

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**

REPLY BRIEF OF APPELLANT JASON SIMPSON

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PRELIMINARY STATEMENT REGARDING CITATIONS

This brief continues with the same shorthand references to the record as the initial brief.

Simpson's corrected initial brief,¹ the State's answer brief, and the amicus brief filed by the Innocence Project & The Innocence Project of Florida are referenced as "IB," "AB," and "Amicus," respectively.

Simpson's habeas petition filed in Case No. SC19-700 is referenced as "Pet.," and the State's response thereto as "Resp."

¹ The corrected initial brief was filed on May 8, 2019, and accepted by this Court's May 10, 2019, order which struck the original initial brief filed on April 29, 2019. The original initial brief is still on the docket, however, so the reader should take care only to use the corrected initial brief.

ARGUMENT

The State has perfected no challenge of its own to the order below.² Yet it does little to defend the reasoning in that order, often countering Simpson’s arguments with points neither relied upon by the trial court nor argued below. Nor does it even address many of Simpson’s arguments or the decisions on which he relies. This brief tracks the organizational structure of the prior briefs to highlight these omissions and counter the State’s arguments. Simpson maintains his suggestion the Court dispose of Point I of the habeas petition first (appellate IAC for not briefing the insufficiency of the evidence on direct appeal), because that will either moot this appeal or at least fully prepare the Court to consider the prejudice prongs of the post-conviction claims at issue in this appeal. A fresh review of the sufficiency of the evidence is especially important here where the opinion on direct appeal only summarized a few key facts (sometimes erroneously), and only two members of the current Court participated in the decision.

² In a footnote, the State argues that the Court should reimpose the death penalty “should this Court recede from *Hurst v. State*’s requirement of unanimous jury findings and/or *Mosley*’s retroactive application of *Hurst*.” (AB 1 n.1.) This contention is improper and unpreserved. The State’s agreement below to a new penalty phase under *Hurst* was unconditional and accompanied with a promise it would not change its position, so any error was invited and unpreserved. (*E.g.*, R3:14,452, 14,537, 14,653.) Simpson also relied on the State’s concession by withdrawing his other penalty phase claims, so the State should be estopped from changing positions. (R3:1366, 10,092-93.) The State never filed a cross-appeal, and in any event, an argument made only in a footnote does not preserve the issue for appellate review. *E.g.*, *State v. Murray*, 262 So. 3d 26, 41 n.10 (Fla. 2018); *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 3d 39, 41 n.1 (Fla. 3d DCA 1996).

I. INTRODUCTORY POINTS

A. The Bar for Showing Prejudice Should Be Low.

The State misconstrues Simpson's arguments in characterizing them as "not proper arguments for post-conviction review" or as contending that the bar for prejudice should be lowered based on who the defendant is. (AB 12-13.) The points made in this section are, as the heading indicates, introductory and not free-standing claims. Simpson's point here is only that, even if the evidence were sufficient to support the conviction, it was such a close call that it should not take much to establish prejudice on Simpson's post-conviction claims.

Acknowledging that the lead prosecutor admitted the State never could prove a reason why Simpson would brutally murder one of the people he was informing against or that person's pregnant girlfriend (AB 13 (citing R3:11007)), the State's appellate counsel has come up with a purported motive for the first time on post-conviction appeal. Though not argued below and certainly not credited in the trial court's 178-page order, the State asserts that a "plausible motive" can be discerned from a passage in the State's opening statement that Simpson had learned that Big Archie knew Simpson was a CI. (AB 13 (citing T:503, 507).) Opening statements, of course, are not "the appropriate place for argument." *First v. State*, 696 So. 2d 1357, 1358 (Fla. 2d DCA 1997). The State nonetheless claims this argument was "corroborated by various witnesses" without citation to anything in the

record. (AB 13.) While there was evidence that Simpson knew that **Little Archie** had figured out that Simpson was a CI and that Simpson had advised a detective that both Big Archie and Little Archie had been putting the “word out on the street” that he was a CI (T:659, 676-77, 798), the State never explains why this was a motive to kill Kimbler at all or to kill Big Archie, but not Little Archie. Nor does it fit the violent nature of the killings, which points to an emotional motive as opposed to a calculated attempt to eliminate a threat. There was zero evidence that Simpson wanted either victim dead, and regardless, this appellate contention directly contradicts the prosecutor’s admission in his post-conviction testimony. This late and dubious suggestion of motive stands in stark contrast to the clear motive that Little Archie had for murdering not just Big Archie, but also Kimbler and her unborn baby – he was angry that Big Archie was having a baby with another woman while still married to his mother, and he told people he would kill all three of them. (T:783-85, 808-09, 1473, 1479-81, 1489-90.) This emotionally driven motive fits the violent crime scene far more closely.

The State offers a few counterarguments about the strength of the evidence that merit a brief reply. In the initial brief, Simpson argued that Durrance’s admission that he was willing to lie under oath to help get a sentence reduction rendered his testimony incompetent under sections 90.603(2) and 90.605(1), Fla. Stat. (2007), and under the reasoning of *Willis v. Romano*, 972 So. 3d 294, 295 (Fla. 5th

DCA 2008), *Wingo v. State*, 158 So. 3d 743, 745 (Fla. 2d DCA 2015), and *State v. Keyes*, 322 A.2d 615, 618 (N.H. 1974). (IB 22-23.) The State does not address, much less attempt to distinguish, any of these authorities, claiming instead that “Simpson made a similar statement in his own testimony.” (AB 16.) Even if correct,³ this would be irrelevant because it was Durrance’s testimony, not Simpson’s, that was necessary for a conviction.

Turning to the DNA evidence, the State repeats the same error this Court made on direct appeal by claiming that the victims’ blood was found on “the sweat clothes.” (AB 17.) As previously shown but ignored by the State, the record establishes that not a drop of blood was found on the sweatshirt. (IB 29-30 (comparing R3:11994, 13278 with *Simpson v. State*, 3 So. 3d 1135, 1147 (Fla. 2009)).) This is no small discrepancy. The State’s theory of the case, pursuant to the alleged confession to Durrance, was that Simpson acted alone. But if a lone killer wore those clothes while chopping the axe up and down on both victims, spraying blood all over the room, how could there be not a drop of blood found on the shirt or hat? If someone wore the clothes during the murder, they could not have swung the axe.

Finally, the State does not even address, much less dispute Simpson’s assertion that the DNA evidence was not competent evidence of guilt at all because it

³ It is not correct. Simpson made clear that he would **not** lie under oath, and the admission cited by the State was, by the State’s own clarification, “referring to somewhere other than the courtroom.” (T:1426-27.)

relied on impermissible inference stacking in violation of the holdings of numerous decisions of this Court and others. (IB 32-33 (collecting cases).)

B. The Trial Court Refused to Consider Cumulative Prejudice.

The State argues that the trial court correctly declined to perform a review for cumulative prejudice because it “did not find any errors, much less multiple errors.” (AB 20.) This is false because, as shown in the sections to come, the court rejected several claims solely on prejudice grounds. The State goes on to argue that the standard to be applied if there are multiple errors is the test for “fundamental error, not using ‘the most “defense-friendly” test for prejudice applicable.’ ” (AB 21 (quoting IB 37).) The case the State cites for this remarkable assertion, however, did not purport to apply cumulative prejudice review for post-conviction claims at all – it was a direct appeal considering claims of fundamental error. *Braddy v. State*, 111 So. 3d 810, 860 (Fla. 2012). The standard is as Simpson argued in his initial brief and will apply in Part VI below.

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

In the initial brief, Simpson embraced the pretrial strategies selected by his trial counsel, but described the lack of any meaningful investigation necessary to implement those theories, including failing to follow up on an actual checklist and related materials prepared by predecessor counsel that summarized what had been

done and what remained to be done. (IB 42-43.) It also demonstrated that even though Eler was responsible for preparing for all guilt-phase issues, he handed off some of the most meaningful trial tasks in that phase – like cross-examining Durance and putting on Simpson – to Fletcher, who was not at all prepared. (IB 43-44.) The State declined to address these issues up front, promising instead to reach them when it addressed the separate claims. (AB 22.) But it never did so.

Simpson also noted that this Court has found Eler to have rendered ineffective assistance in failing to conduct an adequate pretrial investigation in three prior decisions – *State v. Morrison*, 236 So. 3d 204, 220-22 (Fla. 2017), *Shellito v. State*, 121 So. 3d 445, 455-56 (Fla. 2013), and *Douglas v. State*, 141 So. 3d 107, 119-20 (Fla. 2012). (IB 44 n.5.) The State identifies a fourth case. (AB 22 n.9 (citing *Bevel v. State*, 221 So. 3d 1168, 1179-83 (Fla. 2017).) The only reason the State gives for dismissing this serial ineffectiveness is that Eler’s failure to prepare in the other cases affected only penalty phase issues, while this appeal is about guilt. That is not a meaningful distinction. Eler’s failure to fully prepare for so many capital trials speaks loudly. Indeed, the Innocence Projects have documented that this kind of failure is a common cause of wrongful convictions. (Amicus 13-15.)

II. IMPROPER ARGUMENT CLAIMS

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

The State mischaracterizes Simpson’s argument in this appeal as contending that “comments made by the prosecutor during closing should have been noted on direct appeal as improper argument but were not.” (AB 23.) While that claim for appellate IAC is raised in the separate habeas petition, it is **not** the claim Simpson made in the trial court or argues in this appeal. Nor is Simpson seeking direct relief based on the improper remarks themselves, recognizing that would be an argument for a direct appeal and not postconviction review. Rather, his claim here is that **trial counsel** was ineffective for not objecting to the improper arguments or at least responding to them during closing argument, a deficiency that left appellate counsel with no preserved issues at all. (IB 44-70.) This is a tremendously important distinction because this claim – as opposed to the habeas claim directed at appellate counsel – does not implicate the fundamental error doctrine. To the contrary, it would have avoided its application by definition. *See Simpson*, 3 So. 3d at 1146-47 (explaining that the fundamental error test applied on direct appeal because “no objection was made to any of the comments” below).

Thus, the arguments the State makes in its answer brief are misplaced as they claim only that the asserted comments did not rise to the level of fundamental error. (AB 24-28.) And the State’s reliance on its “detailed explanation of why

these comments do not rise to the level of fundamental error” set forth in its separate habeas response (AB 23 (citing Resp. 14-31)) does not assist the State in rebutting the claims in this appeal for the same reason. The State attempts to substitute the stringent test for fundamental error for the test that the Supreme Court of the United States has long held applies to IAC claims by arguing that because (in its view) Simpson “cannot demonstrate these comments amounted to fundamental error, ‘he likewise cannot show that trial counsel’s failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the (U.S. Supreme Court’s) *Strickland* test.” (AB 27.)

The cases the State cites for this proposition are clearly limited to circumstances where the defendant actually raised the improper but unpreserved comments on direct appeal and the appellate court found they did not rise to the level of fundamental error. *Allen v. State*, 261 So. 3d 1255, 1278 (Fla. 2019); *Chandler v. State*, 848 So. 3d 1031, 1046 (Fla. 2003). While Simpson maintains his position that those decisions are wrongly decided because the prejudice test for IAC claims is much less strict than the fundamental error test (IB 55), that should be an academic disagreement because the comments challenged in this appeal were not raised on direct appeal. This Court has expressly recognized that the *Strickland* test applies to claims that trial counsel was ineffective for failing to object to improper arguments by the State where the comments were not raised on direct appeal. *Bell*

v. State, 965 So. 2d 48, 59-61 (Fla. 2007); *see also Rogers v. State*, 957 So. 2d 538, 550 (Fla. 2007) (noting that *Chandler* holding applies “if the comments were raised on direct appeal); *cf. Sims v. State*, 967 So. 2d 148, 154 (Fla. 2007) (unanimously vacating conviction on IAC claim for trial counsel’s failure to preserve objection to prejudicial evidence for appeal). And in considering whether objections to the comments not raised in the direct appeal would have led to a new trial, the Court must consider all improper comments – even unobjected-to comments – in context instead of only reviewing each objected-to comment individually. *Braddy*, 111 So. 3d at 837.

In the initial brief, Simpson provided substantive argument as to why the State’s comments were not only improper, but have consistently led to reversals when trial counsel preserved objections to them. (IB 46-56 (citing *Martinez v. State*, 761 So. 2d 1074, 1082-83 (Fla. 2000), *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999), *Gore v. State*, 719 So. 2d 1197, 1200-03 (Fla. 1998), *Pait v. State*, 112 So. 2d 380, 384-85 (Fla. 1959), *Petruschke v. State*, 125 So. 3d 274, 280 (Fla. 4th DCA 2013), *Toler v. State*, 95 So. 3d 913, 916-18 (Fla. 1st DCA 2012), *Paul v. State*, 980 So. 2d 1282, 1283 (Fla. 4th DCA 2008), and *Pacifico v. State*, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994)).) These cases establish prejudice due to trial counsel’s failure to object to the same errors in this case, and the State does not address any of them in its answer brief. While it addresses some in its habeas

response, it attempts to distinguish them on the ground that the improper comments in those cases had been preserved by objection. (Resp. 24-25.) But that only proves Simpson's point – had counsel objected, he would have been entitled to relief.

In its habeas response, the State claims that “context” somehow justified the prosecutor asking the jury to consider “how bad of a person” Simpson was. (Resp. 25-26.) Even if it were proper to make the other remarks regarding the impact of Simpson's felony convictions and interest in the case in assessing his credibility, there was no excuse for the State to ask the jury to also consider how bad a person Simpson may have been or, as the State suggests without citation, that Simpson had also been a drug dealer. These were improper character attacks.

Also unavailing are the State's partial attempts to defend its argument below that Simpson had fabricated his testimony by reviewing depositions and conspiring with his attorneys, even though it rightly admits that it was improper to refer to Simpson's attorneys. (Resp. 27.) Claiming collusion with counsel is a clear red line that would have been sufficient alone to require a mistrial had trial counsel preserved the issue. *E.g.*, *R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53, 58-59 (Fla. 4th DCA 2016); *Johnnides v. Amoco Oil Co.*, 778 So. 2d 443, 444-45 (Fla. 3d DCA 2001); *Palazon v. State*, 711 So. 2d 1176, 1177-78 (Fla. 2d DCA 1998). And while the State is correct in noting that it is not improper to accuse a criminal de-

fendant of lying when there is evidence to support it (Resp. 24 (citing *Davis v. State*, 698 So. 2d 1182, 1190 (Fla. 1997))), there was no such evidence here.

Counsel also should have objected to or at least rebutted the many unsupported or false statements made during the State's closing. These included asserting that (1) wearer's DNA was "unheard" of in 1999 but was a "sure thing" by the time of trial and "can identify a human being at the exclusion of every other human being on the planet," (2) it was "Florida 100 degrees plus humidity heat" the night of the murders, (3) "there is no unidentified forensic evidence belonging to anybody else inside of this murder scene," and (4) that the 15 allele belonging to an unknown contributor to one of the mixtures of wearer's DNA "tells none of you anything about the identity of anyone that may have at some time in the past touched that sweat clothing." (IB 49 (citing T:1676-78, 1680, 1688).) The State offers no defense for any of these comments in its brief.

The State's habeas response addresses the last two examples, but instead of citing evidence that could support these comments or disputing the evidence cited by Simpson showing they were false, the State now suggests different arguments that the prosecutor perhaps could have made based on the evidence. As to the false statement that no unidentified forensic evidence was found, the State says its prosecutor's "point" was that "there were no tests of items from the crime scene which were still pending." (Resp. 23.) As to the demonstrably false statement that the 15

allele told the jury nothing about who could have contributed it, the State concedes that the evidence was that the allele excluded 75% of the population, but contends that its prosecutor's "point" was that this statistic was "significantly less compelling" than the statistics showing that Simpson was likely one of the contributors to the mixture. (Resp. 22.) Even if those points might have been fair comment, neither is what the State actually said.

In its habeas response, the State similarly seeks to recast the prosecutor's statement that Simpson "is asking you to engage in speculation without proof and possibilities without evidence" from being an attempt to shift the burden of proof to a mere "comment on the plausibility of the defense theory." (Resp. 23 (citing T:1688 and *Salazar v. State*, 188 So. 3d 799, 822 (Fla. 2016)).) But nothing in the comments approved in *Salazar* had accused the defense of lacking "proof" or "evidence," and the comments here were a patent attempt to shift the burden to Simpson to prove that all the unidentified forensic evidence was tied to someone other than him.

The State defends its prosecutor's arguments that Det. Hinson "was taken aback" by Simpson's actions the day after the murder and "had a feeling" Simpson was involved in the murders by pointing out that there was some evidence to support them. (Resp. 28.) It similarly defends the prosecutor's comments that "law enforcement and the State Attorney's Office would not take [Durrance's allegations]

at face value, without more” by calling them “merely summation and the drawing of reasonable inferences from the evidence presented at trial to explain the timeline of events.” (Resp. 29-30 (citing T:1614).) Whether these comments were tied to some evidence is beside the point. Even when supported by evidence, suggesting that “law enforcement and the State Attorney’s Office” believed Simpson was guilty is a red line the State is prohibited from crossing. *E.g., Martinez v. State*, 761 So. 2d 1074, 1079-80 (Fla. 2000).

The State similarly seeks to defend the prosecutor’s assurances that the State had investigated this case “for sometime [sic]” during which it “had the luxury of pretrialing witnesses, meeting them, reviewing depositions, [and] calling them when we had another question” as mere “acknowledgement and attempts to address the holes in the case” with no “allusion to evidence that was not presented at trial that supports the State.” (Reps. 30-31 (citing T:1690).) But these comments go far beyond that and indicated that the State was prosecuting Simpson not just on the evidence presented at trial, but also evidence it gathered during its pretrial meetings with witnesses and review of depositions. *See, e.g., 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.”); *Wicklow v. State*, 43 So. 3d 85, 88 (Fla. 4th DCA 2010) (improper for prosecutor to tell

jury she had interviewed witness before trial or otherwise imply prosecutor or police thought defendant was guilty).

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)

Though it recognized that the trial court’s primary reason for denying *Giglio* relief was that the State’s insinuations that Simpson was released in March 1999 “were not testimony,” the State makes no attempt to defend that rationale. (AB 28; *see also* IB 61-62, 64 n.10 (collecting cases applying *Giglio* to the State’s insinuations during cross-examination and closing argument).) Instead, the State primarily defends the result on a ground not argued below – that because the specific prosecutors at trial were “unaware” that Simpson was not released until June, there can be no *Giglio* violation. (AB 29-30.) The State cites no authority to support this argument, and it overlooks Simpson’s point that it is directly contrary to the express holding and facts in *Giglio v. United States*, 405 U.S. 150, (1972). (IB 63.)

That the specific state attorney prosecuting the case may not have actual knowledge that he is putting on false evidence or argument is of no moment when other State actors know the true facts – their knowledge is imputed to the prosecutor as a matter of constitutional law. *E.g.*, *Guzman v. State*, 868 So. 2d 498, 505 (Fla.. 2003) (citing *Gorham v. State*, 597 So. 2d 782, 784 (Fla.1992)). Citations to the record in the initial brief establish beyond doubt that others in the State Attor-

ney's Office (including then-ASA Tim Collins who arranged for the June 9 release and Caliel's own paralegal who had records showing the release date) knew the truth. (IB 60.) That knowledge is all that matters under *Giglio*. That Caliel and Nelson were only reckless in using false accusations to make it appear Simpson was lying does nothing to lessen the impact of the violation on Simpson's right not to be convicted based on false evidence.

The State's only other argument is that it can carry its heavy burden of disproving materiality beyond a reasonable doubt. (AB 30-31.) Although materiality was an alternative basis for the trial court's holding, the State declines to defend the trial court's actual reasoning. As addressed in the initial brief, the trial court's rationale was that it was immaterial how long before the murders Little Archie visited Simpson's trailer and all that was material was that "it, in fact, occurred at all." (IB 64-65 (citing R3:13461-62).) Instead of defending that rationale, the State makes two different arguments on appeal.

First, it contends that the jury had to have believed Simpson over the prosecutors because "Detective Hinson's testimony corroborated Simpson's testimony and indicated that the incident occurred in June." (AB 41 (citing T:1661).) As noted in and debunked in the initial brief, the trial court made the same suggestion in addressing the IAC claim. (IB 65 & n.11 (citing R3:13463).) The State overlooks that argument and the fact that Caliel forcefully addressed and rejected the notion

that this particular call with Det. Hinson was the one about Little Archie coming to Simpson's trailer a few weeks after his release. (See T:1643-44 (arguing that Simpson's testimony about Little Archie coming to borrow clothes was "not what we're talking about on June 21" and "was not what that conversation on June 21st with Detective Hinson was about").)

Second, the State now contends for the first time that the fact that Simpson was released when he told the jury actually "would have strengthened the State's argument regarding Simpson's motive to kill the victims." (AB 31.) As addressed in Part I.A above, the State's appellate position on motive is contrary to logic, the record, its position below, and the sworn testimony of Caliel that he never could prove motive. But even if a trial based on the true facts might have given the State a slender reed on which to argue motive, that does not disprove the materiality of the false information at the heart of the State's case. Indeed, focusing on motive serves only to show how much more likely it was that Little Archie – who had expressed a deeply emotional motive and specific intent to kill the victims and their unborn child – was the killer than Simpson.

More importantly, the State's closing argument and its own characterization of how it won this trial demonstrate why the State cannot meet its burden of disproving materiality. As detailed in the initial brief but overlooked in the answer brief, the State hammered the false March release date repeatedly throughout

Caliel's closing and Nelson's rebuttal, used it as the **only** basis for claiming that it caught Simpson "concocting" his testimony that Little Archie had taken the clothes before the murders, and called it "vitally important" and the "the most important inconsistency in [Simpson's] testimony." (IB 59 (citing T:1604, 1618-19, 1643, 1681-82).) Indeed, it was not just the repeated hammering of this false argument in closing that led to Simpson's conviction, but also the way in which Caliel used this false insinuation on cross to impeach Simpson's credibility. The State also fails to address the fact that the SAO bragged internally that "[t]he jury didn't believe [Simpson] after [Caliel's] cross-examination." (IB 62-63 (citing R3:7103).) No amount of creative argument can overcome the fact that the State relied on this one false fact as the sole means to overcome Simpson's defense to the DNA evidence.

Even if the false claim that Simpson was released in March did not amount to a *Giglio* violation, Simpson would still be entitled to prevail on his alternative IAC claim. As outlined in the initial brief, the trial court concluded that counsel had a strategic reason not to correct the State's misrepresentation because it could somehow be deemed "impeachment" of Simpson. (IB 65-66 (citing R3:13462-63).) The State makes no attempt to defend this reasoning. Instead, it relies on a conclusory statement that Simpson cannot show prejudice under *Strickland* resulting from his counsel's failure to correct the State's repeated false assertions. (AB 32.) But showing that the State was wrong and Simpson was correct on a point the State

told the jury was the key to convicting Simpson would necessarily raise at least a reasonable probability that the jury would have believed Simpson over the State.

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)

As noted and rebutted in the initial brief, the trial court denied relief on this claim based on its finding that the State's argument that Kimbler was paralyzed by the first blow was a "reasonable inference" from the evidence. (IB 69-70.) The State not only fails to defend that rationale, but affirmatively agrees that the evidence established she was **not** paralyzed by the first blow. (AB 32-33.) The only defense it offers is to argue that the evidence supported a different argument – that the axe was too long for Kimbler to have reached her killer. (AB 33.) There was no evidence to support this. The State's citation is to a question by Caliel to Durrance in which Caliel called the murder weapon a "two foot axe." (T:816.)

But even if there had been evidence that the axe was too long for Kimbler to scratch the hand holding it, the fact remains that Caliel told the jury that the reason "the evidence contradicts" the defense assertion that Kimbler was close enough to have scratched the killer was that "immediately Kimberli Kimbler was paralyzed by her blow." (T:1689.) The State has not satisfied its burden of disproving materiality under *Giglio* or that counsel was ineffective for failing to correct the State.

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

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

The State makes no attempt to defend the trial court’s primary rationale for denying this claim – that “there was sufficient evidence to convict Defendant outside of Durrance’s testimony.” (R3:13367) Indeed, it concedes Simpson’s arguments to the contrary “may be true.” (AB 15.) Nor does it dispute any of the detailed reasons Simpson gave in his initial brief as to why the evidence did not support the trial court’s second reason for denying relief on this claim – that it did not “find it credible that Durrance recanted” to Jordan and Mills in light of “inconsistent statements” he made to them and to JSO officers. (IB 73-76; R3:13367.) Nor does the State address any of Simpson’s arguments or citations of authority⁴

⁴ Since the filing of the answer brief, this Court further made clear that an out-of-court recantation can be admissible if it satisfies the requirements of section 90.804(2)(c) even where the witness fails to reaffirm the recantation at the evidentiary hearing. *Dailey v. State*, No. SC18-557, 2019 WL 4865855 (Fla. Oct. 3, 2019). In *Dailey*, this Court concluded that the trial court had not abused its discretion in applying section 90.804(2)(c) to conclude the hearsay recantation was inadmissible. 2019 WL 4865855 at *3. Here the trial court declined to apply the rule, Simpson has explained in great detail why the rule is satisfied under this record (IB 76-83), and the State has made no attempt to argue otherwise.

And just yesterday, this Court issued its decision in *Calhoun v. State*, SC18-340 (Fla. Nov. 21, 2019), addressing claims by two postconviction witnesses that another person had confessed to the murders. But there, unlike here, the trial court made a finding that the two witnesses’ accusations were “false.” As noted in the initial brief and not disputed by the State, the trial court did not find that Mills elicited false testimony from Jordan about the recants they both witnessed. And while this Court referred to the alleged confessions in *Calhoun* as inadmissible hearsay, it

showing why Durrance's out-of-court recantation would be admissible at a new trial, which refutes the trial court's final reason. (IB 76-83; R3:13367.)

Instead of addressing Simpson's arguments or defending the trial court's reasoning, the sole reason the State argues for rejecting this claim is its prediction that Durrance would refuse to testify at all at any new trial. (AB 36-37.) While Simpson has no reason to dispute the predicate of that argument, the argument only proves Simpson's case because there then would be no claim that Simpson confessed. As the State has all but conceded, that will mean that the State will have no case against Simpson because there will be no direct evidence and the circumstantial evidence was insufficient. And the very reason Durrance refused to testify in postconviction and would not testify in a new trial is his invocation of his Fifth Amendment rights. (R3:10686; *see also* IB 77-78 (explaining why his out-of-court statements to Mills and Jordan expose him to criminal liability).)

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

In the initial brief, Simpson argued that testimony from former ASA Laura Starrett as well as Simpson's original counsel, Alan Chipperfield and Gonzalo Andux, that Caliel told them he did not believe Durrance's account established a *Giglio* violation. (IB 84-86.) The State does not address this argument, much less

did not address section 90.804(2)(c), Fla. Stat. Again, the State does not dispute Simpson's arguments that Durrance's hearsay recantation would be admissible.

purport to point to any competent, substantial evidence in the record that would allow the trial court to reach a contrary conclusion. Nor does it dispute Simpson's legal argument that a prosecutor violates *Giglio* when he secures a conviction based on evidence he does not believe. (IB 87.)

The initial brief next argued that the State knew that Simpson could not have entered Big Archie's house through either the laundry room window as Durrance testified or through the north rear door as Caliel alternatively argued in closing. (IB 88-91.) The State does not dispute either contention, and its only counter-arguments are that Durrance "was cross-examined by defense counsel on inconsistencies in his testimony, such as the impossibility of the claimed point of entry" and that "[p]rior inconsistent statement challenges and contrary testimony by other witnesses alone are insufficient to demonstrate perjury." (AB 38 (citing *Hernandez v. State*, 180 So. 3d 978, 994 (Fla. 2015)).) Neither argument has merit as to the crucial issue of how the killer(s) entered the house. These were not mere "inconsistencies" in a witnesses recollection as was the case in *Hernandez*, they were clear facts that conclusively refute specific factual assertions by Durrance and Caliel. Moreover, they were not the subject of cross-examination – the jury had no way of knowing either assertion was false.

Simpson also asserted a *Giglio* violation based on Durrance's testimony that the State had not provided or promised him any benefits at all in consideration of

the information he was providing against Simpson because (1) Caliel had, in fact, specifically promised to personally support a sentence reduction in exchange for Durrance's testimony, (2) Caliel had provided an earlier benefit by granting Durrance's request that he have Durrance transferred to a prison closer to home, and (3) the State had dropped its initial demand for a life sentence but reduced its demand to 45 years because it agreed to recommend a lower sentence in consideration for information he had provided about several murders specifically including these murders. (IB 100-05.)

The State does not deny that Caliel had, in fact, promised to support the reduction, so that aspect of the *Giglio* claim is established without opposition by the State. As to Simpson's arguments that the State knew Durrance was lying when he said he had not received any benefits before his testimony, the answer brief responds with a conclusory and vague sentence suggesting Simpson failed to prove Durrance received any benefit. (AB 39.) But the State fails to address the specific evidence cited in the initial brief establishing Caliel's role in granting Durrance's request for a prison transfer, Starrett's reduction of the State's original sentence request from life to 45 years, and Graham's agreement to advise the sentencing court about Durrance's assistance in this and other cases. (IB 101-04.) Accordingly, the State bears the burden of disproving materiality on these points.

The State attempts to meet this burden by arguing that the benefits provided and promised by the State in exchange for Durrance's testimony were immaterial because Durrance had admitted that one of the reasons he was testifying was that he hoped that he would receive a sentence reduction. (AB 39.) To state the argument is to refute it. The fact that he admitted that he was testifying in hopes of getting a reduction proves that the State's false evidence that no benefits had been given or promised was extremely material. Absent a reason to believe he had received or would receive a benefit for testifying, the fact that he was testifying in the hope of getting benefits did little to impeach his credibility. Why else did Caliel repeatedly have Durrance confirm on direct and redirect that he had not received or been promised anything? Durrance's credibility was central to the State's case.

The State ignores most of Simpson's *Brady* arguments offering no reason for the Court to reject the arguments in his initial brief that the State violated *Brady* by withholding: (1) Officer Barker's notes and Det. Eason's report of the October 1, 2001 interview where Durrance first claimed Simpson had confessed, which revealed at least eight material inconsistencies with his trial testimony several years later (*see* IB 91-99 (detailing this evidence and how it was inconsistent in *Giglio* argument), 105-06 (incorporating and amplifying those arguments into *Brady* argument)); (2) materials in the State's possession demonstrating that Durrance was aware that the State knew he was guilty of at least accessory after the fact in the

murder of Keith Cauley and believed that he was directly responsible for that murder as well as the murder in this case, one or two other murders in Jacksonville, and the murder of Michael Schmedes in Palm Beach (IB 109-12); (3) the wiretap application from which Durrance learned that Simpson had not only provided information about his drug dealings, but also accused him of committing a home invasion by entering a window and that Durrance had threatened to kill Simpson if he ever talked to the authorities (IB 112-13); and (4) materials in the State's possession indicating that Durrance had retaliated against others who had informed on him (IB113-14). The State makes no attempt to defend the trial court's rejection of these allegations or otherwise show that Simpson is not entitled to relief on them.

Instead, the State focuses on Simpson's arguments that the State violated *Brady* by not disclosing the letters by former ASA Starrett and Lt. Graham. (IB 106-09.) These counterarguments are easily rebutted. First, the State contends that because Durrance was already impeached at trial on entirely different grounds, "any additional impeachment materials from these letters is immaterial" (AB 40), but it cites no authority for that proposition, and any additional information that would have further impeached Durrance was clearly material since the jury could not have convicted Simpson if it disbelieved Durrance. Second, the State contends that the Starrett letter was not *Brady* material since she was a private citizen at the time she wrote the letter (AB 40-41), which ignores the fact that the inculpatory

letter was in the State's possession and therefore did trigger *Brady*. Third, the State relies on *Duest v. State*, 12 So. 3d 734, 745-46 (Fla. 2009), for the proposition that an internal memo between prosecutors expressing opinions on cases can never be *Brady* material (AB 41), ignoring the fact that the initial brief showed the holding in *Duest* is easily distinguished as it referred to a memo that merely indicated that the case was "borderline on sufficiency of the evidence." (IB 115.) Fourth, the State claims that "the majority of the value [of the Graham letter] is undermined in the rest of the letter" (AB 42), but the State points to nothing in the letter that undermines any point helpful to Simpson. Finally, it argues that the letters were "cumulative" to impeachment at trial (AB 42), even though Durrance was not impeached about any matter raised in either letter.

As to Simpson's claim that the State withheld evidence of the benefits that Durrance had been afforded and promised in exchange for his testimony (IB 107), the State contends that Simpson's counsel should have obtained this information on their own. (AB 42-43.) But this Court's precedents that "evidence was not 'suppressed' where it was equally available to the State and the defense" are not as broad as the State suggests; they only apply where the defense is aware the evidence contained information helpful to the defense. *Way v. State*, 760 So. 2d 903, 910 (Fla. 2000); *see also Floyd v. State*, 18 So. 3d 432, 451 (Fla. 2009) (State did not suppress a tape with exculpatory information because defendant "was aware of

the existence **and content** of the taped interview” (emphasis added)). The State points to no reason that defense counsel should have suspected that the State would present evidence and arguments belied by Durrance’s sentencing records. Moreover, the Supreme Court of the United States has long made clear that the State’s duty to disclose exculpatory or impeaching evidence “is applicable even though there has been no request by the accused.” *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)).

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

The initial brief asserted IAC for counsel’s failure to discover and use three categories of evidence to impeach Durrance. First, Simpson argued that counsel was ineffective for failing to obtain Durrance’s sentencing transcript or deposing Det. Bates, Officer Barker, or Lt. Graham, all of which would have led counsel to discover much of the impeachment material addressed under the *Giglio* and *Brady* claims discussed above. (IB 117-18.) Even though the State defended those claims on the basis that Simpson’s counsel could have obtained these materials, it offers no defense of Simpson’s claim that this shows his counsel were ineffective for failing to do so.

Second, the initial brief argued counsel was ineffective for failing to use available photographs and other evidence to show that nobody could have entered the laundry room the night of the murders as Durrance claimed at trial. (IB 118-

19.) The only defense offered by the State to this claim is the same reason given by the trial court – that counsel were effective at trial in showing that nobody could have entered the kitchen window as Durrance had claimed before trial. (AB 44 (citing T:903-08).) But as shown in the initial brief but overlooked in the answer brief, counsel made no attempt to prove that Durrance’s trial testimony – i.e., the testimony the jury had to believe to convict Simpson – was impossible. (IB 89 (citing R3:3073, 3092, 3096, 3098, 3100, 3102, 3104, 11514-24, 12894-95; App. 310-16).) Though it would have been easy to show that nobody could have entered the laundry room window, counsel failed to do so, and neither the trial court nor the State have ever offered any valid reason to excuse that failure.

Third, the initial brief argued counsel were ineffective for failing to use available forensic evidence, which could have included testimony from a crime scene expert, to argue that Durrance’s testimony (and the State’s theory of the case) that there was a lone killer was impossible. (IB 119-23.) The State tries to defend the trial court’s rationale that it was proper strategy for counsel to avoid consulting with a blood spatter expert because the expert “may have developed further evidence that implicated Simpson.” (AB 45.) This relies on pure speculation as there is zero evidence to suggest blood spatter analysis could have implicated Simpson. More fundamentally, the danger of uncovering damaging evidence that would not have to be disclosed to the State is never a reasonable basis for failing to

conduct a thorough pretrial investigation, including consulting with experts. If a generalized concern that investigating or consulting an expert might turn up damaging information were a reasonable basis not to proceed, then counsel could never be found ineffective for failing to investigate or consult. The law is to the contrary. (See IB 40-42 (collecting cases).)

The State cites no authority to support this argument. To the contrary, the only case it cites demonstrates precisely why it would not matter if the expert did develop incriminating opinions. In *Andrews v. State*, 243 So. 3d 899, 901-02 (Fla. 2018), this Court recognized not only that the State cannot learn the opinions of an expert consulted by the defense who is not testifying, but also that the defense can seek appointment of that expert *ex parte* so the State does not even know “the reasons why this [expert] may be of value to the defense.” While the decision broke new ground in applying this concept to pro bono counsel seeking public funds for the appointment of an expert, it recognized the longstanding rule for indigent defendants, like Simpson, represented by counsel provided by the State. *Id.* (citing *Andrews v. State*, 218 So. 3d 466, 472 (Fla. 1st DCA 2017) (Wolf, J., dissenting)).

Moreover, the State offers no response to Simpson’s argument that, even without an expert, counsel should have argued it was impossible for the person who wore that sweatshirt and hat to have committed the murders alone without getting blood on them. Eler conceded this point at the evidentiary hearing when he

(mistakenly) suggested he had done this in his closing argument. (IB 121-22 (citing R3:10148-50).)

The State never disputes that the evidence in this case fully supports – if not compels – the conclusion that the person wearing those clothes could not have swung the axe. Instead, the State embraces that fact, but argues that it “supports the theory that Simpson had a co-perpetrator.” (AB 46.) But that is not only a theory the State never advanced, it is also directly contrary to the State’s theory of the case. Moreover, it disproves the only direct evidence in this case – Durrance’s testimony that Simpson confessed to killing the victims alone – and supports Eler’s defense theory that “Durrance’s testimony didn’t match the physical evidence.” (R3:10154.) In other words, had this been shown at trial given the State’s other evidence and arguments, there would be no direct evidence and an acquittal would have been required. *See, e.g., Hildwin v. State*, 141 So. 3d 1178, 1181 (Fla. 2014) (granting relief even though it might be possible for State to obtain a conviction under a different theory in a new trial because “[t]he State cannot now distance itself from the evidence and theory it relied upon at trial,” nor can this Court “turn a blind eye to the fact that a significant pillar of the State’s case, as presented to the jury, has collapsed and actually supports the defense theory ... presented at trial”).)

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)

As did the trial court, the State refutes this claim only by altering it. The claim is that the State committed a *Giglio* violation when it argued that Simpson entered through the unlocked north rear door and that counsel was ineffective for failing to show that was false because the door was locked and Simpson had no key. Both claims rely on the fact that the State and defense counsel knew from Thompson's deposition that the north rear door was locked shortly after Little Archie and Smallwood left the house. As the State correctly notes, the two men's testimony could be reconciled if Big Archie or Kimbler locked the door after he left. (AB 48.) But that only demonstrates why Simpson is entitled to relief.

Thompson's testimony may not have conflicted with Little Archie's, but it disproved the State's theory of the case that Simpson entered through that door. In short, the reason Thompson's testimony on this point would have disproved the State's theory of the case is that if Big Archie or Kimbler had locked the door after Little Archie left, Simpson could not have entered it. The position of their bodies demonstrates they were in bed when they were killed and, therefore, could not have let their killer(s) in or locked the door after the killer(s) left. There was no evidence Simpson had a key. But Little Archie did, so he was the only one who could have locked or unlocked it other than the victims.

IV. CLAIMS UNDERMINING THE STATE'S DNA EVIDENCE

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

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

Having abandoned other parts of this claim, Simpson has challenged the trial court's rejection of his *Brady* claim based on the State's failure to disclose that Little Archie was serving as a CI against Durrance and even told Caliel that Durrance had confessed to murdering Schmedes. He argued this was exculpatory for two reasons: (1) it would have bolstered the defense attack on the State's failure to fully investigate Little Archie as a suspect by showing that the State was receiving other benefits from him it did not want to jeopardize (IB 127-28; *see also* T:1670-74 (Eler's closing argument noting multiple failures to seriously investigate Little Archie and questioning why)) and (2) it would have impeached Durrance or even dissuaded him from testifying at all once he learned in deposition that Little Archie had told Caliel he confessed. (IB 127-28.) Though it bases its counter-argument on materiality and prejudice, the State has no response to either argument.

Instead, it builds and attacks a strawman argument that the relevance is limited to whether his history as a CI could have been used to impeach Little Archie's credibility. (AB 50-51.) If that was the evidence's only relevance, the State's argument that Simpson had to prove some benefit might be responsive. But it would still be meritless because the benefit Little Archie received as that JSO did not ful-

ly investigate him as a suspect despite all the evidence pointing to him. Case law recognizes that the threat of a criminal investigation provides an incentive for a witness curry favor through biased testimony in favor of the State. *Fulton v. State*, 335 So. 2d 280, 283-84 (Fla. 1976); *Morrell v. State*, 297 So. 2d 579, 580 (Fla. 1st DCA 1974). (See also R3:10640, 10674-75 (Nelson recognizing *Brady* obligation to disclose when a witness is under suspicion because of this risk).) And even if the relevance of this evidence were limited to impeaching Little Archie, the State's argument that Little Archie was impeached in other ways (AB 51) would fail because it fails to account for the cumulative impact of this evidence with the other impeachment evidence that was presented at trial plus all the other evidence raised in this appeal that further points to Little Archie as more likely than Simpson to have participated in these murders.

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

Claim 5 asserts that the State, FDLE, and the Duval County Clerk's Office (collectively, the "evidence custodians") deprived Simpson of due process when they failed to fulfill their statutory duty to preserve the evidence in this case under section 925.11(4) of the Florida Statutes. The State argues first that because section 925.11(4)(a) contains no specific guidelines for how to maintain evidence for which postconviction DNA testing may be requested, it merely imposes a general duty to "maintain any physical evidence." (AB 52.) Notably, the State does not

contest any of Simpson's allegations about the conditions under which the evidence was stored and handled by the custodians, nor the fact that such handling led to the contamination of the shoes, hat, and axe⁵; the evisceration of the fingernail extracts; and the degradation of biological material on the clothes. *See* IB 134-46. Rather, the State argues only that the custodians' handling of the evidence did not violate their duty under the statute.

The State's application of the term "maintain" as essentially imposing no duty other than to hold onto the evidence, which is consistent with the trial court's approach, *see* R3:13374, ignores the plain language of the statute. First, the statute does not just impose a duty to "maintain." Indeed, the heading of subsection (4) is "**Preservation** of evidence[,]" § 925.11(4), Fla. Stat. (2001) (emphasis added), not 'Maintenance of evidence.' Neither the trial court nor the State make any attempt to address, let alone rebut, the ordinary meaning of "preservation" asserted in Simpson's Initial Brief. *See* IB 132-33. They also fail to acknowledge the other references to "preservation" in section 925.11 or the legislative history Simpson presented to the trial court and in his brief making it clear that the Legislature in-

⁵ Any effort to contest the State's handling of the evidence and its resultant contamination would be unavailing in light of the State's concession at the evidentiary hearing, through Nelson, that the State had knowingly exposed the evidence to contamination at trial. When asked whether she provided notice to Simpson or the Attorney General or defense counsel that her agency "was planning to expose th[e] evidence to other people's DNA during trial[,]" R3:10633, Nelson did not challenge the premise of the question, answering simply, "His lawyers were with us during trial." (R3:10633.)

tended to impose a duty on custodians to preserve the scientific integrity of evidence that may be subject to future DNA testing. *See* §§ 925.11(4)(b)-(c), Fla. Stat.; R3:7088-97 (Florida Senate Interim Report); R3:7084; App. 347 (Senate Staff Analysis and Economic Impact Statement); IB 133-34.

Second, Simpson’s claim is not that the statute requires certain “exact conditions” for maintaining evidence, just that the evidence must be maintained in such a way as to preserve as much of its evidentiary value for DNA testing as possible. Here, the plain meaning of the terms “maintain” and “preserve” provide the necessary guidance for the extent of the custodians’ duty. The term “preservation” imposes a duty on evidence custodians to 1) “keep safe from injury, harm, or destruction: protect”; 2) “keep alive, intact, or free from decay” or “maintain”; and 3) “keep or save from decomposition.” Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/preserve>.

As the definitions for preservation above demonstrate, the term “maintain” requires the same standard of care, not a lower one, as suggested by the State and the trial court—the term is, in fact, offered as one of the definitions of “preserve.” Merriam-Webster defines “maintain” in pertinent part as: “to keep in an existing state (as of repair, efficiency, or validity): preserve from failure or decline.” <https://www.merriam-webster.com/dictionary/maintain>. Thus, section 925.11(4) imposes on custodians a duty to store biological evidence in such a way that it will

remain safe from injury, harm, decay, and decomposition such that its validity will be maintained. And, of course, without such requirement, the right to DNA testing would be entirely meaningless.

To be sure, the statute does not specify *how* the evidence custodians should protect evidence from decomposition, contamination, or other harm but, rather, simply that it must. The fact that the Legislature has decided to leave it to the custodians, with guidance from statewide trainings on how to handle scientific evidence, to determine how best to preserve evidence for DNA testing (R3:7094), does not relieve the custodians of their duty to do so. And what Simpson is sure of is that allowing the evidence to be handled by numerous lay people without gloves is *not* among the strategies that can properly fulfill such duty.

Moreover, the State's position that it has no duty to preserve the integrity of biological crime scene evidence in its custody is directly contrary to its position during the investigative stage of Simpson's postconviction proceedings below, when he sought to have expert Janice Johnson examine the evidence being stored at the JSO warehouse. Despite Ms. Johnson's extensive training in examining forensic and biological evidence (R3:11716-19, 3339-87), Caliel told postconviction counsel he would not allow Johnson to handle the evidence at the warehouse unless counsel waived any request for future DNA testing first. Caliel explained later at the postconviction hearing:

The evidence that you were looking at was evidence that was collected by the Sheriff's Office that was kept in the property room and that had never been tested before by anyone. And I did not want there to be this evidence opened up in a non-sterile setting and then five years from now somebody claiming, oh, we want to go test this piece of evidence and they get, you know, one of the ET's DNA off the evidence because they forgot to clean the table properly or something of that nature. This particular evidence had never been tested before. . . . [If] there was potential for that evidence which has not been tested before to be tested for potential DNA purposes, then it should be done in a laboratory setting.

(R3:11125.) Caliel maintained that opening the evidence in a non-sterile environment like the JSO warehouse could compromise its “integrity,” even if it was to be handled by a forensic expert like Johnson. (R3:11125-126.)

Due to the State’s herculean efforts to protect the integrity of the evidence, Simpson had to move for a court order to allow Johnson and his DNA expert to examine it (R2:576-600), which the State, of course, opposed (R2:989-995). The trial court denied the motion (R2:1768-79), and Simpson appealed to this Court, which ultimately ordered that his experts be given access to the evidence, *Simpson v. State*, 117 So. 3d 412 (Fla. 2013).

Caliel testified at the evidentiary hearing that he was only trying to protect the evidence at the JSO warehouse because it had not been tested by FDLE or the defense. He did not have the same concern about the evidence that was admitted at trial and subsequently stored after trial at the Clerk’s office because “[t]hat had al-

ready been tested and submitted” and the defense had had the opportunity to test it prior to trial and “chose not to do so.” (R3:11125-126.)

But Section 925.11 requires preservation of *all* evidence collected in a criminal case that could yield DNA results in the future, whether previously tested by the parties or not. See 925.11(2)(a)(2) (providing that a motion seeking postconviction testing must include, “A statement that the evidence was not previously tested for DNA or *a statement that the results of any previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques would likely produce a definitive result. . . .*”) (emphasis added). Nelson herself understood the reason for this. She worked regularly on cases involving DNA evidence at the time of Simpson’s trial and “had a good working command” of the technology. She was aware that advancements in DNA technology could yield results in DNA testing that previously could not be obtained and explained that the advancement of STR testing could yield DNA profiles from smaller and more degraded samples than its precursor, RFLP testing. (R3:10584-85.) (“[F]requently I was involved in cases where forensic samples had been submitted for RFLP testing and had not revealed results but when subjected to STR testing, in fact, did[.]”).

The State’s cavalier handling of the most critical evidence in this case before and during trial, and its contention now that it has no statutory duty to preserve or maintain the biological material on evidence collected at crime scenes, flies in the

face of the extreme precautions the State took to prevent Simpson's expert from accessing the evidence in postconviction based on the risk that she would be contaminate it. When considered in light of the plain language of section 925.11(4), as well as what Caliel himself believed he had to do to preserve the untested evidence in postconviction, there can be no doubt that the State deprived Simpson of statutory due process when it 1) broke the chain of custody by allowing an artist with no forensic training in the handling of biological evidence to take the evidence home to his house to assemble trial displays that left the hat, shoes, and axe easily exposed by lifting the now-missing foam lids on them, and provided access to the other biological evidence via non-secure "access" doors (11555-56, 11572, 11574, 11577, 11588, 11794-95 (referencing photos 51-2), 11797 (referencing photos 61-5), 11799 (referencing photos 70-2)); 2) stored the evidence at the non-sterile SAO office prior to trial (R3:10593-94); 3) allowed untrained ASAs to handle the evidence—including the exposed hat, shoes, and axe—without gloves during trial (R3:10594-95, 10615); and 4) allowed the exposed/accessible evidence to go back to the jury room during deliberations where no limitations were placed on them about whether or how they could handle the evidence (T:1713; R3:10600, 11677).

The Clerk's Office also breached its duty under the statute when: 1) it stored the sweatclothes, which contained biological material, in a non-temperature controlled vault (R3:11783, 11785); 2) it stored trial displays containing DNA ex-

tracts, standards, slides, hairs, the axe, cuttings from the clothes, hat, and shoes, and other items containing biological material, some without wrappings of any kind, in unsecured areas throughout the Clerk's Office, including in a file room that had visible mold growing on the ceiling (R3:11617-621, 11645, 11782, 11785 (referencing photos 21-4), 11787-88, 11794 (referencing photos 48-9), 11796-99 (referencing photos 60 and 66-69), 11801-802 (referencing photos 80-1), 11805-806 (referencing photo 92-5), 11809 (referencing photo 107)); 3) Assistant Clerk Cole handled the evidence, including the unprotected axe, shoes, and hat, without gloves on a non-sterile desk (violating Clerk's office protocol), and even dropped some of the evidence on the floor in the process (R3:11791 (referencing photos 39-40), 11799 (referencing photos 70-2), 11807-08 (referencing photos 100-04), 11811-12 (referencing photos 113-15), 11816, 11817 (referencing photos 139-40)).

Finally, FDLE breached its duty under the statute when it stored the DNA extracts of fingernail scrapings from the victims in tubes that do not prevent the binding of DNA material to their walls, *against* the manufacturer's recommendation. (R3:12251, 12253.)

On a related note, the State overstates the breadth of the trial court's findings pertaining to this claim when it cites to the court's order below. Specifically, the State references *all* of the court's treatment of Claim 5, including portions that address Simpson's now-withdrawn *Youngblood* claim, as relevant to the court's rul-

ing on the statutory due process claim. (AB 51 (citing R3:13368-84 as representing the court’s holding “that the evidence was maintained as required by the statute.”)). But the two claims are distinct—a *Youngblood* due process claim requires a showing that the State destroyed the evidence in bad faith, while the statutory due process claim does not. The trial court’s order focuses primarily on this issue of bad faith and its treatment of the statutory due process claim is decidedly more brief than the citation provided by the State suggests. Indeed, the trial court expends just slightly more than two pages addressing the statutory due process claim. See R3:13374-75, 13383-84.

However, because the State seems to be suggesting that the findings strewn throughout the trial court’s order pertaining to the *Youngblood* claim may be relevant to this Court’s resolution of the statutory due process claim, a particularly unwarranted finding in the *Youngblood* reasoning is worth mentioning. In denying Simpson’s *Youngblood* claim, the court relied in part on the fact that Simpson has not proven that the jury handled and contaminated the evidence. See R3:13380. This is largely a red herring because whether or not the jury did so, the record is undisputed that Nelson and Caliel handled the exposed hat, shoes, and axe in court without gloves and therefore contaminated them regardless of the jury’s actions. See IB 138-39. Notably, the trial court did not address the undisputed testimony about the ASAs’ improper handling of the evidence anywhere in its order, and the

State has not contested it in its answer; thus, the Court must accept it as true as long as it agrees that the record supports it.

The record is clear that the jurors were given access to the evidence during deliberations. Indeed, they were told they could eat lunch in the courtroom where the unprotected evidence was spread out for them, and they were not given any instructions to restrict their handling of the items.⁶ In this context, it is difficult to imagine that none of the jurors would have picked up or otherwise handled the entirely exposed axe, hat, or shoes, thereby contaminating the evidence.

Without interviewing the jurors, there is no way to know for sure if they did so. Testing is not an option because if it revealed partial DNA profiles, there would be no way to know if they belonged to suspects, jurors, bailiffs, or ASAs. Thus, Burley, Johnson, and Word all testified that testing the items would be of no value

⁶ The trial court instructed the jury as follows:

[W]e're going to take all of the exhibits and we're going to take them around to that courtroom and we're going to place them in there for you. And we're also going to – your lunch should be here by now. There is a jury room off to the side of the courtroom you're going to be in and your lunch is going to be in there. There's only seven or eight chairs in there, but there's a central table your lunch will be on. So you can go in there and get your lunch and spread out in that courtroom or some of you can stay in the jury room. Whatever you want to do, it's up to you.

(T:1713.)

at this point.⁷ Worse, such testing could falsely implicate Simpson if partial profiles identified were consistent with his DNA but actually belonged to one of the many other people who could have handled the evidence after the murders. Even a full profile matching Simpson would be suspect, as any one of the handlers could have unknowingly transferred Simpson's DNA from the sweatclothes or his DNA standard to the hat, shoes, or axe. His fears of contamination are well-founded, as Burley found that the single-profile DNA reference standards for Big Archie, Little Archie, Kimbler, Smallwood, and Durrance all contained "a low level of contaminate" in them. She was specifically able to identify "a little bit of male DNA" in Kimbler's reference standards.⁸ (R3:12256-57.) These standards were kept in stor-

⁷ (See R3:11819 (Johnson testifying that the axe, shoes, and axe are unsuitable for DNA testing because they were in an "open display and multiple people had access" to them), 11800 (Johnson testifying that she examined the axe with an alternative light source and found no sign of blood on it, nor did she observe the amount of fingerprint powder or dye staining that would normally be evident after lab testing), 11819-20 (Johnson testifying "There's no way I would rely on any evidence that came off of the axe" and observing that it appeared to have been "wiped down" because of how clean it was), 11776-77 (Johnson testifying that in the thousands of cases involving DNA evidence in which she has been involved, she knows of none in which the jury was permitted to have physical access to exposed evidentiary items), 12193-194 (Word testimony that she recommended testing the clothes but not the shoes, hat, and axe because of the risk that they had been contaminated in light of how they were displayed at trial and handled in the case), 12238 (Burley testimony that she recommended against testing the shoes, hat, and axe because she was concerned that the way they had been stored left the potential that they were contaminated).)

⁸ This contamination did not hinder Burley's ability to generate profiles of each suspect and victim from their reference standards because the extraneous

age tubes, so they were far more protected from contamination than the hat, shoes, and axe, which were entirely exposed to handling by any number of people.

Thus, while Simpson cannot prove that the evidence was handled by the jurors, or any other specific person, that cannot be his burden in order to prove that his right to due process has been violated. He has demonstrated that the State gave untrained lay persons access to unprotected biological material that it had a duty to protect for future testing.⁹ In doing so, the State deprived Simpson of being able to

peaks were entirely distinguishable from the major peaks that were attributable to the donors. (R3:12257.) Because reference standards, by definition, are intended to contain DNA from just one donor, Burley knew that the extraneous DNA peaks were from a contaminate rather than a minor contributor of relevance to the offense. But had she taken samples from the hat, shoes, or axe and identified mixtures, she would have had no way of knowing whether the minor peaks were from DNA deposited by an unidentified suspect or by one of the many of the lay people who improperly handled the evidence prior to, during, and after trial. This is precisely why Simpson did not to test the evidence that was completely unprotected from contamination by the employees of the SAO and Clerk's Office, as well as the jurors and bailiffs.

⁹ The trial court's recitation of the facts for this claim also takes Simpson to task for speculating as to whether another untrained lay person may have contaminated the evidence—the State's forensic artist, McMillian. (R13380.) But the trial court engages in its own speculation, suggesting that because McMillian took all necessary precautions to protect the evidence in his home—keeping the evidence in a “locked storage closet for evidence,” wearing gloves and changing them in between items, and putting the items on brown paper, which he changed between items—he would not have contaminated the evidence. *See* R3:13378 (citing 11545-48, 11554, 11557).

This speculation is belied by McMillian's testimony and actions in court. The “locked storage closet for evidence” in his home was actually just a non-sterile closet to which his wife also had access. (R3:11549.) And although McMillian did assure the trial court that he changed his gloves between handling items to prevent

test the evidence to exonerate himself. Again, when Caliel himself stopped post-conviction expert Janice Johnson from examining the evidence at the JSO warehouse in 2011, he made clear the importance of releasing evidence only to trained forensic experts under conditions that will preserve their integrity. (R3:11125-26.)

Next, the State argues that because Simpson has withdrawn his *Youngblood* claim and raises only a statutory claim pertaining to the destruction of evidence in this case, “he is not alleging a due process violation” and, therefore, “any error is harmless.” (AB 52-3) (citations omitted). Thus, the State asserts, a new trial is not an appropriate remedy. Instead, the Court should order “remedial training to agen-

contamination (R3:11552-53), his in-court application of this practice was far from fastidious because he clearly lacked a basic understanding of how contamination occurs. In the middle of his testimony, he reached to pick up an evidentiary item after resting his hand on the witness stand. Postconviction counsel had to stop him from touching the item and inquired as to whether he had changed his gloves:

McMillian: I didn’t touch anything after the axe and I changed after the axe.

Rudenstine: You have your hands on the counter. . . .

McMillian: Oh.

(R3:11572.) If McMillian made that error in court, there is no reason to believe he didn’t make it over and over again when handling the evidence in the comfort of his own home without anyone watching. Simpson should not have to prove that McMillian didn’t change his gloves—he cannot prove that. It should be enough that McMillian, whose name does not appear on JSO’s chain of custody documentation (R3:11773), and who has no training in handling biological evidence, took the evidence home to his house at the State’s request.

cies on their duty to ‘maintain’ the evidence.” (AB 53.) Each of the State’s arguments fail.

First, Simpson’s statutory claim alleges a due process violation based on the State’s failure to adhere to the requirements of section 925.11(4). *See* IB 147 (“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.”). This is an ordinary, statutory due process claim of the sort that Florida courts have recognized for decades. *See, e.g., Williams v. Cochran*, 126 So. 2d 887, 888 (Fla. 1961) (“We have held that failure to comply with the provisions of Section 932.38, *supra*, constitutes a deprivation of statutory due process which will invalidate a conviction following upon such non-compliance.”) (citing *Kinard v. Cochran*, 113 So. 2d 843, 843 (Fla. 1959) (ordering the immediate release of juvenile petitioner where the court failed to comply with requirements of the parental notice statute)); *Sanders v. Sanders*, 351 So. 2d 1126, 1126 (Fla. 2d DCA 1977) (recognizing a statutory right to due process established by section 64.071 of the Florida Statutes and dismissing final judgment in divorce action because court did not follow the statute’s procedural requirements for petition); *Rankin v. Rankin*, 258 So. 2d 489, 492 (Fla. 2d DCA 1972) (reversing division of real property where pleadings below failed to comply with due process requirements of § 64.091 requires); *Lake Hosp. & Clinic, Inc. v. Silversmith*, 551 So. 2d 538, 544 (Fla. 4th

DCA 1989) (holding that although the plaintiff could not prevail on a constitutional due process claim against his private employer, section 395.065 of the Florida Statutes provides a statutory due process right for workers against the deprivation of worker privileges by private entities); *T.T. v. State*, 932 So. 2d 614, 614 (Fla. 5th DCA 2006) (recognizing a statutory right to due process when juvenile was not given an indirect criminal contempt hearing within 24 hours as required by section 985.216(4)(b) of the Florida Statutes and ordering his immediate release).

Next, the State's assertion that any violation of section 925.11(4) is harmless simply because Simpson's claim is based on a statutory, rather than a constitutional, right to due process is nonsensical and unsupported by any case known to undersigned counsel. The Court need only look at the cases cited above to see that statutory due process violations are often anything *but* harmless, and can lead to the most severe sanctions, including dismissing charges against a defendant and/or reversing a conviction. Moreover, the State itself has acknowledged the truth of Simpson's assertion that the "circumstantial DNA evidence in this case was not strong, and without it, the State would not have proven the case against Simpson." (AB 17) (conceding that the assertion "may be true"). If Simpson could test the hat or shoes, both of which he denied owning or wearing, and Little Archie's or Smallwood's DNA were identified on them, no one could say the error was harmless. The same would be true if Little Archie's profile matched the DNA under

Kimbler's fingernails, or one of the many degraded, partial profiles on the sweat-clothes that Burley found belonged to one or more individuals other than Simpson or the victims.

Finally, in arguing that because section 925.11(4) is silent as to remedies for its violation, this Court cannot grant a new trial, the State relies on *United States v. Hasting*, 461 U.S. 499 (1983) and *Jenkins v. State*, 978 So. 2d 116 (Fla. 2008). (AB 53) These cases are inapposite.

In *Hasting*, the U.S. Supreme Court addressed the supervisory powers of federal courts to establish rules of procedure that are not specifically required by the U.S. Constitution or Congress. The claim under consideration was whether the Fifth Circuit properly reversed a conviction based on its application of a per se rule that where a prosecutor violates *Griffin v. California*, 380 U.S. 609 (1965), by commenting on a defendant's failure to take the stand, a mistrial must be granted or, as in *Hasting* itself, the conviction must be reversed. The Supreme Court held that the Fifth Circuit's invocation of its supervisory powers to establish the per se rule improperly avoided application of the *Chapman* harmless error rule, which applies even to certain constitutional violations, including the one at issue in *Hasting*. 461 U.S. at 507. The court went on to conclude that the prosecutorial misconduct at issue was harmless in light of the evidence of guilt presented at trial. *Id.* at 511.

Hasting bears no relevance to Simpson's case. Even assuming, *arguendo*, that the harmless error rule applies to a due process violation resulting in the destruction of evidence, Moreover, as this Court previously determined, depriving Simpson of the ability to test the physical evidence in this case, which the State, Clerk, and FDLE constructively achieved by rendering the fingernail extracts, hat, shoes, and axe untestable, constitutes "irreparable harm under the facts of this case." *Simpson*, 117 So. 3d at 412. The same is true of the degraded DNA on the sweatclothes caused by the Clerk's failure to store them under temperature-controlled conditions.

The State's reliance on *Jenkins* is also misplaced and highly misleading. First, the relevant portion of *Jenkins* addresses whether evidence obtained in violation of a procedural statute is subject to the exclusionary rule at trial. *Jenkins*, 978 So. 2d at 120-21. Simpson is not seeking exclusion of any evidence. He is seeking a new trial. A determination of whether testimony about the contaminated evidence would be admissible at a retrial, or whether some other remedy would be more appropriate, is not a question presented in this appeal.

Additionally, the quoted passage relied on by the State indicating that the exclusionary rule should not be applied absent a *constitutional* due process violation, is in reference to a federal decision that addresses a violation of the Vienna Convention. *Id.* at 128 (citing *United States v. Page*, 232 F.3d 536, 540 (6th Cir.

2000)). The *Jenkins* Court did not adopt the reasoning in *Page*, it merely included the case in its survey of case law addressing appropriate remedies for statutory due process violations. And in fact, *Jenkins*' holding on this point is very different from the holding in *Page*. *Jenkins* held that where a statute provides a list of remedies for a violation of its requirements, exclusion should not be applied if it is not enumerated in the list. 978 So. 2d at 130. ("The only reference to remedies in the statute before us is located in subsection (6), and those remedies are civil and injunctive in nature. Therefore, we conclude that the exclusionary rule is not a remedy for a violation of section 901.211 unless a constitutional violation has also occurred.") (footnotes omitted). The Court went on to note that it "has held that the exclusionary rule applies to certain statutes which are silent as to remedy for their violation." *Id.* at 130 n.14 (citing *State v. Johnson*, 814 So. 2d 390 (Fla. 2002) (exclusionary rule applies to willful violation of statute governing confidentiality of patient medical records); *Benefield v. State*, 160 So. 2d 706 (Fla. 1964) (exclusionary rule applies to violation of 'knock and announce' statute)).

Thus, where a statute is silent as to remedies, *Jenkins* makes clear that any remedy the Court deems appropriate may be applied. This includes the most severe of remedies—exclusion of evidence obtained in violation of a statute. Similarly, then, because section 925.11(4) is silent as to remedies for a violation, this Court could (and should) grant Simpson a new trial. In the alternative, it should, at least,

apply an inference that postconviction testing of the axe, hat, shoes, and fingernail extracts would have been adverse to the State. *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). This would then require a new trial due to the prejudice flowing from trial counsel’s ineffectiveness in failing to test the evidence. *See* IB 177 (Claim IV.C.1.a.).

A new trial, whether as a result of this claim or Simpson’s IAC for failure to test claim, is the *only* remedy on appeal that can provide any redress for the evidence custodians’ egregious violations of one of the most sacrosanct rights that exists in the criminal justice system—a defendant’s right to access and test evidence that could exonerate him. By contrast, the State’s suggested remedy of “remedial training to agencies on their duty to ‘maintain’ the evidence” (AB 53), would provide no relief for him at all.

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

Claim 7 asserts that while the postconviction DNA testing of the clothing was not as conclusive as it might have been had the Clerk’s office stored the clothes in ambient room temperature, the testing did identify 29 additional mixtures on the clothes, ten of which, all found on the inside of the clothes, contained

DNA from individuals other than Simpson or the victims. In a new trial, such evidence would eviscerate the State's already-tenuous DNA evidence.

In response, the State makes no attempt to rebut any of the arguments made in the initial brief, essentially just reiterating the scant findings and conclusions of the trial court. First, the State argues that Burley's identification of three additional sweatclothes samples to which Simpson was the major contributor "alone demonstrates that the post-conviction DNA testing evidence is not of a nature to give rise to a reasonable doubt as to Simpson's culpability." (AB 54-5; R3:13396-97.) But the discovery of additional samples containing Simpson's DNA does not make it any more likely that he wore the clothes during the murders, nor does it undermine his defense that he loaned the clothes to Little Archie just weeks before Crook and Kimbler were killed. He always maintained the clothes were his so, as Burley testified, one would expect to find his DNA all over them. (R3:12242.)

Second, the State contends that Burley's findings do not contradict the State's DNA evidence at trial but, rather, are simply consistent with and cumulative of it because Simpson "said the individuals in the robbery ring shared clothing ... and there was expert testimony that the major contributor was likely the last wearer of the clothing due to a variety of factors including DNA degradation through sweat, laundry, etc. (AB 55) (citations omitted).

The contention that the results are merely cumulative of the results at trial ignores the entire basis for the State's DNA argument—namely, that because Simpson's DNA "littered" the clothes and there was only one DNA mixture containing a single minor allele consistent with Little Archie's DNA profile, and he was no more likely to be responsible for it than one quarter of the Caucasian population, Simpson was the killer. (T:1622, 1627-9.) While, as explained below, this argument was inaccurate, it was certainly effective. Burley's results would have made the argument untenable because of the additional ten mixtures she identified on the inside of the clothing that contained DNA from which Little Archie and Smallwood could not be excluded, and which did *not* belong to the victims or Simpson. See IB 152-53.

Badger testified at trial that he identified two mixtures from which Little Archie could not be excluded. The first was from stain C on a cutting from the sweatpants (State's Exhibit 21). He identified Kimbler as the primary contributor and testified that Simpson and Little Archie could not be excluded as the minor contributor because they both shared an 18 allele at the VWA marker, which was inconsistent with Kimbler's profile. (T:1176-77.) This allele is observed in approximately 22 percent of the population. (T:1177-78.) The second mixture was from a cutting from the inside neck of the sweatshirt (State's Exhibit 128). Badger concluded that Simpson was the primary contributor and Little Archie could not be

excluded as the minor contributor because he possessed a 15 allele at the D3S1358 marker. This allele is observed in approximately 24 percent of the Caucasian population. (T:1193-94.)

The State's DNA strategy was twofold. First, Caliel made the inaccurate and unsupported argument that the jury could discount Little Archie's possible contribution to the stain on the sweatpants because Simpson also possessed the single minor allele identified by Badger. The argument was based on Tracey's application of the statistical "theory of probabilities" to DNA testing. Tracey, who was offered as a statistics expert, *not* an expert in DNA testing and analysis, explained the theory as follows: if you have four blood drops in a row and the first three match Kimbler's DNA profile but the fourth only contains a partial profile consistent with her DNA, you can use the presence of her DNA in the other drops to conclude that the fourth belongs to her as well.¹⁰ (T. 1319-20.) Thus, as to the stain on the cutting from the pants, Caliel argued, since "[w]e know [Simpson] wore the sweatpants[.]" he, and not Little Archie, must be responsible for the 18 allele identified for the minor contributor. (T:1632-34; *see also* 1678 ("The discriminating power of DNA, the ability for Dr. Tracey to tell all of you that the DNA belongs to this man, is be-

¹⁰ As explained in Claim IV.C.1.b., had Eler used Word to testify at trial, she could have explained to the jury that Tracey's theory was both outside his expertise and entirely unsupported by science. (R3:12206-207.)

cause of the power that comes from what he called the product rule, the statistics. The most amount of DNA all over this – these clothes came from this defendant.”).

Burley’s results would have robbed the State of this argument. She identified an additional 29 mixtures, ten of which were on the inside of the clothes. Nine of those had at least two contributors and one had at least three contributors. (R3:3736 (samples 87-9 and 87-10), 3743 (samples 87-15, 87-16, 87-17, 87-18, 87-19, 88-9, 88-11, and 88-12), 12244, 12246-47, 12262-63.) Because the victims could reliably be exempted as contributors to these mixtures since they contained no blood and were found on the inside of the clothes (R3:3736-37, 3744, 3751, 12287), and because each mixture had at least two contributors, even if Simpson were a contributor to each of them, Little Archie and/or Smallwood could not have been excluded as the second (and/or third) contributor to each. Thus, as to Burley’s samples, the State could not have employed Tracey’s theory of probabilities to argue, as it did for the stain on the sweatpants, that because only Simpson OR Little Archie could have been a contributor to the minor profile in the mixture, the DNA must belong to Simpson because his DNA was prevalent elsewhere on the clothes. Rather, both Simpson AND Little Archie (or Smallwood) could have simultaneously been contributors to the ten mixtures Burley analyzed because each contained more than one unidentified, non-victim contributor.

This is precisely the problem the State posed by FDLE's mixture identified on the sample from the neck of the sweatshirt: Because Simpson was identified as the major contributor (T:1187, 1193-94), not simply a possible minor contributor to the same allele for which Little Archie was also a possible contributor, Little Archie's possible contribution could not be explained away by the theory of probabilities. Thus, the State had to employ a different theory to convince the jury that there was no chance Little Archie's DNA was on the sweatshirt. The State relied on two other unscientific theories presented by Tracey, which it used to argue that because Simpson's DNA was all over the clothing, and Little Archie's possible contribution amounted to a single possible allele on a single stain—an allele that one quarter of the Caucasian population shared—even if Little Archie wore the clothes at some point, Simpson was the last wearer and, therefore, the killer.¹¹ (T:1622-23, 1678, 1680.) This conclusion was never offered by Badger, who testified, simply, that Little Archie was a possible minor contributor to the mixture. (T:1193-94; *see* IB 191-92, Claim IV.C.1.b.)

Tracey's first theory about how to determine the last wearer of clothing through DNA was based on what happens to clothes when they are laundered. Tracey testified, "[O]ne would expect minor profiles from someone else who had worn that clothing earlier or who had handled that clothing earlier, okay, to de-

¹¹ Caliel took this argument so far that he argued to the jury that "[t]here's zero chance" that Little Archie was the killer. (T:1634-35.)

grade 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.) Thus, in theory, because Simpson’s DNA was readily identifiable in various areas on the clothes, and was the major contributor to various mixtures, he was the last wearer.¹²

Tracey’s second theory was that bacteria from the sweat from the most recent wearer of clothing will degrade any DNA that was previously left behind. (T:1332.) Thus, as the State argued, because Simpson’s DNA was most prominently present on the clothes, he was the most recent wearer.¹³ (See T:1678 (“[P]erspiration releases bacteria and bacteria degrades DNA. Simply stated, this defendant was the last wearer of these clothes. Not only because his sweat scarred those clothes with his identity, but because his sweat degraded whatever was left

¹² One obvious problem with this theory, of course, is that there was no evidence in the record as to when (or if) the clothes were ever laundered. And in fact, Simpson testified that the clothes were laying on the floor when Little Archie came to Simpson’s trailer to borrow them. (T:1387.) It is therefore likely the clothes had *not* recently been laundered and still contained plenty of Simpson’s DNA when Little Archie took them. Had Eler pointed this out, as well as used Word to impeach the scientific validity of Tracey’s laundry theory, *see* Claim IV.C.1.b, counsel could have neutralized Tracey’s testimony and the State’s argument flowing from it entirely. But counsel made no such efforts.

¹³ Again, had Eler used Word as a witness, she could have entirely debunked Tracey’s testimony that the last wearer of clothes could be determined based on the volume and prevalence of one person’s DNA as compared to another’s. She would have testified that neither his laundry theory nor his sweat bacteria theory can be scientifically applied for this purpose. *See* R3:12207-11.

there before him.”); T:1680 (“So naturally whoever committed this crime perspired. The reason you know it was this defendant is because it was his perspiration that he left behind.”).)

Burley’s results would have robbed the State of its “last wearer” argument, based on whatever theory, because she only identified Simpson as a “possible” major contributor to one of the ten interior mixtures she found on the inside of the sweatclothes. (R3:3736 (sample 87-9).) He was not designated as the major contributor, or even a possible major contributor, to any of the other nine samples. (R3: 3736 (sample 87-10), 3743 (samples 87-15, 87-16, 87-17, 87-18, 87-19, 88-9, 88-11, and 88-12).) Thus, even if he were a contributor to them, his DNA would have been no more dominant than the DNA belonging to the other unidentified DNA profiles in the mixtures, from which Little Archie and Smallwood were not excluded. (R3:3736, 3743, 12244, 12262-63, 12246-47.) The laundry and bacteria arguments would have been entirely inapplicable. Thus, the State’s reliance on Tracey’s testimony to refute the materiality of Burley’s results (AB 55 (citing T:1329-32, 1334)) is unavailing and, in fact, demonstrates why Burley’s results would alter the outcome of a new trial.¹⁴

¹⁴ Additionally, the State’s failure to even acknowledge, let alone grapple with, the fact that Simpson has challenged the scientific validity of Tracey’s testimony in Claim IV.C.1.b., *infra*, highlights the problem with its failure to analyze claims cumulatively.

The State suggests in passing that the unidentified DNA in Burley's mixtures can also be explained by the fact that "Simpson said the individuals in the robbery ring shared clothing." (AB 55) (citing T:1384-85.) Thus, presumably, the State is implying that the DNA could have been left by another unknown individual who borrowed the clothes from Simpson for a robbery at some point. But the portion of Simpson's testimony cited by the State makes no reference to Simpson sharing clothes with individuals in a robbery ring and no such evidence was presented at trial. Simpson testified only that *Little Archie* "asked to borrow some clothes because he wanted to go steal something that night, an older Chevy Impala." (T:1384.) This was the underpinning of Simpson's defense and the explanation for how Little Archie got possession of the clothes two weeks before the murders. Thus, the State's reliance on this testimony only strengthens Simpson's argument that Burley's results would lead to Simpson's acquittal.

In short, at a retrial, Burley's results would allow the defense to present an additional *ten* mixtures from which Little Archie and Smallwood could not be excluded even were the State to apply Tracey's unscientific theories of probability, laundry, and sweat. Without being able to exclude Little Archie and Smallwood as possible contributors to the mixtures, and without being able to argue that Simpson was the most recent wearer of the clothes, the State would have no means to convince the jury that Simpson's DNA was any more probative of the fact that he

wore the clothes on the night of the murders than that one of the other contributors of DNA to the mixtures – which could include Little Archie or Smallwood – wore them on the night of the murders. Indeed, the State makes this very point when it relies in closing on *Bogle v. State*, 213 So. 3d 833 (Fla. 2017): “Like in *Bogle*, here, the post-conviction DNA evidence does not demonstrate that any of the contributors to the mixture of DNA found on the sweat clothes was in fact the murderer.” (AB 56) Simpson could not agree more. But the State cannot have it both ways. If that is the case for the postconviction evidence (and it is¹⁵), then it must also be the case for the pre-trial DNA evidence of Simpson’s DNA on the clothes.

As the trial court put it so effectively when discussing Burley’s discovery of foreign DNA under Big Archie’s fingernails:

[I] is speculative to assume that this evidence establishes that the contributor to this DNA mixture was actually the person who murdered Big Archie. Indeed, this evidence merely establishes that Big Archie had contact with another individual at some point in time prior to his death.

(R3:13396.) In the same way, then, it is speculative to assume that Simpson’s DNA on the clothes establishes that he is the person who murdered Big Archie, especially in light of the fact that Simpson’s other claims have eviscerated the probative value of all of the State’s additional evidence against him. *See, e.g., Ballard v. State*, 923 So. 2d 475, 483 (Fla. 2006) (reversing convictions for first-degree mur-

¹⁵ As Badger testified at trial, and the State and Word agreed, DNA cannot be dated, period. (T:1223, 1680; R3:12210.)

der 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"). Rather, his DNA merely establishes that he wore the clothes at some point prior to their discovery at the Church. Because they were his clothes, that stands to reason. What is more difficult to identify is any innocent explanation for the fact that DNA other than Simpson's or the victims', from which Little Archie and Smallwood cannot be excluded, is all over the interior of the sweat-clothes. But this evidence is, of course, entirely consistent with Simpson's defense that he loaned the clothes to Little Archie two weeks before the murders and that Little Archie, with Smallwood's help, killed Kimbler and Big Archie. Thus, Burley's findings not only refute the State's DNA case, they provide valuable support for Simpson's defense.

The State's reliance on *Bogle, Wright v. State*, 995 So. 2d 324 (Fla. 2008), and *Serrano v. State*, 225 So.3d 737 (Fla. 2017), to support its contention that Simpson has not met his burden for NDE (AB 55-56), is misplaced. Unlike in the above cases, to demonstrate the materiality of the postconviction testing, Simpson does not have to prove that the new DNA evidence excludes him and implicates someone else – that would be impossible. He owned the clothes. His DNA is on them. There is no disputing that and this Court was well aware of that fact when it

held that Simpson was entitled to DNA testing to prove his NDE claim. *See Simpson*, 117 So. 3d at 412 (“Simpson seeks DNA testing in order to exonerate him **or produce exculpatory results.**”) (emphasis added). His burden is not to exonerate himself – all he need show is that the evidence gives rise to a reasonable doubt as to his culpability. *Aguirre-Jarquin v. State*, 202 So. 3d 785, 790-91 (Fla. 2016). Because it refutes the State’s entire DNA theory—that regardless of who else wore the clothes, Simpson was the *last* wearer—as well as supports his defense that Little Archie borrowed the clothes before the murders and killed the victims, Simpson’s newly discovered evidence meets that burden. *See, e.g., Hildwin*, 141 So. 3d at 1181 (reversing conviction for capital murder in light of new DNA test results that “totally discredited” the state’s “false theory of scientific evidence that that was woven throughout its presentation of evidence and argument.”).

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

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)

Claim 6 asserts that 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, and, ultimately, for failing to test the evidence. The State argues first that testing the sweatclothes was not without

risk because testing could have revealed Simpson's blood and/or his DNA mixed with the victims' blood, which would have been "devastating" to his case. (AB 58.) The State also relies on Eler's contention that even if he could have kept inculpatory test results confidential, which the trial court record unequivocally demonstrates he could have, *see* R1:1227-28, such results might have posed an ethical dilemma for him regarding Simpson's defense. (AB 58.) Eler's testimony on this point was that if an expert's review of the case revealed that Jason was lying about something, that would make it impossible for Eler to present Simpson as a witness at trial. (R3:10416-17.)

First, Eler never asserted the specific rationale lodged by the State as a justification for failing to test the evidence,¹⁶ nor did the State assert this argument below. The State offers no evidence, nor even conjecture, as to what ethical dilemma might be posed if Simpson's blood were found on the clothes. The results would not have been disclosed to the State and Simpson's testimony would not have needed to be changed at all to avoid perjury. His blood could have been deposited on the clothes when he cut himself shaving long before the murders; thus, his de-

¹⁶ Eler did not testify that he was concerned about Simpson's blood appearing on the clothes or Simpson's profile being identified in a sample with the victims' blood. He testified only that he opted not to pursue testing "for fear that there may be additional DNA come back." (R3:10209-10.)

fense that the clothes were his and Little Archie borrowed them would have remained intact.

As to the possibility that Simpson's DNA could be found in a mixture with the victims' blood, the State had *already* identified one such sample, about which Badger testified—stain E, for which Badger found Kimbler to be the major contributor and Simpson a possible minor contributor. *See* T:1161, 1178. Since the State characterizes such evidence as “devastating” to Simpson's case, then it must also agree that Eler was ineffective for failing to use Word at trial to impeach Badger's methods in interpreting that stain as he did, which she could handily have done. *See* Claim IV.C.1.b., IB 188-89.

More importantly, though, the trial record makes clear that Eler's postconviction justifications for failing to test the evidence were post-hoc fabrications designed to justify his ineffectiveness, not reasonable, strategic, pretrial decisions. At a pretrial hearing on April 21, 2006, the State informed the court that Kimbler's fingernail clippings and two hairs found in her hand, which had been recovered at the autopsy and were subsequently misplaced, had recently been found at the medical examiner's office. The State requested a continuance of the trial to have the evidence DNA tested. (R1:1233-34.)

When asked for his position on the motion, Eler told the court, “I can't object to that. I think that evidence does need to be tested. My client agrees with that,

Judge.”¹⁷ (R1:1235.) At a subsequent hearing, the State requested a hair sample from Simpson for purposes of comparison to the hairs found in Kimbler’s hand, and Eler indicated that Simpson had no objection to providing the sample and he would arrange it with the State. (R1:1241-42.)

If any DNA test results would have posed the risk of inculpatory results and an ethical dilemma for Eler, they would have been Simpson’s DNA under Kimbler’s fingernails or his hair in Kimbler’s hand because the State’s previous testing had not identified any evidence tying Simpson to the crime scene, let alone to the victims. No such results were forthcoming, as Simpson was excluded from the

¹⁷ The State asserts in its Answer Brief that Eler testified in postconviction that he discussed the pros and cons of testing with Simpson and that “Simpson understood and agreed not to independently test.” (AB 58 (citing R3:10102).) The trial court, too, makes this finding in its order. (R3:13387-88 (noting that “Defendant ultimately agreed with the decision not to have additional DNA testing done in this case.”) (citing R3:10102).) This is a gross misrepresentation of the record. Indeed, at the evidentiary hearing, Eler was confronted with his deposition testimony on this issue, which counsel read into the record: “[D]id he ever say anything other than I want his evidence tested, and I’m innocent? Your answer was, no, I’m trying to think, I don’t recall him ever saying that either.” (R3:10102-03.)

Then, when Eler was asked directly by postconviction counsel if Simpson “agreed with” Eler’s decision not to test, Eler answered, “He deferred to my legal expertise in that area.” Thus, Eler’s testimony on this point is not inconsistent with Simpson’s claim that he wanted the evidence tested—Eler himself was telling the trial court in pretrial hearings, over and over again, that he was having the evidence tested and that Simpson wanted it tested. In this context, Simpson deferring to Eler’s judgment does *not* mean that Simpson agreed not to have the evidence tested. But, of course, this dispute is academic, since even if Simpson had knowingly signed on to Eler’s decision not to test, that would not have absolved Eler of having to use reasonable judgment under the Sixth Amendment in coming to that decision.

DNA found under Kimbler's nails and the hairs did not belong to him. (T:1075) But the testing posed far greater risks to Simpson's defense than the testing that Eler failed to have Cellmark conduct. Yet, Eler certainly could have objected to the eleventh hour testing and, instead, told the court that both he and Simpson wanted the evidence tested, and Simpson obliged by willingly providing a hair sample. This occurred a full eight months after Eler's final August 2005 conversation with Word and six months after she gave him her draft report. Thus, his contention that, based on Word's recommendation, he opted not to test the evidence for fear of obtaining inculpatory results that could pose an ethical dilemma vis-à-vis Simpson's testimony, simply is not credible.

Next, the State asserts that Eler reasonably opted not to test the evidence because Word indicated that she might corroborate the State's findings. The State contends that Eler had "meaningful conversations with Dr. Word" during which he "was able to understand what she had to offer," suggesting that the trial court found him more credible than Word, who testified that she did not have a good understanding of the case. (AB 59 (citing R3:10474-75, 3780-99).)

Most importantly, the trial court made no finding that Word lacked credibility. Indeed, the portions of the record to which the State cites for the proposition that the "court was not convinced" by Word's testimony (AB at 59) are just passages from Word's testimony, not the trial court's order. The State provides no ci-

tation to any portion of the Court's order that calls into question Word's credibility. Indeed, the trial court relied on her draft letter and testimony to support its ruling on this very claim. (*E.g.*, R3:13399.)

In addition, the State relies on a false premise in arguing that Eler's decision not to test the evidence was reasonably based on Word's representation that she would likely corroborate the State's results. (AB 59; *see also* R3:13389 (trial court finding that "after Dr. Word told [Eler] she would most likely corroborate the results of the State, Eler chose not to use her as an expert in this case"). But Word actually *recommended* testing to Eler. Her draft report indicates that the presence of mixtures found by FDLE could warrant retesting, and that is consistent with what her notes indicate she told Eler during their August 2005 phone call. (R3:3781, 12146-47.) Eler himself confirmed this when he reported Word's concerns to the trial court so he could obtain a continuance for DNA testing. (*See* R1:1175-76, 1179) (Eler explaining to the trial court at an August 10, 2005 pretrial hearing that he needed a 6-8-week continuance because he had had "a lengthy conference" with Word and "there are some items I wanted retested" and "[t]here were some discrepancies"). Thus, the State's reliance on the trial court's finding that Word told Eler DNA testing would only corroborate the State's results, or that Eler credibly relied on such admonition, is flatly contradicted by the record.

Second, in an apparent attempt to imply that Eler had more substantive conversations with Cellmark about the pros and cons of testing than the single August 2005 conversation with Word about which she testified, the trial court's order references Eler's pretrial representation that he had spoken once with Marissa Kennedy from Cellmark and that he "had scheduled numerous teleconferences with her to review the items of evidence." (R3:13386) (citing R1:1152). But Eler did not testify in postconviction, nor did the State present Kennedy to testify, that any of those conferences ever took place or that if they did, they played any role in Eler's decision not to test the evidence. Eler never mentioned Kennedy in his postconviction testimony.

Third, the court contrasts Word's testimony that she prefers to review data and testing and conduct her own independent interpretation of the evidence, with her testimony that *in this case*, in the trial court's words, "she could not obtain enough information to gain an understanding of Defendant's case, blaming Eler's lack of communication." (R3:13388.) But the trial court's portrayal of Word's testimony as contradictory is overly simplistic.¹⁸ Word testified that while she would

¹⁸ The trial court's further attempt to buttress Eler's purported strategy with the finding that "Word testified ... that Badger's conclusions are not wrong" (R3:13389 (citing R3:12310-12)) is another mischaracterization of Word's testimony. The referenced passage pertains to Badger's interpretations of mixtures, not to any errors he might have made in the testing process. And while she agreed that she had no information that would, in the State's words, "completely discredit Charles Badger," when asked more specifically about his interpretations of various

not have wanted information that would have biased her towards a particular result, one has to conduct DNA testing “with some goal in mind,” and the testing strategy will be affected by whether the analyst is looking to determine possible wearers of the clothes versus whose blood is on them. (R3:12320.) So while she prefers that initially, her review of the documents and previous testing be unfiltered, R3:12319, it would have been totally appropriate for counsel to tell her that Simpson’s DNA was already found on the clothes and that they were interested in identifying other possible wearers. (R3:12323.) And certainly she required all of the documentation to support the testing that was already conducted if she was going to be able to determine whether any mistakes were made that could warrant new testing beyond what she originally recommended. Had she received all of that documentation, she would have recommended retesting the clothes as soon as possible to determine who else was wearing them. (R3:12161-62, 12164-65, 12174-75, 13060.)

While problematic, the State’s reliance on the trial court’s above findings is largely academic because any reliance by Eler on Word’s purported recommendation would have been unreasonable because he failed to provide her with all of the

mixtures, she indicated that she found inconsistencies in his method that she could not reconcile. (R3:12310-12.)

Moreover, the trial court’s reliance on Word’s testimony, however misplaced, undermines the State’s contention that the trial court found Eler credible and Word unreliable as a witness. (AB 59.)

records and information she required to provide any meaningful recommendation about whether testing could assist the defense.

Based on the foregoing, even if Eler's rationales for failing to test the evidence were credible, they would be unreasonable because trial counsel has a duty to *meaningfully* investigate all viable defenses before rejecting them. (See IB 41-42 (collecting cases).) Because the evidence custodians have deprived Simpson of the capacity to prove that had he tested the evidence before trial, there is a reasonable probability the results would have been different, prejudice can and should be inferred. But in the absence of such presumption, Burley's results, which reveal numerous DNA profiles on the clothes that do not belong to Simpson or the victims, establish that had Eler tested the evidence before it degraded and was contaminated, Word likely would have been able to 1) generate full or near-full profiles of the wearer of the shoes and hat and additional wearers of the clothes; 2) determine whether it was Big Archie's or Little Archie's DNA under Kimbler's nails; and 3) obtain additional DNA from the axe. Accordingly, Eler was ineffective for failing to have the evidence independently tested.

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

Claim 8 asserts counsel failed to effectively consult with and provide adequate records to Charlotte Word, Simpson's court-appointed DNA expert. As explained in Simpson's Initial Brief and above, the State's primary argument (and the

trial court’s conclusion) – that Eler consulted with Word and made a strategic decision not to use her because “her testimony would likely corroborate the State’s case” (AB 61 (citing R3:10474)) – holds no water. Eler barely communicated with Word before deciding not to use her as an expert. Moreover, despite her repeated requests, he failed to give her the basic records and information she needed to accurately convey to him how she could be helpful in the case. (IB 168-75, 83; Claim IV.C.1.a, *infra*.¹⁹) Indeed, additional evidence in the record refutes the State’s factual assertions and shows that Eler misled the trial court, the State, and Simpson.

First, despite Eler’s representation to the trial court in an August 10, 2005, pretrial hearing that Word had completed her review of the chain of custody documentation, Word testified, and her November 2005 draft report confirmed, that she was never able to meaningfully assess whether the evidence’s chain of custody had been preserved because Eler never responded to her request to clarify with JSO how they documented chain of custody. (R3:3780, 12140-41, 12151.) Second, despite Eler’s representation to the trial court that Word had reviewed the SOPs and that “after talking with Ms. Word” he had determined that obtaining the raw data was not necessary (R1:1177), Word testified and her draft report reflected that Eler

¹⁹ Because this claim and claim IV.C.1.a involve duplicative facts concerning Eler’s communications with Word and her understanding of the case, in order to save space, Simpson incorporates the relevant facts and arguments made in claim IV.C.1 in the Initial Brief and this Reply into this claim.

never provided her with the SOPs and she had actually indicated to him that a review of the SOPs *and* the raw data was necessary to evaluate FDLE's testing, especially in light of the profiles with low peaks that Badger had analyzed. (R3:3807, 12132, 12141, 12151.)

Third, contrary to Eler's request for a continuance in part because there was not just STR, but also RFLP testing to review (R1:1178-79), Eler never provided Word with any of the RFLP testing documentation (R3:3780, 12140, 12149).

Fourth, on September 14, 2005, Eler outright lied in an effort to obtain another continuance, stating,

Judge, as the Court is aware, we are waiting for certain lab diagnostics from Cellmark, the DNA laboratories in Germantown. Charlotte Ward [sic] is the technician who is assisting me on behalf of the defense, who has done significant work in the – paperwork review of FDLE and JSO work and **is now beginning to conduct actual lab testing.**

(R1:1188) (emphasis added). Not only had Word not begun conducting testing at this point, she had not heard anything from Eler since their August phone call and Eler had never answered her repeated requests to let her know whether he wanted testing. (R3:12130, 12135, 12145-47, 12163.)

As explained in Simpson's Initial Brief and in Claims IV.A.2 and IV.C.1., *supra*, Word could have impeached Badger's interpretations of the mixtures on the clothes as internally inconsistent; highlighted his failure to follow FDLE's SOPs in some instances; pointed out the ways in which FDLE's SOPs were inadequate to

ensure the appropriate interpretation of mixtures; testified that Little Archie and Smallwood were possible contributors to mixtures that Badger excluded them from; and entirely debunked Tracey's unscientific theories for determining the last wearer of the sweatclothes. (IB 184-93.) This testimony would have deprived the State of its damning assertion in closing that Simpson was not only the last wearer of the clothes, but the *only* wearer and, therefore, the killer. (T:1622-23, 1627, 1634-35, 1678-80.)

The suggestion that Eler made a strategic decision is not only belied by all the evidence discussed above and in the initial brief, but is also contrary to this Court's precedents involving Eler himself, which the trial court erroneously refused to even consider. *Douglas*, 141 So. 3d at 118-20; *State v. Morrison*, 236 So. 3d 204, 220 (Fla. 2017); *Shellito v. State*, 121 So. 3d 445, 455 (Fla. 2013); *Bevel v. State*, 221 So. 3d 1168, 1181 (Fla. 2017). The State makes no attempt to distinguish these cases or, indeed, any of the numerous cases cited in the initial brief for the proposition that a strategy based on a less-than-thorough pretrial investigation is inherently unreasonable. (IB at 41-42, 167-68, 172, 174.)

As explained below, in each case, Eler had similarly minimal contact with the experts he employed, failed to provide them with documentation they requested, and then provided seemingly reasonable justifications for failing to use them at trial. But this Court found his actions deficient in each case. Because these cases

are binding precedent enunciating the standard applied to a claim alleging ineffective assistance of counsel for failure to use expert witnesses, and because they also happen to involve Eler, this Court should take note.

In *Douglas*, Eler testified that he had one and possibly more phone calls with mental health expert Dr. Harry Krop and that he and his co-counsel likely decided not to use Krop because the topic of antisocial personality disorder had come up during their conversation and that was a red flag for Eler because of its “negative implications.” 141 So. 3d at 118-20. Despite the fact that Krop had evaluated Douglas for competency and provided a report, the Court rejected the State’s argument that Eler made a reasonable strategic decision not to use Krop:

[E]ven after Dr. Krop’s request for additional materials, the record does not disclose that counsel made any effort to provide Dr. Krop with readily available evidence. Certainly, counsel should not have considered Dr. Krop’s competency evaluation as “a reliable substitute for a thorough mitigation evaluation.”

Id. at 121. Similarly, in this case, Eler never provided Word with numerous documents she requested. Under these circumstances, Eler should not have considered her draft report a reliable substitute for a thorough evaluation of the State’s DNA results and interpretation.

In *Shellito*, Eler hired mental health expert Dr. Ernest Miller to perform a competency evaluation of his client, but opted not to use him to present mitigation in the penalty phase. 121 So. 3d at 454-55. At the postconviction hearing, he of-

ferred a startlingly similar justification – that based on a single conversation with the expert and the discovery of some damaging records, calling Miller to testify would have been damaging to the defense because “cross-examination would have revealed a significant amount of negative information and all of Shellito’s records could have been admitted by the State.” *Id.* at 455 (footnote omitted). Moreover, the State would then have presented rebuttal expert testimony. *Id.*

Having reviewed the records, Eler testified that he made the strategic decision to choose to present some of the records. Eler explained that through the testimony of Shellito’s family members, the jury would be informed of Shellito’s mental issue. Eler also testified that he also spoke to Dr. Elias Sarkis about organic brain disorder; however, Dr. Sarkis testified at the evidentiary hearing that the consultation involved the issue of insanity and that Eler did not ask about mitigation.

Id. The Court found Eler’s performance deficient because “there was no true follow-up on the matters indicated in the various reports”; thus, Eler’s strategic decision to present mental health evidence solely through lay witnesses, rather than an expert, was unreasonable. *Id.* at 456.

In *Morrison*, as in this case, Eler and his co-counsel inherited the case from the Public Defender’s Office when the office had to withdraw due to a conflict of interest. 236 So. 3d at 218. Eler had primary responsibility for the penalty phase, which APD Alan Chipperfield had handled before his withdrawal. *Id.* As here, Chipperfield provided Eler with documentation of what he had done to begin to prepare for the penalty phase, including hiring mental health expert Dr. Harry

Krop. *Id.* at 219. The Court recounted the trial court’s findings on which it based its conclusion that Eler was ineffective in failing to use Krop:

“[Trial counsel] misguidedly believed [Morrison’s] case was ready for trial when he was assigned to represent [Morrison].” Trial counsel unreasonably failed to provide Dr. Krop with the requested additional information necessary to adequately assess Morrison’s case for mitigation. As the postconviction court explained: “Although [trial counsel] testified he relied on Dr. Krop [to address mental health mitigation], he admittedly did not investigate the doctor’s involvement in [Morrison’s] case. Doing so would have revealed Dr. Krop’s request for more information.”

Id. at 220 (quoting from trial court’s order).

Finally, in *Bevel*, again Eler failed to get Dr. Krop what he needed to perform a meaningful evaluation of the defendant. And despite the fact that Dr. Krop testified at trial and offered some mitigation on behalf of Bevel, this Court held,

Based on the failure to discover available records and social history that would have assisted both in the penalty phase presentation and in the mental health evaluation undertaken by Dr. Krop, this is not a case in which penalty phase counsel cannot be deemed deficient because [trial counsel] made a reasonable strategic decision to forego the presentation of certain evidence.

Bevel, 221 So. 3d at 1181 (citing *Simmons v. State*, 105 So. 3d 475, 508 (Fla. 2012)).

Thus, *Douglas*, *Morrison*, *Shellito*, and *Bevel* make clear the pitfalls in Eler’s approach, as postconviction counsel presented a wealth of mitigating evidence that Eler failed to uncover in each case. And in *Morrison*, *Shellito*, and *Bev-*

el, this Court found his deficient performance so prejudicial as to warrant a new penalty phase.

This case demonstrates exactly why case after case reiterates the basic tenet that a strategic decision based on a less-than-complete investigation is never reasonable: Eler's "strategy" as characterized by the trial court – to "make the State prove its case" and to "argue conflicts and flaws in the evidence through various witnesses" (R3:13399) – is but an excuse for failing to adequately investigate Simpson's case, which was patently unreasonable and entirely prejudicial.

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

The State's heading mistakenly suggests that the following claims only involve evidence that Little Archie had a motive to kill the victims – he was upset that Big Archie, who was still married to his mother, and Kimbler were having a baby. But the evidence that is the subject of these claims goes far beyond that, showing that not only did he have a motive, but also that he told multiple people shortly before the murders that he was going to kill them. The evidence also showed that both victims were afraid of him contrary to the State's claims at trial. It showed that he was seen sneaking around Big Archie's back yard dressed in black before the murders. It established that he knew the unique position of the bodies before anyone could have told him. And it shows he fabricated his alibi.

A common theme in the State’s answer on these claims is that the subject evidence “did not negate the DNA evidence.” (AB 64, 67, 69, 70, 75.) While it does not negate the fact that Simpson’s DNA was on the clothes, it does negate the inculpatory nature of that fact, especially when the evidence is considered cumulatively with the evidence and arguments at trial and with the other evidence that should have been presented at trial but for IAC or the failure to have newly discovered evidence. Specifically, all the evidence that is the subject of these claims makes it more likely that Simpson was telling the truth when he said Little Archie took the clothes because it tends to show that Little Archie committed the murders with someone like Smallwood.

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

The State does not challenge the trial court’s finding that “[a]ny investigation into the victims and their property would have surely” led counsel to find Elliott before trial. Nor does it challenge Simpson’s argument that because of this, he has satisfied the first prong of his IAC claim. (See AB 63 (defending trial court’s finding counsel could have found Elliott had they investigated).) But the State makes the same mistake as the trial court by defending the prejudice prong of his IAC claim with the wrong standard, arguing there is no prejudice because it would not have produced an acquittal. But as noted in the initial brief, all Simpson had to show was a reasonable probability it could have affected the outcome. (IB 195-96.)

The State first argues that Elliott’s assertion that she heard Little Archie repeatedly threaten to kill the victims and their unborn baby would have been cumulative to other evidence that was presented regarding similar threats. (AB 64-65.) But the initial brief demonstrated that even though Eler promised there would be testimony just like Elliott’s, the testimony the defense ended up putting on was woefully inadequate. At most, it showed a threat that the victims did not take seriously before Kimbler was even pregnant and that otherwise depended on rumors and hearsay. (IB 196-97.) But Elliott’s testimony was clear and based on direct observation. Even if testimony like this might be somewhat duplicative of other testimony, it is still admissible and, where it incrementally increases the likelihood that the jury would actually believe that original testimony presented at trial, it can satisfy the prejudice prong of *Strickland*. (IB at 198-99 (citing *Valle v. State*, 502 So. 2d 1225, 1226 (Fla. 1987) (admissibility), and *Perez v. State*, 128 So. 3d 223, 225-26 (Fla. 2d DCA 2013) (*Strickland* prejudice)).) The State offers no response.

As for Elliott’s testimony that Kimbler was terrified that Little Archie meant his threats, the State contends it would not have been admissible because it is “hearsay without an exception.” (AB 65.) Yet the State makes no attempt to address, much less refute Simpson’s argument that it would have been admissible under the state-of-mind exception in § 90.803(3)(a), Fla. Stat. (2007). (IB 199.)

Finally, the State argues that Elliott’s remaining testimony – that Big Archie had told her he did not want Little Archie on his property and to call him if she ever saw Little Archie and that she did call him after seeing Little Archie sneaking around in the back yard dressed in black – was both too remote in time and “cumulative to what was presented at trial.” (AB 66.) But this powerful evidence directly contradicts the State’s arguments that Big Archie was not afraid of Little Archie and that they had a good relationship. No evidence like this was presented to the jury. The jury should have known that both victims were worried about and taking precautions against Little Archie and that he was actually seen sneaking around Big Archie’s back yard dressed as the killer is alleged to have done. The State’s suggestions that perhaps Elliott could not see Little Archie well enough to know it was him (AB 66) are matters for cross-examination and ultimately the jury, but they do not undermine the admissibility or relevance of the testimony.

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

The initial brief argued that counsel was ineffective for failing to interview McNeish to prepare her before calling her as a witness and that if counsel had done so, they would have seen the need to protect her both from Little Archie, who had broken her nose when she asked if he had killed his father, and from Little Archie’s mother, who was encouraging her to pretend not to remember what he had said and done. (IB 202-04.) Simpson argued that had counsel been prepared

and taken steps to protect her, they could have elicited that she had previously testified that she had heard him threaten to kill the victims and that when she asked him if he had killed his father, he did not deny it, but instead punched her in the nose again, just as he had done right before the murders. (IB 202-05.)

The State does not defend counsel's failure to interview this key witness before calling her. Instead, it counters the first part of Simpson's argument by contending that McNeish's denial under oath that she ever heard Little Archie make a threat was irrelevant since the defense elicited hearsay from Det. Williams that McNeish had told him about the threat earlier. (AB 68 (citing T;1490).) This overlooks the fact that testimony under oath in court carries far more weight than a repudiated unsworn, hearsay statement. The State mischaracterizes the second part of Simpson's argument. Simpson has not appealed the part of the trial court's ruling rejecting propensity evidence. His argument – unrebutted by the State – is that Little Archie's assault on McNeish after she asked if he killed his father showed consciousness of guilt. (IB 204-05 & n.45.)

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

The State mischaracterizes both the nature of Simpson's claim and the evidence regarding the timeline of when Little Archie told Det. Williams the unique position of the bodies. The State appears to believe that (1) Simpson's claim is that Little Archie gave this statement the morning of July 16 instead of that afternoon

and (2) the record shows that Little Archie did not give the statement until a second interview on July 16 after he had “calmed down, ... went and talked to his family and went to his grandfather’s house.” (AB 72.) Neither is correct.

First, Simpson’s claim is that counsel was ineffective for failing to show the jury that Little Archie made his statement about the bodies to Detective Williams during an interview at 12:30 on July 16. Counsel instead gave the jury the misimpression that the statement was not given until four days later. (IB 206-07.) While it is plausible that Little Archie would have learned the position of the bodies from other family members over the course of several days, it was far less plausible that this could have happened at the crime scene that day while the police were there.

Second, there was no evidence at trial that Little Archie spoke to any family members before the July 16 12:30 interview with Williams testified that Det. Darnell interviewed Little Archie at 8:40 that morning and Williams interviewed him later that day at the police station. (T:746.) The State does not challenge Simpson’s claim that had counsel called Christie Perry at trial, she would have testified Little Archie was immediately apprehended upon his arrival at the crime scene, remained in the back of the patrol car the entire time, and never had a chance to speak with his family before the interviews. (R3:2843, 11295-96.) This is consistent with Williams’ report, which notes that Little Archie (1) was interviewed in Darnell’s patrol car as soon as he arrived that morning, (2) was restrained during the interview

when he jumped out of the car and ran towards the house, (3) was still in a patrol car afterward, and (4) was transported to the station between 11:15 and 11:20. (T3:3683-87.)

Little Archie did not testify at all during the trial regarding when he was detained and interviewed. The sole citation for the State's claim that Little Archie met with his family at his grandfather's house in between the interviews is to Little Archie's testimony during the evidentiary hearing. (AB 72 (citing R3:11487-89).) Because he did not offer that testimony at trial it is irrelevant to whether counsel's deficiency in failing to interview and call her as a witness were prejudicial. And even if Little Archie had have given this testimony at trial, that would only have created a conflict in the testimony for the jury to resolve. The jury reasonably could have believed Perry, especially because (a) she had no reason to lie, while Little Archie had every reason to deflect suspicions of guilt and (b) Little Archie had told Williams that he learned the position of the bodies from his uncle, even though his uncle testified this was not true. (T:546.)

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

In the initial brief, Simpson argued counsel was ineffective in three different ways in their attempts to impeach Little Archie's version of events the night of the murders, all involving his whereabouts that night: (i) their failure to search for Heather Smith or Stacy Gill, either of whom would have testified that Little Archie

fabricated his alibi (IB 212-17); (ii) their failure to reschedule Christy Perry's deposition, which would have led them to call her as a witness to testify that Little Archie was not wearing a shirt when he was at the gas station after leaving his father's house and said he might return later that night, that she heard a door slam at Big Archie's house at 2 a.m. that night, and that Little Archie started acting very paranoid when she told him she had heard someone that night (IB 217-19); and (iii) their failure to use information from police reports showing that Little Archie could not remember where he had been and was seen in a tan Cougar at a gas station at the time he testified he was at Big Archie's house in a gray Monte Carlo (IB 220-21). The State does not even address the second and third issues, much less defend the trial court's rulings on them.

While the State makes three arguments in response to the first issue, none have merit. First, in defending the trial court's findings that counsel and JSO had made a diligent search for Smith without success, the State does not address any of the arguments Simpson made in the initial brief that there was no competent, substantial evidence to support those findings and that, regardless, Gill would have been found had counsel simply followed up on the Orme Street address appearing in the police report. (*Compare* IB 214-16 with AB 73-74.) Second, the State contends that it was irrelevant whether Little Archie ever went to Smith's house that night because counsel put on evidence that he was seen at a gas station after leav-

ing Big Archie’s house. (AB 74.) He never denied stopping by the RaceTrac gas station for a few minutes – which he and Smallwood could have done on their way to Smith’s house.²⁰ In any event, a brief stop at a gas station is far less inconsistent with his alibi than not having gone to Smith’s house until four in the morning at the earliest and asking Smith to lie to the police to say he had been there all night. Finally, the State argues that testimony by Smith and Gill would have been “unreliable” and “cumulative”. (AB74-75.) But because Simpson has already explained why that is not the case (IB 216-17) and the State does not address any of those argument, nothing more need be said here.

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

The State defends Eler’s closing argument as “pointing out all of the flaws in the State’s case” and making “the points that supported his theme and theory.” (AB 76-77.) The State merely identifies some effective arguments that trial counsel made, failing to address any of the specific errors and omissions identified in the initial brief, such as (1) failing to argue that Simpson had no motive, (2) failing to argue the reasonable doubt standard while taking on the burden of showing Little Archie was the killer, (3) initially arguing Durrance was the killer before arguing

²⁰ On cross by defense counsel, Little Archie said he did not remember stopping by a Hess station on his way to Smith’s house, but he was seen at a Race-Trac station, not a Hess station. (T:813-14, 823.) Indeed, the State made this point in cross-examining Thompson, demonstrating that the two stations were about two miles apart. (T:1498; *see also* T:1629 (closing argument).)

that Little Archie was the lone killer, (4) bolstering the State’s DNA witness as “the best DNA mind in Florida,” (5) making the unsupported claim that “epithelial DNA,” a technical term never defined for the jury, on the clothes “matches” Little Archie, (6) trying to impeach testimony Little Archie never actually gave regarding cashing a check the day of the murders, (7) saying Simpson called Det. Hinson about Little Archie wanting to “hit a lick” the day after the murders even though it was before the murders and related to the Little Archie taking the clothes, and (8) contending that Little Archie had committed the murders alone and went in through the front door even though the evidence showed both were impossible. (IB 222-25.)

The State’s only other point is to claim that a deficient closing argument could not have prejudiced Simpson because the jury was given the standard instruction that what attorneys say is not evidence. (AB 77.) But the State cites no case for that proposition. Closing argument is recognized as one of the most important tasks for trial counsel, and providing an incoherent argument that is contrary to the evidence on an important issue is prejudicial. *E.g.*, *Acker v. State*, 787 So. 2d 77, 83-84 (Fla. 2d DCA 2001); *Henry v. Poole*, 409 F.3d 48, 64-65 (2d Cir. 2005); *Oesby v. United States*, 398 A.2d 1, 7-8 (D.C. Ct. App. 1979).

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

The State does not contest Simpson's arguments that postconviction testimony from Little Archie and Thompson satisfies the first prong of the NDE test and challenges these claims only on prejudice grounds. (AB 78.) Parroting the trial court, the State characterizes the inconsistencies between Little Archie's trial and postconviction testimony as "minor." (AB 80.) But whether Simpson was telling the truth when he said Little Archie came to his trailer shortly before the murders and left Det. Waugh's business card out were key aspects of his testimony providing the innocent explanation for why his DNA was on the clothes. If the jury learned that Little Archie had lied to them and really did go to the trailer that day and found the business card, it is likely it would have rejected the rest of his testimony denying that he borrowed the clothes. Had the jury also known that the only other basis for the State's impeachment of Simpson's account – the timeline discussed in Part II.B, *supra* – was also false, there is at least a reasonable probability the jury would have believed Simpson.

Thompson's testimony would have further bolstered Simpson's DNA defense and made it much more likely that the jury would have concluded that all the evidence pointing to Little Archie meant there was at least reasonable doubt as to Simpson's guilt. Thompson's testimony was not "speculative at best," as the State suggests. (AB 81.) He was clear in the end that Little Archie participated in rob-

beries wearing these kinds of clothes, actually kept a bag of these kinds of clothes at the scene of the murders, frequently followed the path of the killer(s) through the barbed wire fence, and – within a couple weeks of the murders – yelled in the yard he would kill the victims.

V. CLAIMS UNDERMINING THE STATE’S REMAINING EVIDENCE

The common thread to these claims is that the State now seeks to downplay whether the trial evidence on the following points was inculpatory to begin with. On this point, the parties agree, though this only highlights just how ineffective the briefing was on direct appeal in failing to address the sufficiency of the evidence. Whatever the State’s position now, this Court did identify almost all of this evidence as supporting the conviction.

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

Other than its arguments related to prejudice, rebutted in the introduction to this Part, the State’s defenses to this *Brady* claim are that JSO did not collect the pager and so could not produce it to the defense and that, in any event, the defense could have “asked for the phone records for the pager,” which were equally available to the State and defense. (AB 83.) This was not the basis of the trial court’s ruling and was not argued below. In any event, it is not supported by the record. The only documentation in the postconviction record regarding numbers on the pager was Det. Bialkoski’s notes, which the State had and the defense did not. And the

only record of attempts to obtain documentation from the phone company shows that when the State tried to subpoena them, it learned that the records no longer existed due to the passage of time. (T:11117-20.)

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. (Claim 20, 21, and 22)

In trying to minimize the prejudice of withholding Hinson's notes showing that he left a message for Simpson between 9:00 and 9:40 the morning after the murders and that Simpson returned the call between 10:11 and 12:30, the State argues that the notes merely "corroborate that he was, in fact, trying to contact Simpson, which Simpson himself admitted." (AB 87.) But the notes do far more. As the State recognizes in a subsequent argument, Hinson's alleged suspicion that Simpson was involved in the murders was based in part on his having trouble reaching Simpson. (AB 90.) More importantly, the notes corroborate Simpson's account and contravene Caliel's argument to the jury. After noting that Hinson arrived to the homicide office at 8:00 a.m., Caliel argued:

[Hinson] immediately began to page Jason Simpson. But there was no return page or return phone call. He stated that he continued to page this defendant **over and over**, trying to get in contact with him, he went to the crime scene, he spoke to the detectives, **still paging this defendant**, and it was only four hours later at nearly noon, and remember this, ladies and gentlemen, that **this defendant returned his page. Not the other way around, not that Detective Hinson called him at his mother's house. This defendant returned the detectives' page and they arranged to meet.**

(T:1597-98 (emphases added).) If the jury had known of the notes this argument would be ineffective and unbelievable.

Hinson's notes also stated that Simpson only had a "small cut" or "scratch," not the large gash Hinson testified to or the "oozing gash" the State described in closing. In characterizing this discrepancy as only a "small inconsistency" that the defense would not want to "dwell on" (AB 89-90), that State overlooks Simpson's point that the defense **did** focus on the cut by not only having Simpson testify to rebut Hinson's claims, but also calling a defense witness to help show Simpson was telling the truth. Eler confirmed the notes undermined Hinson's credibility and could have been used. (R3:10324.) In corroborating this evidence to support Simpson's version, the notes would have bolstered his credibility and undermining Hinson's. Any lingering question as to the materiality of this issue is resolved by the State's closing argument, which not only emphasized the supposed "gash" on Simpson's hand at least six different times, but argued that his attempt to downplay the injury to Hinson was evidence of a "group of lies" Simpson had put together to defend himself. (T:1598-99, 1639-40, 1688.)

Finally, the State's attempts to minimize the prejudice from Hinson's withheld note that Simpson had stopped cooperating with him in June, three weeks before the murders (AB 92-93) are belied by the argument it made to the jury about Simpson's reaction when Hinson asked him to provide a DNA sample:

And that scared this defendant. It scared this defendant because that process of going from big to small was starting to take place and the focus was now turning to him. It scared this defendant and remember what Detective Hinson said, **after that day he wasn't cooperative with me anymore.**

(T:1604 (emphasis added).)

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 correctly points out that Eason's report provided to the defense indicated that, at 2:30 p.m., Simpson told the detectives he had to be at work in an hour. (R3:8087.) But this only supports the IAC claim. Had counsel reviewed this and used it to refresh Simpson's recollection, Simpson surely would not have denied having told them that before being accused of the murders. (AB 93-94 (citing T:1414-15).) Just as importantly, it supports the *Brady* claim because Eason's concealed notes were not consistent with that report as the State claims. The report and Eason's testimony made it appear that the exchange about work took place during the interview at 2:30. But the notes show that Simpson only arrived at the station 2:30 and warned them he had to be at work by 3:30. They made him wait until 3:00 before even beginning the interview. (R3:6477.) That they made him wait 30 minutes despite knowing he had to leave for work explains both why Simpson thought he had time for the interview on his way to work (he would have had they

started when he arrived) and that he, in fact, had to leave when the interview finally started to avoid being late.

Moreover, the State points to no actual evidence to support its reliance on the purely speculative contention by Eler that perhaps Simpson was not worried about being late to work since he had been late before. (AB 95 (citing R3:10546).) To whatever extent any evidence he had been late before might be relevant, it only shows how important it was for him not to be late again. And the work records must be considered cumulatively with the JSO records showing the first thing Simpson said when he arrived – before being made to wait a half hour to be accused of murder – was that he had to leave for work.

VI. CONCLUDING POINTS ON SIMPSON’S CLAIMS.

Though it confusedly talks in terms of “harmless errors,” the State appears to argue review for cumulative prejudice would only apply if Simpson establishes the initial prongs of two or more claims. Simpson does not disagree with that and has not argued to the contrary. But the State’s suggestion that Simpson has not established the initial prongs of two or more claims is false not simply because Simpson has met his burden for demonstrating deficiencies in every claim, but also because the only defense the State concedes as much as to at least five claims, where its only arguments are a lack of prejudice. (See AB 34-37 (defending NDE claim involving Durrance recantation solely on prejudice grounds), 49-51 (same as to *Brady*

claim involving Little Archie’s work as a CI), 62-67 (same as to IAC claim regarding Elliott), 67-69 (same as to IAC involving McNeish), 77-82 (same as to NDE claim regarding postconviction testimony by Little Archie and Thompson).)

Simpson stands by his assertion that cumulative review requires assessing prejudice on all claims where Simpson has proven the initial prongs and applying the most “defense-friendly” standard applicable to any of those claims. (IB 37-38, 249.) Thus, for example, if the Court agrees that the State violated *Giglio* by having Durrance repeatedly deny he received any promises or benefits or by insinuating and arguing that Simpson fabricated his defense because he was released in March even though he was released in June, then the State bears the burden of proving beyond a reasonable doubt neither the benefits Durrance was given and promised nor the June release date were material. In considering whether the State has met that burden, the Court should consider all other *Giglio* and/or *Brady* violations, any deficient representation by counsel, and any newly discovered evidence. Anything less is not cumulative review. *See, e.g., Jimenez v. State*, 265 So. 3d 462, 479 (Fla. 2018) (“Considering the undisclosed evidence cumulatively means adding up the force of it all and weighing it against the totality of the evidence that was introduced at the trial. That is the way a court decides ... if the suppression was harmless beyond a reasonable doubt where a *Giglio* type of *Brady* claim is involved.”) (quoting *Smith v. Sec’y, Dep’t of Corr.*, 572 F.3d 1327, 1334 (11th Cir.

2009)); *State v. Gunsby*, 670 So. 3d 920, 924 (Fla. 1996) (prejudice for *Brady*, IAC, and NDE claims must be examined cumulatively).

In undertaking review for cumulative prejudice, the Court should focus on two key concessions by the State. In response to what it fairly characterizes as Simpson's argument "that Durrance's testimony, the only direct evidence in this case, was not strong and without it, the State could not have proven the case against Simpson," the State concedes that "[t]hat may be true" and makes no argument to the contrary. (AB 15.) Similarly, in response to what it fairly characterizes as Simpson's argument that "the circumstantial DNA evidence was not strong, and without it, the State would not have proven the case against Simpson," the State again concedes that "this may be true" and makes no argument to the contrary. (AB 15.) Thus, Simpson should only have to nudge the needle to establish prejudice under any standard if he meets the initial prongs of one or more of his claims in either Part III (claims involving Durrance) or Part IV (claims involving DNA evidence).

While the same cannot be said for the claims addressing the remaining evidence in Part V, those claims are demonstrative of the State's failure to grapple with cumulative prejudice. The majority of the State's arguments against these claims are that each piece of evidence considered individually is not sufficiently material or clear to establish the requisite level of prejudice. Just like the trial

court, the State errs in refusing to address the cumulative nature of this evidence. Cumulatively, these claims require consideration of how the jury would have reacted had it learned that nearly all of the 2007 testimony by detectives that painted Simpson as acting guilty was in near direct conflict with their notes taken at the time the events occurred several years earlier before Durrance came forward to accuse Simpson and before the DNA tests. These claims tend to show that not only did the detectives do a sloppy job investigating this case, but they altered their recollections – whether intentionally or subconsciously – to make Simpson appear guilty once the DNA test results came back. Indeed, the strength of these claims comes from their cumulative impact.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following counsel for Appellee by email on November 22, 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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