harm Big Archie after the cocaine Durrance had fronted him was stolen and Big Archie could not repay Durrance, as well as Durrance’s ruse of selling them fake cocaine to get his money back. (R3:2637-38.) He further related that Durrance had told him that “the guy who sold him the cocaine wouldn’t be selling any more bad cocaine” because “the police found the guy dead.” (R3:2639.)

This Court has made clear that the State's *Brady* obligations include disclosing to the defense when a State witness has served as a confidential informant even in unrelated cases. *E.g.*, *Hendrix v. State*, 908 So. 2d 412, 424 (Fla. 2005); *Gorham v. State*, 597 So. 2d 782, 784 (Fla. 1992). Indeed, the State is required by rule to disclose the confidential informant status of any witness it intends to call at trial. Fla. R. Crim. P. 3.220(g)(2). Had Little Archie's status as a confidential informant been disclosed, the defense would have been able to ask Little Archie about it.

When asked about information he had provided to the State at the evidentiary hearing, Little Archie testified that he told JSO he thought Durrance had killed Big Archie in retaliation for the drug disputes. (R3:11421-22.) He told Caliel that Durrance had admitted to killing the dealer in West Palm Beach who had sold Durrance the fake cocaine. (R3:11422-23.)

Armed with this information, the defense could have impeached the State's entire case by showing that there was an explanation for why the State so quickly dismissed Little Archie as a suspect – he was a valuable source of information. The defense would have also, of course, had the opportunity to depose Durrance about the West Palm Beach murder underlying the drug dispute between Durrance and Big Archie. And once Durrance learned that Little Archie had told the State that Durrance confessed to killing the West Palm Beach drug dealer, he likely would

have seen what he discovered after trial – that he was being “double-crossed.”³⁰ (R3:12602.) It is highly unlikely he would have chosen to testify against Simpson without a deal, and even if he testified with or without a formal deal, the defense would be able to impeach him with this tremendous new incentive to help the State in an effort to avoid murder charges.

The trial court did not reach the issue of prejudice because it found Little Archie’s role as a CI was not *Brady* material because there was no evidence that the State ever gave Little Archie any benefits or that the State, in fact, chose to overlook evidence that Little Archie may have been the murderer because it valued the information he was providing. (R3:13443-44.) But this Court held in *Hendrix* that the State is required to disclose a witness’s status even where the record refutes that the witness “was treated favorably or given anything in exchange for his testimony.” 908 So. 2d at 424. Thus, this was a *Brady* violation, and the information above should be considered when this Court undertakes its cumulative prejudice review. Even if it would not be sufficient by itself, it is yet another weight on the scale of prejudice warranting relief.

³⁰ Indeed, after he testified as a State’s witness against Simpson, the State brought Little Archie down to West Palm Beach where he testified against Durrance. (R3:11423.) As detailed in Part III.A, Durrance was convicted and is serving a life sentence for that murder. *Durrance v. State*, 44 So. 3d 217, 220 (Fla. 4th DCA 2010).

2. The State Violated Its Duty to Preserve the Evidence for Future DNA Testing. (Claim 5)

Claim 5 charged the State with failing to preserve the evidence for future DNA testing in violation of Simpson's due process rights under both the constitution as recognized in *Arizona v. Youngblood*, 488 U.S. 51, 56-58 (1988), and section 925.11, Florida Statutes. (R3:1282-93.) This brief focuses only on the latter aspect of the claim and abandons his contention that there would be a *Youngblood* claim apart from the statutory violation. Section 925.11, Florida Statutes, enacted in 2001, requires that governmental entities in possession of any physical evidence, including "any investigating law enforcement agency, the clerk of 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. (2002). The evidence must be maintained until 60 days after the execution of a death sentence. *Id.* § 925.11(4)(b).

The original version allowed evidence to be disposed of earlier upon notice to the defense so long as the defendant did not request further preservation within 90 days of the request. *Id.* § 925.11(4)(c)(1)-(2). But in June 2006, still over six months before Simpson's trial, the statute was amended to remove that provision, thereby eliminating any exception to the duty to preserve evidence in a capital case until after the sentence is carried out, even if the defendant or his counsel has waived the right. § 925.11(4), Fla. Stat. (2006); ch. 97-292, § 1, Laws of Fla.

The SAO, FDLE, and Duval County Clerk of Court (collectively “the evidence custodians”) violated their duty under this statute to preserve the biological evidence on various physical items collected prior to trial and used by the State to convict Simpson. Thus, to the extent that the Court finds Simpson has not met his burden on his newly discovered evidence DNA testing claim argued in Part IV.B, or his IAC claim for failing to independently test the evidence prior to trial argued in Part IV.C.1, it is through no fault of his own due to the collective destruction of material, exculpatory evidence in this case – evidence that this Court previously granted him the right to test under Rule 3.853 and *Strickland. Simpson*, 2013 WL 2663541, at *1.

The evidence custodians’ failure to preserve the biological evidence specifically deprived Simpson of his capacity to: 1) identify additional wearers of the sweatclothes; 2) identify wearers of the shoes and hat, on which none of his DNA was found; 3) conduct STR DNA testing on Kimbler’s fingernail clipping extracts to determine whether they contained Little Archie’s DNA; and 4) test the axe for any biological or fingerprint evidence. The trial court denied this claim based on its conclusion that the statute required the State do more than refrain from disposing of the evidence and did not impose a duty to preserve the evidence so it could be tested. (R3:13374.) This was error because (a) the court misinterpreted the statute and (b) the evidence proved the State failed to preserve the evidence.

(a) While all of the evidence recovered from the crime scene and church was potentially exculpatory to Simpson’s defense because any of it could have held DNA from the killer, this claim focuses on the destruction of uncontaminated biological material on the following items: 1) the sweatclothes, 2) the shoes, 3) the hat, 4) the axe, and 5) the extracts Badger generated from Kimbler’s right- and left-hand fingernail clippings (combined). All of the items listed above were “retained” in one form or another – Simpson makes no claim that they were disposed of. Rather, he contends that the government agencies that had custody of the items failed to store them in such a way as to prevent the destruction of exculpatory biological material contained thereon. The destruction falls into two categories: 1) the degradation and other loss of DNA resulting from unsuitable storage conditions, and 2) the contamination of DNA due to improper handling of the collected items.

The trial court held that section 925.11(4) does not impose a burden on governmental entities to preserve the evidentiary value of evidence; rather, it simply prohibits them from disposing of it. (R3:13374, 13383.) In so holding, the trial court essentially found that the meaning of “maintaining” evidence is limited to retaining and providing access thereto. Not only does that contradict and eviscerate the patent purpose of the statute, but section 925.11(4)(c) of the 2001 version and subsection (b) of the 2006 version make clear that the term “maintain” is synonymous with “retain[ing] **and preserv[ing]**” the evidence. See § 925.11(4)(c) (2001)

(providing that a governmental agency may dispose of physical evidence in any case before the expiration of the time period set for preservation [only] if ... [n]o other provision of law or rule requires that the physical evidence be **preserved or retained.**”) (emphasis added); § 925.11(4)(b), Fla. Stat. (2006) (same as to evidence in non-capital cases only).

Moreover, a 2004 bill analysis provided to the trial court makes clear that the Legislature intended to require the State to preserve collected evidence, not simply retain it. The Senate Staff Analysis and Economic Impact Statement for CS/CS/SB 44, the bill that extended the statute of limitations for petitions for DNA testing, noted that it might result in “an indeterminate increase in costs incurred by the extension as affecting storage **and preservation** of evidence.” (R3:7084; App. 347 (emphasis added).)

The trial court disregarded the above staff analysis on the ground that if the Legislature intended for the discussed standards to become law, it would have included them in the statute. (R3:13374-75) (citing *Fla. Dep’t. of Revenue v. Fla. Mun. Power Agency*, 789 So. 2d 320 (Fla. 2001)). But *Fla. Dep’t. of Revenue* does not stand for this proposition. Rather, it addresses (and rejects) the Department’s contention that language in a statute can simply be ignored, based on legislative history, in such a way as to completely alter the statute’s unambiguous, plain language. *Id.* at 324. That is not what is required here to give meaning to the legisla-

tive history of section 925.11. Rather, as explained below, the legislative history is **consistent with**, albeit more detailed than, the unambiguous, plain language of the statute, which makes clear that “maintaining” evidence is the same as “retaining and preserving” it. Merriam-Webster’s Dictionary defines “preserve” to include “to keep ... free from decay” and “to keep or save from decomposition.” Merriam-Webster Dictionary on-line, <https://www.merriam-webster.com/dictionary/preserve> (last accessed May 6, 2018). Thus, the obligation imposed by the term “preserve” is clearly greater than the decidedly more relaxed duty imposed by the trial court.

A Florida Senate Interim Report from the Committee on Criminal Justice entitled “Evidence Preservation for Postsentencing DNA Testing – Reassessing Current Statutory *Requirements in Section 925.11, F.S.*” further confirms that the legislature’s intended use of the term “maintain” is to “preserve or retain,” not simply to retain and provide access to, as the trial court suggests. (R3:7088-97.) The report addresses the storage problem faced by governmental entities that, under section 925.11(4), are “responsible for retaining and preserving physical evidence gathered from crime scenes.” (R3:7088.) This is due in large part to the fact that “entities (primarily law enforcement agencies) have been forced to acquire costly additional secure storage space and refrigeration units.” (R3:7088.) In recommending solutions, the Committee made clear that evidence must be maintained in a “scientific-

cally-acceptable” manner, not simply stored, and that this includes “being mindful of expanding testing methods.” (R3:7094.) The Committee noted,

It does not seem advisable to set forth in statute when and how a particular type of evidence should or could be preserved in a particular way. This is an arena where latitude should be given for professionals to exercise their judgment. However, along with the survey responses, the group discussion on this particular topic indicated there may be a need for on-going statewide training on handling evidence as it relates to current and future DNA science.

(R3:7094.) Thus, although the Legislature opted not to enumerate in the statute exact procedures required to preserve every type of evidence that may someday be subjected to DNA testing under section 925.11, it certainly did not intend to require no procedures at all. If the trial court’s interpretation of the statute were to prevail, governmental agencies could meet their duty to maintain evidence by simply dumping all of it in a pile without protective covering or temperature control. As long as they could find the evidence when they needed to, there would be no consequences. But that would render the right to DNA testing under section 925.11 and rule 3.853 a dead letter.

(b) Badger testified at the evidentiary hearing that in order to preserve or maintain biological evidence on clothing, the clothing must be stored “at ambient room temperature under air conditioning.” (R3:11873.) Although Burley’s lab freezes all non-porous biological evidence, she agreed with Badger that if one does not have room to freeze items like clothing, room temperature (65-70 degrees)

would be adequate, provided there is some humidity control, which is critical to preventing growth of bacteria and degradation of the DNA. (R3:12260, 12286.) She explained, “Warm, moist conditions encourage bacterial growth. Anytime we have that they’re going to eat up the DNA.” (R3:12310.) Badger and Burley agreed that DNA extracts must be stored frozen. (R3:11873, 12285-86.) And Burley testified that so-called “low bind” liquid storage tubes are recommended for DNA extract storage to prevent the extracts from binding to the sides of the plastic, which can cause loss of the sample. (R3:12251, 12253.)

As detailed below, any wearer DNA that was present on the shoes and hat, as well as biological material and/or fingerprints on the axe, was effectively destroyed by exposure to contamination permitted by the SAO. Further, untold amounts of DNA on the sweatclothes was severely degraded by the Clerk’s failure to store it in a temperature-controlled environment after trial in 2007 until sometime after defense expert Johnson viewed the evidence at the Clerk’s office on May 19, 2011. Finally, FDLE failed to store Kimbler’s fingernail clipping DNA extracts in low bind tubes, contrary to manufacture recommendations, thereby eviscerating the biological material in the extracts for testing purposes. (R3:12250-53.)

The most egregious destruction of evidence in this case was committed by the State in a reckless, if not entirely deliberate manner. At the evidentiary hearing, the defense presented James McMillan, a forensic artist who prepared the State’s

evidence displays for Simpson's trial. (R3:11542.) He testified that before trial, he took numerous items of evidence to his house to create the State's trial displays. He has no training in handling biological evidence and stored the items in a locked closet in his house while they were in his possession. (R3:11543.) Johnson reviewed the chain of custody documents for the evidence stored at the JSO warehouse and the Clerk's office and did not see McMillian's name listed on either of them. (R3:11773.) She has testified all over Florida and has never heard of anyone ever taking evidence home to his residence. (R3:11773.)

At the evidentiary hearing, McMillian was shown state trial exhibits 86 (the axe), 89 (the hat), and 90 (the shoes), which he recognized to be displays he created for trial at Caliel's request. (R3:11555, 11576, 11577; App. 318, 321, 322, 323, 324, 326, 328.) For trial, he prepared opaque foam core lids to cover these items until they were shown to the jury. (R3:11555-56, 11572, 11574, 11577.) The covers would just sit on top of each item of evidence and could simply be lifted off to reveal the item. (R3:11577.) Once the cover was taken off, the items were not protected in any way, so they could be touched directly by members of the jury. (R3:11588.) The hat, shoes, and axe were all missing their covers. (R3:11557, 11572, 11576.)

McMillian also created some panels in the back of the displays so that the evidence could be accessed. For example, the DNA swabs included on the display

of the axe could have been accessed through the back of the display by lifting the tape that closed the panel. (R3:11562, 11565, 11588-89, 11594, 3474, 3480; App. 334, 335 (photos of trial display for Simpson known standards, including of rear evidence access panel).) He noted damage to the axe exhibit, including a broken seal of the package containing swabs taken from the axe handle. (R3:11561-62.) Similarly, there was damage to the hat exhibit – the hat itself was flattened, whereas when it was displayed to the jury, it would have been propped up with padding or wires. (R3:11573; App. 324.)

Although McMillian did not have an independent recollection of the displays he created for the clothes, which had been dismantled by agreement so they could be shipped to defense expert Burley for testing in postconviction (R3:11569-70), his description of what he generally does with such clothing items was consistent with the displays of the sweat clothes viewed by Johnson at the clerk's office – namely, they were mounted in “what I call a surround, it would have had a cut-out in the shape of the sweatshirt, it would have been covered on both sides with Mylar.” (R3:11565, 11570, 3420-21; App. 329, 330.)

Johnson testified that on May 19, 2011, she and postconviction counsel went to the old Duval County Courthouse on Bay Street where the State's admitted evidence had been stored since trial. (R3:11780-81.) When inspecting the evidence, Johnson observed that the access panels described by McMillian were loosely

taped and bore a notation, “lift to access evidence.” (R3:11794-95.) On the axe display, a notation indicated that a panel could be lifted to access packaging containing the debris from the axe. (R3:11799, 11801; Ex. 86(I) on CD filed 10/16/18; App. 322.) The swabs used to collect material from the axe handle and shoelaces were displayed on boards, as were debris and trace material removed from the axe. (R3:3457, 11797-801; App. 320.) One display board contained DNA extract vials that had been used to generate Kimbler’s fingernail scrapings and another displayed the extracts themselves. (R3:3470, 3507, 11802; App. 332, 333.) Similarly, the fingernail scrapings, debris from the rape kit, DNA extracts, and hairs collected from Kimbler’s hand were displayed on boards. (App. 336; R3:11812-13, 11814, 2509, 3511-14, 3520-21, 22 (three hairs from clothing debris attached to post-it note and mounted on display board).)

Nelson confirmed that the State’s trial exhibits were displayed on white foam boards and that the displays were kept at the SAO for some period of time before trial. (R3:10593-94.) She and Caliel likely both handled the evidence in the courtroom and it was not her practice to wear gloves. (R3:10595.) While on the stand, Nelson was shown the axe, the shoes, and the hat, all in the condition they were in at the Clerk’s Office. She confirmed that the axe appeared at the evidentiary hearing as it had at trial and that while she had no independent recollection of how the shoes and hat were mounted and displayed at trial, she had no reason to

believe they were not displayed in the same way they were shown to her at the evidentiary hearing, with the exception that the shoes were separated from the box on which they would have been mounted at trial. (R3:10598-99.) None of the items were protected in any way once the Clerk's brown paper covering used for storage was removed. (R3:10602.) Nelson confirmed that anything that was introduced into evidence would have presumably gone back to the jury room. (R3:10600.) Rose Devoe, Deputy Chief Administrative Officer at the Duval County Clerk's Office, testified that it would have been "normal protocol" for the evidence to have been sent back to the jury room and handled by bailiffs, attorneys, clerks, and staff. (R3:11677.) The trial record confirms this. (T:1713, 1717.)

Johnson, who has participated in thousands of trials as a witness, testified that she normally opens up a package of evidence and displays it for the jury, or if it is sent back to the jury, it is wrapped up in Visqueen. (R3:11777.) She could not recall participating in any trials in which the jury was actually permitted to touch the evidence. (R3:11776-77.)

After trial, the evidence was stored at the Clerk's Office (and still is, though under different conditions). Buffy Stagg, Senior Manager of the Felony Department, testified that the Clerk's Office moved from the old courthouse to the new one in the summer of 2012. (R3:11605.) In the new courthouse, the evidence vault for death cases, which houses biological as well as physical evidence, is climate

controlled. The clerk also maintains a refrigerator in which certain evidence is stored. (R3:11622-23, 11650.) The clerk now uses the refrigerator to store items that come to them refrigerated. (R3:11650.)

When Johnson went to the old Clerk's office to review the evidence in 2011, she was permitted to accompany assistant clerk Gail Cole to some of the locations where the evidence in this case was being stored. (R3:11622.) Some of the items, including the sweatclothes, were in a vault. (R3:11781-82.) Other items, such as the hat, shoes, and axe, were in either a non-secure file room or elsewhere in the courthouse. (R3:11782.) Johnson photographed mold on the ceiling of one of the file rooms. (R3:3409-10, 11785.) One of the evidence displays taken out of one of the file rooms was just lying on top of a box with no wrapping around it. (R3:3411.) That display contained DNA extract vials taped onto it. (R3:3412-13, 11786.) Another containing known standard cheek swabs was found on the top shelf of a different file room. (R3:3523-24, 3528-29, 11816-17.) As for the vault where the clothes were stored, Johnson observed that the temperature was "very hot in there," though she could not tell the temperature because the thermostat was broken, as Cole pointed out. (R3:11781-83.)

In short, all of the biological evidence that the State referenced and admitted at trial, which included the sweatclothes, shoes, hat, axe, nail clippings, scrapings, swabbings, and extracts, was stored at the SAO, taken home by McMillian where

he mounted it on display boards (much of it unprotected and accessible), provided to the jury during deliberations, and stored thereafter in non-temperature controlled environments with little protection from contamination.

Following the defense team's visit to view the evidence in 2011, Stagg reiterated the policies and protocols for evidence handling to her staff, including that they should not disclose the Clerk's evidence storage locations to anyone except a designated clerk employee. (R3:11648.) Upon receiving an email from Nelson regarding the transfer of evidence from the Clerk's office to the State Attorney for review by FDLE that would take place in 2014, Stagg created an "agreement and acknowledgment for temporary transfer custody of evidence" to "assure the integrity of the record and the chain of custody." (R3:11652.) The purpose was to establish who had custody of the evidence in case it was "not maintained," but Stagg indicated that she never received the log back from the SAO. (R3:11652-53.)

Finally, when FDLE generated DNA extracts from Kimbler's fingernail clippings for testing purposes, Badger stored the extracts in polypropylene tubes, which are not "low bind" tubes. (R3:12251.) Burley testified that research indicating the necessary use of low bind tubes to preserve DNA evidence goes back at least as far as 1998, so the drawbacks of using polypropylene tubes were known even before the murders in this case. And indeed, the manufacturer of the tubes specifically recommends against using them for storage. Just like FDLE, Burley's

lab generates extractions in polypropylene tubes, but always then transfers the extractions into low bind tubes for storage purposes. (R3:12250-54.)

The result of the failures by the State to properly store and maintain the evidence in this case had dire consequences for Simpson's capacity to prove his innocence and his IAC claim for failure to test the evidence. Prior to postconviction DNA testing, Johnson, Burley, and Charlotte Word all advised postconviction counsel about what items might be suitable for testing after the storage conditions described above were discovered. Based on her experience with the collection and preservation of DNA evidence, her discussions with JSO personnel, as well as what she observed when she examined the evidence at the JSO warehouse and the Clerk's office in 2011, Johnson advised that the axe, hat, and shoes were not suitable for reliable DNA testing due to probable contamination. (R3:11819-20.) Indeed, she observed that the axe appeared to have been "wiped down" because of how clean it was. (R3:11819 ("There's no way I would rely on any evidence that came off of the axe."); *see also* R3:3457-59, App. 318, 320, 321.) Burley and Word agreed that these items were not suitable for DNA testing. (R3:12194, 12238.)

Because the sweatclothes were protected by Mylar at trial and at the Clerk's Office, the defense asked Burley to attempt to identify wearer DNA on them, as well as the cuttings that FDLE removed from them for pretrial testing. (R3:12238.)

She also tested Big Archie's and Kimbler's fingernail scrapings and clippings (as well as any DNA retained on the picks used to scrape under their nails). (R3:12248-49.) Finally, she attempted to test the DNA extracts generated by FDLE from Kimbler's fingernail scrapings, as well as FDLE's extract control, which is a "quality-assurance measure that ... controls or monitors whether there is contamination in the environment introduced during" DNA testing. (R3:12250.)

Notably, while the trial court's order addresses whether the Clerk's office violated Simpson's statutory right – holding that it did not contrary to the evidence just described (R3:13383-84) – the order does not address or evaluate whether the SAO's exposure of the hat, shoes, and axe to irreparable contamination, rendering any evidentiary value of those items useless, violated section 925.11. It surely did.

Simpson's inability to test the hat and shoes was particularly significant because FDLE made no effort to obtain wearer DNA from the hat,³¹ which Simpson denied ever wearing or possessing, and left numerous areas that could have yielded

³¹ Badger tested only two cuttings from the left side of the hat, which had been removed from JROC because they contained possible blood stains. No human DNA was detectible in the stains. (R3:11977-78.) Despite the fact that Badger had the hat in his possession in addition to the cuttings, he did not swab the inside or the bill or any other areas to try to obtain and test wearer DNA. (R3:11978.)

wearer DNA on the shoes.³² Burley indicated that in her “casework experience ... we almost always get some detectible amount of DNA from items like shoes, socks and hats.” (R3:12258.) Although it may not always be interpretable, there is at least some sort of DNA identified. She added, “If an analyst in my unit came back with a negative result [on a hat], I would probably tell him or her to go back and retest it or troubleshoot their analysis.” (R3:12258.) Similarly, Word was surprised there was no detectible human DNA, other than the victims’ blood, on the axe. (R3:12189.) In her experience, it is very unusual not to get a profile from tools that have been handled and used and that wood is a good material to get DNA from. (R3:12189-90.)

In light of Simpson’s claim that he never wore the hat and shoes and did not kill the victims, and Burley’s and Word’s testimony that the axe, hat, and shoes were all likely to have produced robust DNA results had FDLE or trial counsel thoroughly tested them, Simpson’s inability to test these three items alone warrants a new trial.

As for the sweatclothes, Badger failed to test numerous areas on the inside of both items that, according to Burley, contained visible stains that she determined contained biological material. He also did not examine the clothes with an alternate

³² Word would have recommended testing the tongue of each sneaker and the laces themselves (rather than just a swabbing), particularly the ends where a wearer was likely to touch them. (R3:12187-88.)

light source, thereby missing numerous additional stains of biological material that Burley identified and tested. (R3:12240-42.) As noted in Claim IV.B below, Burley was able to identify and test 29 DNA mixtures on the sweatclothes, many of them visible to the naked eye, that Badger did not test.

Although the clothes were covered in mylar for the trial and stored in the Clerk's Office thereafter, thus reducing the possibility of contamination, their storage in a non-temperature controlled environment for several years at the clerk's office certainly led to significant degradation of DNA on the clothes over time. Burley testified that a majority of the samples that she produced profiles from were "extremely degraded," which limited her capacity to interpret the results. (R3:12256.) And, of course, this meant that she was unable to identify any of the at least two additional wearers of the sweatclothes who contributed to no less than ten mixtures on the inside of the sweatclothes, as discussed below in Part IV.B. Had any of these contributors been identified as consistent with the DNA profiles of Little Archie or Smallwood, even Caliel would have had to agree that Simpson was entitled to not just a new trial, but release. (See R3:11087 (Caliel conceding under oath that had the DNA results identified Little Archie, "then he would become a suspect much like Mr. Simpson was").)

As for Kimbler's fingernail scraping extracts, when Burley examined them, she found that their storage tube was empty, despite the indication in LabCorp's

notes that 10 microliters remained after they completed their testing and sent the extracts back to FDLE. (R3:12250-51.) She surmised that this was likely due to FDLE's failure to store the extracts in low bind tubes. (R3:12251.) Burley attempted to retrieve the DNA by adding sterile water to the tube, vortexing it, and then centrifuging it, but that did not yield any results.³³ (R3:12254.)

Burley's inability to test the extractions has undermined Simpson's ability to demonstrate that new DNA testing likely would have led to an acquittal or that trial counsel was ineffective for failing to have the extracts tested. As detailed in Part II.C above, the State had tested the extracts with a test that could not distinguish between father and son, but showed that DNA likely belonging to either Big Archie or Little Archie was under Kimbler's nails. Had counsel simply had them tested with nuclear testing or had they been preserved for postconviction testing, we would know whose DNA it was. Similarly, had the extracts been preserved, Burley could have been able to perform STR testing using Identifiler Plus to settle the question as to whether Little Archie's DNA was under Kimbler's nails. Again,

³³ Also empty were 1) the tube that previously contained DNA extracts from one of the hairs recovered from the debris taken from the sweat clothes and 2) the tube previously containing Badger's extraction control, which is generated to ensure there is no contamination in the testing environment. (R3:12250, 12254, 12255.)

had she identified Little Archie as the contributor, Simpson's defense would have been completely corroborated and his immediate release required.

The prejudice resulting from the evidence custodians' failure to preserve the evidence is indisputable, especially in light of the fact that trial counsel failed to independently test the evidence before trial. Thus, at a time when the biological evidence was significantly less degraded and uncontaminated, Eler's inexplicable failure to test effectively waived Simpson's ability to exonerate himself before trial as argued in Part IV.C.1.a below. The SAO and FDLE then hammered the nail in the coffin by eviscerating any evidentiary value in the hat, shoes, axe, and nail extracts for evermore. Finally, the clerk contributed to the significant degradation of any biological material on the clothes, thereby likely preventing Burley from identifying additional wearers. These failures deprived Simpson of his statutory right to due process just as surely as if the State had denied him access to the evidence altogether, as it attempted to do in 2011. As this Court held in ordering that the trial court grant Simpson's experts access to the evidence,

[W]e conclude that the results of the examination and testing that Simpson requests would assist him in demonstrating entitlement to postconviction relief. We further conclude that Simpson has demonstrated irreparable harm under the facts of this case, because without the requested access, examination, and testing, Simpson would be unable to demonstrate his postconviction claims. This would not only eviscerate his ability to litigate and demonstrate his claims, but would deprive this Court of being able to conduct a meaningful review on appeal.

Simpson, 2013 WL 2663541, at *2.

Based on the foregoing, the evidence custodians' failure to maintain the biological evidence by preserving it pursuant to section 925.11 violated Simpson's statutory right to due process and requires that his convictions be vacated. *See State v. Williams*, No. 1992-CF-2390, Order on Defendant's Motion for Post-Conviction Relief at 21 (12th Jud. Cir. Mar. 28, 2011) (copy at R3:7036-56) (even in the absence of bad faith, court reversed convictions for kidnapping, sexual battery, robbery, grand theft auto, and two counts of battery under section 925.11 due to Manatee County Sheriff's knowing destruction of exculpatory evidence that the Defendant was unable to obtain through other reasonable means); *State v. Schwartz*, No. 10-11679, Order on Defendant's Motion to Dismiss for Destruction of Evidence (17th Jud. Cir. Dec. 9, 2011) (despite finding that a Broward County Sheriff's Deputy did not intentionally fail to ensure that a DUI video was clear for presentation, the court found that "his failure to follow mandated SOP's resulted in a useless video for both the State and the Defense," requiring that the DUI charges be dismissed); *cf. United States v. Elliott*, 83 F. Supp. 2d 637, 647 (E.D. Va. 1999) (holding that government agency's "failure to follow established procedures [for preservation of the evidence] is probative evidence of bad faith" for purposes of a constitutional due process claim under *Youngblood*).

B. The Limited Postconviction DNA Testing That Was Possible Requires a New Trial. (Claim 7)

In 2013, this Court granted Simpson DNA testing pursuant to rule 3.853 and to prove his claim that trial counsel was ineffective for failing to have the evidence independently inspected and tested prior to trial. *Simpson*, 2013 WL 2663541, at *2-4. While the results of that testing were not as conclusive as they might have been had the evidence not been compromised by various agencies' failure to preserve it, as argued in Part IV.A.2, the testing did yield results that “ ‘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.’ ” *Hildwin v. State*, 141 So. 3d 1178, 1181 (Fla. 2014) (quoting *Jones v. State*, 709 So. 2d 512, 521, 526 (Fla. 1998)) (additional citation omitted). The trial court held that this evidence met the first prong of the test for newly discovered evidence that the results could not have been known at the time of Simpson's trial and the State's pretrial testing. (R3:13392.) However, it concluded the results were “not of such a nature that it would probably produce an acquittal on retrial.” (R3:13393.) This legal conclusion is erroneous based on the record and evidence presented below.

The defense hired DNA analyst Lynne Burley of the Santa Clara County District Attorney Office Crime Laboratory to conduct independent DNA testing under rule 3.853. (R3:3726-31.) Burley is a supervising criminalist and DNA tech-

nical leader at her lab, which is under the umbrella of Santa Clara D.A., but also handles some private work as well. (R3:12233.) Burley oversees approximately 22 criminalists and is in charge of validating new technologies and conducting trainings at the lab. She also performs technical and administrative reviews on the casework of the analysts. She has held her position since 2004. (R3:3726-31, 12233.)

Burley recommended using Identifiler Plus, a new DNA test kit that had recently come online at her lab. (R3:12236-37.) After receiving background about the conditions under which the evidence was stored, Burley advised that it would not be fruitful to test “some of the items that had been exposed to elements and perhaps inappropriate climate.” (R3:12238.) She felt that the hat, shoes, socks, and axe were compromised and contaminated because of the manner in which they had been stored and recommended starting with the clothes. (R3:12238.)

In contrast to FDLE, which seemed to be largely focused on identifying blood stains (R3:12177), and with the exception of the cuttings FDLE sampled (R3:12279-80), Burley had free reign to sample any and all areas of the clothes that were likely to have substantial contact with skin so she could try to determine who had worn the clothing. She examined them with an alternate light source, which

highlights areas where there may be biological material.³⁴ (R3:12241.) Starting with those areas, she collected 19 different samples from the interior and exterior on the sweatshirt and 14 different samples from the interior of the sweatpants. (R3:12240-41.) A majority of the samples that Burley tested contained DNA that was consistent with Simpson's DNA. (R3:12242.) Out of the 36 samples, 20 of them were clearly mixtures. (R3:12243.) In an additional nine, there were peaks below the lab's 50 RFUs detection threshold that also indicated a mixture. (R3:12243-44.) Thus, there were 29 mixtures in all. (R3:12243-44.)

Burley compared the mixtures to amplifications of the reference standards from Simpson, Big Archie, Kimbler, Little Archie, Smallwood, and Durrance. For three of the samples taken from the clothes, she concluded that Simpson was the major contributor and all of the known reference profiles were excluded as minor contributors. (R3:3736, 12255-56, 12262.) For the remainder of the samples analyzed from the sweatclothes, Burley could not include or exclude any of the reference standard individuals from the mixtures due to insufficient data and low levels of DNA. (R3:3743-44, 12245-47, 12262-63.)

³⁴ By contrast, Badger simply used a "bright light" to detect red-brown stains on the clothes – *i.e.*, possible blood stains – to sample and test for the presence of blood. He commented, "There are other detection methods that are available that I don't necessarily have at FDLE, but they are out there." (R3:11941.)

Burley's results from ten interior mixtures on the clothes from which none of the suspects could be excluded can be summarized as follows: First, there were at least three contributors to a mixture found on the interior waistband of the sweatshirt. (R3:12244 (referencing R3:3743, sample 87-18).) Second, there were at least two contributors to six additional interior samples taken from the sweatshirt and three interior samples taken from the sweatpants. (R3:3736 (samples 87-9 and 87-10), 3743 (samples 87-15, 87-16, 87-17, 87-19, 88-9, 88-11, and 88-12).)

Burley tested all of the above ten interior mixtures for the presence of blood and found none (R3:3736, 3751, 12287), thereby tending to confirm what common sense would dictate if the killer or his accomplice wore the clothes when he killed the victims – while one would expect to find plenty of DNA from the victims on the outside of the clothes, it is highly unlikely that the victims would have deposited any of their DNA on the inside of the clothes.³⁵ Thus, the aforementioned ten interior mixtures, collectively, were likely to contain DNA from at least three

³⁵ Seven of these interior samples were scraped or swabbed from the following areas of the sweatshirt: interior right cuff (87-9), interior left cuff (87-10), interior waistband (87-15), interior right elbow and armpit (87-16), interior left elbow and armpit (87-17), interior waistband (87-18), and interior chest area (87-19). (R3:3736, 3743.) The remaining three were scraped or swabbed from the following areas of the sweatpants: interior lower crotch area (88-9), interior left leg seam (88-11), and interior right leg seam (88-12). (R3:3743.)

wearers of the clothes, none of whom is any less likely to have worn them during the murders than Simpson.³⁶

The trial court's summary of Burley's results regarding the clothes focuses on the fact that Burley identified Simpson as a possible contributor to various mixtures she analyzed. (R3:13393-95.) And its denial of this claim stems directly from that misplaced emphasis:

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.

(R3:13395 (citing *Banks v. State*, 219 So. 3d 19, 29 (Fla. 2017)).)

But the additional mixtures to which Burley found Simpson was a possible or likely contributor do no more to confirm the jury's verdict than they do to confirm Simpson's defense. As Burley pointed out, she would expect to find Simpson's DNA in the majority of the samples if he owned the clothes. (R3:12242.) And, of course, she analyzed plenty of mixtures for which she did not include Simpson as a contributor. More importantly, the trial court's conclusion that the

³⁶ Simpson was identified as a possible contributor to only four of these ten interior mixtures. (R3:3736 (samples 87-9 and 87-10), 3743 (samples 87-16 and 87-17).) Because each of these mixtures, as well as the remaining six interior mixtures discussed above, contained at least two contributors, and because Little Archie and Smallwood were not excluded from any of them, Simpson was no more likely to have worn the clothes during the murders than either of them.

new mixtures have no exculpatory value overlooks the import of the nine, above-summarized interior mixtures with two or more contributors and the one mixture with three or more contributors. These ten mixtures provide clear evidence of DNA deposited by at least two wearers of the clothes other than Simpson, and Burley could not exclude Little Archie or Smallwood as contributors to any of these mixtures.³⁷ Thus, the evidence shows that neither Little Archie nor Smallwood was any less likely than Simpson to have worn the clothes during the murders.

Rather than acknowledging this, the trial court found that the mixtures merely confirm the State's theory that Simpson wore the clothes and provide no exculpatory value to the defense because Badger testified that there were various DNA mixtures on the clothing and Eler highlighted Simpson's lack of DNA on certain evidence during cross-examination. (R3:13394-95 (citations omitted).) In short, because "the jury heard there were mixtures on the clothing at trial," and the new evidence merely "continue[s] to show Defendant as the source of DNA or a prima-

³⁷ As the trial court points out, Little Archie **was** excluded from other mixtures on the clothes. (R3:13395 (noting that Little Archie was excluded from samples 88-5 and 88-6, which were recovered from the interior of the sweatpants); *see also* R3:3736.) Indeed, both Little Archie **and** Smallwood were excluded from these samples, as well as from sample 88-3, taken from the garment tag on the sweatpants. (R3:3736.) But because Burley found DNA from at least three different individuals on the inside of the clothes, the fact that Little Archie and Smallwood were excluded from three out of the 19 interior mixtures for which results were obtained is hardly proof that neither of them wore the clothes. If it were, then Simpson also could not be a wearer of the clothes, since Badger excluded **him** from a mixture on stain B removed from the sweatpants. (R3:7064.)

ry contributor to DNA mixtures,” the new evidence would not produce an acquittal. (R3:13395.) For the following reasons, this legal conclusion is erroneous.

First, the references to the trial record relied on by the court for the above proposition³⁸ do not make the case that the jury heard evidence that was essentially cumulative of Burley’s results. Indeed, the portions of the transcript cited by the court demonstrate exactly why the new evidence provides a critical missing piece to support Simpson’s defense and undermine the State’s case. While Badger testified about mixtures found on the clothing, most of the mixtures were not in the least bit probative of the defense’s theory that Little Archie or Smallwood wore the clothes. And those that were had lost all probative value once the State’s experts and Nelson put their spin on them. Thus, as discussed below, the evidence and argument that the jury considered about mixtures in this case was significantly less exculpatory than Burley’s test results.

At trial, Badger testified about his analysis of several mixtures that he tested from the clothes. He found that for stain E from the sweatpants (St. Ex. 122), Kimbler was the primary contributor, Simpson could not be excluded as the secondary contributor, and Little Archie and Smallwood were excluded. (T:1178-80, 1232-

³⁸ (See R3:13394 (trial court’s string cite to portions of trial testimony from Badger “about various DNA mixtures present on the clothing”), 13394-95 (string cite to portions of trial testimony in which trial court claims Eler highlighted the lack of Simpson’s DNA on certain evidence and Badger testified he could not exclude Little Archie from “some mixtures” on the clothes).)

33.) Thus, this mixture, of course, did nothing to further Simpson's defense that Little Archie or Smallwood wore the clothes.

Next, Badger testified about the mixture on the waistband of the sweatpants (St. Ex. 126). He found that Simpson was the primary contributor and then, by assuming there were only two contributors, that Little Archie and Smallwood could be excluded as secondary contributors. (T:1184-88.) This assumption features prominently in Simpson's claim, argued in Part IV.C.1.b below, that Eler was ineffective for failing to challenge the State's DNA evidence, as Eler never followed up on cross to ask Badger whether he could exclude Smallwood or Little Archie from the mixture if Badger allowed for the possibility that there were more than two contributors to the mixture. Thus, Badger's testimony about this mixture also did nothing to further Simpson's defense that Little Archie or Smallwood wore the clothes.

Next was the mixture on the swabbing of the sweatpants' leg cuffs (St. Ex. 127), to which Badger concluded Simpson could not be excluded as a primary contributor. (T:1188-89, 1211.) Badger testified that he formed no conclusion about the inclusion or exclusion of the other known suspects or victims as secondary contributors. (T:1190-91.) Notably, here, too, Eler never asked Badger the obvious follow-up question to make use of this evidence for Simpson's defense: So you could not exclude Little Archie or Smallwood as a possible contributor to the mixture on

the leg cuffs? (T:1241-42 (Eler cross-examining regarding the leg cuffs and confirming, simply, that the primary profile that “matched the DNA profile of Jason Simpson” was only a partial profile).) Thus, again, Badger’s testimony and Eler’s cross regarding this mixture did nothing to further Simpson’s defense that Little Archie or Smallwood wore the clothes.³⁹

The only two mixtures about which Badger testified that supported the defense that Little Archie or Smallwood wore the clothes were stain C, a cutting from the sweatpants (St. Ex. 121), and the cutting removed by FDLE’s Jacksonville Regional Operations Center (JROC) from the neck of the sweatshirt (St. Ex. 128). (T:1176-78, 1191-93.) As to the mixture from stain C, Badger testified that Kimbler was the primary contributor and that Simpson and Little Archie could not be excluded as possible contributors to the minor profile. (T:1176-78.)

But any possible probative value of this mixture to Simpson’s defense was eviscerated by two factors: First, Badger testified that only one fairly common allele was foreign to Kimbler; thus, 22 percent of the general population would have the same allele. (T:1177-78.) Second, Eler utterly failed to use Badger’s conclusion to Simpson’s advantage. In fact, rather than highlighting the fact that Little Archie could have been the minor contributor to the mixture, Eler sought to downplay the

³⁹ Notably, crossing Badger regarding this mixture, Eler actually **assisted** the State by assuming in his question that the primary profile “matched,” rather than was just consistent with, Simpson.

fact that Simpson was also a possible minor contributor, by eliciting from Badger that the single foreign allele in the mixture that he and Little Archie shared essentially had no probative value. (See T:1231 (“Okay. So this thing is not even a marker, it’s like half of a marker. ... So you’re not sitting here telling this jury that that No. 18 [allele] means it matched [Simpson’s] profile.”).) Thus, when Eler finally got to the point of asking, “And, sir, you couldn’t exclude Archie, Jr., either, could you?” (T:1232), the jurors surely would only have asked themselves, “So what?”

The second mixture potentially useful to the defense was State’s Exhibit 128, the cutting removed from JROC from the inside neck of the sweatshirt. (T:1191.) Badger concluded that Simpson was the primary contributor, Big Archie and Smallwood could be excluded as the secondary contributor, and that Little Archie possessed the one allele that was foreign to Simpson’s profile in the mixture. (T:1191-93, 1211-12; *see also* T:1251 (Badger conceding on cross that it is “a fair statement” that Little Archie cannot be excluded from the secondary profile).)

Here again, the probative value of this evidence was diminished by two factors. First, the State elicited from both Badger and statistician Martin Tracey that because only a single allele was foreign to the primary profile, Little Archie was no more likely to be a contributor than 20-25% of the population. (T:1194, 1324-25, 1335.) Second, the State elicited from Tracey that although one cannot pinpoint

when DNA is deposited on an object, when clothes are washed in the laundry,

one would expect minor profiles from someone else who had worn that clothing earlier or who had handled the clothing earlier, [] to degrade or at least diminish in the process of washing and that the major profile would be the DNA from the individual who had worn that clothing most recently.

(T:1331.) In the same vein, when asked by Nelson whether perspiration from the most recent wearer of clothing can also degrade any DNA previously left behind, Tracey confirmed that to be the case. (T:1332.)

Setting aside the fact that this testimony was outside the scope of Tracey's expertise as a statistician and has no basis in science, as addressed in Part IV.C.1 below, the testimony negated any probative value the jury might otherwise have attached to the mixture from the neck cutting. Tracey effectively laid the groundwork for the State's subsequent closing argument that because Simpson's DNA was all over the clothes, and because DNA from other possible wearers was scant, Simpson was the last person to wear the clothes and was, therefore, the killer.

Indeed, Nelson's primary DNA strategy in closing seemed to be to convince the jury that the mixtures from which Little Archie could not be excluded held so little probative value that they should be disregarded. (See T:1626-27 (Caliel sarcastically stating, "[Little Archie's] the killer, ladies and gentleman. That's what the defense wants you to believe. And why is this? Because of some jealous juvenile statements[.] ... [A]nd then that 15 ... allele that as Dr. Tracey and Mr.

Badger both testified, the same 15 allele that one of every four people in this courtroom share, one of every four people in the entire population share, but because of that 15 allele Archie Crook, Jr., is the killer in this case.”), 1631-32 (recounting Tracey’s testimony that it is no more likely that Little Archie contributed to the mixture than that a blue-eyed female contributed to it), 1633 (urging the jury not to focus on just the 15 allele on the sweatpants, “it’s the clothing in general”), 1633-34 (arguing, albeit by mischaracterizing the evidence, that Archie Jr. “could not have deposited the secondary DNA mixture on the waistband” and although he possessed the same allele as the minor contributor to one mixture on the pants and one on the shirt, “25 percent share that common allele” and because “zero times anything equals zero[,] ... [i]t is an impossibility that Archie Crook, Jr.[] deposited the minor contributor on those sweatpants. Ladies and gentlemen, it is an impossibility, zero chance, that he is the killer in this case.”).)

Burley’s identification of 29 additional mixtures on the clothes and, specifically, the ten interior mixtures from which Little Archie and Smallwood could not be excluded as contributors, would have prevented the State from arguing that Simpson was the last wearer of the clothes. This was the only argument that rendered the clothes relevant to Simpson’s guilt at all, especially when considered in light of Simpson’s claims challenging the only direct evidence of guilt in this case – Durrance’s testimony alleging Simpson confessed. *See, e.g., Ballard v. State*, 923

So. 2d 475, 483 (Fla. 2006) (reversing convictions for first-degree murder in circumstantial evidence case despite defendant's fingerprint on a bed frame and one of his hairs on one of the victims because "the state presented no direct evidence of when the hair and fingerprint were left or how they came to be left in their locations"); *Finley v. State*, 139 So. 3d 940, 942-43 (Fla. 4th DCA 2014) (reversing conviction for felon in possession of a handgun in circumstantial evidence case where defendant's DNA was found on a gun in his apartment, but he claimed an intruder left it there and there was evidence of a second individual's DNA found on the gun); *accord Miller v. State*, 107 So. 3d 498, 499 (Fla. 2d DCA 2013).

In short, the newly discovered DNA evidence and logical argument flowing therefrom, especially when combined with all of the other evidence presented in postconviction proceedings and when considered cumulatively with Simpson's other claims, not only "weakens" the State's trial evidence, *see Hildwin*, 141 So. 3d at 1181, it bends it to the breaking point. Accordingly, Simpson's convictions must be reversed.

C. Counsel Failed to Effectively Pursue Their Strategies for Countering the DNA Evidence.

Simpson never had a chance even if the State had not engaged in misconduct. Largely as a result of his lawyers' failure to adequately prepare for trial as detailed in Part I.C above, they were ineffective at trial both in their attempts to challenge the State's DNA test results and to show that not only did Little Archie take

the clothes, but there was a mountain of evidence showing he was far more likely to have committed these murders than Simpson.

1. **Counsel Failed to Understand and Effectively Challenge the State's DNA Test Results.**

- a. **Counsel Unreasonably Failed to Independently Test the DNA Evidence. (Claim 6)**

Trial counsel was deficient for failing to adequately prepare and consult with Word before deciding not to have Orchid Cellmark conduct independent testing of the evidence in this case. The State's DNA results as presented at trial were all entirely consistent with Simpson's defense of innocence. Although DNA consistent with Simpson was found on several areas of the sweatclothes, he admitted he had worn the clothes and had possession of them until he gave them to Little Archie a couple of weeks before the murders. By contrast, Simpson denied owning the shoes and hat and, indeed, no DNA linked him to these items, to the axe, or to the scene of the murders. And the shoes were a half size larger than his feet. The clothes contained DNA consistent not just with Simpson and the victims, but also with **other unidentified individuals**. Little Archie could not be excluded from a mixture on the inside neck cutting from the sweatshirt and Smallwood could not be excluded from a blood spot on the bedroom floor from which Simpson was excluded. Little Archie and Big Archie could not be excluded from DNA extractions amplified from Kimbler's fingernail clippings, but Simpson **was** excluded. The

YSTR test kit LabCorp used to test the extracts could not distinguish between Little Archie's and Big Archie's DNA; thus, the State argued the DNA was Big Archie's and could be explained by "intimate contact" between him and Kimber. (T:1075-76.)

Because trial counsel failed to have Cellmark independently test the evidence, Simpson could not point to any results demonstrating that the DNA of Little Archie, Smallwood, or someone else with motive and opportunity was definitively on any of the items of evidence that the State successfully (though unscientifically and with improper argument) linked to the killer. As detailed below, because even the State agreed that had Little Archie's DNA been discovered on the sweatclothes, he would have been as much a suspect as Simpson (R3:11087), and the same certainly would have applied to Smallwood or Durrance, trial counsel's decision not to have Cellmark independently test the evidence was both unreasonable and prejudicial. *See State v. Plummer*, 228 So. 3d 661, 667 (Fla. 1st DCA 2017) (counsel's refutation of the prosecution's theory without presenting the necessary expert testimony to support the refutation was constitutionally deficient performance).

Simpson has always maintained his innocence and had an innocent explanation for why his DNA was found on the clothes. Thus, the defense had everything to gain and nothing to lose by having the physical evidence tested to determine if an individual other than Simpson or the victims could be identified in any of the

numerous mixtures amplified by FDLE or on the numerous areas of the evidence that FDLE failed to examine and test. *See* Claim IV.B. Trial counsel, the State, and the trial court all agreed that the defense would not have had to disclose any adverse results to the State. (R1:1181-82, 1227-29; R3:10220, 13283.) And even if the results had to be disclosed, there was clearly **no** risk of obtaining adverse results from scouring the sweatclothes for additional wearer DNA to try to identify the killer. Simpson's DNA had already been identified on them, which was to be expected. Similarly, he had nothing to lose by testing the fingernail scrapings using STR, rather than YSTR testing, which could have distinguished between Little Archie and Big Archie, because the FBI's testing had already excluded Simpson from those samples.

Simpson consistently insisted he wanted all of the evidence tested (R3:13278-79, 13283), and Andux had it sent to Orchid Cellmark for that purpose. Word was appointed as DNA consultant with the hope that testing would reveal evidence of DNA belonging to Little Archie, Smallwood, Durrance, or a combination, given the defense's belief that it was likely that more than one person committed the murders. (R3:13279-82.) Andux told Word that he intended to have her start by reviewing FDLE's testing data and standard operating procedures (SOP's) and then recommending specific items and areas of evidence for Cellmark to test. (R3:13280-81.)

While Simpson admitted he had possession of the sweatclothes in his trailer at one time, he indicated that he and others with whom he committed robberies shared clothes frequently. Durrance, Little Archie, Smallwood, and others were in this group, according to Andux. (R3:13213, 13271-72, 13280, 13285-86.) Simpson denied ownership of the hat and shoes, and that was consistent with FDLE's failure to find any of his DNA on those items. Moreover, there was no evidence linking Simpson to the crime scene. He told Andux that his DNA would not be found there. (R3:13278-79.) Andux wanted to both review FDLE's testing, as well as conduct additional testing because "a lot of items had not been tested, and [on] the items that had been tested, there are other areas that could have been tested to see if somebody else had worn them." (R3:13279.) Little Archie, Smallwood, and Durrance were all potential suspects in his mind, and had they found DNA from one or more of them on the clothes, that would have corroborated Simpson's defense. (R3:13280.)

Andux was not able to speak with Word about which items to test before he and Chipperfield withdrew, but their intention was to test any item within their budget that might lead to a DNA profile on the items found at the church, in Big Archie's yard, on the fence, or in the bedroom where the murders occurred. (R3:13281-82.)

Andux testified that while one is “always concerned” about possible adverse results of testing, there was no risk in testing the clothes because Simpson’s DNA was already on them. (R3:13283.) As to the other items, Simpson “swore up and down that it was not him and he wanted them tested. It’s his life, you know, and I certainly had discussions with him to how harmful it would be if we tested ... some item, like ... swabs off the axe or somewhere or other that hadn’t been found and it’s him ... and his statement to us was, I want this tested; I was not there.” (R3:13283.) Moreover, because any adverse results to the testing would have been confidential, there was really no risk at all. (R3:13283-84.)

Eler claimed in postconviction that when he was appointed, Simpson miraculously decided to leave the decision of whether to test the evidence in Eler’s hands, deferring to his “legal expertise in that area.” (R3:10103.) Eler handled the DNA defense and abandoned Simpson’s efforts to have the evidence tested. He indicated that after consulting extensively with Fletcher and Cellmark, he ultimately decided not to have Cellmark test anything. (R3:10552-53.) But Fletcher testified that he was not privy to any discussions about whether to test the evidence and, in fact, he did not even know who Word was. (R3:10553-54.) Moreover, he was still under the impression in postconviction proceedings that Eler had had Cellmark test the evidence, but that the results had been damaging to the defense (though he

could not remember the details of any specific conversation with Eler about this). (R3:10314-17, 10553.)

Simpson, too, indicated at a 2005 pretrial hearing that he was under the understanding that Eler had requested independent DNA testing, which had been the basis for several defense requests for continuances and Simpson's agreements thereto. (R1:1146-47.) Indeed, when the State found the previously misplaced rape kit containing Kimbler's fingernails and scrapings, Simpson could have avoided having the fingernail scrapings tested on grounds they were disclosed too late, but he instead agreed to a continuance just before trial because "I feel it is important that it needs to be tested." (R1:1235.) Thus, the only times the trial court gave Simpson input, he made clear that he wanted the evidence tested.

But it is ultimately of no material consequence whether Simpson entrusted Eler to decide whether to test the evidence, as Eler claims, or Eler simply ignored his client's wishes, as Simpson maintains. Under either scenario, Eler's rationale for not testing the evidence – "fear that there may be additional DNA" (R3:10210) – was unreasonable in light of his concession that he would not have had to disclose any adverse testing results to the State and the clear fact that finding more Simpson DNA on the clothes was consistent with his innocence. (R3:10220.) It was also unreasonable because Eler failed to appreciate the relevance of the State's findings, much less explain the facts of the case to the defense expert or provide

her with the documentation she requested so she could provide meaningful assistance. *Bright*, 200 So. 3d at 730-32; *Douglas*, 141 So. 3d at 117-22.

Word's expertise as Senior Manager and Forensics Laboratory Director at Cellmark when she was hired by Andux were unimpeachable. (R3:3755-76, 12108-13, 12117.) Even Caliel recognized that "Cellmark has the best reputation with the parties in the State of Florida. ... I have used them on a number of occasions on other cases." (R1:1189-90.) But despite Word's best efforts, trial counsel never made any meaningful attempt to engage Word's expertise regarding whether and what to test and/or how to otherwise challenge the State's DNA evidence.

To say that Eler's contact with Word was minimal is an understatement. Word left several messages for Eler between April 21, 2005, and July 13, 2005, and never received a return call with the exception of a single voicemail message on May 13, 2005, "telling me to do all the work and he'll request more funding." (R3:12123.) On July 13, Word left him a message providing preliminary information and asking if he wanted to retest the evidence. (R3:3801, 12130, 12135.)

Word conducted 18.25 hours of review up through July 27, 2005, but it still "wasn't clear to me what Mr. Eler needed, what he wanted in his report, [or] what kind of information I could provide him that would be helpful" so she could only review the materials she had "according to my normal review procedures." (R3:12133.) She believed there was still an outstanding request for DNA testing,

so a price sheet was generated for Eler, but Word could not get Eler to call her back. (R3:12134.) Her files reflect a stack of emails that she sent to Eler and a series of voicemail messages she left asking him to “please call” because her lab was closing, so if he needed testing done, he had to get it done right away. (R3:3782-85, 12134, 12153-55.)

Eler finally returned Word’s messages on August 9, 2005, approximately a year after his appointment, and they spoke the following day for an hour and ten minutes, which was their only substantive conversation Word could recall. (R3:3801-02, 12135-38.) She told Eler that she disagreed with some of Badger’s conclusions and that she could review the SOPs and FDLE’s raw data to determine if the standard testing procedures were followed, noting that this might be particularly useful for some of the samples with very low peaks. (R3:12140-41.) But Eler never provided her with the SOPs or raw data, so all she could do was review Badger’s case notes and reports. (R3:3807, 12131-32, 12140-41, 12149.) She did think that the presence of mixtures found by FDLE could warrant retesting, which she believes she recommended. (R3:12146-47.) Eler asked Word to review chain of custody procedures and to estimate the cost of testing any items that were left over from FDLE’s testing. (R3:12127-28.)

Importantly, Word’s contemporaneous notes from the August 8 conversation reveal that Eler told her that Simpson’s DNA had been found on a t-shirt and the

female victim's sheets. (R3:12126-29.) Thus, she was under the misimpression that Simpson's DNA was found at the crime scene. (R3:12126-27.) Cellmark still had the evidence at this time, so Word documented what items had been consumed to help Eler make up his mind about testing. (R3:12141-42.) Andux had wanted her to retest everything FDLE had tested, so she informed Eler that the sweatclothes cuttings could be retested and that there was a tube of DNA extracts from a hair that had never been tested, asking him if he wanted that done. (R3:12145.) She noticed that there was a potential problem with the volume of the reagent controls that Badger had used to detect contamination, but that there were pages missing in the documentation she was given. (R3:3803-04, 3806, 12145, 12148.) She also noted that she was missing some of Badger's bench notes. (R3:12148-49.)

Based on the items that were listed in Andux's motion to compel discovery as to DNA evidence and the Court's order thereon, Word posed various questions to Eler for which she never got answers. (R1:227-34; R3:12151.) She asked him if he wanted her to check for errors and contamination in FDLE's testing, if he wanted retesting of the areas FDLE had already tested or new areas, if he wanted testing of the trace evidence, and if he would clarify the relevance of the evidence to the defense so she could make determinations about what evidence to focus on. (R3:3809, 12151-52, 12163.) Finally, Word listed testing recommendations based

on her limited (and erroneous) knowledge of the facts of the case, but noted that “there are a lot of question marks in there.” (R3:12153.)

Word’s recollection from her only substantive conversation with Eler was that he “did not have a good handle on the case” and therefore nor did she. (R3:12136.) Eler had not conveyed to her that Simpson was claiming he was innocent, nor that finding additional evidence of Simpson’s DNA on the sweatclothes would not harm the defense because Simpson admitted the clothes were his. Moreover, Eler had given her the mistaken impression that Simpson’s DNA had been found at the crime scene. (R3:12143-44.) To her great frustration, Word never could “understand[] what was going on” because Eler never responded to her inquiries about whether he wanted Cellmark to conduct DNA testing, and she never spoke with him again after their August conversation. (R3:12130, 12135, 12145-47, 12163.) He never provided her with the SOPs and raw data she conveyed she needed for a thorough review of FDLE’s testing and conclusions, and he never requested any DNA testing, so Cellmark ultimately returned the evidence untested. (R3:3780, 12137-38, 12160, 12163.)

Despite their limited discussion of the case, Eler requested that Word draft a written report with her conclusions. It was in this context that she drafted a letter to Eler recommending that “re-testing should be performed on any items for which the reported data are thought to be in question by the defendant and/or his attorney,

keeping in mind that, depending on the DNA samples present on the various items, additional testing of the evidence may result in DNA profiles that are more helpful to the state's case.” (R3:3781, 12144.) She further indicated that although she would be able to testify for the defense, it was likely her testimony would include corroboration of the State's findings. (R3:3781.) Finally, she stressed that the decision about whether she could be of assistance to the defense is always a determination that the attorney must make, not her, but she wanted to specifically make clear to him that there were risks because she had been unable to speak with him directly about that issue on the phone. (R3:12160.)

Word sent the draft report to Eler on November 17, 2005, in an email reminding him that money was still available for her and the lab to conduct additional review and DNA testing. (R3:3782.) Eler simply responded via email that she should finalize the draft report and email it to him. In the absence of any additional information, feedback or requests, she finalized her draft report without making any changes and emailed it to Eler. (R3:12137-38, 12156.) Without any indication from Eler regarding how he intended to use the report, it was necessarily generic. (R3:12159.)

Thus, any reliance by Eler on his phone call with Word or on the contents of her report to make the determinations not to use Word as an expert or to conduct independent testing was entirely unreasonable. *See, e.g., Douglas v. State*, 141 So.

3d 107, 118-21 (Fla. 2012) (finding Eler deficient for failing to conduct a reasonable investigation and provide adequate information to a retained mental health expert before deciding not to present mental health mitigation evidence in penalty phase of capital trial);⁴⁰ *Hurst v. State*, 18 So. 3d 975, 1008 (Fla. 2009) (“[I]t is axiomatic that ‘counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.’ ”) (quoting *Strickland*, 466 U.S. at 691). Indeed, Eler’s stunning concession at the evidentiary hearing that he was not sure if he ever went over the biological matter “in great detail” with Word before deciding not to test the evidence (R3:10215), is all the Court needs to find deficient performance. He also admitted that he had essentially made up his mind not to test the evidence **prior** to speaking with Word. (R3:10474.) This is a primary example of a trial attorney’s unreasonable strategic decision in the absence of a full investigation.

Had Eler provided Word with the documentation and information she needed to make an informed decision about the pros and cons of testing, she would

⁴⁰ A pattern of Eler being found ineffective for failing to adequately prepare and consult with experts has been established in the case law. *See also State v. Morrison*, 236 So. 3d 204, 219-20 (Fla. 2017) (finding Eler ineffectively failed to investigate and prepare for penalty phase by, among other things, failing to provide his expert with necessary information and unreasonably relying simply on Chipperfield’s notes); *Shellito v. State*, 121 So. 3d 445, 455-56 (Fla. 2013) (finding Eler failed to adequately investigate and prepare for mitigation stage and misstated the nature of his consultation with the mitigation expert).

have advised Eler to test the evidence. Indeed, in the absence of accurate information about Simpson's defense her assessment in her letter to Eler that "additional testing of the evidence may result in DNA profiles that are more helpful to the state's case" (R3:3781, 12144), had no meaningful value and any reliance on it by Eler to forego testing was unreasonable. *See, e.g., Showers v. Beard*, 635 F.3d 625, 632 (3d Cir. 2011); *Morrison*, 236 So. 3d at 220; *Plummer*, 228 So. 3d at 668-69; *Bright*, 200 So. 3d at 730-31; *Douglas*, 141 So. 3d at 107;.

In postconviction proceedings, Word was provided with and reviewed all of the materials she was given by defense counsel before trial, as well as the following items that trial counsel had **not** provided: the Jacksonville FDLE notes for RFLP testing, Orlando FDLE's SOPs from the testing time period, and the raw data for FDLE's testing. She also reviewed the trial and deposition testimony of a number of State witnesses. (R3:12174-75, 13060.) Word testified that had defense counsel provided her with the materials she lacked prior to trial and meaningfully discussed the evidence and the defense theory with her, she would not have written in her report that 1) testing of the evidence could result in DNA profiles that were more helpful to the state's case or that if she testified for the defense, or 2) that it was likely her testimony would include corroboration of the State's case. (R3:12161-62, 12164-65.) She told the court:

Had I known that the clothing was from Mr. Simpson and the fact that his DNA on that was not the key issue in the case, at least from the

defense perspective, and the key question was who was actually wearing these ... items of clothing, I would have definitely recommended retesting and the sooner the better because the DNA, even that Mr. Badger got, was in bad shape. ... [T]he profiles are not high quality and any period of time after that just allows for more loss of good data.

(R3:12162.)

Eler confirmed in postconviction testimony that counsel's guilt phase defense was to suggest that Little Archie had killed the victims. (R3:10115.) He also confirmed that Kimbler's fingernail clippings, which did not exclude Little Archie as a contributor but did exclude Simpson, were relevant to that defense. (R3:10146-48 (referencing T:1075-76).) Eler acknowledged that there was no forensic evidence connecting Simpson to the crime scene, stating, "There was a lot more evidence pointing to Junior and Smallwood than there ever was on Mr. Simpson." (R3:10148-49.) He continued that he may have planted the seed that there were multiple perpetrators and that that defense "fit like a glove for Smallwood and Archie, Jr." (R3:10149-50.)

The prejudice resulting from Eler's failure to have Cellmark test the DNA evidence is well-documented in Section IV.A.2.(b), *supra*, and had he meaningfully consulted with Word, she would have been able to advise him as to all of the untested areas of the clothes, hat, shoes, and axe that were likely to yield useful DNA to the defense if they had been tested before contamination and degradation set in. (R3:11939, 11943, 11977-78, 12178-79, 12187-88, 12240-42, 12280.)

Indeed, the DNA results that Burley obtained (identifying 29 mixtures on the clothes), albeit with a more advanced test kit than Cellmark would have been using back in 2005, are compelling evidence that **pretrial** DNA testing would have borne fruit on all of the areas of the items that Badger failed to test for wearer DNA, including the inside of the clothes. (R3:12240-42, 12280.) As discussed in Part IV.B above, Burley was able to identify and test 29 DNA mixtures on the sweatclothes, many of them visible to the naked eye that Badger did not test. (R3:12241-43.)

Moreover, pretrial STR testing could potentially have been used on Kimbler's fingernail extracts to determine whether Little Archie or Big Archie was the minor contributor to the mixture identified by Badger. Had testing identified Little Archie, Simpson would not even have been prosecuted, let alone convicted. Again, there was no downside to conducting this testing because Simpson had already been excluded from the mixture.

But now the hat, shoes, and axe are irrevocably contaminated, Kimbler's nail clipping extracts have disappeared into the plastic of FDLE's extract storage tubes, and much of the DNA on the sweatclothes has likely degraded due to the lack of temperature control storage at the Clerk's Office after trial. This, of course, makes it virtually impossible for Simpson to prove that there is a reasonable probability that had Eler tested the evidence, the outcome would have been different.

Thus, this Court should apply a presumption of prejudice flowing from the evidence custodians' failure to preserve the evidence under section 925.11. *See, e.g., United States v. Flores-Rivera*, 787 F.3d 1, 19 n.13 (1st Cir. 2015); *United States v. Laurent*, 607 F.3d 895, 902 (1st Cir. 2010); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015); *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006).

Even if the Court does not provide the presumption, however, Simpson has demonstrated prejudice under *Strickland* because trial counsel's failure to test the evidence has effectively deprived him of any access to it at all, at least as to the hat, shoes, axe, and nail extracts. Thus, he has suffered irreparable harm.

The trial court denied relief on this claim based on a limited view of the facts presented below and so-called strategic decisions by trial counsel that were made without first conducting a proper investigation and were therefore unreasonable. **First**, the trial court improperly relied on Eler's "strategy" to "mainly, attack the lack of investigation and flaws in the State's case." (R3:13388-89.) This is no reasonable strategy where trial counsel failed to conduct a meaningful investigation.

The trial court's characterization of Eler's contact with Word (R3:13387-90), ignores the evidence presented below of the very limited nature of that contact, despite Word's repeated attempts to reach Eler by phone and email, as well as Eler's complete failure to provide her with the information and documentation she

required to perform a thorough and informed review of the case – again, despite her having informed Eler that she needed them.

While the trial court is correct that Word was unable to interpret some of her notes and conceded that she had no way of decisively confirming whether there were inaccuracies in them (R3:12297), Word testified independently of her notes that after having her only substantive conversation with Eler about the case, she had no idea that Simpson was claiming he was innocent or that he admitted to owning the clothes on which his DNA was found, or even that the clothes were found somewhere other than the crime scene. (R3:12143.) It was in that context that she noted that testing may result in DNA profiles that are more helpful to the State.⁴¹ (R3:12144.) The State presented no evidence to refute Word’s contention.

⁴¹ Notably, the court’s factual finding that Word recommended against testing because “she would most likely corroborate the results of the State” is not supported by the record. (R3:13389.) Word stated in her letter to Eler that based on her limited review, **if she were called to testify**, her testimony would be likely to corroborate the State’s findings. (R3:3781.) That statement is relevant to Simpson’s next subpart, not this one. Word did **not**, in fact, recommend against testing the evidence. Instead, she wrote:

It is my recommendation that re-testing **should be performed on any items for which the reported data are thought to be in question by the defendant and/or his attorney**, keeping in mind that, depending on the DNA samples present on the various items, additional testing of the evidence may result in DNA profiles that are more helpful to the state’s case.

(R3:3781 (emphasis added).)

Second, the trial court concluded, “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.” (R3:13389 (citing R3:12310-12).) This is a mischaracterization of Word’s testimony.⁴² But more to the point, it bears no relevance to whether Eler reasonably decided not to test the evidence. The possibility of eliciting damaging testimony from Word at trial is only relevant to the claim raised in the next section, not this one.

Third, the trial court concluded that there is no indication in the record to support Simpson’s contention that Eler misled Simpson or Fletcher regarding whether the evidence had been tested. Instead, it relied on Eler’s testimony that he had discussed the pros and cons of testing with Simpson and Simpson had agreed to Eler’s decision not to test. (R3:13387-88 (citing R3:10101-02).) The court then seems to buttress this conclusion with several bases for deciding not to test the evi-

⁴² Word testified that while Badger’s decision to assume two contributors and report the results based on that assumption for one mixture was “totally appropriate” (R3:12312), and she did not necessarily disagree with each of Badger’s interpretations of mixtures when “taken on their own,” he was inconsistent in how he reported on samples that seemed to be similar (R3:12311). And Badger’s postconviction testimony, which Word listened to, did nothing to clarify for her why he treated the samples differently. (R3:12311-12.) This is a far cry from providing damaging testimony that could justify Eler’s decision not to enlist Word’s assistance in light of all of the possible helpful expertise and testimony she could have offered the defense.

dence: 1) Eler did not want to make DNA “his sole feature of trial,” 2) he was concerned that DNA testing might produce results harmful to his client, and 3) even if such adverse results did not have to be produced to the State, they could present an ethical conflict with the evidence Eler planned to present. (R3:13387 (citing R3:10209-10, 10416-17).)

Whether or not Simpson asked for testing and was under the impression that Eler was having it done – and there is ample evidence in the record that he did and he was – Eler’s testimony that Simpson deferred to Eler’s expertise on whether to test (R3:10103, 10480-81) would have done nothing to relieve Eler of his Sixth Amendment duty to perform a thorough investigation and make an **informed** decision, with the assistance of his expert, about whether or not to test the evidence. As recounted above, he did not meet that standard.

Moreover, the trial court’s reliance on Eler’s three purported strategic reasons for not testing the evidence are not supportable. The first, that Eler did not want to make DNA a feature of the trial, was not offered by Eler as a basis for not testing the evidence. (See R3:10208-210 (Eler testifying that the reason he did not challenge Badger’s exclusion of Little Archie from the waistband DNA mixture was because he “wasn’t trying to make the DNA a feature of the trial”).) Thus, the trial court has improperly imputed a strategic decision to Eler that Eler himself did not assert. But more to the point, there was no way to avoid making DNA a feature

of the trial. The State called seven experts to present the DNA and other biological evidence in this case, and Eler himself called DNA expert Karen Lanning to testify regarding her microscopic hair analysis results. Eler himself conceded at the hearing that “besides Durrance [the DNA evidence] was all they pretty much had.” (R3:10167-68.) Thus, any “strategy” to leave it unchallenged in hopes it would recede into the background was either disingenuous or pure folly.

Next, Eler’s contention that he was concerned that testing would produce results harmful to his client was based on a misunderstanding of the law. As Eler conceded in postconviction, at the time of Simpson’s pretrial and trial proceedings, he would not have had to disclose any adverse testing results to the State. (R3:10220.) Thus, any decision based on this concern was unreasonable. *See Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (citing *Williams v. Taylor*, 529 U.S. 362, 395 (2000)); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).

Finally, the court’s reliance on Eler’s concern that testing the evidence might produce an ethical dilemma because it would conflict with Eler’s planned defense is inconsistent with *Strickland*’s requirement that counsel investigate viable defenses before rejecting them. *See, e.g., Fitzpatrick*, 118 So. 3d at 761-62; *id.* at 755-56 (“Decisions rendered by counsel after a less than complete investigation are only reasonable to the extent that reasonable professional judgments support the limitations on investigation.”) (citing *Strickland*, 466 U.S. at 690-91); *Bright*, 200

So. 3d at 730-31. Moreover, any fear that Eler might have had about obtaining test results that were inconsistent with the defense theory would not have applied to the sweatclothes: Simpson's defense was that he owned the clothes and his DNA had already been identified on them by FDLE. There were ample areas left to test on the clothes that Badger never examined, and Burley's testing results make clear that these areas may well have led to the identification of an additional wearer or wearers of the clothes if conducted before years of degradation occurred. Such identification would have changed the outcome of Simpson's trial.

In short, trial counsel had no reasonable strategy for failing to have the evidence discussed above independently tested for DNA and his decision not to do so constituted ineffective assistance of counsel. The trial court's conclusion to the contrary is based on incomplete and unsupported findings of fact and the misapplication of *Strickland* and its progeny.

b. Counsel Failed to Effectively Consult With the Court-Appointed DNA Expert. (Claim 8)

Claim 8 asserts counsel failed to effectively consult with Charlotte Word, Simpson's court-appointed DNA expert. (R3:1302-13.) The State's DNA evidence may seem compelling in the abstract insofar as DNA consistent with Simpson, including one full profile, was found in various places on the sweatpants and sweatshirt, and the pants and shoes contained the victims' blood. But because even the State had to concede that there was also DNA on the clothes that excluded Simp-

son **and** the victims, and in at least one case did not exclude Little Archie, the State's evidence was entirely consistent with Simpson's defense that these were the black clothes that Little Archie borrowed when he went to see Simpson at his trailer. Simpson also denied owning or wearing the hat or shoes, on which his DNA was not found. Indeed, the State cannot point to a single DNA result that is inconsistent with this defense. Instead, it argued at trial that the sheer volume of Simpson's DNA on the clothes and the fact that two hairs matching Simpson persisted on the clothing proved that he was the last wearer of the clothes, and, therefore, the killer. (T:1622, 1626-27, 1645-46, 1678, 1680-83.) But these arguments were unsupported by Badger's testing data or by science.

Had Eler provided Word with adequate factual background on the case, FDLE's SOPs, and Badger's raw data, and enlisted her expert consultation and testimony regarding the State's DNA testing and interpretations as presented through Badger and Martin Tracey, he could have impeached Badger's assessment that Little Archie was excluded from all but two mixtures and eviscerated the State's argument that Simpson was the last wearer of the clothes. Since that was the **only** DNA-based argument the State could make that tended to show that Simpson was more likely to be the killer than one of the other non-victim contributors to the mixtures on the sweatclothes, Eler's failure to use Word to impeach the State's fo-

rensic testimony was highly prejudicial and requires that Simpson's convictions be vacated.

Had Eler enlisted and adequately prepared Word, she could have impeached the State's case in the following ways. **First**, Word could have assisted Eler in impeaching Badger's interpretations of various critical mixtures. The mixture from the inside neck cutting from the sweatshirt was the defense's most exculpatory DNA evidence since Badger attributed the primary profile to Simpson and concluded that Little Archie, along with 24 percent of Caucasians, could not be excluded as a minor contributor. (T:1192, 1194.) Thus, along with Kimbler's fingernail clipping extracts, which revealed foreign DNA that matched either Little Archie or Big Archie, the neck cutting could be used as an indication that Little Archie could have been a second wearer of the clothes and the killer. Eler clearly understood the import of this and got Badger to reiterate his direct testimony that he could not exclude Little Archie from the neck cutting mixture, though it took a full seven pages of transcript for Badger to concede this. (T:1244-51.) Thus, it was clearly part of Eler's strategy to demonstrate through expert testimony that Little Archie's DNA could be on the items found at the church. (*See also* T:1658-59; R3:10210.) But without Word, his efforts to do so were completely ineffective.

As to the mixture from the waistband of the sweatpants, Badger testified that the primary profile was consistent with Simpson. (T:1187.) Unlike for the neck

cutting, for which Badger made no assumption about the number of contributors, here he assumed there were only two contributors to the waistband, which allowed him to exclude Little Archie and Smallwood as the minor contributor. (T:1188.) As Word testified in postconviction, had Eler followed up to ask Badger whether Little Archie and Smallwood could be excluded if Badger had assume **three** contributors (or more), Badger would have had to concede that Little Archie and Smallwood could not be excluded. (R3:12217-18.)

Had Badger responded as he did in postconviction that he assumed two contributors because he saw no evidence of three or more (R3:12029), Word could have explained to the jury that although it was perfectly accurate for Badger to provide results based on an assumption of two contributors, she would have interpreted it as a mixture containing **at least** two contributors because it contained low template DNA and partial profiles, likely due to degradation. Thus, there was no way of knowing what might be missing from the results. (R3:12218-19.)

Word would have explained that given these factors, Badger's general method for determining the presence of a major and minor contributor was inaccurate, which rendered his assumptions about the number of contributors and his exclusions incorrect. (R3:12214-15.) When dealing with low template DNA, one cannot rely on the same criteria for determining the number of contributors to a mixture as one might with a more robust sample that indicates clear, consistent major and mi-

nor peaks and provides high confidence that all the data are present. In the latter scenario, with no evidence of a third contributor, it is reasonable to make an assumption that there are only two contributors as long as it is grounded in experience and the lab's validation studies. But when there are low amounts of DNA and we know data are missing, "that criteria sort of falls apart," so the analyst can really only determine the minimum number of contributors. (R3:12215-16.)

The waistband mixture falls into this category – that is, the peak height ratios for the so-called major and minor peaks are not consistent across the sample and there are clearly data missing. Thus, while it was not necessarily wrong for Badger to assume there are two contributors and that there are clear major and minor profiles, "that may not be the correct assumption." (R3:12215.) If the assumption is incorrect, and there are actually **three** contributors, then any inclusions and exclusions will also be incorrect. (R3:12216-17.) Word concluded that although Badger's assumption of two contributors may be defensible, she would not have felt confident leaving it at that based on the data. Rather, she would have provided interpretation based on a two-person assumption **and** an "at least two" assumption. (R3:12217-18.) Under the latter assumption, Little Archie and Smallwood could not be excluded from the mixture. This would have provided the defense with a **second** sample on the sweatclothes that was consistent with the defense theory.

When questioning Badger about the waistband mixture at trial, Eler took for granted that Simpson was the major contributor and then, as to the minor contributors, he asked whether it would change things if there were three donors instead of two. (T:1239-40.) Badger then launched into an abstract explanation about how he generally determines the difference between a two- and three-person mixture, not addressing the specific sample. (T:1240-41.) Instead of asking the obvious follow-up question to establish that Badger would not have been able to exclude Little Archie (or Smallwood or Durrance) if he assumed three contributors, Eler simply moved on to discuss the next sample. (T:1241.) Had he consulted with Word, she could have assisted in preparing a cross-examination that would have elicited from Badger that Little Archie and Smallwood could not be excluded from the waistband swabbing. Whether or not he was able to get Badger's concession on this point, Eler could have called Word to explain why Badger's interpretation was incomplete.

As for the mixture from the swabbing of the sweatpants leg cuffs, Badger concluded that Simpson could not be excluded as a major contributor to the mixture despite conceding that "[t]here were several genetic markers where I was not able to make a clear cut determination as to the primary contributor," requiring him to base his conclusion on "the remaining markers." (T:1189.) But again, Word testified that a primary contributor should be consistent across all markers absent

some explicable justification for the inconsistency, which Badger could not provide. (R3:12214-15.) Thus, she would not have designated a major contributor, let alone concluded that Simpson could not be excluded from it.

As to the minor contributor(s), Badger concluded that “due to the limited nature of the minor component(s), no determination could be made as to the possible contributor(s) within the mixture.” (R3:7063.) But Word could not discern anything in the raw data that justified his failure to make an assumption about the number of contributors for the leg cuffs sample, but to assume only two contributors to the waistband sample. The deficiencies in the data were basically the same. Thus, if he were going to do it for one, he should have done it for the other. (R3:12219-20.) Notably, had he assumed only two contributors to the leg cuffs, he would have had to exclude Simpson as a contributor. Essentially, Word could have testified there was no scientific support for Badger’s approach.

Next, for Stain E on the sweatpants, Badger identified Kimbler as the major contributor. (T:1162, 1179.) As with the cuffs, he made no assumptions about the number of contributors and found the information pertaining to one or more minor contributors to be limited. (T:1122-23.) Again, Word explained that based on the data, Badger should have reached the same conclusion for Stain E that he did for the leg cuffs – namely, that no determination could be made about the possible contributors “[d]ue to the limited nature of the minor component(s).” (R3:7063 (in-

terpretation of minor contributor(s) to leg cuffs sample), 12222.) But instead, Badger concluded that Simpson could not be excluded as a minor contributor for Stain E, and he offered no conclusions about any of the other known individuals. (T:1179-80,; R3:7064.)

By analyzing Badger's profile summary sheets and assisting Eler in deposing Badger, Word could have prepared Eler to impeach Badger at trial about his methods for analyzing Stain E. Badger's postconviction testimony and his profile summary sheets make clear that when he interpreted the mixture, he used not only the known standards, but also the background information he had been given about the murders to render his interpretation. (R3:12217-23.) That is, he plugged Simpson's profile into the profile summary sheet to see which alleles would be accounted for and which would be left over. Once Kimbler was designated as the major contributor and Simpson was designated as the minor contributor, one minor allele was unaccounted for – the 8 allele at the D13S317 locus, which neither Kimbler nor Simpson possess. (R3:12050, 13049.) Thus, in order to include Simpson as the minor contributor, Badger had to conclude that there were more than two contributors to the mixture. In doing so, he noted that Big Archie possesses an 8 allele at D13, which made narrative sense to him, so he settled on the conclusion that there were at least two contributors and that Simpson could not be excluded as the minor donor and Big Archie could not be excluded as a minor contributor. (R3:12050

(referencing R3:4683); *see also* R3:12053 (Badger noting that attributing Big Archie and Simpson as minor contributors “is not inconsistent with what the case presents with the crime scene where both decedents, Ms. Kimbler and Mr. Crook, are present”).) As is also clear from Badger’s profile summary sheet and the testimony above, he considered the alleles below the analytical threshold in including Simpson and Big Archie as possible minor contributors. Word could have testified that this is contrary to Badger’s own testimony regarding FDLE protocol. (R3:12224-25, 13011.)

In short, Word could have assisted Eler in eliciting the testimony above to demonstrate to the jury that Badger not only violated FDLE SOPs, but applied inconsistent approaches to mixtures with similar characteristics, and interpreted the evidence to fit the State’s theory of the case rather than in a neutral, scientifically consistent and accurate manner.

Second, and related, Word could have emphasized for the jury, which Eler failed to do, that in addition to the three mixtures discussed above, Little Archie, Smallwood, and Durrance also could not be excluded from four other mixtures, for which Badger had concluded that there was too little information to form any conclusions about inclusions or exclusions – another swabbing of the leg cuffs, the cutting removed by JROC from the sweatpants, and Stains A and C from the sweatpants. (R3:7063-65.)

The prejudice stemming from FDLE's erroneous interpretations is not so much that Badger inaccurately identified Simpson's DNA on the sweatshirt in some cases – the defense has never contested that the clothes belonged to Simpson and that his DNA is on them, and Burley has confirmed this with her testing. Rather, the point is that Badger's interpretations tended to err on the side of over-including Simpson and under-including the other possible suspects in several very complex mixtures, to which he did not apply consistent methods of interpretation or sometimes even correct ones. The result was that the State was able to argue to the jury in closing that despite **all** of the mixtures on the sweat clothes, Little Archie, the person who the defense alleged committed the murders, was excluded from all but two. But the State went even further and misrepresented the evidence by contending that Little Archie could be excluded from the neck cutting, contrary to Badger's direct **and** cross-examination testimony. (T:1193-94, 1244-51.) Not only did the State misstate the one test result Badger offered that could tie Little Archie to the murders, it did so in such a manner as to mock the defense:

It would be pretty lucky on Mr. Crook's part and, in fact, even more lucky that the DNA would include this defendant and show that this defendant's the person who committed the crime and exclude Shawn Smallwood, Mike Durrance and, yes, ladies and gentlemen, it excludes, it excludes Archie Crook, Jr., despite what the defense will say is this 15 allele that includes him.

You may be thinking to yourself why is that? How? We thought we heard that Archie, Jr., shared this 15 allele. And, ladies and gentlemen, we can see he does. This is the chart. State's Exhibit 128 in

evidence. And there's that secondary contributor, this minor trace amount of DNA that can only be amplified at one location, and there's a 15. Well, let's look at it. Archie Crook, Jr., 15, 15. Well, then he must have committed this crime, ladies and gentlemen, because he contributed that 15. If you get so focused and so close to that 15 and you want to believe it, you want to force yourself to believe that, you would be looking only at that 15 and ignoring everything else that you heard about the DNA evidence in this case.

(T:1630-31.) Word would have helped Eler avoid or at least effectively respond to this argument.

Third, after reviewing FDLE's SOPs, which Word was provided in post-conviction, Word confirmed that Badger's selection of a major and minor profile not only violated the general rule that the ratio between the high and low peaks must be consistent across loci, but also when the ratio between the high and low peaks was inadequate under FDLE's SOPs to be indicative of a major and minor profile. Word could have testified extensively at trial about this failure to apply FDLE's protocols (*see, e.g.*, R3:13080-81), which had a direct impact on Badger's interpretations.

Finally, Word could have rebutted Martin Tracey's highly damaging testimony, on which the State capitalized on in closing regarding the prevalence of DNA evidence on articles of clothing. Specifically, Tracey testified that because perspiration can eat up DNA, the last wearer of an article of clothing will generally be detectible because their DNA will be most prevalent. Similarly, he alleged that

when clothes are washed in the laundry, the washer will wash away DNA from the person who wore it first, not the most recent wearer. Thus, the last wearer's DNA will appear in larger amounts. Word could have testified at trial that there simply is no scientific support for that theory (R3:12207-11), thereby depriving the State of its argument that it could, in fact, date DNA evidence, and conclude that because there was more of Simpson's DNA on the clothes than anyone else's, he was the last wearer of the sweat clothes and, therefore, must have killed the victims. (T:1678.)

At the evidentiary hearing, Eler testified that he may not have asked certain questions of Badger because he "wasn't trying to make the DNA a feature of the trial." (R3:8825.) But that rationale is belied by Eler's own cross-examinations—while he was not effective, he admitted that it would have been helpful to the defense if he had been successful in getting the State's expert to admit that Little Archie could not be excluded from any of the mixtures on the clothing. (R3:10211.)

Moreover, regardless of his intentions, the DNA was a feature of the trial. The State called **seven** experts to testify about the examination or testing of physical evidence in the case—Jason Hitt, Connie Fisher, Shawn Weiss, Deane Johnson, Badger, Heather Velez, and Martin Tracey. (T:956-95, 1027-1336.) Eler himself called FBI hair and fiber analyst Karen Lanning to testify that she microscopically

excluded Simpson as the donor of two hairs recovered from Kimbler's hand. (T:1006, 1012-14.) Eler elicited from Lanning that she was not given known hair samples from Little Archie or Durrance to compare to the evidence, thereby suggesting that one of them could have been the donor and, therefore, the killer. (T:1016.) Thus, trial counsel was clearly eager to impeach the State's DNA evidence and any attempt to characterize his failures to do so as strategic are unreasonable.

2. Counsel Failed to Discover and Use Available Evidence Supporting Their Theory That Little Archie Committed the Murders.

Though they elected to pursue the reasonable strategy of coupling Simpson's testimony that Little Archie took his clothes with evidence showing that Little Archie had a motive and, with Smallwood, the opportunity to commit the murders, counsel's failure to adequately prepare for trial resulted in their failing to discover or use ample evidence that would have all but assured an acquittal.

a. Counsel Failed to Find and Use Shannon Elliott Who Had Information Inculcating Little Archie. (Claim 9)

Claim 9 asserts a claim under alternative theories of NDE or IAC that the testimony of Shannon Elliott would have supported the defense theory that Little Archie was far more likely to have committed the murders than Simpson. (R3:1314-17.) Elliott testified at the hearing that she had been Kimbler's best friend and had lived in the trailer on Big Archie's property (the same one Thomp-

son and his girlfriend moved into the night of the murders, as discussed in Part IV.C.2.c below) until she moved to Idaho about a month before the murders. (R3:11219-20, 11381.)

The trial court concluded that the failure of the defense to find her before trial was the result of counsel's lack of diligence and that "[a]ny investigation into the victims and their property would have surely yielded her existence." (R3:13407.) Accordingly, it applied the IAC standard to this claim.⁴³ (R3:13408-11.) Thus, the sole issue on this claim should now be whether her testimony would have satisfied the prejudice standard for IAC claims, as Eler confirmed he would have called her as a witness had he known about her. (R3:10267-68.)

The trial court denied Simpson's claim by finding that Elliott's testimony was "inadmissible, cumulative, or irrelevant, and what statements may have been admissible would not have changed the outcome of the trial." (R3:13407; *see also* R3:13408-11 (reviewing each part of her testimony under IAC standard).) The trial court's conclusion that her testimony would not have "changed the outcome" reveals that it applied the wrong standard. All Simpson needs to show is that there is a reasonable probability of a different outcome, less than a showing that a different

⁴³ In the event the State challenges the trial court's threshold ruling and this Court determines that Elliott would not have been found even if counsel had performed an effective investigation, Simpson continues to preserve his alternative NDE claim and asserts this evidence would meet the stricter test for prejudice that would apply.

outcome was more likely than not. Any fair reading of Elliott's postconviction testimony reveals that the bulk of her testimony, while succinct, was not only admissible, but reasonably could have led to an acquittal in several ways. (R3:11218-38.)

More importantly, Elliott had very relevant, admissible, non-cumulative testimony to provide demonstrating that Little Archie had made multiple, explicit threats to kill the victims and that, contrary to the evidence at trial, the victims did take him seriously. Elliott testified that every time Little Archie came to Big Archie's house after Kimbler became pregnant, Elliott could hear him screaming in the yard with threats to kill Kimbler – "He said he'd see her dead, he'd kill her and make sure that that baby never seen [sic] the light of day." (R3:11223-24.) Little Archie had explained that he felt that Big Archie would reconcile with his mother but for Kimbler, and he wanted her "out of the picture" with no kids. (R3:11224.) This testimony would have been crucially important because the very first words out of Eler's mouth in opening statement after greeting the jury was:

That baby will not see the light of day. That's what Archie Crook, Jr., boldly and brashly proclaimed on one and more than one occasion in front of family and friends.

(T:517.) The trial court found that Elliott's dramatic confirmation of Eler's promise to the jury "would not have impacted the jury verdict" and Simpson had not proven it "would have resulted in an acquittal" – again applying the wrong standard instead of considering whether it reasonably could have – because it was cumu-

lative to other evidence and “the jury heard this information through other witnesses.” (R3:13408, 13410.)

But the defense largely failed to fulfill Eler’s promise as the defense called several family members to support it, but their testimony fell far short of backing up his promise and paled in comparison to Elliott’s postconviction testimony. They called Little Archie’s aunt, but all she testified to was that on a single occasion a year before Kimbler was even pregnant, Little Archie made a threat that was not taken seriously. (T:1473-75.) They called Little Archie’s brother, but he denied ever hearing Little Archie ever say anything like this, though he had heard “through the grapevine” that Little Archie may have said something like this. (T:1479.) They called Misty McNeish, who had dated Little Archie since they were kids and was the mother of his child (and is addressed in more detail in the next subpart), but she testified that she never heard Little Archie make statements about killing Kimbler’s baby or that the baby would “[n]ever see the light of day.” (T:1483-85.) These denials required them to call Det. Williams back to the stand as a defense witness, and he testified that Little Archie’s brother and McNeish had both told him that Little Archie had said this. (T:1489-90.)

For his part, Little Archie denied killing Big Archie or Kimbler and testified that he did not have any reason to want them dead. (T:806.) When asked on cross if he had ever told anyone that the “baby Kim’s going to have wouldn’t see the

light of day,” he said that he did not remember telling anyone that, “but I could have said it.” (T:808-09.)

Caliel dismissed this evidence in closing as “some jealous juvenile statements made almost a year before” the murders. (T:1626.) He then went through “what you must force yourself to believe” to accept the defense theory, which included that Little Archie “would have the audacity to announce his intentions openly and repeatedly in front of members of his family. His father’s brother, his father’s sister, his girlfriend. Just openly, I want them all dead.” (T:1627-28.) This argument that Little Archie had not really been so brash found support in the evidence, but would simply not be available had Elliott testified, especially since neither the State nor the trial court ever identified any reason she would make this up.

In stark contrast to the testimony the jury heard, Elliott’s testimony that Little Archie threatened to kill Kimbler and her unborn child shortly before the murders when Kimbler was very pregnant would not have been cumulative because it offered a timeline and facts that made the threat real and relevant. Her testimony based on her direct observations (juxtaposed against the before-the-pregnancy single comment heard by Little Archie’s aunt or the “through the grapevine” rumor heard by his brother) would have fulfilled Eler’s opening promise and could have been the difference with the jury. It was simply not cumulative to the weak evidence presented at trial, especially on such a central issue. *See Valle v. State*, 502

So. 2d 1225, 1226 (Fla. 1987) (duplicative testimony not cumulative where prior testimony was qualified and new testimony is stronger in “quality and substance”); *Perez v. State*, 128 So. 3d 223, 225-26 (Fla. 2d DCA 2013) (testimony that duplicates other evidence is not cumulative where it is qualitatively more credible); *Witham v. Sheehan Pipeline Constr. Co.*, 45 So. 3d 105, 109 (Fla. 1st DCA 2010) (defining cumulative evidence as “evidence so repetitive that, notwithstanding its exclusion, it is not reasonably likely a different result would have occurred”).

Beyond the making of the threats, Elliott testified that although Kimbler did not appear to take the threats seriously at first, she later confided in Elliott that “if anything ever happens to me you know Little Archie did it because it’s getting worse, the threats are getting worse and more frequent and he really does not like me at all.” (R3:11224.) The court held this testimony would have been inadmissible hearsay at trial. (R3:13409-10.) But this testimony clearly went to the state of mind of Kimbler, as the declarant. *See* § 90.803(3)(a), Fla. Stat. (2007) (providing hearsay exception for “A statement of the declarant’s then-existing state of mind ... when such evidence is offered to ... [p]rove the declarant’s state of mind ... when such state is an issue in the action.”). The State had directly put the victims’ state-of-mind as to Little Archie’s threats at issue by eliciting from Little Archie’s aunt on cross-examination that Big Archie told her not to worry about the threats and Little Archie was “just running his mouth.” (T:1475.)

Elliott had further information to rebut the suggestion that Big Archie did not consider Little Archie to be a threat. She testified that Big Archie had given her a cell phone and asked her to call him immediately if she ever saw Little Archie come to his house because he did not want Little Archie on his property any more after a large amount of drugs had been stolen from his home. (R3:11225-26.) She had occasion to use it when she saw Little Archie sneaking around “all dressed in black” in the back of the property and “figured he had jumped the fence to get back and forth on to the property without being seen.”⁴⁴ (R3:11226.)

In denying relief on this point, the trial court focused only on the portion of this testimony about Little Archie stealing from Big Archie and whether that “caused a rift in the father-son relationship,” finding that was cumulative to evidence at trial. (R3:13409.) The court pointed to (1) testimony from Hinson that Simpson had told the police that Little Archie had stolen 50 pounds of marijuana from Big Archie and (2) testimony from Durrance that he had given Little Archie two kilos of cocaine intended for Big Archie. (T:677-78, 919.) Even assuming the latter could be interpreted by the jury as implying that Little Archie had stolen the

⁴⁴ Thompson confirmed that Little Archie had stolen a considerable amount of drugs from his father (potentially over \$40,000 worth) and would often use the backyard and church parking lot as means to get to and from Big Archie’s house. (R3:11391, 11399-11400.) When asked if it would be true that someone saw him wearing black sweat clothes in the backyard before the murders, Little Archie testified, “I don’t know if it would be or not. It’s my yard, I’ll do what I want to in my yard, can’t I?” (R3:11418.)

cocaine, the foregoing testimony referencing hearsay from Simpson, whose life was at stake, and vague testimony by Durrance, who had little credibility, was no substitute for Elliott's testimony that Big Archie did not want Little Archie on his property and needed a lookout.

Making her testimony about the "rift in the father-son relationship" even more relevant, the State had elicited from Big Archie's father even though Big Archie and Little Archie "had arguments and what have you like any daddy and son would. There was never nothing in between them bad, as I know anything about." (T:543.) The State also had a neighbor testify that they had a "[r]egular father son relationship." (T:564.) And it had Little Archie's aunt (Big Archie's sister) agree "that they had a good relationship." (T:1476.)

Her testimony was relevant beyond just impeaching this evidence and showing there was, in fact, a rift between father and son. It tended to show that Little Archie was not, in fact, welcome at the house uninvited the night of the murders and that he had been spotted sneaking around the backyard dressed in black using the same path the killers took over the back fence. This evidence was not cumulative to anything presented at trial and suggests what the jury easily could have found to be a trial run for these murders.

**b. Counsel Failed to Elicit Misty McNeish's Testimony
Inculcating Little Archie. (Claim 10)**

Claim 10 asserts counsel was ineffective in failing to elicit testimony from McNeish further inculcating Little Archie. (R3:1317-20.) Andux had deposed McNeish in 2003, and Eler listed and called her as a defense witness at trial, even though he never spoke to her to prepare her as a witness for the 2007 trial. (R3:2845-2904, 11198.) Had counsel taken the time to interview and prepare her, she would have provided ample testimony supporting Simpson's theory that Little Archie was the killer.

The only testimony that Eler sought to elicit when he called her was that she had heard Little Archie make threats that Kimbler's baby would "never see the light of day." (R3:10270.) But all she had testified in her deposition when asked if she had ever heard him say that the baby would never be born was, "I'm sure I have. He always says things. ... Yeah, that's just Archie, he may not mean it." (R3:2871-72.)

As noted above, she denied ever hearing anything like that at trial. (T:1484-85.) But at the evidentiary hearing McNeish admitted that she "lied" at trial, at which point the trial court prevented Simpson from asking her more details or why she lied out of concern that she was confessing to perjury and instead accepted Simpson's proffer that she would have said she lied because she was afraid for her life. (R3:11202-08.) In any event, a review of the pretrial deposition testimony,

which was confirmed in her postconviction testimony, provides the clear explanation for why she was afraid.

She testified at the hearing that in the days just before the murders, Little Archie had gotten upset that someone had called her pager and punched her so hard in the face that it broke her nose with bone sticking out, and he threatened to “kill my mother, make me watch, and cut my head off and sent it to her in a box” if she told anyone. (R3:11174-75.) She testified in her pretrial deposition about this and, although she did not relate that vivid threat, she told Andux she did not like having to talk about this and that Little Archie had told her not tell anyone about it. (R3:2859-60, 2863, 2866-67.) Further, she testified in her pretrial deposition and at the evidentiary hearing that when she later accused Little Archie of killing his father, he did not deny it, but broke her nose again. (R3:2897, 11197.)

Had Eler interviewed her or even simply read her deposition taken by Andux instead of simply relying on a police report of what she had told Williams eight years prior, he would have seen the need to take reasonable precautions to assure her of her safety and readiness to testify. Instead, having made no arrangements of his own to secure her appearance, the record shows that he allowed the State to have Little Archie’s mother Rosie Crook arrange for McNeish to be in court to testify. (T:493-95.) As McNeish had testified in deposition, Rosie was Big Archie’s wife and had been very upset about Big Archie having a child with Kimbler.

(R3:2871.) So Eler should have known that allowing the State to have Rosie give McNeish direction on when to come to court was a terrible idea when he was expecting McNeish to give testimony indicating Rosie's son had committed the murders. Indeed, McNeish explained the result – Rosie had McNeish stay at Rosie's house during the trial, provided McNeish with Xanax, told her to just testify that she did not remember anything, and brought her to court to testify while the Crook family all waited outside. (R3:11198-11202.)

Even if interviewing McNeish, as any reasonable lawyer would do before calling a witness he had never met, and taking reasonable precautions for her safety would not have prevented her from lying at trial, Eler should have at least used her deposition to make two important points at trial. First, he could have impeached her to show that she had previously testified under oath that Little Archie had made the threat about Kimbler's baby. Second, he could have elicited her testimony about Little Archie breaking her nose twice to show the jury that she was afraid of him, which was why she had denied he had made the threat.

Indeed, just as the State has successfully argued that Simpson's reaction to questions about his involvement in the murders, such as alleged denials of knowing the victims or owning the clothes, tended to show his "consciousness of guilt" (DA An. Br. 79), Little Archie's reaction to McNeish's accusation would not only have

explained why McNeish did not want to testify against him, but would also have strongly reinforced the defense strategy of pointing the finger at Little Archie.

The court concluded that counsel's failure to impeach McNeish with her deposition was neither deficient nor prejudicial because Eler was worried that impeaching his own witness "can sometimes backfire and be 'absolutely horrible,' " and he was able to elicit from Williams that she had told him about the threats.⁴⁵ (R3:13415 (citing R3:10467).) But there was no evidence that she could have said anything "horrible" or that impeaching her with her prior testimony would have been worse than the jury seeing this "defense witness" deny the one thing she was called to testify about. And especially without the readily available evidence (again, from her deposition) as to why she was afraid of Little Archie, eliciting hearsay evidence that she had earlier told Williams about a threat was no substitute for her actual testimony.

**c. Little Archie Knew the Position of the Bodies Before
Anyone Could Have Told Him. (Claim 16)**

Claim 16 asserts counsel was ineffective in failing to show that Little Archie knew the details of the murders before anyone could have told him. (R3:1335-36.)

⁴⁵ The trial court rejected other aspects of this claim based on credibility findings and/or its view that evidence of Little Archie's increasingly violent behavior in the days leading up to the murders would not have been admissible as substantive evidence. As it would take many more pages detailing the evidence and arguing its relevance to challenge these rulings, Simpson does not address them further in this brief in light of the overwhelming strength of the remaining claims.

At trial, Eler was able to get Little Archie to admit on cross that he had told Det. 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.) Eler never asked Little Archie when he had said this to Williams, but called Williams as a defense witness to go over this and other statements he had received during his investigation. (T:1488-89.) Eler first directed Williams’s attention to pages 18 and 19 of his report, which covered July 21, 1999, and had him confirm the statements by McNeish and Thompson described above relating to Little Archie making threats. (T:1489-90.) He then asked Williams to turn back to page 14, which Eler said indicated was the “day before,” which would have been July 20, four days after the bodies were discovered. (T:1491.) Williams then confirmed that was when Little Archie told him the position of the bodies, but noted, “I believe he said he got it from his ... grandfather.” (T:1492.)

Earlier in the trial, the grandfather, Troy Clyde Crook, had testified that he never told Little Archie the position of the bodies (T:546), but after Williams’s testimony, the State elicited from Thompson that in the days after the murder, he had heard “through the grapevine about the – what had happened inside and how the bodies were found.” (T:1502-03.) In closing, Eler did not address Thompson’s testimony, but reminded the jury that Little Archie had told Williams he learned the position of the bodies from his grandfather, who had denied it, which was

“[p]robably the most important thing ... to remember about Archie, Jr.” (T:1664.) But, as the State argued below, the jury “[l]ogically” must have found that Little Archie learned the details from family members before telling Williams. (R3:10033-34.)

At the postconviction evidentiary hearing, Simpson put the police report into evidence, and it unequivocally shows that the interview Williams was referring to on page 14 of his report was an interview at 12:30 the afternoon of July 16, the day the bodies were found. (R3:3687-88.) Here is what he reported:

Archie Crook Jr. said that his father was probably lying in bed when he was hit and that Kim was trying to get out of bed when she was hit. Archie Crook Jr. knew that Kim’s leg was up on the bed. He stated that Clyde Crooke told him about Kim.

(R3:3688.) Williams confirmed this in his postconviction testimony and agreed that it had made him suspicious that Little Archie would know these unique details of the crime scene. (R3:12924-25.)

The trial court rejected Simpson’s claim because Eler had presented “testimony that Little Archie had knowledge of the crime scene before those details were released.” (R3:13451-52.) This was error because it overlooks the fact that Eler had misread the report at trial and made it appear that Little Archie did not make this statement until several days later, which would have been after Thompson had heard the position of the bodies “through the grapevine.” It further overlooks the fact that Little Archie prefaced the statement by asking Williams how

Big Archie had died, a question he would not need to ask if the details had been openly discussed. Eler may have been correct in telling the jury that Little Archie's knowledge of the bodies was the most important thing to know about him, but his argument fell flat because he failed to get the details right. Details matter, especially in a capital case. Had the jury understood that Little Archie had said this before word got out, it would have seen just how guilty Little Archie appears.

The trial court suggested that because Thompson had testified that family members had gathered at the scene on July 16 and talked about the murders, Little Archie might have heard the details that morning. (R3:13451.) As speculative as that reasoning would be since Thompson did not testify the position of the bodies was discussed that morning and Little Archie had professed ignorance about the cause of death, there was evidence available to the defense that would have eliminated even that possibility – testimony from Christy Perry.

Perry was a known, material witness because she was not only Thompson's girlfriend, but she, Thompson, and her father Dana Guinn had seen Little Archie and Smallwood at a gas station right after the two men had left Big Archie's house, she was with Thompson when they left the station to go to Big Archie's house, where they were moving in to the adjoining trailer, and she would have information about the Crook family. (T:1497-98, 1571-84; R3:3585, 3590, 13238, 13275-76.) Andux had set all three for deposition in 2003 and was able to depose

Thompson and Guinn about these events. (R3:3284-3318.) But when Perry appeared for her deposition, she explained she was suffering from an abscessed tooth, and they agreed to reschedule her deposition. (R3:3315-16.) Counsel were deficient in failing to reschedule that deposition, and had they done so, they would have learned she had ample additional information that would have helped on a number of issues, including whether Little Archie could have learned the position of the bodies before speaking with Williams.

Simpson's postconviction investigator, Daniel Ashton, interviewed Perry to determine what she would have told the defense had counsel rescheduled her deposition or even just called her to see what she knew. (R3:11288.) He prepared an affidavit, which she executed, confirming what she had told him. (R3:2843, 11299.) But Simpson was unable to call her as a witness at the evidentiary hearing because she died in 2016. (R3:3119, 11300, 11380.) As Ashton testified and the affidavit confirmed, Perry told him that she was woken up at 6:00 a.m. the morning after the murders and was present at the murder scene when Little Archie first arrived. (R3:2843, 11295.) She saw that he was "immediately apprehended" by the police before he had a chance to speak to anybody from the family. (R3:2843, 11295-96.)

The trial court concluded the foregoing evidence did not support Simpson's claim because Simpson "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.” (R3:13451-52.) The court had cited *Nelson v. State*, 73 So. 3d 77, 88 (Fla. 2011), for the proposition that a defendant must have the witness affirmatively state they would have been available to testify to state an IAC claim for failing to call the witness. *Nelson* stands for no such thing. Rather, this Court concluded that the witnesses at issue in *Nelson*, the defendant’s mother and stepfather, would not have been available because the testimony they would have allegedly provided was that the stepfather had sexually abused the defendant and that he had a “dysfunctional upbringing” and as soon as they heard that counsel referenced sexual abuse by the family in his opening statement, they absconded from trial and could not be found. *Id.* at 88-89. In contrast, the evidence in this case was that Perry appeared for a deposition and asked to reschedule due to an abscessed tooth, that her testimony was not the least bit self-incriminating, and that she was alive at the time of trial. There are no circumstances here to suggest she was not willing and able to testify.

The court had previously ruled that what Perry told Ashton was inadmissible hearsay. (R3:13438.) The court acknowledged Simpson’s argument was not hearsay because he was offering it solely to prove what she would have said had she been asked, not that what she said was true, but the court concluded this was “a

distinction without a difference.”⁴⁶ (R3:13438.) This might have been a sound ruling if Simpson’s claim had been based on an NDE theory, but this was an IAC claim. The legal issue before the court was not whether Perry was telling the truth, it was whether she would have disclosed this information had she been asked. It would have then been up to trial counsel to present her testimony for the purpose of persuading the jury that it was true. “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); *see also Roe v. State*, 254 So. 3d 612, 613 (Fla. 5th DCA 2018) (granting relief on IAC claim for failure to elicit an out-of-court statement and rejecting trial court’s ruling that statement was inadmissible hearsay because the statement was offered to prove that it had been made, not that it was true).

d. Little Archie Lied About His Whereabouts the Night of the Murders. (Claims 13 and 14)

Claims 13 and 14 accuse counsel of failing to discover and use evidence that would have impeached Little Archie’s testimony about his whereabouts during the murders and made it all the more likely the jury would have seen that it was far

⁴⁶ The court relied on this Court’s opinion in *Banks v. State*, 790 So. 2d 1094 (Fla. 2001), but there, this Court relied on the fact that “the State simply cannot point to any purpose for the admission of these statements other than for the truth of the matter asserted therein” and concluded that “the only possible relevance [was] directed to the truth of the matter stated by a declarant.” *Id.* at 1098-99 (quoting *Keen v. State*, 775 So. 2d 263, 274 (Fla. 2000)).

more likely that the killer was Little Archie than Simpson. (R3:1325-30.) This claim was born out by the evidence in three material regards.

(i) Little Archie testified at trial that after leaving Big Archie's house, Smallwood drove him to his girlfriend Heather Smith's house, where he spent the night and stayed until he learned of the murders the next morning. (T:793-94, 823, 827-28.) Counsel was well aware of the need to confirm this alibi. They had Williams's police report relating that Little Archie had made this claim during the same interview discussed above where he revealed he knew the positioning of the bodies. (R3:3688.) The report further noted that several days later, Troy Crook provided the license plate number he believed "belongs to the girl that Archie Crook Jr. spent the night with on the night of the murder." (R3:3694.) The report indicated that the tag number belonged to Stacy G. Orr and provided her address on Orme Road. (R3:3694.) Eler's files also contained numerous notes highlighting the importance of finding Heather Smith and referencing Orr's name and tag number. (R3:3556, 3584, 3626, 3629, 13220-21, 13235-36.)

Postconviction investigator Ashton tracked Smith down at a drug rehabilitation facility in North Carolina and planned to interview her after her release. (R3:11273-77.) He later learned that she had died while in the facility and contacted her mother Sandy Smith, who will be referred to as Sandy to avoid confusion. (R3:11277-79.) Sandy testified at the evidentiary hearing that Smith's husband had

murdered her in 2012. (R3:11240.) Before that, Sandy had learned that an investigator was looking for her, so she called Smith to find out why. (R3:12242-43.) Sandy testified that Smith told her that Little Archie had come by her house at 4:30 in the morning and “said that if anybody asked he was there all night.” (R3:11245.)

Sandy advised Ashton he should speak to her niece Stacy Gill who had been Smith’s roommate. (R3:11252, 11279.) He interviewed Gill in Jacksonville in May 2013 and obtained an affidavit. (R3:11280.) She confirmed that she lived with Smith at the time of the 1999 murders and attested to the following:

Within a couple of days of the murders I received [a] call on my cell phone from Little Archie. He wanted to speak with Heather. Heather asked me if Little Archie could come over to speak with her. Heather asked because she knew that Little Archie was not a welcomed guest. I agreed to allow him to come over with the understanding he was not allowed in.

When Little Archie arrived Heather met with him outside of the front door. I listened to their conversation through an open window. Little Archie instructed Heather to tell the police if asked that Little Archie and a friend had come over the night his father and Kim Kimbler were murdered and that Little Archie spent the night.

(R3:3114-15, 11280-86.) She was positive that Little Archie had not come to the house that night. (R3:3115, 11281.)

Gill could not testify at trial because she committed suicide on July 25, 2014. (R3:3112, 11253.) Her death certificate lists her mother’s address as the same Orme Road address listed in Williams 1999 report as being the address for

the license plate Troy Crook told JSO belonged to the girl Little Archie claimed to have stayed with the night of the murders. (R3:3694.)

Had counsel or their investigator followed up to find and interview Smith directly or through the tag number, they would have found Gill, at the least, who could have directed them to Smith if they could not find Smith on their own. Had either woman, both of whom were very much alive at the time, testified about Little Archie's request for a false alibi, there should be little doubt, under any standard, that Simpson would have been acquitted.

The trial court denied this claim by concluding that counsel had made a diligent search, but had just been unable to locate Smith. (R3:13431.) Chipperfield testified that before being disqualified, he had been asking about Heather Smith in depositions and that he and Andux "were trying to locate her." (R:13220-21.) He never suggested they had completed the search without success; this was clearly a task for successor counsel to undertake as indicated on the typed to-do list. (R3:3556.) There is no indication anywhere in counsel's files that they had done anything to locate either Heather Smith or Stacy Orr. Neither Eler nor his investigator Hurst could remember having made any such attempt, and Eler and Hurst

agreed that if they had, it would have been documented in Eler's file.⁴⁷ (R3:10404-05, 10498-50, 10507-08.)

The court supported its conclusion with a finding that "JSO was also unable to locate Smith." (R3:13431.) The evidence does not support that finding either. No police report has ever been produced indicating any steps taken by law enforcement either to find Heather Smith directly or follow up on the Orme Road address from the license tag. When Williams was asked at the postconviction hearing who Heather Smith was, he replied, "I have no idea. Never could find out who Heather Smith was." (R3:12922-23.) When Simpson's counsel started to ask whether Williams would have documented attempts to find or interview Smith, the trial court stopped him with the rebuke "not when he didn't remember who the hell you're talking about." (R3:12923.) When counsel later asked Williams if the Heather Smith alibi was one of the reasons JSO eliminated Little Archie as a suspect, he replied, "Like I said, sir, I never found Heather Smith. I don't know if that was an alibi or not." (R3:12970.) When the State asked him on cross whether he had determined whether this was a "valid alibi," Williams responded, "I couldn't find Heather Smith and I don't remember everything we did to try to find the per-

⁴⁷ The trial court seemed to suggest that Hurst might have documented something not produced to Simpson because his notes had been destroyed. (R3:13431 (citing R3:10502-03).) But Hurst made clear that he copied Eler with everything in his files, so if he had any notes, a copy would have been in Eler's file. (R3:10497-98.)

son. But I know we never did. I just know we never could find who she was. If this person even truly existed.” (R3:12981.) When read together and bearing in mind that the evidentiary hearing was over 18 years after the fact, it is clear that Williams was not saying and could not credibly testify that any investigation, much less an adequate one, had been undertaken without success.

But even if one were to accept those findings, counsel still could have found Gill through the Orme Road address belonging to her mother. The trial court made no finding that anyone ever followed up on that address or made any attempts to follow up on the tag number or otherwise try to find Smith’s family. Instead, the trial court refused to consider her affidavit or statements to Ashton based on its conclusion that they were inadmissible hearsay. But this was error for the reasons discussed in Part IV.C.2.c above – Simpson offered them only to prove this is what they would have said had they been asked. *Roe*, 254 So. 3d at 613; *Breedlove*, 413 So. 2d at 6. They were both alive, and there is no evidence suggesting they would have refused to testify, so they would have testified directly to allow the jury to determine whether what they were testifying to in open court was true.

Finally, the trial court pointed to an inconsistency between the accounts of Smith and Gill. As an initial matter, if the trial court were correct that Smith could not have been found, then there would be no conflict; Gill’s testimony would have stood alone. But even if both were found, the inconsistency was minor, was easily

explained, and did not make their testimony any less inculcating of Little Archie. Specifically, Smith indicated that Little Archie had come by at 4:30 in the morning (over four hours after Little Archie claimed at trial), while Gill said she was sure Little Archie had not come by at all. Presumably, Gill was simply asleep and unaware of his presence, especially since he knew she did not want him at the house. Regardless, the point is that Little Archie asked Smith to lie and say he was at her house when the murders took place.⁴⁸

(ii) As argued in part IV.C.2.c above, counsel was ineffective for failing to depose Perry, Thompson’s girlfriend who was with him when they saw Little Archie the night of the murders. In addition to the testimony she would have provided discussed in that section, she would have testified that when they saw Little Archie at the gas station, he not only said he had just come from Big Archie’s house, but “further commented that he might return later.” (R3:2843, 11291.) She and Thompson then went to the trailer they were moving into on Big Archie’s property, and she heard a door slam at Big Archie’s house at about 2:00 a.m. (R3:2843, 11292-93.) It was “pitch black” outside so she could not see anything,

⁴⁸ Evidence from the autopsies indicated that Big Archie died within an hour of eating red particulate matter that was consistent with the cherry or strawberry dessert Little Archie and Smallwood shared with Big Archie. (T:858; R3:7143-45.) Simpson had a claim that counsel was ineffective by not demonstrating this with sufficient clarity, but the trial court rejected the claim based on a finding that it was clear. (R3:13418-20, 13423-24.)

but assumed it was Little Archie since he had said he might come back and whoever it was must have known their way around the property since it was so dark. (R3:2843, 11293-94.)

She further noted that once Little Archie was released after being arrested at the scene the morning after the murders, he starting questioning everyone about what they knew. (R3:2843, 11296-97.) She told him she had heard the door slam at 2:00 a.m., at which point “he became very paranoid” and started calling her daily to question her. (R3:2844, 11296-97.) She was concerned that he was the only one making a big deal about her hearing the door slam. (R3:2844.)

Thompson confirmed in his testimony below that Perry had been listening to Little Archie at the gas station. (R3:11382-84.) He also confirmed that Perry had woken him in the middle of the night saying she heard a door slam. (R3:11385-86.) He also explained that the trailer was only a few feet from Big Archie’s north rear door, but that they could not see the south rear door to Big Archie’s bedroom or the deck it opened onto (i.e., the path the killer took after the murders) because that view was blocked by the house. (R3:11381, 11386-89.)

Thus, Perry’s affidavit testimony and Ashton’s relation of what she told him were both corroborated and clarified by Thompson’s live testimony. Together, they show that Perry could have offered damning testimony that not only tended to show that Little Archie lied about his whereabouts, but also would have allowed

the jury to conclude there was reasonable doubt as to Simpson's guilt because it appeared that Little Archie was the more likely killer.

One final point that did not make it into her affidavit, but that Ashton testified Perry said was that Little Archie was not wearing a shirt when they saw him at the gas station and that he was acting "more bizarre than normal." (R3:11289-90.) This was additional inculpatory evidence, especially since the State's theory was that the killer had shed a sweatshirt after the murder. Counsel tried to elicit that Little Archie was not wearing a shirt from Perry's father, who did testify at trial, but all he could testify to was that he was not sure whether Little Archie had been wearing a shirt or not. (T:1575.)

As noted and argued in Part IV.C.2.c, the trial court erroneously refused to consider Perry's account on hearsay grounds. (R3:13438-39.) The court did concede that if Perry had provided her account at trial, it would have been admissible since it was based on her own observations. (R3:13439.) But it concluded that her account would not have "swayed the verdict," again applying the wrong prejudice test. Worse, it ignored most of her account in reaching this conclusion, focusing only on the fact that she saw Little Archie was not wearing a shirt and was acting bizarre. It found that Little Archie not wearing a shirt was "as probative that he committed the murders as it is that Little Archie shed his shirt because it was a humid July evening." (R3:13439.) Aside from the fact that there was no evidence

about the weather that night, this reasoning overlooks that the standard is simply whether the evidence – cumulatively with other evidence the jury should have heard – would have created a reasonable possibility that the jury would find reasonable doubt about Simpson’s guilt. Even if Little Archie had testified that he took his shirt off due to the humidity, the fact is that the jury reasonably could have concluded that, in combination with all the other suspicious circumstances, he was the more likely killer.

(iii) Finally, counsel failed to use JSO reports in their possession to demonstrate that Little Archie’s testimony about his whereabouts that night was a lie. Had counsel used the very passage of Williams’s report discussed in Part IV.C.2.c regarding Little Archie knowing the position of the bodies the day of the murders, he also could have elicited the following observation that Williams had put in bold type in his report from that day: “Mr. Crook keeps jumping around the story and can’t seem to remember what he did during different parts of the days.” (R3:3687-88.) Williams confirmed this in his testimony below and agreed that it had made him suspicious about Little Archie’s story. (R3:12924-25.)

Moreover, JSO Officer R. Gonzalez’s report revealed he had information directly contradicting Little Archie’s story. (See R3:10061 (stipulation that Gonzalez would have testified consistent with his report had he been called).) Little Archie testified that he was at Big Archie’s house as early as 10:00 p.m. but no later than

11:00 p.m. (T:781, 823.) They stayed about an hour and a half, and he was sure they left right around midnight. (T:790-91, 793, 823.) But Gonzalez saw Little Archie in a tan Mercury Cougar at 10:55 that night at a different gas station. (R3:3634-35.) This was important because Little Archie testified at trial that they were in Smallwood's gray Monte Carlo that night. (T:824.) And at the evidentiary hearing, he testified that he had never driven a tan Cougar and did not even know anybody who had one. (R3:11415.) Eler's file even had a note about the importance of Gonzalez's report to impeach Little Archie on this. (R3:3594.)

The trial court rejected this claim based on a finding that 10:55 p.m. would have been before, not after Little Archie's visit and that what car he was driving was immaterial. (R3:13440.) The evidence does not support the first finding, but either way, Little Archie denied being in that car. The court was probably correct that, in isolation, this aspect of this claim was relatively minor and not prejudicial. But this just highlights one of the biggest errors below – the failure to ever conduct a review for cumulative prejudice. When all of the information inculcating Little Archie that competent counsel would have put before the jury is considered together along with the evidence actually presented, there is at least a reasonable chance that the jury would have acquitted Simpson.

3. Counsel Presented an Incoherent Closing Argument. (Claim 26)

Claim 26 asserts counsel was ineffective for presenting an incoherent closing argument. (R3:1362-64.) Despite the wealth of material to work with in light of all of the misstatements by the State during its closing, Eler was prejudicially ineffective by offering an incredibly disjointed and nearly incoherent closing argument. Even though Eler recognized below that one of the two most important points to make was that the State must prove its case beyond a reasonable doubt (R3:10228-29), he never made that point in closing. He did not even make the most obvious point that any competent counsel would make – Simpson had no motive to commit these murders; he had a motive not to do so because he had just been released to work as an informant against Big Archie and others.

Instead, Eler began with an odd attack on Durrance. Even though the jury heard no evidence in this case that Durrance had ever killed anyone (because the State had concealed it from Simpson as explained in Part IV.A.1 above), counsel referred to him as a “killer.” (T:1650.) Despite the fact that the defense theory, from its opening statement, was that Little Archie and Smallwood 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, Eler inconsistently told the jury that Little Archie was the killer. (T:1664.) Eler even abandoned the more appropriate strategy of put-

ting the State to its burden and merely showing that Little Archie was more likely to be the killer than Simpson, he essentially assumed the burden of proving Little Archie was guilty, arguing 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, but even then, forgot that the actual defense theory was that it was likely Little Archie and Smallwood together.

Eler went out of his way to bolster the State’s DNA expert, gratuitously calling him “the best DNA mind in Florida.” (T:1659.) He referred to the sweatshirt containing “epithelial DNA that matches” Little Archie (T:1658), even though there was no testimony about what “epithelial DNA” was and, of course, the testimony about DNA mixtures was only that Little Archie could not be excluded – along with 25% of the population. By overstating the conclusion that the evidence actually matched Little Archie, Eler lost any possible credibility with the jury.

Similarly, he 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. This was not the last time he squandered his

credibility by misstating important and clear aspects of the evidence. He 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; the only testimony about “hitting a lick” was that Little Archie told Simpson he was going to do that **three weeks before** the murders. (T:1437.)

Leaving no doubt that he never bothered to learn the basic crime scene evidence and floorplan, Eler 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 and then argued that Little Archie returned through the front door with an axe to commit the murder. (T:1670-71.) 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.)

Eler 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 and to the State’s theory that there was a lone killer wielding the axe without getting a drop of blood on his shirt or hat.

Eler even failed to address the fact that the State had offered no real motive for Simpson to commit the murders, much less argue that that he actually had the opposite motive 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.

The trial court's perfunctory statement that it reviewed the closing and found it reasonable is a legal conclusion entitled to no deference. In short, Eler's closing was not only riddled with facts belied by the evidence and incoherent, but it did nothing to plant reasonable doubt regarding Simpson's guilt. Rather, it planted doubt as to Simpson's innocence. There is much more than a mere reasonable probability that an effective closing would have resulted in a not guilty verdict, but that is all Simpson need show to prevail.

D. Postconviction Testimony by Little Archie and Thompson Corroborates Simpson's Defense. (Claims 30 and 31)

Claims 30 and 31 assert that during postconviction depositions shortly before the evidentiary hearing, Little Archie and his cousin Thompson provided dramatically new testimony that tended to corroborate Simpson's defense that Little Archie had taken the clothes from him at his trailer a few weeks before the murders and was more likely than Simpson to have been involved in the murders. (R3:1968-71.)

First, Little Archie testified at trial in 2007 that he never borrowed any clothing from Simpson, had never even gone to Simpson’s house before the murders, and had only been to Simpson’s mother’s house one time, but not in the months immediately preceding his father’s murder. (T:799-800, 804.) Furthermore, he denied at trial having found a business card of Lieutenant Waugh’s from the Clay County Sheriff’s Office. (T:817-18.) This contradicted Simpson’s testimony that Little Archie had come to his trailer a few weeks before the murder to borrow black clothing laying on the floor, searched through Simpson’s dresser and found Waugh’s card while Simpson was in the shower, and left the card on the dresser and left before Simpson got out. (T:1387-89.)

By contrast, at the evidentiary hearing ten years later, Little Archie admitted that sometime between when Simpson was released from jail and the murders, he did go to Simpson’s home after all – specifically Simpson’s trailer. (R3:11436.) He further admitted to finding Waugh’s business card while Simpson was in the shower, stated that was when he knew Simpson “was snitching,” and left before Simpson got out of the shower. (R3:11436-37.)

Not only did this testimony confirm key details of Simpson’s explanation, but it also demonstrated that Little Archie falsely denied Simpson’s account at trial. These were not “minor” discrepancies as the trial court found. (R3:13456.) The trial court’s conclusions that Little Archie “stated at trial that he had been to De-

defendant's trailer on one occasion prior his father's death" and never denied finding Waugh's card at trial are contrary to the trial transcript and resulted in its erroneous denial of relief on this claim. (R3:13454, 13456; *see also* T:798-800, 804, 817-18 (denying going to Simpson's residence on 118th Street – though admitting going to Simpson's mother's house once – and stating he thought Simpson was a "snitch" because he had been released from jail while denying having seen Waugh's card).)

True, Little Archie's postconviction testimony did not establish definitively that Little Archie took black clothes from Simpson or that the clothes he took were the same ones found by the murder scene, as the trial court noted. (T:13456.) But the point remains: this admission to so many key and unique details of Simpson's trial testimony would have made it much more likely for the jury to believe Simpson – especially absent the State's blatantly false impeachment arguments about Simpson's timeline addressed in Part II.B – and determine that the State had failed in its burden of proving beyond a reasonable doubt that Simpson had worn the clothes the night of the murders.

Second, Thompson's new testimony at the evidentiary hearing would have further supported Simpson's account. At trial, defense counsel had called Thompson in an unsuccessful effort to establish that Little Archie was among a group of people who shared black clothes for robberies. (R3:10227, 10230-31.) Thompson testified then, in response to defense counsel's questions, that he had never known

Little Archie to wear sweatshirts or sweatpants. (T:1504.) But at the evidentiary hearing, Thompson testified that Little Archie had admitted to participating in at least one home-invasion robbery and hung out with a group of men who committed a rash of robberies, and they always involved wearing black sweatclothes. (R3:11393-94.) And he saw that Little Archie kept a bag of black clothes in the laundry room at his father's house. (R3:11394-95.) This testimony shows why Little Archie would have asked Simpson for black clothes to commit a robbery because Little Archie had none while staying at his mother's house.

Additional postconviction testimony from Thompson supported Simpson's defense theory that Little Archie (or Smallwood) wore the clothes he had taken from Simpson while committing the murders. Thompson testified that within a couple weeks before the murders, Little Archie was screaming in Big Archie's yard that he was going to kill Big Archie, Kimbler, and their unborn baby and that it was not unusual for Little Archie to come and go from Big Archie's house following the same path between the strands of barbed wire and through the church property that the killer(s) took the night of the murders. (R3:11390-91.)

The postconviction court rejected this as newly discovered evidence, concluding that Thompson was reluctant to admit many of these things at the evidentiary hearing and pointed to minor inconsistencies having nothing to do with the points made herein. (R3:13457-58.) For example, the court concluded that it was

not persuaded that Thompson knew for sure that Little Archie had participated in the robbery ring. (R3:13458.) This misses the point. The point is not that Little Archie was a participant in a robbery ring, but that he had black clothes in his possession just like the ones Simpson said he had taken and just like the ones the State claimed were worn by the killer. Indeed, although Little Archie denied participating in any robberies, he admitted at the evidentiary hearing that he was “[l]iable to have” kept a bag of black sweatclothes “[b]ecause I was around a bunch of people who did home-invasion robberies.” (R3:11447.) Again, the material issue in this case is not whether Little Archie participated in robberies; it is whether he had black sweatclothes.

As for the fact that Thompson was reluctant to provide testimony at the evidentiary hearing that cast suspicion on his cousin Little Archie, whenever he gave an equivocal answer on a material point, he was forced to confirm the devastating testimony after being reminded of his clear deposition testimony. (R3:11394-96.) Neither the State nor the trial court identified any reason for Thompson to make any of this up, and Little Archie admitted he and Thompson were close and that Thompson had no reason to lie to hurt him. (R3:11407.)

The trial court made no finding that with diligence the defense could have elicited any of the new testimony from Little Archie or Thompson, so it did not need to reach Simpson’s alternative IAC claim that if that was the case, counsel

was ineffective for failing to do so. Instead, the court rejected these claims largely on grounds of lack of prejudice after erroneously evaluating the credibility and relevance of the new testimony. The final reasons given by the trial court for its conclusion on prejudice reveal how little it understood the facts and law at issue and only highlight its error:

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. ... As such, this Court does not believe Thompson's testimony would have produced an acquittal on retrial.

(R3:13459.)

But the State's entire case is based on the "large speculative leap" that Simpson's DNA shows he possessed the clothes at some undisclosed time and links him to the murders. Showing that Little Archie also possessed black clothing – especially along with Simpson's testimony that Little Archie took the clothing from him – highlights that the evidence is as inculpatory of Little Archie as it is of Simpson. Moreover, Simpson did not have to prove Little Archie committed the murders. He only needed to create reasonable doubt as the State's speculative evidence that he committed these murders with no motive.

Finally, the passage above shows the trial court applied the wrong standard. The issue is not whether there is "sufficient evidence to convict Defendant." Even if there is sufficient evidence to convict, relief on a NDE claim is still warranted

where, despite that sufficient evidence, there is also reasonable doubt. And as noted earlier, the trial court refused to conduct any cumulative review of prejudice, which would have required this claim be evaluated along with all other meritorious claims and under the most defense-friendly standard applicable to those claims.

V. CLAIMS UNDERMINING THE STATE’S REMAINING EVIDENCE

As argued in Part I.A.3, the remaining evidence against Simpson was weak to begin with. But largely as a result of JSO turning over its officer’s notes to the repository for postconviction review, it is now clear that most of that evidence was entirely false and some of it actually supported Simpson’s defense that Little Archie was the more likely killer. Despite the trial court’s conclusion that the State never has to disclose detectives’ notes because they are not subject to disclosure under Florida Rule of Criminal Procedure 3.220 (R3:13474), this Court has made clear that withholding detectives’ notes that undermine a state witness’s testimony is a *Brady* violation. *State v. Huggins*, 788 So. 2d 238, 241-43 (Fla. 2001).

A. The State Knew the Last Numbers to Page Big Archie Were Tied to Little Archie and Smallwood, Not Simpson. (Claim 19)

Claim 19 asserts that, among other contentions not discussed here, the notes obtained in postconviction discovery reveal *Giglio* and *Brady* violations because they show the State misled the jury into believing that the last number to page Big Archie belonged to Simpson’s mother. (R3:1344-46.) The trial evidence left this Court with the same belief in finding sufficient evidence to support Simpson’s

convictions. *Simpson*, 3 So. 3d at 1148. But the notes produced in postconviction discovery and subsequent testimony from JSO officers would have, at the very least, created a reason for the jury to disbelieve that. Indeed, they prove that the last numbers to page Big Archie were tied to Little Archie and Smallwood.

The pager found at the murder scene by Big Archie's body was a key feature in the evidence against Simpson. Williams testified at trial that on September 13, 1999, he personally examined the pager, scrolled through the numbers from the pager's memory to write down the numbers, and personally called each number. (T:734-35.) He testified that when he called "[t]he first number that came up on the pager," Melanie Stuckey answered. (T:735.) That is Simpson's mother, and he was living at her house at the time of the murders. (T:651.)

This testimony was largely consistent with Williams's report provided to the defense before trial and discussed in several places above. (R3:3695-96.) Eler knew there was at least one problem, however, in that the number listed on the report was slightly off from the actual number and further investigation was warranted. (R3:3555-56, 3593, 13245-46.) Little did the defense know that it was far worse.

JSO provided a copy of notes from Det. Mark Bialkoski that indicated that on July 16, 1999, he found the pager at the scene, scrolled through the numbers in memory, and wrote them down with the times. (R3:4865.) It was all but impossible

to read the numbers in that copy due to highlighting, and the State eventually provided a clear copy in 2017 pursuant to a court order. (R3:4857-59.)

At the evidentiary hearing, Bialkoski agreed that he had written these notes and provided them to Williams. (R3:12654-60.) He did not remember whether he collected the pager for evidence (R3:12653, 12660), and it is not among any of the evidence Williams's report documented as having been collected in this case. (R3:3678-80, 12898-99.) Bialkoski testified that his practice is not always to collect pagers like that, so long as he carefully writes down all information from the pager's memory, which he confirmed he would have done in this case. (R3:12653-54.) He was sure that he wrote them in the order they were stored in memory and believed from experience having a pager of his own that the first number listed was the most recent call, but could not be sure. (R3:12657-58.) There were no dates, so it was not possible to tell how long ago any of the pages had come, although times were provided. (R3:12656-58.)

At the hearing, Williams confirmed that he got the numbers listed in his report from Bialkoski's notes, and that is how he got the number he called on September 13, almost two months later. (R3:12899.) The first number listed on his report, the one he said belonged to Stuckey, was not even on Bialkoski's list, but a similar number that just one digit off was third from the last on the list. (R3:3695, 4859, 12900.) Williams assumed that he had just made a typo and had actually di-

aled the correct number – otherwise, his report would prove that Stuckey’s number had not paged Big Archie at all. (R3:12901-02.)

Upon comparing his report with Bialkoski’s notes, he concluded that the first three numbers on the pager belonged to Little Archie and his mother, and the parents of Shawn Smallwood. (R3:12902-03.) Thus, the State’s postconviction disclosure of Bialkoski’s notes and the testimony of Williams and Bialkoski at the hearing reveal not only that Williams’s trial testimony was false, but that the truth is further implication of Little Archie and Smallwood.

The trial court rejected Simpson’s argument that the State violated *Brady* by not allowing the defense to examine the pager because it found that the State had not collected the pager and instead relied on Bialkoski’s notes. (R3:13466-67.) Simpson accepts this finding as fully supported by the evidence. But the court never even addressed the *Brady* violation for not providing the notes to the defense, and it clearly was because it would have allowed the defense to impeach Williams’s testimony and show the last numbers to page Big Archie were not tied to Simpson, but to Little Archie and Smallwood.

But the bigger violation is the *Giglio* violation because Williams’s testimony at trial was demonstrably false. The trial court rejected that claim by finding that Williams testified truthfully at trial that he had scrolled through and recorded the numbers and that it only appeared that he was testifying this took place in Septem-

ber due to a “poorly worded” question by the State. (R3:13468.) The record belies that conclusion. The State had directed Williams’s attention to September 13, 1999, and asked whether he had examined the pager “on that day.” (T:734.)

The court also refused to credit Williams’s postconviction admission that he had instead gotten the numbers from Bialkoski’s report because his testimony at trial was “given more proximately to the actual events.” (R3:13468.) This ignores not only the clear testimony of both Williams and Bialkoski that it was Bialkoski who looked at the pager, not Williams, but it also ignores the dates on Bialkoski’s notes and Williams’s report. Bialkoski’s notes were taken contemporaneously when he viewed the pager on July 16, 1999, while Williams did not prepare his report until September 26, 2000, over a year later.⁴⁹ (R3:12870.)

The trial court further found that Simpson had failed to prove that Williams’s testimony that the first number Williams called was Stuckey was false because it was “plausible that the first number on the pager could have been Defendant’s mother.” (R3:13469.) But the notes and testimony of both detectives was clear that it was not the first number and that the first three numbers were tied to Little Archie and Smallwood, facts the trial court never grappled with. Withhold-

⁴⁹ Indeed, Williams was reprimanded in August 2000 for failing to file timely reports in this and two other homicide investigations. (R3:2793-94.) He agreed to an employee improvement plan on September 8, 2000, to complete all the reports promptly. (R3:12846-47.)

ing these notes was a clear *Brady* violation and Williams's testimony a clear *Giglio* violation.

B. The State Knew and Counsel Failed to Show That Simpson's Injured Hand and Alleged Suspicious Interactions With Hinson Were Not as Hinson Testified. (Claims 20, 21, and 22)

In closing argument, the State relied heavily on Hinson's testimony about allegedly suspicious conduct by Simpson, painting a long narrative that included not just the hand injury referenced by this Court on direct appeal, *Simpson*, 3 So. 3d at 1148, but also that Simpson did not return multiple pages from Hinson the morning after the murders for several hours, that Simpson lied when he said he did not receive any pages and called Hinson because Hinson had left a message with his mother, and that Simpson stopped cooperating after Hinson asked for a cheek swab DNA sample, all of which made Hinson very suspicious that Simpson was involved in the murders. (T:1597-1605.) Claims 20, 21, and 22 allege *Giglio* and *Brady* violations because the foregoing arguments were based on testimony that Hinson's withheld notes show was not true, or at the very least was highly impeachable, and also IAC claims because even the reports provided by the State showed major inconsistencies counsel failed to raise.

(1) The cut on Simpson's hand was the only aspect of Hinson's testimony that this Court identified as supporting the convictions. At the 2007 trial, Hinson testified that when he went to see Simpson over seven years earlier on the day after

the murders, he “[i]mmediately” saw that Simpson “had a large gash on his finger.” (T:656.) When he asked how the injury occurred, Simpson replied that “he had gotten upset during the night and hit the electrical panel in his mother’s garage which had caused the cut on his finger.” (T:657.) Simpson testified that around 7:00 or 8:00 that morning, the power went out at his mother’s house, and when he tried to turn the breakers on in the garage, he scratched his finger on the electrical box. (T:1391-92.) He denied that it was “a gaping, oozing wound” and described it as just a “scratch.” (T:1392-93.) The witness from the power company confirmed the power in that neighborhood had gone out at 7:56 a.m. (T:1466.)

In closing, Caliel argued this was evidence of guilt because Hinson had testified that Simpson told him the injury “happened the night before. The night before.” (T:1599.) Caliel characterized the injury first as a “gash,” repeating that term five times in five lines of argument. (T:1598.) In rebuttal, Nelson referred to it as an “oozing gash.” (T:1688.) They both downplayed the notion that this was really an injury from committing the murder and very well could have been from the electrical box, but argued that Simpson thought it was incriminating and therefore came up with a “group of lies” that the State had exposed. (T:1639-40, 1688.)

Postconviction discovery reveals that it is likely Hinson who fabricated, or at least exaggerated, his account to make Simpson appear guilty, and now Hinson is

caught in a group of lies. To see this, one has to look at how Hinson's account changed over time, working backwards from his 2007 trial testimony.

Over four years earlier, on September 26, 2002, Hinson prepared a report in the Crook/Kimbler investigation, which was provided to the defense before trial. (R3:3720-24, 6509, 12433-34.) This was closer to the time of the events (though still over three years after them), but it was not only after Durrance had told JSO that Simpson confessed and after the DNA test results came back connecting Simpson to the clothes, but it happened to be the very day Simpson was charged with the murders. (R1:9-10; R3:12434.) In this report, Hinson described the injury as a "rather large cut," which is probably closer to the "gash" he testified to at trial than the "scratch" Simpson claimed. (R3:3721.) The report relays that Simpson had said "he cut it on an electrical panel in his parent's garage." (R3:3721.) It said nothing about Simpson having gotten mad or that this happened at night, as Hinson testified to in trial. Competent counsel should have impeached Hinson on these details, which would have at least shown that Hinson was either exaggerating to make Simpson look more guilty or somehow had a better memory in 2007 than in 2002 of what he witnessed in 1999.

Hinson had filed a different report about these events on November 13, 2001, in another homicide investigation that appears unrelated, the Shawn Gresham case. (R3:3704-15, 12386-88.) This report had also been provided to the de-

fense and was prepared about a month after Durrance said Simpson had confessed but before the DNA test results came back. (R3:6509.) This report mentioned nothing about the cut or his interactions with Simpson that day, other than noting it was the day of the murders, that Hinson had told Williams that “Simpson could be possibly involved or have knowledge of Mr. Crook’s death,” and that he obtained a cheek swab from Simpson to check against blood that had been found at the scene. (R3:3712.) Again, competent counsel would have used this to further a narrative that Hinson’s account evolved over time to be more inculpatory as other evidence was gathered.

Unknown to Hinson who believed he had destroyed them, his handwritten notes taken at the time of these events in July 1999 were provided to Simpson in postconviction disclosures. (R3:4771-74, 12399, 12459-62.) Hinson explained that his “practice” was to transfer all material details from his notes to a typed report and then destroy the notes because everything in the notes would be in the report. (R3:12414.) He claimed that he prepared the report from his notes and would never make changes from his notes in preparing a report. (R3:12383-85, 12437.) His practice was to write notes like this on his pad as the events he was recording were happening. (R3:12461-62.) But he could not testify about exactly when he took these notes because he finally admitted that he could not remember exactly what had happened back in 1999 due to the passage of time. (R3:12461-62.)

In any event, his notes reveal that what he witnessed on July 16, 1999, was a “small cut” on Simpson’s finger. (R3:4772, 12466.) Hinson recalled that during a deposition shortly before the evidentiary hearing, when Simpson’s counsel asked him “what my definition of a small cut was, I pointed to my finger,” he pointed to a cut on his own arm.⁵⁰ (R3:12467-68.) As counsel was trying to introduce a photo taken of his finger at the deposition, the court interrupted by questioning how this would impeach Hinson because, in the court’s view, “[a] small cut is a gash.” (R3:12469.) When Hinson then denied that when he uses the words “small cut” he means a “scratch,” counsel started to show him his postconviction deposition transcript, where counsel said that he not only pointed to his finger, but defined it as a “scratch or something.” (R3:12470-71.) At this point, the court interrupted to chastise – “My next question is are you going to take the stand and testify to this, Mr. Mills?” – and then directed counsel to move to another topic. (R3:12470-71.) The next day, however, the court allowed counsel to enter the photo taken of Hinson’s cut into the record for appellate purposes, but made clear that it would not consider the photo, which it found to be “completely irrelevant.” (R3:12564-65.)

The photo vividly shows the trial court’s error – no reasonable person could describe this injury as a “gash,” much less an “oozing gash,” and it is clearly just a

⁵⁰ Having now seen the notes (he was unaware they had not been destroyed until he learned on the stand at the evidentiary hearing), he insisted that this was not how he remembered the injury from so many years ago. (R3:12468.)

scratch. (R3:4841; App. 317.) While it is obviously not intended to depict the injury on Simpson's hand, it makes perfectly clear that the words Hinson used when he saw it when combined with his own definition of those words yields a description corroborating Simpson's trial testimony and contradicting Hinson's testimony.

His notes said nothing about asking how Simpson got the cut, and the only suggestion in the notes that Hinson thought Simpson might be involved was that Williams had advised Hinson that Little Archie had indicated that Simpson or Durrance "could be involved." (R3:4772-73.) These notes strongly suggest that Simpson did not say the injury occurred at night or did anything to arouse Hinson's suspicion that day and that Hinson's subsequent reports and testimony as JSO and the State focused on Simpson revealed that his testimony was neither reliable nor true, whether based on intentional deception or faulty memory. Even if this Court were to disagree that this establishes a *Giglio* violation, the notes were *Brady* material that should have been disclosed before, not after trial.

The trial court suggested that Eler would not have impeached Hinson on this topic because it would "not support the strategy Eler formulated to present to the jury." (R3:13475.) That would not have been a reasonable strategy, however, given that Eler chose to make the cut a feature of the defense, not only by having Simpson provide his conflicting account, but also calling a witness from the power

company to corroborate it. A chance to show Hinson was not being truthful on this point was something no reasonable lawyer would ever pass on.

(2) Though less material since the Court did not rely on them in finding the evidence sufficient, the notes also undermine Hinson's testimony and Caliel's arguments in closing that Hinson had been trying to page Simpson for four hours the morning after the murders, that Hinson had not called Simpson's mother's house and only dialed Simpson's pager, and that, therefore, Simpson was lying when he said he did not receive any pages and called Hinson because Hinson had left a message with his mother. (T:653-55, 1597-98.) Specifically, Simpson testified that his mother woke him up to say that Hinson had called, so he returned the call. (T:1394.) He denied trying to avoid Hinson's calls and did not remember receiving any pages that morning, but noted that he did not use his pager very much and it may have been turned off. (T:1394-95, 1422.)

The notes produced in postconviction undermine Hinson's testimony and support Simpson's. They do not reflect the "numerous" attempts Hinson claimed he made to contact Simpson or that Hinson had only tried paging Simpson. Instead, they reflect that Hinson left a message for Simpson between 9:00 and 9:40, and he received a page back from Simpson between 10:11 and 12:30. (R3:4771-72, 12464-65.) This perfectly fits Simpson's account of laying down after breakfast and being woken up by his mother who gave him a message that Hinson had

called. And it directly contradicts Hinson's trial testimony and, more importantly, Caliel's closing argument, contrary to the postconviction court's conclusion that the testimonies were "essentially consistent." (R3:13480-81.) To whatever extent there were nuances to Hinson's testimony, the notes directly undercut Caliel's arguments that Hinson did not call Simpson's mother's house. Again, the State used false testimony and argument to support its claim that Simpson was a liar.

Finally, Hinson's report from the Gresham case, which counsel had and should have used, contradicted his testimony and the State's argument that Simpson stopped cooperating with Hinson after Hinson asked for a cheek swab to test against blood found at the scene. (T:690, 1604.) In the Gresham case, Hinson reported that Simpson "was not being cooperative in my opinion and started avoiding my attempt to contact him" as of June 22, 1999, over three weeks before the murders. (R3:3712.)

A reasonable jury could easily conclude from the notes and timing of reports that Hinson – whether intentionally or not – was remembering things years later very differently because by that time he thought Simpson was guilty. This is especially so where Williams denied that Hinson ever gave him any indication he suspected Simpson was the killer, which explains why he would not have included Hinson's innocuous notes in his report. (R3:12880-82.)

The postconviction court rested its *Brady* and *Giglio* analyses on its conclusion that the discrepancies here were not material and would not change the outcome of this case. (R3:13474-79.) But that court’s prejudice assessments improperly ignored how the State capitalized on Hinson’s testimony and the discrepancies with Simpson’s story. And once again, they demonstrate the trial court’s error in refusing to conduct a review of cumulative prejudice. It may well be that one or more or even all three of these claims would be insufficient to establish prejudice in isolation, but when considered with all the other constitutional violations and newly discovered evidence in this case, prejudice is easily shown. And if the Court finds a single *Giglio* violation, Simpson need not even show prejudice because the burden would be on the State to show no prejudice beyond a reasonable doubt.

C. Counsel Failed to Corroborate That Simpson Did Leave the Interview to Go to Work, and the State Concealed the Fact That He Told the Detectives This Before They Mentioned the Murders. (Claim 23)

The State persuaded this Court that “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.” was further evidence of guilt. *Simpson*, 3 So. 3d at 1147-48. Claim 23 asserted IAC for counsel’s failure to use available work records to corroborate Simpson’s explanation that he had to leave the interview with Bialkoski and Eason because he was late to work. (R3:1350.) And as argued below, unobjected-to evidence and argument at and after the evidentiary

hearing further showed that the State's evidence was undermined by notes the State failed to disclose before trial in violation of *Brady*.

(1) Eason testified that this occurred in a November 8, 2001, interview, when Bialkoski asked Simpson for “assistance on a case that we were working with Crook Kimbler.” (T:949.) Simpson's first response was to say, “I don't know who you're talking about,” but Bialkoski “then said Archie Crook,” and Simpson responded, “[O]h yeah, I knew Archie Crook.” (T:949.) At that point, according to Eason, Simpson “immediately looked at his watch and said, it's time for me to go, I've got to get to work.” (R3:950.) This testimony made it appear, as this Court apparently concluded, that Simpson was leaving not because he had to go to work, but because he was being asked about the murders.

Counsel knew this was an issue pretrial. Chipperfield had not only secured Simpson's work records and provided them to Eler and Fletcher, but included a notation that they showed that Simpson worked 10 hours that day. (R3:2005-06, 13218-19.) The typed to-do list in Eler's file also noted the need to handle these records on the issue of Simpson leaving the interview to go to work. (R3:3555.) Counsel was ineffective for failing to use these records to corroborate Simpson's account, as they show that he worked a 10 hour shift that day.

The trial court denied relief on this claim, crediting Fletcher's testimony that he “did not believe the work records were necessary to support Defendant's state-

ment” and that they “could demonstrate Defendant did not care about being late to work because his employer had previously written up Defendant for tardiness.” (R3:13486 (citing R3:10545-46).) The first conclusion is not a reasonable strategy – independent records are crucial for corroborating the testimony for the person being accused of a capital crime. The second conclusion misses the point. The point was that Simpson was telling the truth when he said he had to go to work – he **did** go to work. True, there was a record of a second notice and warning for being late to work on October 24, 2001, but that only explained why Simpson needed to be sure not to be late. (R3:2030.)

(2) Moreover, postconviction discovery revealed more notes that materially conflicted with Eason’s testimony. His trial testimony was consistent with reports prepared by Bialkoski and Gilbreath that had been provided to the defense. (R3:2583, 4880, 6509.) Bialkoski prepared his report on January 25, 2002, a little more than three months after the interviews, while Gilbreath’s report was prepared on December 30, 2002, over a year afterwards. (R3:12633, 12692.) But Gilbreath had not been present at the interview, and Bialkoski was the one who conducted the interview while Eason took contemporaneous notes. (R:13146-47.)

Eason’s notes, which were not produced until after the trial, revealed major omissions and discrepancies from the accounts given at trial and supported Simpson’s version of his reactions at the interviews. (R3:6477-78, 13147.) Eason con-

firmed at the evidentiary hearing, without objection, that the notes reflect that Simpson arrived at the police station at 2:30 p.m., that he told them at that time that he had to be at work at 3:30 and so did not have long to talk, but that they did not start the interview until 3:00. (R3:6477, 13147-49.) Between this information and the records confirming he worked 10 hours that day, effective counsel could and would have rebutted any suggestion that Simpson's departure was suspicious.

The trial court rejected this argument finding that Eason's notes did not sufficiently corroborate every aspect of Simpson's account as to the way he acted during the interview.⁵¹ (R3:13487.) But the bigger point is that the notes undermine the entire reason the State even referenced this interview – the notes show thirty minutes before they mentioned the murders, Simpson had told them that he could not stay long and had to go to work.

⁵¹ The trial court complained the argument about Eason's notes was "woefully insufficiently pled," but understood it to be a *Brady* claim and considered it on its merits. (R3:13486.) It would have been error to do otherwise. To whatever extent the *Brady* claim involving Eason's notes was not clearly pled, Simpson's argument was a "mere[] refinement[] and expansion[] upon arguments that had already been raised in [Simpson's] amended motion for postconviction relief" and are therefore properly considered on the merits. *Taylor v. State*, 62 So. 3d 1101, 1108-09 (Fla. 2011). Moreover, the State did not object when this evidence was presented at the evidentiary hearing, did not argue waiver in its closing argument, and did not object when Simpson made these arguments in his closing argument. (R3:9974-76, 9981-10051.) The trial court erred in refusing to accept that these issues were tried by consent. Fla. R. Civ. P. 1.190(b); *Bryant v. State*, 901 So. 2d 810, 818 (Fla. 2005).

VI. CONCLUDING POINTS ON SIMPSON'S CLAIMS

A. The Court Should Review the Foregoing Claims for Cumulative Prejudice, Placing the Burden on the State to Prove No Prejudice Beyond a Reasonable Doubt.

After the Court has considered each of the foregoing claims, it should conduct one final step to whatever extent it has not already decided relief is required. It should identify each claim for which it agrees that Simpson has shown NDE, violations of *Giglio* and/or *Brady*, or IAC and then conduct a global, cumulative prejudice review to determine whether, considered altogether, the errors establish prejudice under the most defense-friendly applicable prejudice standard. *Suggs*, 923 So. 2d at 441-42; *Mordenti*, 894 So. 2d at 174-75; *Smith*, 572 F.3d at 1334; *Gunsby*, 670 So. 2d at 924.

Because Simpson has established the first prong of his *Giglio* claims, the question should be whether the State has proven its misconduct was harmless beyond a reasonable doubt when considering the evidence presented at trial along with all newly discovered evidence and how the case would have been tried absent any *Giglio* or *Brady* violations and absent IAC. If the Court rejects all the *Giglio* claims, then the question is whether Simpson has established at least a reasonable probability – not a certainty or even that it is more likely than not – that he would be acquitted on retrial in light of all the evidence at trial and newly discovered evidence and absent any *Brady* violations and IAC.

Regardless of the standard, the conclusion should be the same – Simpson was prejudiced. The closeness of the sufficiency of the evidence in this case is highlighted not only by this Court’s opinion and by a reasonable review of the evidence presented at trial, but also by the fact that Juror Cody sought to recant her verdict based on her belief there was insufficient evidence. It bears repeating, there was no evidence of motive; to the contrary, common sense shows that Simpson had a motive **not** to kill Big Archie. He was actively working as a CI against Big Archie and others for JSO, so he knew they were being watched closely by law enforcement. There was no evidence – beyond the ambiguous DNA evidence – to rebut Simpson’s testimony that he was at his mother’s house at the time of the murders. And even though DNA, fingerprints, footprints, and even blood the State suspected may have come from an injury to an assailant were found in suspicious locations inside Big Archie’s house, not a single piece of that evidence was ever tied to Simpson. There is no more reason to think Simpson committed these murders than anyone else who knew the victims, and far more reason to think Little Archie was involved. In short, there should be a very low bar for proving prejudice on each of Simpson’s claims even before considering all of the deficient performance, prosecutorial misconduct, destruction of evidence, and newly discovered evidence established above.

Cumulative review of all of the claims should soar far above this low threshold. It should show that not only is Simpson entitled to a reversal and remand with directions to set aside Simpson's conviction, but also that the case should be dismissed because no reasonable jury could conclude, after a fair trial, that Simpson is guilty. He is an innocent man who should not only be released from death row, but exonerated for these crimes so the State can start working on solving these murders and prosecuting the real killer.

B. Simpson Concedes He Is Not Entitled to Reversal for a New Trial on His Remaining IAC Claims (Claims 2, 11, 24, 27, and 28)

Though they are meritorious and the trial court erred in denying them, Simpson rests on the foregoing argument. He has not briefed the denial of Claims 2, 11, 24, 27, or 28. And as to the claims he has briefed, he has not challenged every erroneous ruling or the denial of every aspect of those claims. He recognizes that this decision may result in his being deemed to have abandoned those claims. But to intelligently brief them would require another 100 pages of briefing and only detract from the clearly meritorious arguments raised above.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand for the trial court to dismiss the charges against Simpson or, alternatively, grant a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following counsel for Appellee by email on May 8, 2019:

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I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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