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IN THE SUPREME COURT OF FLORIDA

JASON ANDREW SIMPSON,

Petitioner,

v.

MARK S. INCH, ET AL.,

Respondents.
_____/

CASE NO. SC19-700
Lower Tribunal No.
2002-CF-11026 Duval County
DEATH PENALTY CASE

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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STATEMENT OF THE CASE AND FACTS

Petitioner was tried and convicted for the axe murder of Archie Crook Sr. and Kimberly Kimbler and sentenced to death. *Simpson v. State*, 3 So. 3d 1135, 1139-40 (Fla. 2009). On direct appeal, Petitioner was represented by Frank Tassone, Esq., and Rick Sichta, Esq. The initial brief was 61 pages, not including the table of contents, table of authorities, or signature pages. The initial brief raised six issues:

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

Id. at 1140 n.5. The reply brief was 34 pages.

On direct appeal, this Court addressed both the issue of improper prosecutorial comments during closing arguments and sufficiency of the evidence. *Simpson*, 3 So. 3d at 1146-48. Regarding the closing arguments, since none of the comments were objected to and preserved for appeal, this Court concluded that

"[n]one of the comments individually or collectively rises to the level of fundamental error." *Id*. at 1146. This Court noted that most of the comments were proper as they "were based on facts in evidence." *Id*. Some of the comments "could be construed as impermissible bolstering" but this Court notes that they "were brief and in no way do they constitute fundamental error." *Id*. at 1146-47.

Regarding the sufficiency of the evidence, even though it was not raised by Petitioner on direct appeal, this Court "has a mandatory obligation to review the sufficiency of the evidence in every case in which a sentence of death has been imposed." *Simpson*, So. 3d at 1147 (citing *Jones v. State*, 963 So. 2d 180, 184 (Fla. 2017); Fla. R. App. P. 9.142(a)(5). This Court determined that testimony from a witness who knew Simpson, Mike Durrance, that Simpson confessed to the murders constituted direct evidence and combined with DNA evidence tending to link Simpson to the murders and inconsistencies in Simpson's version of events constituted sufficient evidence to support the convictions. *Id*. at 1147-48.

ARGUMENT

"Habeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised on appeal or in other postconviction motions." *Pham v. State*, 177 So. 3d 955, 963 (Fla. 2015) (citing *Mills v. Dugger*, 559 So. 2d

578, 579 (Fla. 1990)). Such claims are procedurally barred. Claims that have been previously raised and decided are procedurally barred under the law of the case doctrine, or collateral estoppel.

> The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings. *See Greene v. Massey*, 384 So. 2d 24, 28 (Fla. 1980) ("All points of law which have been adjudicated become the law of the case and are, except in exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings in the case.").

Fla. Dep't of Transp. v. Juliano, 801 So. 2d 101, 105-06 (Fla. 2001). "In Florida, collateral estoppel prevents the same parties from relitigating issues that have already been fully litigated and determined." *Zeigler v. State*, 116 So. 3d 255, 258 (Fla. 2013) (citing *State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003)); *see also Allen v. State*, 854 So. 2d 1255, 1262 (Fla. 2003) (finding inmate was precluded from raising claim relating to proportionality review in habeas petition as the claim had already been rejected on direct appeal).

The analysis for ineffective assistance of appellate counsel mirrors *Strickland*'s test for ineffective assistance of trial counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on an ineffective assistance of appellate counsel claim, Petitioner must show:

> (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Farina v. State, 937 So. 2d 612, 626 (Fla. 2006) (quoting *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985)). Appellate counsel is not ineffective for failing to raise issues that were procedurally barred or that would "in all probability have been found to be without merit" on direct appeal. *Mosley v. State*, 209 So. 3d 1248, 1271 (Fla. 2016) (quoting *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000)); *see also Nelson v. State*, 43 So. 3d 20, 35 (Fla. 2010) ("Nor can appellate counsel be deemed ineffective for failing to prevail on an issue raised and rejected on direct appeal.").

Additionally, "appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." *Farina*, 937 So. 2d at 634 (quoting *Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002)) (emphasis omitted). For example, in *Farina*, appellate counsel's initial brief was 96 pages and raised 10 issues, and this Court opined that counsel was not ineffective as "[a]ppellate counsel could have reasonably concluded that these issues represented his strongest arguments." *Id.*

ISSUE I: APPELLATE COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO RAISE SUFFICIENCY OF THE EVIDENCE BECAUSE THIS COURT REVIEWED AND REJECTED THE ISSUE ON DIRECT APPEAL

Petitioner claims his appellate counsel were ineffective for failing to raise the issue of sufficiency of the evidence on direct appeal. (Petition at 25-35). This claim should be denied because it is procedurally barred as this Court already determined on direct appeal that the evidence was sufficient in this case. *Simpson*, 3 So. 3d at 1147-48. This claim is also meritless because counsel were not deficient and there can be no prejudice because this Court concluded the evidence was sufficient on direct appeal. *Id*. at 1148. Because appellate counsel cannot be ineffective for failing to raise a meritless claim on direct appeal, this claim should be denied.

This Court reviews the sufficiency of the evidence on direct appeal in every capital case. Fla. R. App. P. 9.142(a)(5) ("On direct appeal in death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief."). Because this claim was previously addressed and rejected on direct appeal, it is procedurally barred and should be denied. *Hannon v. State*, 228 So. 3d 505, 510 (Fla. 2017).

Even if this claim was not procedurally barred, it lacks merit. In *Serrano*, this Court held that appellate counsel was not

ineffective for failing to raise a meritless sufficiency of the evidence claim on direct appeal. *Serrano v. State*, 225 So. 3d 737, 757 (Fla. 2017). Trial counsel in *Serrano* moved for a directed verdict after the State's case-in-chief, which was denied. *Id.* "[O]n direct appeal, this Court concluded that the circumstantial evidence was sufficient to support Serrano's four convictions. . . ." *Id.* Because "this Court's sufficiency analysis would not have been any different," appellate counsel cannot be deemed ineffective for failing to raise this meritless issue. *Id.; see also Reed v. State*, 875 So. 2d 415, 439 (Fla. 2004) (concluding that appellate counsel was not ineffective because even if counsel had raised a sufficiency of the evidence claim, it would have been meritless as this Court found the evidence sufficient on direct appeal).

Like in *Serrano*, here, trial counsel raised a motion for a judgment of acquittal after the conclusion of the State's case. (TR 1364-66). The trial judge denied the motion. (TR 1366-68). Trial counsel renewed the motion at the conclusion of the presentation of evidence, which was also denied. (TR 1540).

Also like in *Serrano*, this Court reviewed the sufficiency of the evidence in Petitioner's case on direct appeal. *Simpson*, 3 So. 3d at 1147-48. Sufficiency of the evidence is reviewed "viewing the evidence in the light most favorable to the State" and determining whether "a rational trier of fact could have found

the existence of the elements of the crime beyond a reasonable doubt." *Id.* at 1147 (quoting *Simmons v. State*, 934 So. 2d 1100, 1111 (Fla. 2006)).

In finding the evidence was sufficient, this Court noted that the case was "not entirely circumstantial, in that the State introduced Durrance's testimony that Simpson confessed" to murdering the victims. *Simpson*, 3 So. 3d at 1147. In addition to Durrance's testimony, this Court noted that Simpson's DNA was found on the sweat clothes and Simpson's hairs were found among the sweat clothes, as well as the following:

> 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. This Court concluded that "there was sufficient evidence to support Simpson's convictions." *Id.* at 1148.

To prove ineffective assistance of appellate counsel, Petitioner must demonstrate that his counsel were both deficient and that the deficiency prejudiced him. *Farina*, 937 So. 2d at 626. However, appellate counsel cannot be ineffective for failing to raise a meritless claim. Because this Court specifically reviewed the sufficiency of the evidence on direct appeal and found that it was sufficient, this claim is meritless. Even if appellate

counsel were deficient for not raising a sufficiency of the evidence claim, there can be no prejudice where this Court has already held that the sufficiency of the evidence claim is meritless.

Appellate counsel were not deficient as they raised the claims on direct appeal which they believed were the most likely to be successful. The main focus of the direct appeal was related to a juror's alleged recantation of a guilty verdict. *Simpson*, 3 So. 3d at 1140-46. Appellate counsel were not deficient in focusing on this issue as it is clear from this Court's six-page treatment of the issues, they were not lackluster or entirely frivolous. Further, appellate counsel knew that this Court has a mandatory obligation to review sufficiency of the evidence in all capital cases whether appellate counsel raised the issue or not. Merely having extra pages in which to raise additional issues is an insufficient demonstration that "appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance. . . ." *Farina*, 937 So. 2d at 626 (quoting *Wilson*, 474 So. 2d at 1163). Thus, Petitioner fails to demonstrate that his appellate counsel were deficient in failing to raise a claim regarding the sufficiency of the evidence on direct appeal.

Even if appellate counsel were ineffective for failing to raise sufficiency of the evidence on direct appeal, Petitioner requests an improper remedy. Petitioner would not be entitled to

the reversal of his convictions based on the claim of ineffective assistance of appellate counsel. Instead, Petitioner would be entitled to a new direct appeal. *Wilson*, 474 So. 2d at 1163.

In support of his argument that appellate counsel were ineffective for failing to raise a sufficiency of the evidence claim, Petitioner compares his direct appeal to that of *Wilson*. *Wilson*, 474 So. 2d at 1163-64. However, *Wilson* is distinguishable from Petitioner's case. In *Wilson*, it was clear "from the cold record" that sufficiency of the evidence related to premeditation was at issue in the case as two dissenting judges both noted this in their separate opinions. *Id*. at 1163. Here, there was no dissent to any portion of the opinion, much less to the sufficiency of the evidence portion. *Simpson*, 3 So. 3d at 1149. This Court pointed to very specific evidence which demonstrated clarity from the cold record that the evidence was sufficient in this case. *Id*. at 1147-48. This Court held that "in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime[s] beyond a reasonable doubt." *Id*. at 1147 (quoting *Simmons*, 934 So. 2d at 1111).

Additionally, since Simpson testified at trial, as did the two "alternate" suspects, the jury made a credibility determination regarding which version of events was more believable based on the evidence presented to them. "[D]etermining the credibility of witnesses is within the province of the jury."

Bell v. State, 841 So. 2d 329, 346 n.9 (Fla. 2002) (citing *Carter v. State*, 560 So. 2d 1166, 1168 (Fla. 1990)). It is "the jury's duty to weigh the evidence and resolve any factual conflicts" and it is "not within the province of this Court to pass on the credibility of a witness presented at trial." *Id.* (citing *Jent v. State*, 408 So. 2d 1024, 1028 (Fla. 1981)).

The specific evidence to which Petitioner points in support of factual insufficiency are all issues that were presented to and rejected by the jury at trial. For example, Petitioner claims appellate counsel should have argued to this Court on direct appeal as part of challenge to sufficiency of the evidence that he had no motive to commit the murders, but the two other suspects, Archie Crook Jr. and Mike Durrance, did have motives. (Petition at 26). However, Petitioner did have a motive. As the prosecutor mentioned during opening statement, Petitioner "believed that Archie Crook, one, knew, or suspected that [Simpson] was working with the police and, two, was telling people that [Simpson] was a snitch." (TR VOL XIII at 507). This theory was confirmed by Archie Crook Jr., who testified that he believed Simpson was working for the police because he was arrested for a serious felony but got time served instead of a harsher sentence. (TR VOL XIII at 798). This theory was also confirmed by Detective Hinson who testified that Simpson told him that the "victim and Little Archie, his son, had been putting the word out on the street that he was snitching or

cooperating with the police." (TR VOL XIV at 659). This is a clear motive.

The "alternate" suspects, Archie Crook Jr. and Durrance, were confronted at trial with their motives and inconsistencies. Archie Crook Jr. was confronted at trial with comments that he made about the victims that appeared threatening, for example, that his father, Archie Sr. and his father's girlfriend, Kimbler's baby would not see the light of day. (TR VOL XV at 808).

Similarly, Durrance was confronted with the fact that Archie Sr. owed him money for a drug deal gone bad. (TR VOL XV at 920-21). Durrance was also confronted with his motives to lie about Simpson's confession, including the suspicious timing of his cooperation, that he desired a sentence reduction from the State, and the impossibility of portions of the confession as relayed by Durrance, like Simpson's point of entry into Archie Sr.'s house. (TR VOL XV at 886, 889, 906-07). Durrance admitted that he would lie to get out of prison but stated that he was not lying during his testimony. (TR VOL XV at 898). Simpson's jury had the opportunity to hear testimony from Archie Jr., Durrance, and Simpson, and to weigh the credibility of each individual before coming to a conclusion regarding guilt.

Since this Court performed a sufficiency of the evidence review on direct appeal and determined that there was sufficient evidence to support the convictions, this claim is procedurally

barred and should be denied. Even if this claim was not procedurally barred, appellate counsel were not ineffective for failing to raise a sufficiency of the evidence claim on direct appeal because the claim would have been denied. Because Petitioner has failed to demonstrate that his appellate counsel were deficient or that he was prejudiced by their deficiency, this claim should be denied.

ISSUE II: APPELLATE COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO RAISE AN IMPROPER ARGUMENT CLAIM BECAUSE THE CLAIM WAS RAISED AND REJECTED ON DIRECT APPEAL

Petitioner claims his appellate counsel were ineffective for failing to effectively argue on direct appeal that the improper prosecutorial comments during the closing arguments constituted fundamental error. (Petition at 35-49). This claim is raised contemporaneously in the appeal of the denial of Simpsons post-conviction motion, case number SC18-1238. (IB 44-70). Because a claim of improper prosecutorial comments was raised and rejected on direct appeal, this claim is procedurally barred and should be denied. This claim is also meritless as the additional comments noted by Petitioner are either not in error or do not rise to the level of fundamental error. Because appellate counsel were not ineffective for failing to raise a meritless claim on direct appeal, this claim should be denied.

On direct appeal, appellate counsel raised a claim that unpreserved improper prosecutorial comments amounted to fundamental error. *Simpson*, 3 So. 3d at 1146-47. Appellate counsel pointed to the following arguments during the guilt phase closing that are allegedly improper: (1) the comment that Simpson "struck blow after blow until he left their lifeless and bleeding bodies gurgling on the floor" was inflammatory; (2) that the victim's blood "speaks to the truth about who it was that wielded that axe inside the bedroom"; (3) comments implying that Archie Crook Jr. was eliminated as a suspect; (4) that the shoes found near the crime scene belonged to Simpson; (5) that the DNA demonstrated that Simpson was the last person to wear the clothes found near the crime scene; (6) improper bolstering of Durrance's credibility stating he was "honest and forthright"; (7) attacking Simpson's character by saying he was "betraying a friend by assisting law enforcement"; and (8) implying Simpson was a liar in denying knowing the victims and denying the clothes belonged to him. (Direct Appeal Initial Brief (DAIB) at 56-60).[1] This Court determined that:

> [n]one of these comments individually or collectively rises to the level of fundamental error. In fact, the majority of the comments were based on facts in evidence and therefore proper. . . . Several of the comments could be constructed as impermissible bolstering. . . . However, the comments were brief and in no way do they constitute fundamental error.

[1] The DAIB can also be found at 2007 WL 4632642.

Simpson, 3 So. 3d at 1146-47 (citation omitted). This Court rejected this claim. Because this claim was previously addressed on direct appeal and rejected, it is procedurally barred and should be denied. *Hannon*, 228 So. 3d at 510.

Even if this claim was not procedurally barred, it lacks merit. Because these comments were not objected to at trial, they were not preserved for appellate review and must rise to the level of fundamental error in order for an appellant to receive relief. *Simpson*, 3 So. 3d at 1146 (citing *Brooks v. State*, 762 So. 2d 879, 898-99 (Fla. 2000)). Fundamental error is defined as 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 assistance of the alleged error." *Id*. (quoting *Brooks*, 762 So. 2d at 899). Just as the comments which were raised on direct appeal did not amount to fundamental error, none of the comments complained of in the Petition, alone or collectively, caused the guilty verdict in this case. The evidence, including the evidence that was specifically mentioned in the sufficiency of the evidence analysis by this Court on direct appeal, was the reason Simpson was found guilty. *Id*. at 1147-48.

Petitioner argues that additional comments made by the prosecutor during closing should have been noted on direct appeal as improper argument but were not. (Petition at 37-49).

Petitioner argues that had appellate counsel noted these comments in their claim on direct appeal, the standard of fundamental error would have been met. (Petition at 37, 49). However, the un-objected-to comments must be considered "in the context of the entire closing argument. . . ." *Lowe v. State*, 259 So. 3d 23, 48 (Fla. 2018) (citation omitted). On direct appeal, this Court was already required to take the arguments as a whole and would have reviewed them in their entirety when determining that the standard for fundamental error had not been met. The State's closing argument consisted of 57 pages and 17 pages of rebuttal argument, for a total of 74 pages of the record. (TR VOL XVIII at 1590-1600; VOL XIX 1604-47, 1675-92). The comments complained of "represented a very brief portion of the State's entire closing." *Id*. at 48. Argument is not improper if it is used "to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." *Gonzalez v. State*, 990 So. 2d 1017, 1028-29 (Fla. 2008) (citation omitted). The majority of the comments to which Petitioner raises a complaint do just that.

First, Petitioner argues that the State misled the jury about when Simpson was released from jail and began working as a confidential informant, which caused the jury to disbelieve Simpson's testimony that Archie Jr., borrowed his clothes because Simpson's timeline was wrong. (Petition at 37-38). Simpson was the only person who testified at trial that Archie Jr. borrowed

clothing from him. (TR VOL XVII at 1384-85). This testimony was extremely self-serving; that someone happened to borrow the exact clothes which were found near the murder scene and had Simpson's DNA as well as blood from the victims on them. Archie Jr. denied borrowing these clothes and a defense witness who knew both Simpson and Archie Jr. testified that Archie Jr. was not known to have ever borrowed clothes from Simpson. (TR VOL XIV at 799-800; VOL XVIII at 1503).

Regarding Simpson's release date, the State argued Simpson was released from jail in March 1999, but Petitioner argues it was in June 1999. (VOL XIX at 1604, 1618); (Petition at 38 n.4). During his testimony, Simpson could not recall the exact date he was released. (TR XVIII at 1423). The crime occurred in 1999 but this trial occurred in 2007, so the jury already knew that the timeline was subject to witness's recall from eight years prior. Even if the March 1999 date was inaccurate and Simpson was actually released in June of 1999, the State's argument regarding Simpson's motive to kill the victims, that Simpson murdered Archie Sr. because he knew Simpson was a confidential informant and were telling other drug dealers, was more persuasive than if he was released in June 1999 instead of in March 1999. Archie Jr. testified that he knew from Simpson's release that he must be working with the police. (TR VOL XIV at 798-99). If Archie Jr., and the victim, Archie Sr. knew immediately upon his release that

Simpson was an informant, and were informing other people of Simpson's working with the police, the Crooks were likely putting out this information as soon as they knew. If the Crooks started putting out the word in March when the State said Simpson was released, Simpson's motive would have diminished in the four months leading up to the time of the crimes in July. If Simpson was instead released in June, his motive would have been fresh at the time of the crimes in July. Thus, even if the prosecutor was incorrect in stating Simpson was released in March, it was harmless as the March date was less "prejudicial" to Simpson's case than Simpson having been released in June. This comment cannot rise to the level of fundamental error because Simpson was not convicted because the prosecutor argued that Simpson's timeline of events was incorrect.

Second, Petitioner argues that the prosecutor misrepresented the victim's defensive wounds by first arguing Kimbler did not fight off her attacker but later arguing that the defensive wounds indicated the victims attempted to fend off their attacker. (Petition at 38-39). This argument was in rebuttal to the defense argument that the DNA under Kimbler's nails was from Archie Jr. because he was the murderer, rather than from Archie Sr. because he was the intimate partner of Kimbler. (TR VOL XIX at 1689). However, Petitioner fails to acknowledge that the prosecutor's statement that "[t]here is no indication that the axe murderer

even got close enough to his victims for the victims to get a scratch off" can be consistent with the statement that "[d]efensive wounds found on both victims showed that they attempted to fend off Simpson." (TR VOL XIX at 1689); *Simpson*, 3 So. 3d at 1138. The murder weapon in this case was an axe and there was no indication of hand-to-hand combat. An axe adds two to two and a half feet to the reach of an individual. The victim could have tried to defend herself from being hit with the axe without coming close enough to the person wielding the axe to touch, or scratch, that person. The medical examiner testified that the blow to Kimbler's right side of her neck was "immediately fatal" but that there were "other wounds, too" and the examiner could not "tell which [wound] was first." (TR VOL XV at 860). Both parties used the available testimony to argue alternate theories, which is entirely permissible and cannot constitute fundamental error.

Third, Petitioner argues that the prosecutor misrepresented the DNA evidence in the case. (Petition at 39-42). Petitioner complains that the prosecutor's rebuttal argument, which started with a quote about physical evidence being a "silent witness against" a perpetrator, was improper. (TR VOL XIX at 1675-76). But the prosecutor's stated purpose was to argue that "[t]his case does not come down to Michael Durrance. This case comes down to physical evidence." (TR VOL XIX at 1676). The quote conveys the same point, that there is physical evidence which tends to indicate

Simpson was involved in the murders. The State's main argument was that because Simpson was the major contributor to DNA found on the sweat clothes, he was most likely the last person to have worn them. This is supported by the DNA expert's testimony. (TR VOL XVI at 1126-27, 1187-89). One of the State's DNA experts, Badger, testified regarding swabbings from the waistband of the sweatpants, that the major contributor matched Simpson, with a statistical significance of 1 in 6.1 billion Caucasians. (TR VOL XVI at 1185-88). Assuming a mixture of two individuals, Archie Sr., Kimbler, Smallwood, and Archie Jr. were excluded as secondary donors in the DNA mixture. (TR VOL XVI at 1188). From the swabbings from the leg cuffs of the sweatpants, Simpson was found to be the primary contributor with a frequency of 1 in 9.5 billion Caucasians. (TR VOL XVI at 1188-89). The sweatshirt neck matched Simpson's DNA profile with a frequency of 1 in 140 thousand Caucasians (TR VOL XVI at 1191-93). A stain on the left shoulder of the sweatshirt matched Simpson's DNA profile with a frequency of 1 in 760 billion Caucasians. (TR VOL XVI at 1195-96). Further, the State presented an expert in population genetics, who confirmed Badger's testimony and opined that in general, "the major profile would be the DNA from the individual who had worn that clothing most recently." (TR VOL XVII at 1321, 1326, 1329-31). The prosecution's argument that the DNA points to Simpson and not to Archie Jr., Smallwood, or Durrance, is inference from the DNA

testimony. Defense counsel argued the inference the other way by discussing how "epithelial DNA that matches Archie Jr." was on the neck of the sweatshirt. (TR VOL XIX at 1658). Arguing inferences from the evidence presented at trial is proper and cannot constitute fundamental error.

Petitioner also complains of the following passage related to the DNA evidence:

> The real power of DNA comes from the cumulative effect of gene after gene, address after address, and the information and the order of the information in which it is revealed. A single 15 allele tells none of you anything about the identity of anyone that may have at some time in the past touched the sweat clothing.

(TR VOL XIX at 1678). Petitioner argues this is a misstatement of the evidence because Archie Jr. could not be ruled out from the minor profile identified containing that allele. (Petition at 40-41). The point was that testimony that 25 percent of the population could not be excluded from the minor profile from the sweatshirt neck was significantly less compelling than the testimony that the major profile matched Simpson with a frequency of 1 in 140 thousand Caucasians. (TR VOL XVI at 1191-93). This inference was proper argument.

Petitioner complains of the following passage related to the DNA evidence:

> This defendant is asking you to engage in speculation without proof and possibilities without evidence. They just told you that because there's no evidence of him in the crime scene and there's no blood of him on the

> clothing that you need to acquit him. 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.

(TR VOL XIX at 1688). Petitioner argues that this is a misstatement of the evidence that some of the DNA consisted of mixed profiles where the minor contributor could not be identified. (Petition at 42). However, the prosecutor's point was that all of the evidence was presented to the jury, that there were no tests of items from the crime scene which were still pending. This is a correct statement and proper argument.

Fourth, Petitioner argues that the prosecutor improperly shifted the burden of proof by stating "that Simpson sought to have the jury engage in 'speculation without proof and possibilities without evidence. . . .'" (Petition at 44). The argument continued: "[Defense] just told you that because there's no evidence of him in the crime scene and there's no blood of him on the clothing that you need to acquit him." (TR VOL XIX at 1688). The prosecution is allowed to comment on the plausibility of the defense theory, especially when Simpson testified to a version of events that was not corroborated by any other evidence presented at trial. *Salazar v. State*, 188 So. 3d 799, 822 (Fla. 2016) ("statements questioning the plausibility of the defense's theory were appropriate"). This is not burden shifting and cannot constitute fundamental error.

Fifth, Petitioner argues error due to "the State's repeated character assassinations of Simpson." (Petition at 44). However, Petitioner put his credibility at issue when he decided to testify and the prosecutor is permitted to argue the inferences from a defendant's statements being "inconsistent with the other evidence" and such arguments do not constitute "derisive comments offered merely to ridicule the defense." *Davis v. State*, 136 So. 3d 1169, 1204 (Fla. 2014); *see also Davis v. State*, 698 So. 2d 1182, 1190 (Fla. 1997) (concluding that prosecutor's reference to defendant's statements as "bald-faced lies" was not improper).

Additionally, "the prosecutor is permitted to suggest to the jurors that 'based on the evidence of the case, they should question the plausibility of the defense's theory.'" *Mosley*, 209 So. 3d at 1270 (quoting *Davis*, 136 So. 3d at 1203). All of the comments which Petitioner notes as improper "character assassinations," fall squarely within questioning the plausibility of the defense theory and the unreliability of Petitioner's own testimony when compared with the other evidence presented at trial.

Petitioner cites to multiple cases, claiming that they are examples of "[f]ar less egregious" comments resulted in new trials. (Petition at 46); *see Petruschke v. State*, 125 So. 3d 274, 278-80 (Fla. 4th DCA 2013) (claiming a child lacked the mental ability to fabricate a sexual battery allegation and repeatedly referring to appellant as a "pedophile" constituted reversible error in this

case); *Martinez v. State*, 761 So. 2d 1074, 1082-83 (Fla. 2000) (improper references to an "injection" and attack on defendant's credibility when he did not testify, not alone sufficient to warrant reversal); *Gore v. State*, 719 So. 2d 1197, 1200-03 (Fla. 1998) (entreaty to convict the defendant solely based on whether he lied in his testimony was impermissible); *Pacifico v. State*, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994) (calling the defendant a liar outside of a reference to testimony given was improper but was, by itself, not "sufficiently egregious to cast doubt upon the fairness of the trial"). However, each of those cases involved clearly improper argument, most objected to and thus preserved for review, whereas here, there were no objections and the argument is not improper. Additionally, in these cases, the improper argument error was reversible when considering the case as a whole and in conjunction with other errors. Here, the comments were not derisive, did not implicate the burden of proof, but instead, were comments on the veracity of Simpson's testimony which were proper.

Besides references to Petitioner's version of events being unbelievable, Petitioner points to two statements as being improper. The first is a passage which appears to insinuate that Simpson is a "bad" person. That passage, in context, is a follows:

> This defendant told Mike Durrance what he did because this defendant was his friend. And I'm sure that you're going to hear all of these attacks on Mike Durrance and how bad he is and how bad of a person he is and he has an interest in the case, but remember, ladies and

> gentlemen, that in doing so those same things apply to this defendant.
>
> The Court will instruct you that when the defendant takes the witness stand that you must treat him like any other witness in this case. He, too, shares felony convictions. Actually even more. He had eight. He had a crime involving dishonesty, and despite what he tried to deny on the witness stand, he has the greatest interest in the outcome of this case, even greater than Mike Durrance's interest in getting a sentence reduction.

(TR VOL XIX at 1636). In context, it is clear that the prosecutor's intention is not to call Simpson a "bad" person, but merely to note that both Durrance and Simpson are drug dealers with multiple felony convictions and motives to lie. Further, the prosecutor is not urging the jury to convict Simpson because he is a "bad" person. Instead, the prosecutor is urging the jury to look at all of the evidence and judge the credibility of the witnesses. This is entirely proper argument.

Petitioner argues that in the next passage complained of, the prosecutor "accused Simpson of conspiring with counsel to fabricate his DNA defense based on depositions. . . ." (Petition at 45).

> And then the big slip-up, ladies and gentlemen, where he truly demonstrated where he was getting all his testimony from. He said, when Detective Hinson called me, he told me they wanted to talk to me about the DNA, and that's why I went down to talk to Detective Eason.
>
> Well, we know that's not true, ladies and gentlemen. One, the DNA hadn't been worked yet. Two, and you heard from Detective Hinson, he's a seasoned homicide detective. Jason Simpson, in his mind, is a prime

> suspect in this case. He would never, ever tell a suspect when he's coming in to be interviewed in regards to a crime the physical evidence in regards to the case and the reason for the interview. It's counter intuitive. You want to catch them denying things.
>
> He would have never told him that the DNA existed and he denied ever telling him that. But this defendant said, oh, no, he did, he did, trust me. I saw it in the deposition. And that's where the true color of his testimony came out. He had gone through with his attorneys and by himself and read through all the testimony, all the evidence in this case, and this clearly demonstrates, despite the fact that he got caught in a bald-faced lie, clearly demonstrates that he was trying to make everything fit the best that he could.

(TR VOL XIX at 1640-41). During his testimony, Simpson referred to Hinson's deposition, that Hinson said "Bialkowski called him and said he needed to talk to me about as far as some DNA coming back. . . ." (TR VOL XVIII at 1436). Hinson testified that he never told Simpson that the detectives wanted to speak with him about DNA evidence. (TR VOL XVIII at 1524-35). Though the prosecutor should not have made reference to Simpson's attorneys, the argument itself is not improper. Simpson testified, and his testimony was, as in other places, contrary to other testimony at trial. The prosecutor's goal was to demonstrate this inconsistency by pointing to the source of Simpson's information, which Simpson himself designated in his testimony, Hinson's deposition. This is not improper.

Sixth, Petitioner argues that the prosecutor vouched for members of law enforcement. (Petition at 46-47). Petitioner

points to three passages, which, taken in context, are not vouching but instead are comments based on the facts in evidence and inferences therefrom, which is proper argument. *Gonzalez*, 990 So. 2d at 1028-29. Petitioner argues as improper that the prosecutor "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." (Petition at 46). The full passage is as follows:

> [Simpson] told Detective Hinson that Archie Crook, Sr., was putting the word out that he was a snitch and he wasn't sorry that he was dead. If you live by the sword, you die by the sword.
>
> Detective Hinson was taken aback by these actions. He had a feeling, he went back and he told the other investigators, you need to look at Jason Simpson. You need to look at him.

(TR VOL XVIII at 1600; TR VOL XIX at 1604). This is merely summation of Detective Hinson's testimony and reasonable inferences therefrom. Hinson testified that Simpson told him the "victim and Little Archie, his son, had been putting the word out on the street that he was snitching or cooperating with the police." (TR VOL XIV at 659). After speaking with Simpson and observing his demeanor when he informed Simpson of the murders, Hinson told the detectives they "needed to look at [Simpson] in regards to this murder." (TR VOL XIV at 660). When asked about his suspicions about Simpson, Hinson stated "I knew what my feelings were but I didn't know if they were accurate, so I didn't

want to just operate on what I felt. I wanted to talk with the detectives that were actually in the scene and were working it and had more knowledge." (TR VOL XIV at 689). The prosecutor's comments during closing argument constituted summation of the testimony presented at trial and reasonable inferences therefrom. This is proper argument.

Next, Petitioner argues as improper vouching that "the state attorney's office had initially refused to take Durrance's assertation that Simpson confessed 'at face value, without more,' but believed him once the DNA test results came back." (Petition at 47). The full passage from the portion of the prosecutor's argument is as follows:

> You may want to ask yourselves, well, why did the State treat [Durrance] like this, if this information was valid. Because, ladies and gentlemen, at the time there was no corroboration. At the time we had the word of a seven-time convicted felon, a drug dealer, a person who knew these individuals, a person who admitted that, in essence, he had a motive himself to have the victim killed over this drug dispute, over this alleged hit that the victim may have been putting out on him. So law enforcement and the State Attorney's Office would not take at face value, without more, the testimony of Mike Durrance.
>
> . . . at this point in time they didn't have anything more than Mike Durrance's word. But they had a start. It was sort of a kick in the pants to them to say, hey, we better start looking at Jason Simpson again. And how did they go about doing that?
>
> Well, they went about doing that by trying to get Mr. Simpson to come and talk to them again. But remember, in October 2001 when Mike Durrance told the detectives the same thing he told you on that witness stand, that

> Jason Simpson is the person who committed this crime, the DNA evidence had not even been worked.

(TR VOL XIX at 1613-15). This argument is merely summation and the drawing of reasonable inferences from the evidence presented at trial to explain the timeline of events. This is not improper.

Petitioner's final argument that the prosecutor improperly vouched for law enforcement is:

> 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.

(Petition at 47; TR VOL XIX at 1690). Petitioner argues this passage indicates there was additional information not presented to the jury which supports the State's case. (Petition at 47). However, this passage was immediately preceded by a paragraph summation of the holes in the evidence in the case, which was concluded with: "And these are questions that will remain forever unanswered because the evidence does not answer those questions." (TR VOL XIX at 1689-90). The passage is immediately followed by "And we tried to ask every question we could, but inevitably, ladies and gentlemen, there are questions that either we failed to ask or for whatever reason you still have in the back of the mind." (TR VOL XIX at 1690). Soon after, the prosecutor argued that "nonetheless, [the evidence] continues to implicate, incriminate, inculpate and direct us to but one single human being. Jason

Simpson." (TR VOL XIX at 1690). The prosecutor's acknowledgment and attempts to address the holes in the case is proper material for closing argument, as the prosecutor must prove guilt beyond a reasonable doubt, which is "not a mere possible doubt, a speculative, imaginary or forced doubt." (TR VOL XIX at 1704); Fla. Std. Jury Ins. 3.7. There is no allusion to evidence that was not presented at trial that supports the State. In fact, the statement goes the other way, indicating that there is nothing else out there. As the complained-of passage states in conclusion, "we threw [the witnesses] all up on the stand for you and hoped that we covered everything." (TR VOL XIX at 1690). This is not improper and cannot constitute fundamental error.

Even if all of the new passages complained of were improper, collectively they do not constitute fundamental error. The conviction in this case was not based on the prosecutor's argument. The conviction was based on Simpson's confession to Durrance, Simpson's DNA on the clothes found near the murder scene, and the additional evidence presented by the State that points to Simpson as the perpetrator. *Simpson*, 3 So. 3d at 1147-48.

Because the claim of fundamental error based on improper prosecutorial comments during closing arguments was raised and rejected on direct appeal, this claim is procedurally barred and should be denied. Even if this claim was not procedurally barred, it lacks merit as the new comments addressed do not constitute

error or rise to the level of fundamental error. This claim lacks merit and should be denied.

CONCLUSION

WHEREFORE, this Court should deny this Petition for Writ of Habeas Corpus.

Respectfully submitted,

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ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 6th day of September, 2019, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Sonya Rudenstine, Esq., at srudenstine@yahoo.com; John Mills, Esq., at jmills@mills-appeals.com; Thomas Hall, Esq., at thall@mills-appeals.com; Courtney Brewer, Esq., at cbrewer@mills-appeals.com; and Jonathan Martin, Esq., at jmartin@mills-appeals.com; Attorneys for Petitioner.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Jennifer A. Donahue
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