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IN THE SUPREME COURT OF FLORIDA

JASON ANDREW SIMPSON,

Petitioner,

v. Case No.: SC19-

MARK S. INCH,
SECRETARY, DEPARTMENT OF
CORRECTIONS,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

For ease of reference, this brief uses the following abbreviations, which are identical to those used in the initial brief on the postconviction appeal, when citing the proceedings or filings in this case with the blank representing the page number:

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

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

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

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

App. _ Appendix accompanying initial brief in postconviction appeal, No. SC18-1238

JURISDICTION TO GRANT HABEAS CORPUS RELIEF

Jason Simpson seeks habeas relief because he was deprived of the effective assistance of counsel on direct appeal of his capital convictions and sentences, resulting in their affirmance. This Court has original jurisdiction over this action under article V, sections 3(b)(1) and (9) of the Florida Constitution as well as Florida Rule of Appellate Procedure 9.030(a)(3).

STATEMENT OF THE CASE AND OF THE FACTS

Simultaneously with this petition, Simpson is filing his initial brief in his appeal of the trial court's final order denying his initial postconviction motion to set aside his convictions for the murders of Archie Crook, Sr. ("Big Archie") and Kimberli Kimbler. Because Simpson asserts that appellate counsel was ineffective for failing to brief the sufficiency of the evidence on direct appeal, this petition first includes a complete statement of the evidence at Simpson's trial. It then sets forth a brief procedural history of the direct appeal and postconviction proceedings.

Facts Adduced at Trial

The murders and crime scene. Big Archie and Kimbler were murdered by multiple axe blows to the neck, head, and upper torso in the bedroom of Big Archie's home in Jacksonville late on the evening of July 15, 1999, or early the next morning. (T:577, 588, 836-37, 840-44.) At the 2007 trial, the State produced

no eyewitnesses to the murders and no physical evidence placing Simpson at the murder scene. Assistant state attorney Mark Caliel was the lead prosecutor; then-assistant state attorney Melissa Nelson was co-counsel. Caliel admitted during the 3.851 evidentiary hearing that the State never could "ascertain" or "prove" what Simpson's motive would have been to kill the victims. (R3:10998, 11007.)

The last people known to have seen the victims alive were Archie Crook, Jr., ("Little Archie") who was Big Archie's son, and Little Archie's close friend, Shawn Smallwood. (T:815.) Smallwood did not testify because he died in a motorcycle accident sometime after Big Archie's death. (T:782.) Little Archie did testify and admitted to being angry that his father was dating Kimbler and that she was pregnant with Big Archie's child. (T:783-85.) He was upset because he hoped his parents, who were still married, would reconcile. (T:784-85.) Though he could not recall doing so, he conceded that he may have told family members that Kimbler's baby "wouldn't see the light of day" and that he would "kill all three of them." (T:808-09.)

Little Archie and Smallwood arrived at Big Archie's house sometime between 10:00 and 11:00 the night of the murders. (T:781.) They arrived on the back deck and knocked on the south rear door to the bedroom,[1] which was locked.

[1] A floorplan appears at R3:3073, a copy of which is also in the appendix filed in the postconviction appeal at App. 310.

(T:789-90.) Little Archie had his own key, but they waited for Kimbler to let them in. (T:789-90, 812.) He, Big Archie, and Smallwood smoked a joint, ate strawberry shortcake, drank milk, and chatted until Big Archie was sleepy. (T:790-91.) Little Archie told the jury that he and Smallwood let themselves out the north rear door, which they left unlocked, and because Kimbler was in bed and Big Archie was falling asleep on the living room couch, nobody followed them to lock the door behind them. (T:791-92.) He testified that after they left around midnight, Smallwood dropped him at the home of his girlfriend Heather Smith. (T:793-94, 823.) The State never sought to corroborate this alibi and Smith did not testify.

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

After Howard called the police, JSO detectives and evidence technicians spent the rest of the day taking pictures, collecting evidence inside the house, and surveying the scene. (T:555-56; 578.) Blood had been splattered all around the

room, including not only on the bed and floor under the victims, but also on the surrounding rugs and floor, furniture around the bed, the walls and window blinds, and by the south rear door leading from the bedroom to the back deck. (T:590-98, 626-28.) Blood also was found outside the door on the back deck and on papers found on the ground. (T:625-26.) Blood samples were taken from throughout the crime scene and kept sterile so that they could be tested for DNA in the lab. (T:598.) The lead evidence technician speculated, without objection, that droplets of blood on the bedroom floor came either from the victims' blood dripping from the axe or possibly from a wound to the assailant. (T:595-96.)

The crime scene team concluded that the front door was impassable because a pile of clothes prevented anyone from entering or exiting through it. (T:585.) They found the north rear door unlocked, and though three fingerprints were found on the knob and shoe prints found on the kitchen floor between the north rear door and the bedroom, none of them were identified. (T:583-84, 612-13.)

While JSO was processing the scene, Howard noticed that a chicken pen in Big Archie's backyard had been knocked over. (T:560.) He took the police into the backyard, but they did not see anything out of place. (T:562.) Later, when his kids got home, Howard allowed them to go into the backyard as long as they did not cross the police tape. (T:562.) Within a few minutes, they found an axe and some white socks. (T:562.) They showed Howard, and he discovered two torn pieces of

black cloth on a barbed wire fence at the back of Big Archie's yard. (T:562.) He alerted the police. (T:564.) They found blood, subsequently identified as belonging to the victims, on the axe, but no fingerprints. (T:1088, 1160, 1171.) No physical evidence, such as blood, was found on the socks. (T:1088, 1160.)

The next day, medical examiner Dr. Bonifacio Floro conducted autopsies on the victims. (T:836-37.) Dr. Floro did not testify at trial, but Dr. Margarita Arruza, the circuit's chief medical examiner, testified without objection based solely on her review of Dr. Floro's report and photographs. (T:838-39.) She testified that Big Archie's stomach contained a "very large amount" of partially digested food consisting mainly of curdled milk, beans, green vegetables, and some "red particulate material." (T:858; 861.) Dr. Arruza testified that because the contents of Big Archie's stomach were "well-preserved" and contained a "very large amount and very recognizable food, very undigested," she estimated that Big Archie died within an hour of ingesting the food. (T:858.)

On July 20, 1999, over four days after the murders, a young man mowing the lawn at the church behind Big Archie's house found a pile of black clothes next to an air conditioning unit. (T:698.) JSO was called and collected the clothing for processing. (T:699.) The clothing consisted of a black baseball cap, black sweatshirt, black sweatpants, and a pair of black tennis shoes, all of which JSO collected, storing the hat and clothes together in a single paper bag. (T:729-30.)

DNA evidence. The clothes and items collected at the crime scene were provided to the Florida Department of Law Enforcement (FDLE) in 1999, but were not actually tested until 2001. (T:961, 1214.) The State tested four blood stains from the bedroom floor; samples taken from the sweatshirt, the sweatpants, the hat, and the shoes; hairs recovered from a trace debris sweep of the clothing; blood stains from the back deck; a bloody magazine found on the deck; the axe and socks found in the backyard; and a sexual assault kit from Kimbler, including scrapings taken from under Kimbler's fingernails. (T:1144-83, 1207-09.)

Kimbler's DNA was found on stains from the bedroom floor, four of nineteen stains from the sweatpants, two of four locations tested on the shoes, and the axe. (T:1144, 1167-68, 1171, 1175-79, 1183.) Big Archie's DNA was found on two stains from the sweatpants, and he could not be excluded as a contributor to possible DNA mixtures on one of the stains from the bedroom floor, one cutting from the sweatpants, and the axe. (T:1149, 1172, 1175-76, 1181-82.) One swabbing of blood found on the floor produced a mixture from which Smallwood could not be excluded. (T:1149.) Neither victim's DNA was found on the hat, sweatshirt, or socks. (T:1088-90, 1094.) Indeed, not a drop of blood was found on the hat, the sweatshirt, or the socks. (T:1088-90, 1094.)

The State found a full profile of Simpson's DNA on a visibly crusty stain on the shoulder of the sweatshirt and two of the nineteen hairs recovered from the

raking of the sweatshirt and pants for trace evidence. (T:1211-12.) A partial profile consistent with Simpson's DNA was recovered from the neckline of the sweatshirt and the waist- and cuff-bands of the sweatpants. (T:1211-12.) Those three locations contained a mixture of DNA, indicating that one or more persons other than Simpson had also left DNA on the clothes in those locations. (T:1239, 1262.) Simpson's DNA was not found on any other items recovered.

The State's expert, Charles Badger of FDLE, opined that Little Archie could be excluded from the two mixtures on the sweatpants, but could not be excluded from the mixture on the neckline of the sweatshirt. (T:1193-94.) These opinions were based on his assumption that there were only two contributors to the mixtures, and he conceded they would not be valid if three or more people had worn the clothes. (T:1122-23, 1166-67, 1180, 1188, 1231-32, 1235, 1239-41.) Instead, Badger agreed that if there were more than two contributors, then Little Archie could not be excluded from any of the mixtures. (T:1236-37.) The State never offered any evidence to support Badger's assumption and never suggested who else had worn the clothes.

DNA testing on the scrapings from under Kimbler's fingernails yielded a profile that was consistent with both Big Archie and Little Archie, but excluded Simpson. (T:1075.) The type of test the lab performed could not distinguish between the DNA of a biological father and son. (T:1075.) Another expert for the

State, Shawn Weiss, testified on direct that these results could be explained if Big Archie and Kimbler "had had intimate contact" that evening. (T:1075.) On cross-examination, he agreed the results could also be explained if Little Archie was the killer and Kimbler struggled with him. (T:1077.) He also conceded that if the State had conducted nuclear DNA testing, it would have been able to determine whether the DNA came from Big Archie or Little Archie. (T:1077.)

Durrance's Testimony. George Michael Durrance provided the State's only direct evidence. (T:879-83.) He knew Simpson, Big Archie, and Little Archie and had been selling cocaine to Big Archie for a number of years. (T:864-65.) He testified that "less than a week" before the murders, Simpson showed up at his door out of the blue to say that he planned to rob Big Archie. (T:874-75.) Durrance claimed that Simpson also told him that Big Archie had offered Simpson $10,000 to kill Durrance,[2] but Simpson said he would not do it. (T:871-73.)

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[2] Durrance testified that he had a dispute with Big Archie over a drug deal. Over a year before the murders, Durrance fronted around two kilos of cocaine worth about $40,000 to Big Archie by leaving it with Little Archie. (T:866-67.) Little Archie told Durrance that someone stole the drugs and Big Archie never paid Durrance for them. (T:866-67, 921.) Durrance testified that he got his money back around six months before the murder by making Big Archie pay up front for the next delivery, but after he was paid, Durrance supplied Big Archie with fake cocaine. (T:867-68; *see also* T:819 (Little Archie's testimony that the fake cocaine deal occurred shortly before the murders).) Big Archie was angry over being "ripped off" by Durrance, and Durrance heard from several sources that Big Archie wanted him dead. (T:869-70, 921-22.)

Durrance did not see Simpson again until after the murders. (T:876.) He claimed that Simpson came to his house and said "matter of factly" that "I'm the one who killed him, you know I did." (T:876-78.) Simpson allegedly explained that he waited for Big Archie and Kimbler to fall asleep, happened to find an axe in the backyard, and climbed "through the laundry room window." (T:879, 904.) Durrance testified that Simpson then went into the bedroom and killed Big Archie first, and when Kimbler "tried to make a run for it," he killed her, too. (T:879, 903-904.) He claimed that Simpson characterized the murders as "his wet work." (T:880.) He testified that Simpson later confirmed he had acted alone. (T:881-82.)

Durrance did not inform law enforcement of Simpson's alleged confession until Durrance was arrested and charged with conspiracy to traffic cocaine almost two years after the murders. (T:885-88.) After his arrest, but before coming forward about the murders, Durrance discovered that Simpson had been cooperating with the police, which led to a wiretap, which in turn led to his trafficking arrest and a 32-year prison sentence. (T:885-87.) When asked at Simpson's trial why he waited over two years to tell the police Simpson confessed, Durrance testified that he waited until he thought the information could help him avoid the possible 50-year sentence he was facing for trafficking. (T:888-91.) He was testifying in the hope he would receive a sentence reduction for his assistance, but made clear he had not been promised anything. (T:887-89.)

On cross-examination, Durrance admitted that he would do "anything" to get out of prison early, including lying under oath, although he denied he was lying in his testimony. (T:898.) Defense counsel reminded Durrance that in his deposition he testified that Simpson had climbed through the kitchen window, not the laundry room window. (T:902-04.) When asked whether he was telling the truth in the deposition or at trial, Durrance replied, "They're both – the laundry room separates from the kitchen. There's like when you walk in the door, there's an area where you got washer and drier and then there's the kitchen window. Both of them are the same area." (T:904.) He testified, based on his memory of the house, that Simpson would have first climbed through the laundry room window and then "open[ed] up the kitchen room window." (T:904.) The floorplan in evidence showed that there were no windows between the laundry room and the kitchen. (App. 310.)

Defense counsel showed Durrance pictures of the kitchen window that revealed it would have been impossible for someone to have climbed through the kitchen window because there were angled pieces of wood preventing the window from opening and a number of wine glasses were stacked up on the windowsill undisturbed. (T:906-07.) Durrance explained, "I think it's possible that I misunderstood Jason, what window or, you know, it's been a long time." (T:908.) JSO Lieutenant Hugh Eason confirmed that Durrance reported at the first interview

in October 2001 that Simpson entered through the kitchen window. (T:955.)

The investigation focuses on Simpson. JSO Detective Robbie Hinson testified that Simpson began working with JSO as a confidential informant ("CI") on June 10, 1999, to investigate several suspected criminals including Big Archie and Durrance. (T:650.) Simpson reported to Hinson on June 21, 1999, that "Archie" – Hinson was not sure which one – had contacted Simpson and wanted to "hit a lick," which meant do something illegal. (T:651-52.) Hinson tried to get in touch again several times beginning the next day, but did not speak to Simpson until July 16. (T:652-53.) When Hinson heard about a double murder that morning, he recognized the address as Big Archie's and started trying to reach Simpson. (T:653-54.) He testified that he tried reaching Simpson "numerous times" starting when he arrived at work at 8:30 that morning, but that Simpson did not call him back until around noon, when they agreed Hinson would pick Simpson up at his mother's house. (T:653-55.)

Hinson testified that when he arrived, he noticed a "large gash" on Simpson's finger, which Simpson explained was from hitting the electrical panel in the garage. (T:656-57.) When Hinson told Simpson of Big Archie and Kimbler's deaths, he said that Simpson said "he wasn't really sorry and then he said that when you live by the sword, you die by the sword and he kind of shrugged his shoulders." (T:659.) Simpson advised that the last time he spoke with Big Archie

was about two weeks prior when they went to someone's residence to buy drugs. (T:658.) Hinson had Simpson show where that house was and then dropped Simpson back at his mother's house. (T:658-60.) Hinson asked Simpson to get close to the Crook family and to find out all he could about the murders. (T:678.)

JSO Det. James Williams testified that two months after the murders, he examined Big Archie's pager, which had been collected at the scene. (T:734.) He scrolled through and wrote down all of the numbers stored in the pager's memory. (T:735.) He testified that he called "the first number that came up on the pager" and Simpson's mother answered. (T:735.)

Lt. Eason testified that he and JSO Detective Mark Bialkoski interviewed Simpson in November 2001 and told him "we were working with Crook Kimbler." (T:949.) When Simpson stated he did not know who they were talking about and they said Archie Crook, Simpson affirmed he knew him. (T:949.) Eason testified that Simpson then "immediately looked at his watch and said, it's time for me to go, I've got to get to work." (T:950.) Eason characterized Simpson as "belligerent" and testified that Simpson told them they could not hold him and that he did not "scare easy." (T:951.)

Detective Dale Gilbreath testified that in August 2002, FDLE advised it had found Simpson's DNA on the sweatclothes, and he set up an interview with Simpson. (T:1339-40.) Gilbreath testified that when he told Simpson he "wanted to

talk to him about the Crook and Kimbler murders," Simpson denied knowing them. (T:1343.) Gilbreath then "asked if he did not know Archie Crook, Sr., and at that point [Simpson] said he knew him a little." (T:1343.) Gilbreath asked Simpson what he would say if Gilbreath told him that his DNA was found at the murder scene. (T:1344.) Simpson replied that was impossible. (T:1344.)

The next day, Gilbreath interviewed Simpson again and showed him photos JSO had taken of the clothes next to the church. (T:1346, 1349-50.) When he told Simpson the clothes were related to the murders and that he had information the clothes belonged to Simpson, Simpson replied the information was wrong. (T:1351.) He showed Simpson a close-up photo of the pile of clothing and Simpson denied that they were his. (T:1351.) On cross-examination, Gilbreath admitted the 4x6 photos he showed Simpson, including the close-up, were substantially smaller than the blowups presented at trial. (T:1358-59.) Indeed, even from the blown up photos at trial, Gilbreath could not tell whether the clothes were inside out and noted that they appeared to be dark blue. (T:1360.) The State's expert fiber analyst from FDLE, Heather Velez, who spent hours looking at the clothes, could not identify them from the photos, either. (T:1283-84.)

Simpson's testimony. Simpson took the stand for the defense and denied committing the murders. (T:1396.) He testified that he had prior convictions and that in 1999 he was released from jail early to work with law enforcement as a CI

to develop information mainly about drug dealers. (T:1377-80.) Right after he was released, he rented a room in a trailer on 118th Street, although he also spent a good bit of time at his mother's house. (T:1380-81.) One day, he was painting at his mother's house when Little Archie came over. (T:1383.) Little Archie said he heard that Simpson was working for the police and joked that "I think I hear a tape recorder." (T:1383.) Simpson brushed it off and Little Archie gave him a ride back to the trailer on 118th Street. (T:1383-84.) On the way, Little Archie asked to borrow some dark clothes because he was going to "hit a lick" that night, which meant steal a car. (T:1384-86.)

Simpson told Little Archie he could pick something out of a pile of clothes on the floor. (T:1387-89.) As Simpson was getting ready to step into the shower, he saw Little Archie pick up black clothing. (T:1387.) When he got out of the shower, Little Archie was gone. (T:1387.) Simpson's dresser drawer was open, and the business card of Lieutenant Tom Waugh, with whom Simpson had been working as a CI, had been placed on top of the dresser. (T:1387.) Simpson immediately called Waugh who told him to try to go with Little Archie that night and to call Hinson. (T:1389.) Simpson told Waugh about Little Archie's plan, and Hinson told him to stay in contact with Waugh. (T:1389.) But Simpson did not see Little Archie again that night. (T:1389.)

Simpson testified that he only lived in the trailer for "a couple of weeks" and then moved in with his mother about two weeks prior to the murders. (T:1382, 1390, 1423-24.) On cross-examination, Caliel suggested Simpson had been released from jail back in March 1999, which would have placed Little Archie's visit to the trailer to borrow clothes in April instead of a few weeks before the mid-July murders as Simpson claimed. (T:1422-24.) Simpson conceded he did not know the exact date he was released and, when asked to explain the State's suggestion that his timeline was off, Simpson stated, "It's been a long time ago. I don't remember exactly." (T:1423.) When the State asked if he was sure about how long he stayed at the trailer, he replied, "It could have been longer. I'm not sure, sir." (T:1424.) The State used this exchange throughout closing to claim Simpson's testimony that Little Archie borrowed his clothes was fabricated, but never offered any evidence that Simpson was released in March as Caliel's questions assumed. (T:1618-19, 1643-44, 1681-82.)

Simpson testified that he spent the entire night of the murders at his mother's house. (T:1390-91.) He woke up around seven or eight that morning and had breakfast. (T:1391.) The power was out, so he went to the dark garage and scratched his finger on the breaker box. (T:1391-92.) He testified the injury was "nothing really major," just a "scratch" and denied it was "a gaping, oozing wound." (T:1392-93.) An employee from JEA testified that the power had gone off

that morning at 7:56 a.m. for three minutes at about 3500 residences, including Simpson's mother's home. (T:1468-69.)

Unemployed at the time, Simpson had nothing to do that morning and went back to bed. (T:1393-94.) Later, his mother woke him and told him that Detective Hinson had called. (T:1394.) He called Hinson back and then showered and dressed. (T:1394-95.) When Hinson picked him up and told him that Big Archie and Kimbler had been murdered, he was shocked, but did not have much to say because "it took awhile to kick in." (T:1397.) He agreed he had told Hinson something to the effect of "if you live by the sword, you die by the sword," but explained this was simply a Bible verse he referenced because he knew Big Archie always carried a gun and assumed Big Archie had been shot. (T:1398, 1447.)

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

Simpson confirmed that, working as a CI, it would not have been out of the ordinary for him to have paged Big Archie, though he did not remember because it was such a long time ago. (T:1439.) He had driven with Big Archie to a house to

purchase drugs some time before the murder as part of his CI work. (T:1439.)

Simpson testified that he agreed, at Hinson's request, to the 2001 interview by Eason and Bialkoski before he had to go to work one day. (T:1413-14.) He said that when he got there, they were very rude to him and locked him in an interview room for a while. (T:1414-15.) He denied telling them that he did not know Big Archie and said that he misunderstood Bialkoski at first: "He didn't say Crook, he said Crews. I said the crews? What kind of crew you talking about? The people I hang out with? Who's the crews. I don't know no crews. He said, you don't know Archie and Kim? I said, of course I know them." (T:1427-28.) He explained that when Bialkoski started yelling at him and trying to scare him by threatening to violate his probation, he replied he was not scared of them and had to leave to get to work across town. (T:1415, 1428-29.) Simpson testified that in the subsequent interview a year later, Gilbreath also started by asking him about "Crooks" or "Crews." (T:1442-43.) Simpson replied he did not know who Gilbreath was talking about, but when Gilbreath told him he was referring to "Archie, Sr. and Kim," he confirmed knowing them. (T:1442-43.)

Additional defense witnesses. The defense also called Brenda Crook, Big Archie's sister, who testified that during a conversation with Big Archie, Kimbler, and Little Archie shortly before learning that Kimbler had gotten pregnant, Little Archie stated he would "kill all three of them if they ever had a baby," though she

added that Big Archie told her that Little Archie was "just running his mouth, not to pay no attention to him." (T:1473.)

The defense also called Troy Lamar Crook, Big Archie's oldest son and Little Archie's big brother, and he admitted he had told police that he had heard that "Little Archie said that the baby Kim was going to have would not see the light of day." (T:1479, 1481.) He denied that he had heard this from Little Archie; he had only heard it "through the grapevine." (T:1479-80.) The defense also called McNeish, Little Archie's former girlfriend and the mother of his daughter, but she denied ever hearing Little Archie make statements about killing anyone or being upset that Kimbler was pregnant. (T:1482-85.)

The defense called Williams back to the stand to confirm from his report that on July 21, 1999, Troy "said that Little Archie said the baby Kim was going to have would not see the light of day" and that "Little Archie was not happy about Kim being pregnant with a male child." (T:1489-90.) That same day McNeish told him that Little Archie was upset that Kimbler was pregnant and had said that "the baby would never see the light of day." (T:1490.) Williams went on to testify that Little Archie revealed that he knew the relative position of the bodies. (T:1491-92.) Indeed, Little Archie admitted telling Williams that Big Archie "was probably lying in bed when he was hit and that Kim was trying to get out of bed when she was hit and that Kim's leg was up on the bed." (T:821.) That is the exact way the

bodies were found. When Williams asked him how he knew that, Little Archie responded that his grandfather had told him. (T:1492.) But his grandfather denied this at trial. (T:546.)

The defense also called Terry Thompson, Little Archie's cousin, and he testified that around midnight on the night of the murders, he saw Little Archie and Smallwood at a RaceTrac gas station about five minutes from Big Archie's house. (T:1496-97.) On the State's cross, he testified that they appeared normal, they all "shared a couple laughs," and Little Archie told him they had just been "drinking milk and eating cookies" at Big Archie's house. (T:1499.) Thompson, who was renting a trailer on Big Archie's property, then went home and went over to knock on Big Archie's door to see whether his phones were working. (T:1500.) Thompson knocked on the north rear door, pointing to it on the floor plan diagram and clarifying that he did not try the south rear door to Big Archie's bedroom. (T:1500-01.) He noted that he had been to Big Archie's house many times when the doors were unlocked and this door had a double dead bolt that required a key to lock it on the way out. (T:1501.) He testified that there was no answer and that he did not call out. (T:1497-98, 1502.) He was not asked by either party whether the door was locked.

The final defense witness was Dana Guinn, whose daughter Christie Perry was living with Thompson at the time of the murders. (T:1571-72.) He and Perry

were with Thompson that night when they saw Little Archie and Smallwood at the RaceTrac. (T:1572-73.) Guinn testified that Little Archie might not have been wearing a shirt and was acting jittery and nervous. (T:1574-75.)

Closing arguments. In closing arguments, the State made numerous attacks against Simpson for being a "bad person" and accused him of having fabricated his defense; concurrently, it vouched for Durrance's credibility. (T:1600-04, 1614-15, 1636-37, 1640, 1642-46, 1690.) The State also accused Simpson's defense of wanting the jury to engage in "speculation without proof and possibilities without evidence." (T:1688.) But it was the State that repeatedly misrepresented the evidence that had been presented, particularly in regard to the DNA evidence. (T:1622, 1675-78, 1680, 1688, 1689.) Defense counsel neither objected nor sought to rebut any of these comments, which will be set out in greater detail in Issue II of this petition.

The verdicts. The jury found Simpson guilty on both counts of first-degree murder. (T:1723-26.) When polled, each juror affirmed the verdict. (T:1726-27.) Juror Cody, who appeared timid, had been looking down when the verdict was read. (T:1830.) One week later, on the first morning of the penalty phase, Juror Cody asked to speak with the court about "some questions that were unanswered before the verdict was made." (T:1826-28.) After reminding her that the jurors had been polled under oath, the court asked her directly, "Was that, in fact, your

verdict?" (T:1835.) She replied, "No." (T:1835.) She stated that it had been her understanding that she could only consider the physical evidence and "not take into consideration everyone's testimony as well," and that when she incorporated the testimony with the physical evidence, she did not believe that Simpson was guilty. (T:1838.)

The trial court denied Simpson's motion for mistrial and proceeded to the penalty phase. (T:1839-40.) That phase lasted three days, after which the jury recommended death sentences for Big Archie's murder by a vote of 8 to 4 and for Kimbler's murder by a vote of 9 to 3. (T:1976.)

Direct Appeal

Simpson's appellate counsel raised six issues on direct appeal. In. Br. on Direct Appeal, *Simpson v. State*, No. SC07-798, 2007 WL 4632642 [hereinafter DA Br.]. Following oral argument, this Court affirmed in *Simpson v. State*, 3 So. 3d 1135, 1149 (Fla.), *cert. denied*, 558 U.S. 839 (2009).

Four of the six claims raised on direct appeal (and the only subject discussed at oral argument) involved the Juror Cody issue. *Simpson*, 3 So. 3d at 1140. This Court rejected these claims raised because she had confirmed the verdict was hers when the jury was polled and the reasons she gave for retreating inhered in the jurors' deliberations. *Id.* at 1141-44. The fifth claim involved an evidentiary issue on which the trial court had never ruled and the defense had never made a proffer.

Id. at 1145-46.

As their final claim on direct appeal, appellate counsel contended that certain prosecutorial comments during closing argument, to which trial counsel did not object, amounted to fundamental error. *Id.* at 1146. Specifically, they challenged the following comments that: (1) Simpson "struck them blow after blow until he left their lifeless and bleeding bodies gurgling on the floor" (T:1591); (2) "[t]heir blood speaks the truth about who it was that wielded that axe inside the bedroom" (T:1593); (3) Little Archie was eliminated as a suspect (T:1597); (4) the shoes found at the church belonged to Simpson (T:1622); (5) the DNA evidence showed that Simpson was the last to wear the clothes found at the church (T:1622); (6) Durrance was "honest and forthright," "smart," and "credible" (T:1607-08, 1637); (7) Simpson was "betraying a friend" by informing on Durrance (T:1607); (8) Simpson was a liar (T:1617, 1636, 1642); and (9) Simpson denied the clothes were his (T:1636). DA Br., 2007 WL 4632642, at *56-60

The Court agreed that several of these comments were "clearly improper" and "impermissibly 'place[d] the prestige of the government behind the witness or indicate[d] that information not presented to the jury support[ed] the witness's testimony,' " but affirmed because they "were brief and in no way do they constitute fundamental error." *Id.* at 1146-47 & n.7 (alteration in original) (quoting *Spann v. State*, 985 So. 2d 1059, 1067 (Fla. 2008)).

Even though appellate counsel did not brief the issue, the Court recognized its duty to review the sufficiency of the evidence in every death penalty case. *Id.* at 1147. In describing the evidence supporting the conviction, the Court pointed to three aspects of the State's case. **First**, the Court noted that the State presented Durrance's testimony that Simpson had confessed to committing the murders, which "constituted direct evidence of Simpson's guilt." *Id.* The Court emphasized that because this direct evidence meant "this case is not entirely circumstantial, … the special standard of review applicable solely to circumstantial cases does not apply." *Id.* **Second**, the Court pointed to DNA evidence:

> Simpson's DNA was on the sweatshirt and sweatpants that were linked to the murders in that they contained the victims' blood, were found on the church property directly behind [Big Archie's] house, and matched material found on the barbed wire fence right outside the back door to the house. Simpson's hairs were found among the sweatshirt, sweatpants, and hat.

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

> Simpson's initial denial of knowing the victims and his immediate departure from the police interview after being asked whether he knew Archie Crook, Sr.; his denial that the clothing, hat, and shoes were his; his freshly injured hand and conflicting story about how he got the injury; and the telephone number of his mother's home, where he stayed, as the last number on the victims' pager.

Id. at 1147-48. After finding the death penalty to be proportional to the crimes, the Court affirmed. *Id.* at 1148-49.

GROUNDS FOR HABEAS CORPUS RELIEF

Simpson's convictions are unconstitutional because he was deprived of his right to effective assistance of appellate counsel, which is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. This Court examines ineffective assistance of appellate counsel claims under a review standard that "mirrors the *Strickland v. Washington*, 466 U.S. 668 (1984), standard for claims of trial counsel ineffectiveness." *Valle v. Moore*, 837 So. 2d 905, 907 (Fla. 2002). Thus, Simpson must demonstrate "that appellate counsel's performance was **deficient** because the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance." *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000) (internal citations and quotation marks omitted). Simpson then must show that he "was **prejudiced** because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Id.* Here, had this Court had effective briefing from appellate counsel as to the insufficient evidence there was to convict Simpson and the inflammatory closing arguments that painted an evidentiary picture that did not exist while denigrating Simpson and vouching for the State's witnesses, it would not have affirmed Simpson's convictions.

I. APPELLATE COUNSEL FAILED TO ARGUE THE INSUFFICIENCY OF THE EVIDENCE.

Despite the recognition by all major players at the postconviction evidentiary hearing and even at trial that this case was by no means a slam dunk for the State, Simpson's counsel on direct appeal neglected to raise a sufficiency of the evidence argument. *Simpson v. State*, 3 So. 3d 1135, 1147 (Fla. 2009). Even though this Court undertook its own analysis, appellate counsel's failure to brief it was unacceptable and led to errors and holes in the Court's analysis.

This Court concluded that the convictions were supported by three categories of evidence: Durrance's testimony that Simpson confessed, Simpson's DNA being found on the sweatclothes, and various details surrounding Simpson's behavior during the investigation. A brief addressing the sufficiency of the evidence should have fleshed out the fatal flaws in the State's case, which would have prevented the Court's apparent misconceptions about the evidence. Particularly given that the direct appeal brief was well under the page limits, only raised six issues (four of which were different pieces of the Juror Cody issue), and also made the claim that the closing argument was fundamental error as explained in Issue II, it was inexplicably deficient to not include an argument challenging the sufficiency of the evidence in this case. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163-64 (Fla. 1985) (concluding appellate counsel was ineffective where he "briefed only five issues" and failed to "raise or discuss any issue relating to the

sufficiency of the evidence to support the jury's finding of premeditation in either death"). Appellate counsel's "decision not to raise this issue cannot be excused as mere strategy or allocation of appellate resources." *Id.*

It appears that this Court reasonably relied on the professionalism of the Attorney General's office by accepting the very brief argument in the answer brief identifying the evidence supporting the conviction, especially since appellate counsel did not attempt to rebut or supplement that description in the reply brief.

A brief by an effective appellate advocate for Simpson on the sufficiency o the evidence would have first pointed out that Simpson had no motive either to commit the murders in the first place or to confess capital crimes to Durrance because he had just been released from jail to work as a CI for JSO against both Big Archie and Durrance. (T:650.) To the contrary, Durrance[3] and Little Archie both had clear motives to kill the victims, and Little Archie had the clear opportunity to commit them as he and Smallwood were known to have been with the victims within an hour of their deaths. There was no evidence that Simpson had a similar opportunity. Effective counsel would have pointed out that the murder scene was full of physical evidence like fingerprints, blood that could have come

[3] Caliel had even told the jury that the State could not accept Durrance's account at face value for the foregoing reasons and also because Durrance had, in Caliel's words, "admitted that, in essence, he had a motive himself to have [Big Archie] killed over [a] drug dispute, over this alleged hit that [Big Archie] may have been putting out on him." (T:1614.)

from an injury to the killer, footprints, and hair fibers, but nothing found on Big Archie's property could ever be tied to Simpson.

Counsel should have also demonstrated that Durrance's testimony was not competent, substantial evidence because it was rife with factual and credibility problems that were collectively fatal. His narrative made no sense. According to Durrance, Simpson went to commit the murders without a weapon, happened to find an axe lying around in the backyard, climbed through a window with the axe, and then murdered the victims in their bed all by himself. (T:876-82.) Durrance initially told the police that Simpson entered through the kitchen window, but changed his story at trial to say he went through the laundry room window first and then the kitchen window because photos showed that nobody could have entered the kitchen window. (T:902-08, 955.) Though trial counsel failed to point it out, the State's diagram of the house layout shows there is no window between the laundry room and kitchen, so this story was every bit as impossible.

As for Durrance's credibility, effective appellate counsel could have pointed out that he did not come forward with his story until after he was arrested and charged with conspiracy to traffic cocaine, almost two years after the murders and after learning that Simpson was a CI in the wiretap application that ultimately led to his arrest. (T:885-88.) Indeed, Bialkoski admitted that Durrance's report of Simpson's apparent confession alone did not even establish probable cause for

Simpson's arrest. (R3:8940.) For his part, Durrance admitted not only that he was testifying with the hope of having his trafficking sentence reduced for assisting the State, but also that he would do just about "anything" to get out of prison early, including lying under oath. (T:888-91, 898.)

Indeed, effective appellate counsel would have argued that Durrance's his admission that he would lie under oath alone eliminates any argument that his testimony is competent and substantial evidence sufficient to support the convictions. *See* § 90.605(1), Fla. Stat. (2007) (requiring witnesses to take an oath to tell the truth); *id.* § 90.603(2) (requiring a witness be disqualified if he is "[i]ncapable of understanding the duty of a witness to tell the truth"). How can a witness's saying he does not feel bound to tell the truth by the oath be any different than refusing to take the oath or being found mentally incapable of understanding the obligation to tell the truth? *E.g.*, *Willis v. Romano*, 972 So. 2d 294, 295 (Fla. 5th DCA 2008); *see also Wingo v. State*, 158 So. 3d 743, 745 (Fla. 2d DCA 2015) (noting that a "witness is presumed competent to testify until a party places competency at issue" and that part of the competency question is whether the witness is able "to understand the duty to tell the truth"); *State v. Keyes*, 322 A.2d 615, 618 (N.H. 1974) (holding that witness should be disqualified as incompetent were it is uncontroverted that witness feels no moral obligation to tell the truth when under oath).

The Court's emphasis on the fact that Durrance's testimony was direct evidence of guilt avoiding the special test for when purely circumstantial evidence can support a conviction was no casual observation; it was dispositive.

> "[W]here a conviction is based wholly upon circumstantial evidence, a special standard of review applies." *Reynolds,* 934 So. 2d at 1145 (quoting *Darling v. State,* 808 So. 2d 145, 155 (Fla.2002)). "The special standard requires that the circumstances lead 'to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of, and be consistent with, guilt. They must be inconsistent with innocence.' " *Lindsey v. State,* 14 So. 3d 211, 215 (Fla. 2009) (quoting *Frank v. State,* 163 So. 223 (1935)). ….
>
> …. [S]uspicion alone is not enough. As we have stated:
>
> > Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, [] is not sufficient to sustain [a] conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.
>
> *Ballard,* 923 So. 2d at 482 (quoting *Davis v. State,* 90 So. 2d 629, 631–32 (Fla.1956)).

Dausch v. State, 141 So. 3d 513, 517-18 (Fla. 2014).

An effective appellate advocate's analysis of the evidence would have pointed out the impermissible inference stacking required to establish a link

between the DNA found in the sweatclothes and Simpson's guilt. The State's DNA case was tenuous. The clothes contained the only physical evidence linked to Simpson; the tests done on the other evidence found at the crime scene, including fingerprints, footprints, hair fibers, and blood, excluded Simpson. Even the hat and shoes found with the clothes did not contain Simpson's DNA. By contrast, Little Archie and Smallwood could not be excluded as matches to certain DNA actually found at the murder scene as well as on the clothes. (T:1075, 1148-49.)

True, the sweatpants carried some of the victims' blood and the sweatpants and sweatshirt contained Simpson's DNA. But the clothes contained DNA from at least one unidentified person who must have also worn the clothes, and there was no evidence that there was only one person other than Simpson to have worn the clothes, so neither Little Archie nor Smallwood could be excluded from any of the mixtures on the neck or cuffs. (T:1122-23, 1166-67, 1180, 1188, 1231-32, 1235, 1239-41.)

To conclude that Simpson's DNA on the clothing meant he was a participant in the murders, let alone the killer, would have required impermissible inference stacking. *See Voelker v. Combined Ins. Co. of Am.*, 73 So. 2d 403, 407 (Fla. 1954) (noting that the purpose of the rule against inference stacking is "to protect litigants from verdicts or judgment based upon speculation"); *Brown v. State*, 672 So. 2d 648, 650 (Fla. 4th DCA 1996) ("Circumstantial evidence is insufficient when it

requires pyramiding of assumptions or inferences in order to arrive at the conclusion of guilt.") (citing *Gustine v. State*, 97 So. 207 (Fla. 1923).

The blood on the clothes allows an inference, but cannot prove, that the clothes were worn by a participant in the murders. That Simpson's DNA was on the clothing only supports an additional inference that he wore the clothes at some point. Thus, the conclusion that this evidence shows Simpson wore the clothing while murdering Big Archie and Kimbler would require stacking inferences to the exclusion of other reasonable inferences, including that the killer was one of other contributors.

Moreover, any inference that the killer wore the clothing during the murders would equally establish they wore the hat and shoes found with the clothing. But since there was no evidence the hat or shoes were ever in Simpson's possession, this only tends to prove that someone other than Simpson committed the murders.

Florida courts have reversed several conviction relying on this kind of evidence. *See Finley v. State*, 139 So. 3d 940, 943 (Fla. 4th DCA 2014) (explaining that DNA evidence is circumstantial when additional inferences are needed to conclude that the defendant's DNA evidence was put on the murder weapon by him and placed by him at the scene); *Miranda v. State*, 113 So. 3d 51, 55 (Fla. 2d DCA 2013) (reversing conviction as evidence was insufficient where State had no evidence to show that blood DNA of defendant was left at the time of the murder

on shirt found at the scene); *Ballard*, 923 So. 2d at 484 ("The fingerprint and hair evidence only serves to prove that Ballard was in Jones and Patin's apartment at some point in time, which Ballard readily admits because he was a long-time friend of the couple and socialized regularly with them.").

That Little Archie had proven motive, Little Archie and Smallwood had proven opportunity, and the clothes were not found until several days after the murder all further undermine any inference that Simpson was the killer. Combined with Simpson's testimony that Little Archie had borrowed the clothes, this evidence all but proves that Little Archie was the likely killer and planted the clothes to frame Simpson, even if he knew nothing about touch DNA, because there was a visible crusty stain on the shoulder. (T:1195-98; *see also* T:1622 (Caliel describing the stain as "white crusty mucous").) The only basis the State offered for disbelieving Simpson's testimony was its suggestion that he was released in March 1999, which was directly contrary to his timeline. But the State offered no evidence to prove that.

Finally, the remaining circumstantial evidence upon which this Court rested its sufficiency of the evidence analysis without any assistance from counsel contained several mistakes that the "partisan scrutiny of a zealous advocate," *Wilson*, 474 So. 2d at 1165, might have prevented. This Court noted that Simpson's "conflicting story about how he got the injury" on his hand was

circumstantial evidence of his guilt. *Simpson*, 3 So. 3d at 1148. But a review of the entire transcript shows no conflict in the testimony as to how the injury occurred; Simpson's account at trial and to Hinson on July 16 was that the injury occurred when he was dealing with the electrical panel. (T:657, 1392, 1412.) Hinson testified that Simpson originally said he cut his hand "during the night" while Simpson testified it was early morning (T:657), but Simpson corroborated his account at trial with the power company witness who testified that the power had gone out that morning. (T:1391-92, 1464-69.) And because there was no actual evidence – as opposed to rank speculation by the crime scene team – that the killer was injured, an injury on Simpson's hand was not very probative in any event.

Though there was evidence of what this Court described as "Simpson's initial denial of knowing the victims" during two police interviews, 3 So. 3d at 1147, in both instances the detectives made clear that when they repeated the victims' names right after he denied knowing them, he immediately confirmed he knew them. (T:949, 1344.) In any event, Simpson was working as a CI for JSO against Big Archie, so it was no secret that he knew him.

As for his "immediate departure from the police interview after being asked whether he knew" Big Archie, *Simpson*, 3 So. 3d at 1147-48, the State offered no evidence to rebut Simpson's explanation, which was that Simpson was late to work. (T:1413-14.) The detective admitted Simpson had said this during the

interview, so it could not be something made up for trial. (T:950.)

Simpson's denial that the hat and shoes were his, *Simpson*, 3 So. 3d at 1148, is not at all in conflict with the evidence, as his DNA was never found on those items. (T:993, 1094, 1163, 1251.) Indeed, if he wore the hat, he apparently had to find a way to leave no sweat or oil from his skin on it. As for the clothing, Simpson denied the clothes were his during an interview when he was shown a small picture of the clothes in which they looked blue, a picture that the FDLE analyst who assessed the DNA from them could also not identify as being the clothing because it was such a bad picture. (T:1283-84, 1408-10.) But Simpson fully admitted the clothing was his when he was able to see a clear picture of it. (T:1410.) Moreover, at the time of the interview before DNA tests had come back and well before Simpson was charged and able to discover Little Archie's motive to kill his own father, Simpson had no reason to think that the generic black clothes tied to the murders could be his. Indeed, if he had claimed the clothes as his own, that would been far more suggestive of guilt, just like Little Archie's disclosure that he knew the positioning of the bodies and false claim he learned it from his grandfather.

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

evidence against this drug dealer. Moreover, there was no evidence as to when that page had come. If it was two weeks before the murders, the page would not have been probative at all.

In short, had the sufficiency issue been adequately briefed, this Court would have seen that applying clear case law to the evidence in the record required his convictions be reversed.

II. APPELLATE COUNSEL FAILED TO DEMONSTRATE THE FUNDAMENTAL ERROR WROUGHT BY THE STATE'S NUMEROUS IMPROPER ARGUMENTS.

To whatever extent the Court may disagree on Issue I and find sufficient evidence to get to the jury, it likely still would have reversed had appellate counsel effectively argued fundamental error in the State's closing argument. Whether it is generally sound appellate strategy to raise claims of fundamental error on appeal is not an issue in this case. Certainly it would not be sound strategy in a case where the evidence overwhelmingly supported the conviction, but that was not the case here. In any event, having elected to raise fundamental error arguments at all, counsel committed themselves to a strategy that required they do two things: (A) demonstrate how weak the State's case was so that they would have chance of establishing the harsh prejudice requirement for proving fundamental error and (B) point to all of the improper argument by the State, focusing on the most egregious. Counsel were ineffective because they did neither.

A. Counsel Failed to Argue How the Evidence Supported Their Fundamental Error Arguments.

Appellate court not only recognized that trial counsel had not objected to any of the comments they challenged on appeal, but even correctly stated the definition of fundamental error: "error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the alleged error." DA Br., 2007 WL 4632642, at *56. That is the precise test this Court applied. 3 So. 3d at 1146. Yet counsel not only failed to actually brief how this standard was satisfied, it did not even address the sufficiency of the evidence. Perhaps worse, its only argument even touching on the issue was not only conclusory without referencing any evidence, but applied the wrong standard:

> In light of the arguments made by the prosecutor, and defense counsel's failure to object, there is a **reasonable probability** the outcome of Defendant's case would have been different. The fundamental error created by the prosecution in Appellant's case allowed the jury to convict Appellant for reasons other than his alleged guilt.

DA Br., 2007 WL 4632642, at *60 (emphasis added).

Thus, the appeal never had a chance. This Court rejected their fundamental arguments, much like it rejected their arguments that the courtroom should have been closed for the colloquy with Juror Cody and that the trial court should have allowed certain evidence because appellate counsel failed to even try to show prejudice. What was the Court supposed to do – drop its role as a neutral and come

up with its own reasons for why the verdict could not have been obtained on the evidence alone? The argument in Issue I demonstrates how an effective argument about the evidence would have gone a long way to showing that the bar for prejudice in this case was actually quote low under any standard of prejudice, even fundamental error. But even that would not have been enough.

B. Counsel Failed to Raise the Most Egregious Improper Arguments.

The comments that counsel chose to raise on direct appeal were far from the most egregious comments made by the State, and some were arguably fair comment on the evidence. But there were many more, far more egregious comments that counsel failed to raise. These comments would have been enough to meet the difficult fundamental error on the unique facts in this record, especially when considered along with the few improper arguments raised in the brief and all the weaknesses in the State's case identified above.

First, the State made numerous arguments that had no basis in, or even directly misrepresented the evidence. As noted above, the State argued throughout closing that Simpson had fabricated his account about Little Archie coming to his trailer to take the black clothes based solely on the State's insistence that Simpson was released to start working as a CI in March 1999, telling the jury this was "vitally important" because it threw off Simpson's timeline. (T:1604, 1618-19, 1643, 1681-82.) The State's logic was spot on, which made this a devastating

argument against Simpson, but the problem is that there was zero evidence of it.[4]

Caliel also argued in the State's initial closing argument that Kimbler did not fight her attacker before her death:

> There is no indication that the axe murderer even got close enough to his victims for the victim to get a scratch off. In fact, the evidence contradicts that. What you know is immediately Kimberli Kimbler was paralyzed by her blow. She didn't scratch her attacker.

(T:1689.) This representation is not only unsupported by the evidence, but the State's expert conceded on cross-examination that one possible explanation for the fact that Kimbler had material under her nails that came from either Big Archie or Little Archie could be that Kimbler had been struggling with Little Archie before being killed. (T:1074-75, 1077.) Moreover, the State elicited that Kimbler had defensive wounds on at least one of her fingers. (T:849.)

Raising this comment on direct appeal would have been especially powerful because the Court also had to consider whether the death penalty was proportionate, and the State not only argued, but convinced this Court that it was, in part, because "[d]efensive wound found on both victims showed that they attempted to fend off Simpson." 3 So. 3d at 1138. The State would have had to have conceded its argument was directly contrary to the evidence or come up with an argument how a paralyzed victim can fend off an attacker and sustain defensive

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[4] As argued in the accompanying brief in Simpson's appeal of the denial of his Rule 3.851 motion, the State knew this was false and that Simpson was actually released in June, which fits his timeline perfectly.

wounds. Indeed, once the State used this improper argument to secure Simpson's conviction, it secured a recommendation of death by arguing the exact opposite in penalty phase closing. (*See* R3:6589 ("The Defendant repeatedly struck her with the axe, as she attempted to defend herself, as indicated by defensive wounds on her arm and hands.").)

As improper as those arguments were, at least they were made in the State's initial argument, which gave trial counsel the opportunity to rebut them.[5] The same could not be said for the argument Nelson made in rebuttal that went well beyond and sometimes contrary to the evidence presented at trial. *See Evans v. State*, 177 So. 3d 1219, 1233 (Fla. 2015) (noting that rebuttal is "the last opportunity for the jury to hear the attorneys speak about the case and the conclusions to be drawn from the evidence"), *receded from on other grounds by Johnson v. State*, 252 So. 3d 1114, 1116 (Fla. 2018). For example, she began her rebuttal argument with the following:

> My favorite quote about forensic science was said years and years ago, before forensic science was developed as we know it today, by a man named Paul Kirk who is a criminologist. Wherever he steps, whatever he leaves unconsciously will serve as silent witness against him. His hair, the fibers from his clothes, the blood that he deposits or that he collects. Each of these and more will bear mute witness against him. This is evidence that does not forget, it is not confused by the excitement of the moment, it is not absent because human witnesses

[5] Trial counsel's failure to do so or to object to any of the improper arguments detailed herein is another basis for relief argued in the 3.851 appeal.

> are. It is factual evidence. Physical evidence cannot be wrong. It cannot perjure itself and it can never, ever, be wholly absent. Only human failure to find it, to study it, and to understand it can diminish its value. It is impossible for the criminal to act without leaving behind traces of his presence.

(T:1675-76.) But no such evidence or testimony was ever presented to the jury.

Following up, Nelson claimed that the "case comes down to physical evidence," which conclusively demonstrated who wore the sweatclothes:

> [T]he accepted scientific testimony, what is known throughout the world about trace evidence and DNA, has told you that it can be but one man. Not Archie Crook, Jr., not Shawn Smallwood, not Michael Durrance, but the defendant that sits before you today.

(T:1676-77.) She claimed that "wearer's DNA was unheard of" in 1999, but by the time of trial was not only a "new technology," but "a sure thing … that can identify a human being at the exclusion of every other human being on the planet." (T:1677.) No evidence in this case supported any of these assertions. Instead, the State's own experts had conceded that it was not scientifically possible to tell who was the last person to wear the clothes, that a minor contributor to the mixtures could have worn the clothes after Simpson, and that it was not possible to tell when DNA was left on the clothes. (T:1223-24, 1331, 1333-34.)

Nelson next asserted that "a single 15 allele," a reference to an allele present on the mixture on the clothes that came from an unidentified contributor, "tells none of you anything about the identity of anyone that may have at some time in the past touched that sweat clothing." (T:1678.) In fact, the State's expert testified

that the allele meant that 75% of the population could be excluded from the mixture containing that allele, but Little Archie could not. (T: 1335.)

Based solely on testimony that perspiration is one way that wearer's DNA can be left on clothing (T:1127) and that perspiration can degrade DNA (T:1332), Nelson argued that Simpson had to be the last wearer of the clothes "[n]ot only because his sweat scarred those clothes with his identity, but because his sweat degraded whatever was left there before him." (T:1678.) Aside from the State's expert testimony that identifying the last wearer was impossible, there was no evidence that Simpson's DNA on the clothes came from sweat, as opposed to friction, snot, or saliva. There was no evidence about the temperature or humidity either at times that Simpson was wearing the clothing or at the time of the murders. Nor was there any evidence that whoever may have worn the clothes during the murder was not wearing other clothes underneath such that they would have stripped to leave the clothes behind the church and flee naked. None of that stopped Nelson from making up facts to fit her theory. She argued that the night of the murders, it was "Florida 100 degrees plus humidity heat. Whoever committed this murder, … was perspiring."[6] (T:1680.)

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[6] There is no reason to presume these were the weather conditions even though the murders took place in July. According to the Weather Underground website, the temperature that night was 78 degrees with humidity as low as 52 percent. https://www.wunderground.com/history/airport/KNIP/1999/7%20/15/

Finally, Nelson wrapped up her rebuttal argument on the physical evidence by using blatant misrepresentations to undermine Simpson's defense:

> This defendant is asking you to engage in speculation without proof and possibilities without evidence. …. But make no mistake, there is no unidentified forensic evidence belonging to anybody else inside of this murder scene and there is no unidentified blood on any of this clothing.

(T:1688.) The State's evidence contradicted this statement. The clothing contained mixtures of wearer's DNA that not only included contributors who could not be identified, but also did not exclude Little Archie or Smallwood. As for inside the house, there was DNA in a bloodstain on the floor that could not have come from Simpson, but could have come from Smallwood, and the State's witness speculated blood on the floor may have come from an injury to one of the killers. Unidentified fingerprints (some of them bloody) were found on the doors, unidentified shoe prints were found in the kitchen, unidentified hair fibers were found in the bedroom, and unidentified blood was found all over the bedroom and the ground and a magazine in the straight path out the door toward where the axe was found.

Stating facts in closing argument that the jury never heard as evidence is improper. *See Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999) (holding that a "criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in

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analyzing that evidence, not to obscure the jury's view with … nonrecord evidence"); *see also Evans v. State*, 177 So. 3d 1219, 1237 (Fla. 2015) (holding that prosecutor's statement that "most homicides are committed by family members or friends" was improper because it was not derived from evidence presented to jury), *receded from on other grounds by Johnson v. State*, 252 So. 3d 1114, 1116 (Fla. 2018); *Aja v. State*, 658 So. 2d 1168, 1168 (Fla. 5th DCA 1995) ("It is plainly error for counsel to present facts to the jury in closing that have not been presented to the jury in the taking of evidence."). This Court has emphasized that "[t]he role of the attorney in closing argument is 'to assist the jury in analyzing, evaluating, and applying **the evidence**. It is not for the purpose of permitting counsel to testify as an expert witness.' " *Ruiz*, 743 So. 2d at 4 (quoting *United States v. Garza*, 608 F.2d 659, 662 (5th Cir. 1979)).

And it is particularly egregious for a prosecutor to misrepresent "evidence, because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty." *Rodriguez v. State*, 210 So. 3d 750, 755 (Fla. 5th DCA 2017) (quoting *Washington v. Hofbauer*, 228 F.3d 689, 700 (6th Cir. 2000)); *see also Pacifico v. State*, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994) (reversing for new trial based on these kind of comments and noting, "It is impermissible for a prosecutor to comment in closing argument upon matters outside the record."). Given the State's weak case against Simpson, the

various misrepresentations regarding the strength and even presence of physical evidence went "to the very foundation of the case." *Everett v. State*, 124 So. 3d 938, 939 (Fla. 1st DCA 2013); *see also Ryan v. State*, 457 So. 2d 1084, 1091 (Fla. 4th DCA 1984) ("In a close case, such as the one at hand, where the jury is walking a thin line between a verdict of guilt and innocence, the prosecutor cannot be allowed to push the jury to the side of guilt with improper comments such as these.").

Additionally, Nelson's comment asserting that Simpson sought to have the jury engage in "speculation without proof and possibilities without evidence" (T:1688) was also an improper attempt to shift the burden of proof. This too is prohibited closing argument. *See Paul v. State*, 980 So. 2d 1282, 1283 (Fla. 4th DCA 2008) ("When arguing to the jury, the State may not make comments that mislead the jury as to the burden of proof."); *Sandstrom v. Montana*, 442 U.S. 510 (1979) (reversing conviction on basis that jury instruction might have been interpreted as shifting burden to defendant).

Another category of fundamentally improper closing argument in this case was the State's repeated character assassinations of Simpson. Some of those remarks were raised on direct appeal, but they were only the tip of the iceberg,[7]

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[7] Although appellate counsel raised challenges on direct appeal to comments by Caliel that Simpson lied to police when he denied knowing the victims or owning the clothes (DA Br., 2007 WL 4632642, at *59-60 (citing

and far more egregious comments were not challenged. For example, Caliel attacked Simpson's character and urged the jury to consider just how "bad of a person" Simpson was:

> I'm sure that you're going to hear all of these attacks on Mike Durrance and how bad he is and how bad of a person he is and he has an interest in the case, but, remember, ladies and gentlemen, that in doing so those same things apply to this defendant.

(T:1636.)

Caliel ardently expressed his opinions that Simpson's testimony was "simply unbelievable," that Simpson's attempt to explain his actions after the murders was "a group of lies," and that Simpson's testimony on cross-examination was rife with "inconsistencies" and "lies." (T:1637, 1640, 1642-45.) He even accused Simpson of conspiring with counsel to fabricate his DNA defense based on depositions that Caliel, Simpson, and the lawyers had seen, but the jury did not:

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

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

T:1617, 1636, 1642)), those were arguably comments on the evidence and did not involve accusations that Simpson was lying at trial, as Simpson did not deny knowing the victims or owning the clothes at trial.

While it is certainly fair and appropriate for the State to make arguments why the jury should not believe a defendant's testimony or even call the defendant a "liar" when those arguments are supported by record evidence, there was no such evidence here. And even where there is room to argue the defendant was lying, it is never, ever appropriate to ask the jury to consider "how bad of a person" the defendant is. That is not a veiled attack; it is about as blatantly improper a character attack as a prosecutor can make.

Such "vituperative or pejorative characterizations of a defendant" are designed to encourage the jury to convict on the character of the defendant rather than the evidence and "are clearly improper." *Crew v. State*, 146 So. 3d 101, 109 (Fla. 5th DCA 2014). Far less egregious compilations of the forgoing improper comments resulted in new trials and admonitions to the State. *E.g.*, *Petruschke v. State*, 125 So. 3d 274, 280 (Fla. 2013); *Martinez v. State*, 761 So. 2d 1074, 1082-83 (Fla. 2000); *Gore v. State*, 719 So. 2d 1197, 1200-03 (Fla. 1998); *Pacifico v. State*, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994). No strategic reason existed for appellate counsel to fail to raise such fundamental error.

Finally, the State made improper vouching arguments far worse than the ones raised on direct appeal. Caliel urged the jury to consider the fact that Hinson "was taken aback" by Simpson's actions the day after the murder and "had a feeling" that Simpson was involved. (T:1600-04.) He went on to argue that JSO

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

> We've had this case for sometime. We've had the luxury of pretrialing with witnesses, meeting them, reviewing depositions, calling them when we had another question, and in a week's time we threw them all up on the stand for you and hoped that we covered everything.

(T:1690.)

Such remarks ought to have been raised as fundamental error on appeal. These comments did far more to "impermissibly place[] the prestige of the government behind the witness" and "indicate[] that information not presented to the jury supported the witness's testimony" than the few comments this Court considered on direct appeal. *Simpson*, 3 So. 3d at 1146 n.7 (internal quotation marks and citation omitted). They implied that the State was confident in Simpson's guilt based on evidence and investigation it had performed before trial. They also sent the message to the jury that the State had other evidence of guilt that was not presented. *See Ruiz*, 743 So. 2d at 4 ("The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. The same power and force allow him … to impress on the jury that the government's vast investigatory network, apart from … the trial knows, that the

accused is guilty … .") (citation omitted); *Pait v. State*, 112 So. 2d 380, 384-85 (Fla. 1959) ("It is not appropriate to undertake to give the jury the benefit of the composite judgment of the State Attorney's staff allegedly reached on the basis of investigations and discussions taking place before the trial.").

Many of these remarks would have been enough on their own to require a new trial, but this Court could not have said with any confidence that the jury would have convicted Simpson without them, when all of the improper remarks are considered cumulatively. *See Card v. State*, 803 So. 2d 613, 622 (Fla. 2001) ("the Court examines the totality of the errors in the closing argument and determines whether the cumulative effect of the numerous improprieties deprived the defendant of a fair" proceeding); *Charriez v. State*, 96 So. 3d 1127, 1128 (Fla. 5th DCA 2012) ("Although Charriez's defense counsel did not object to each of these comments and they may not individually rise to the level of fundamental error, their cumulative effect denied Charriez a fair trial."). Considering the evidence against Simpson, the extensive, prejudicial, and deliberate remarks of the prosecutors required a new trial. *See Davis v. Zant*, 36 F.3d 1538, 1549 (11th Cir. 1994) ("in determining whether there is a reasonable probability that prosecutorial misconduct changed the result of the trial, relevant criteria include (1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether they were

deliberately or accidentally placed before the jury; and (4) the strength of the competent proof to establish the guilt of the accused"). Appellate counsel's failure to raise these comments on direct appeal as fundamental error was a serious error that compromised this Court's review. *See Johnson v. Wainwright*, 498 So. 2d 938, 939 (Fla. 1986) (reversing conviction for a new trial because if "appellate counsel had brought the jury separation issue to our attention on appeal, a new trial would have been granted").

CONCLUSION

For the foregoing reasons, the Court should grant this petition and reverse Simpson's conviction, as it would done have had Simpson received effective appellate counsel.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following by email on April 29, 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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