Filing # 99364306 E-Filed 11/22/2019 09:16:11 PM

**IN THE SUPREME COURT OF FLORIDA**

JASON ANDREW SIMPSON,

Petitioner,

v. Case No.: SC19-700

MARK S. INCH,
SECRETARY, DEPARTMENT OF
CORRECTIONS,

Respondent.

---

**PETITIONER'S REPLY**

---

Sonya Rudenstine
224 NW Second Avenue
Gainesville, Florida 32601
srudenstine@yahoo.com

John S. Mills
Thomas D. Hall
Courtney Brewer
Jonathan Martin
The Mills Firm, P.A.
325 North Calhoun Street
Tallahassee, Florida 32301
jmills@mills-appeals.com
thall@mills-appeals.com
cbrewer@mills-appeals.com
jmartin@mills-appeals.com
service@mills-appeals.com (secondary)

Attorneys for Petitioner

RECEIVED, 11/22/2019 09:16:30 PM, Clerk, Supreme Court

## TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF CITATIONS ..... ii

REPLY ARGUMENT ..... 1

I. Appellate Counsel Failed to Argue the Insufficiency of the Evidence. ..... 1

A. That This Court Found the Evidence Sufficient on Direct Appeal Without the Benefit of Briefing Does Not Bar Simpson's Claim. ..... 1

B. The State Has No Argument in Response to Any of Simpson's Challenges to the Sufficiency of the Evidence. ..... 5

C. There Is No Reason to Delay the Inevitable Reversal by Requiring Another Round of Briefing on the Sufficiency of the Evidence. ..... 9

II. Appellate Counsel Failed to Demonstrate the Fundamental Error Wrought by the State's Numerous Improper Arguments. ..... 11

CERTIFICATE OF SERVICE ..... 13

CERTIFICATE OF COMPLIANCE ..... 14

## TABLE OF CITATIONS

### CASES

*Ballard v. State*,
923 So. 3d 475 (Fla. 2006) .....6

*Betts v. State*,
157 So. 3d 376 (Fla. 2d DCA 2015).....10

*Brown v. State*,
672 So.3d 648 (Fla. 4th DCA 1996).....6

*Farina v. State*,
937 So. 3d 612 (Fla. 2006) .....3, 4

*Finley v. State*,
139 So. 3d 940 (Fla. 4th DCA 2014).....6

*Hannon v. State*,
228 So. 3d 505 (Fla. 2017) .....2

*Johnson v. Wainwright*,
498 So. 3d 938 (Fla. 1986) .....10

*Miranda v. State*,
113 So. 3d 51 (Fla. 2d DCA 2013).....6

*Reed v. State*,
875 So. 2d 415 (Fla. 2004) ..... 3

*Sanders v. State*,
959 So. 2d 1232 (Fla. 2d DCA 2007).....10

*Serrano v. State*,
225 So. 3d 737 (Fla. 2017) .....3, 4

*State v. Keyes*,
322 A.2d 615 (N.H. 1974).....6

*Voelker v. Combine Insurance Co. of America*,
73 So. 2d 403 (Fla. 1954) .....6

*Whitmore v. State*,
27 So. 3d 168 (Fla. 4th DCA 2010).....10

*Willis v. Romano*,
972 So. 3d 294 (Fla. 5th DCA 2008).....6

*Wilson v. Wainwright*,
474 So. 2d 1162 (Fla. 1985). .....passim

*Wingo v. State*,
158 So. 3d 743 (Fla. 2d DCA 2015).....6

**STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES OF COURT**

§ 90.603(2), Fla. Stat. (2007).....6

§ 90.605(1), Fla. Stat. (2007).....6

## REPLY ARGUMENT

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

The State's response to Simpson's claim that his appellate counsel was ineffective for failing to argue the insufficiency of the evidence on direct appeal boils down to the assertion of two procedural points, both conclusively rejected by this Court and sandwiched around a conclusory merits argument that fails to provide either (1) a substantive defense of the evidence this Court found sufficient on direct appeal or (2) a response to Simpson's arguments that the Court was misled by counsel's ineffectiveness as to each piece of evidence on which it relied in affirming Simpson's convictions.

#### A. That This Court Found the Evidence Sufficient on Direct Appeal Without the Benefit of Briefing Does Not Bar Simpson's Claim.

The State's primary response is to argue that this claim is "procedurally barred" and "meritless" because this Court reviewed the evidence on its own in the direct appeal and found the evidence sufficient. (Resp. 7-10.) But this Court has expressly rejected that exact argument in the strongest of terms:

> The role of an advocate in appellate procedures should not be denigrated. Counsel for the state asserted at oral argument on this petition that any deficiency of appellate counsel was cured by our own independent review of the record. She went on to argue that our disapproval of two of the aggravating factors and the eloquent dissents of two justices proved that all meritorious issues had been considered by this Court. It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death

> cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

*Wilson v. Wainwright*, 474 So. 2d 1162, 1165 (Fla. 1985).

The State claims *Wilson* is "distinguishable" because there were two dissenting justices in the direct appeal in that case, while the affirmance here was unanimous. (Resp. 11.) But this is not a legal distinction because there is no principled basis to limit ineffective assistance of appellate counsel claims for failure to brief an issue only to instances where there was a dissent. That this Court granted habeas relief in *Wilson* where dissenting opinions reveal that the Court was aware of specific weaknesses with the State's evidence yet affirmed on direct appeal only makes it more appropriate here where the problems were not identified at all during the direct appeal.

It is the cases on which the State relies that are distinguishable. In *Hannon v. State*, 228 So. 3d 505, 509-11 (Fla. 2017), this Court rejected an argument in a third successive motion for post-conviction relief that challenged the proportionality of the death penalty because the issue had been "previously addressed on direct appeal and is untimely." There was no claim of ineffective assistance of appellate counsel, so *Hannon* is inapposite.

*Serrano v. State*, 225 So. 3d 737 (Fla. 2017), and *Reed v. State*, 875 So. 2d 415 (Fla. 2004), do involve claims of ineffective assistance of appellate counsel for failure to brief the sufficiency of the evidence, but they support Simpson on the law and are distinguishable on the facts. The Court entertained but rejected these claims on the merits, but only after reviewing the respective records, which led it to conclude on the facts of those cases that it would not have found any merit had the sufficiency of the evidence been effectively briefed on appeal. *See Serrano*, 225 So. 3d at 757 ("The end result of this Court's sufficiency analysis would not have been any different. Accordingly, appellate counsel cannot be deemed ineffective for failing to raise this meritless issue."); *Reed*, 875 So. 2d at 440 ("If appellate counsel had challenged the sufficiency of the evidence on direct appeal, we would have found no merit to that claim."). They thus support a new review of the sufficiency of the evidence here, a review that should yield the opposite result on the very different and unique facts of this case.

Similarly, in *Farina v. State*, 937 So. 2d 612 (Fla. 2006), this Court rejected a habeas claim that counsel was ineffective for failing to raise claims of prosecutorial misconduct based on the State's reference to biblical authority while cross-examining a defense witness and in closing argument. The Court exhaustively reviewed the claim on the merits and ultimately rejected it because

the argument had not been preserved by trial counsel and the errors were not fundamental. *Id.* at 626-35. Again, this supports Simpson's position on the law.

This Court also noted in *Farina* that even if there had been fundamental error, appellate counsel would have been reasonable in concluding that "the prosecutor's alleged misconduct, given that it was not properly objected to, was a weaker claim with less chance of success." *Id.* at 634. In contrast, as the State itself emphasizes, the sufficiency of the evidence claim was preserved below in this case (Resp. 8 (citing T:1364-68, 1540).) Moreover, in *Wilson*, this Court rejected the notion that counsel can reasonably decline to brief the sufficiency of the evidence where it is close:

> The decision not to raise this issue cannot be excused as mere strategy or allocation of appellate resources. This issue is crucial to the validity of the conviction and goes to the heart of the case. If, in fact, the evidence does not support premeditation, petitioner was improperly convicted of first degree murder and death is an illegal sentence. To have failed to raise so fundamental an issue is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome.

474 So. 2d at 1163-64.

At bottom, this Court's decisions in *Wilson*, *Serrano*, and *Farina* collectively stand for the proposition that the failure to adequately brief the sufficiency of the evidence in a capital case is ineffective assistance of appellate counsel unless the argument for insufficiency is meritless. Thus, the question for the Court is whether Simpson's arguments that the evidence was insufficient are

meritless. This is a question to be answered de novo by this Court as this is an original proceeding, and a fresh review is all the more important here where only two members of the current Court participated in the decision on direct appeal.

### B. The State Has No Argument in Response to Any of Simpson's Challenges to the Sufficiency of the Evidence.

In his petition, Simpson identified every piece of evidence on which this Court relied on direct appeal and offered specific arguments as to why the Court had misunderstood that evidence and why matters in the record that were overlooked in the Court's opinion (because no advocate brought them to the Court's attention) fatally undermined the State's evidence. While the State's offers conclusory statements that the evidence was sufficient, it offers no substantive response to any of Simpson's arguments.

Specifically, Simpson noted that the Court relied on Durrance's testimony that Simpson confessed as direct evidence that obviated the need for the State to satisfy the circumstantial evidence test. (Pet. 23, 29.) The State's response does not disagree. Simpson went on to argue that several facts overlooked by the opinion prevented Durrance's testimony from being sufficiently competent and substantial to support the convictions, including (a) it made no sense that Simpson would confess to someone on whom he was actively informing, (b) the details of the confession involving Simpson entering through a window in the kitchen or laundry room were directly contradicted by the physical evidence showing that was

impossible, (c) Durrance waited two years to claim Simpson confessed and only did so because he learned that Simpson had been informing on him and he hoped for a sentence reduction, and (d) Durrance admitted he was willing to lie under oath to help get a sentence reduction, which rendered his testimony incompetent under sections 90.603(2) and 90.605(1), Fla. Stat. (2007), and under the reasoning of *Willis v. Romano*, 972 So. 2d 294, 295 (Fla. 5th DCA 2008), *Wingo v. State*, 158 So. 3d 743, 745 (Fla. 2d DCA 2015), and *State v. Keyes*, 322 A.2d 615, 618 (N.H. 1974). (Pet. 26-29.) The State has no response and did not even address the statutory and case law on which Simpson relies, much less seek to distinguish it.

Simpson's petition went on to explain why the remaining circumstantial evidence was insufficient. He started with the DNA evidence and explained in detail why that evidence required improper inference stacking contrary to *Voelker v. Combined Insurance Co. of America*, 73 So. 2d 403, 407 (Fla. 1954), and *Brown v. State*, 672 So. 2d 648, 650 (Fla. 4th DCA 1996). (Pet. 29-31.) He even cited three cases where Florida courts reversed convictions based on the same kind of circumstantial forensic evidence – *Ballard v. State*, 923 So. 2d 475, 484-86 (Fla. 2006), *Finley v. State*, 139 So. 3d 940, 943 (Fla. 4th DCA 2014), and *Miranda v. State*, 113 So. 3d 51, 55-57 (Fla. 2d DCA 2013). The State's response does not dispute that the DNA evidence relied on improper inference stacking and does not even mention, much less seek to distinguish any of those decisions.

Simpson then detailed the remaining circumstantial evidence from the investigation explaining why each item, which was only marginally inculpating in the abstract, was rebutted by other evidence the Court had overlooked and was not inculpating at all when considered in context. (Pet. 32-35.) The State has not disputed any of this.

Indeed, the only merits argument the State addresses involves evidence that this Court did not even mention, much less suggest constituted evidence supporting the convictions. Simpson argued in his petition that the State never did prove that he had the motive or opportunity to murder the victims, noting that despite vast amounts of physical evidence being found at the crime scene, none was connected to Simpson while some could be connected to Little Archie, who had a clear motive to commit the murders, and Little Archie's best friend Smallwood, who was shown to have been in the victims' house with Little Archie within an hour of the murders. (Pet. 26-27.) The only part of that argument the State disputes is that Simpson had no motive.

Specifically, the State points only to (1) a passing sentence in the State's opening that Simpson believed Big Archie had learned Simpson was working as a CI and (2) evidence at trial that (a) Little Archie had figured out that Simpson was a CI and (b) Simpson had advised a detective that both Big Archie and Little Archie had been putting the "word out on the street" that he was a CI. (Resp. 12-13

(citing T:507, 659, 798); *see also* T:676-77 (officer confirming that after the murders, Simpson advised that both men had been putting the word on the street that he was a CI).) The State never explains why this was a motive to kill Kimbler at all or to kill Big Archie, but not Little Archie. Moreover, as noted in the petition but ignored in the response, the lead prosecutor has unequivocally admitted that the State never could prove what motive Simpson could possibly have had for killing these victims. (Pet. 2 (citing R3:10998, 11007).)

Even if there were some logic to the State's appellate claim of a motive, it pales in comparison to the clear motive that Little Archie had for murdering not just Big Archie, but also Kimbler and her unborn baby – he was angry that Big Archie was having a baby with another woman while still married to his mother and he told people he would kill all three of them. (T:783-85, 808-09, 1473, 1479-81, 1489-90.) This emotional motive fits the violent crime scene far more closely than any motive Simpson might have to eliminate one of two people who may have told others he was working as a CI. The State utterly ignores the other evidence that was highly inculpatory against Little Archie, including that he knew the unique position of the bodies, claiming he learned it from his grandfather even though his grandfather denied under oath having disclosed those details. (T:546, 821, 1492-92.)

In short, the evidence cited by the Court in its opinion is fatally undermined by evidence it overlooked because it did not have the benefit of briefing by Simpson's counsel and ample additional evidence not only directly exculpates Simpson, but also inculpates Little Archie instead. The case for the insufficiency of the evidence to support these capital convictions is overwhelming, and the State has provided no real response on the merits.

### C. There Is No Reason to Delay the Inevitable Reversal by Requiring Another Round of Briefing on the Sufficiency of the Evidence.

Though it has offered no response to most of Simpson's arguments on the merits, the State claims he has demanded the wrong remedy by seeking reversal, arguing that if he prevails on this claim, the remedy is a new direct appeal instead of a reversal. The State correctly notes that was the remedy this Court granted in *Wilson*, but overlooks the context of that remedy and subsequent case law.

In *Wilson*, this Court explained that it was granting a new direct appeal with new briefing because without the briefing, the Court could not predict how it would rule. *See* 474 So. 2d at 1165 ("We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation.") As noted above, the context included the fact that the justices had taken three different positions on the unbriefed issue of the sufficiency of the evidence in the direct appeal – the majority found the evidence sufficient for both

counts, Justice Overton found it sufficient for one but not the other, and Justice McDonald found it insufficient for either. While this Court certainly has the discretion to only grant a new appeal if it is unable to predict from the current arguments and record how it will rule, the trend since *Wilson* has been to go ahead and rule on the merits if possible instead of wasting time and resources on an entirely new appeal.

In *Johnson v. Wainwright*, 498 So. 2d 938, 939 (Fla. 1986), the defendant sought a new appeal based on his claim that appellate counsel was ineffective for not briefing a jury separation issue. But this Court held that remedy was unnecessary because the record already demonstrated that the defendant would win with effective appellate counsel and "a new appeal would be redundant because we acknowledge that reversible error occurred at trial." *Id.* The lower courts have followed suit. For example, then-Judge Canady has explained that reversal and not a direct appeal was the appropriate remedy where appellate counsel had failed to brief a meritorious issue. *Sanders v. State*, 959 So. 2d 1232, 1234 (Fla. 2d DCA 2007); *accord Betts v. State*, 157 So. 3d 376, 380 (Fla. 2d DCA 2015); *Whitmore v. State*, 27 So. 3d 168, 172 (Fla. 4th DCA 2010).

The complete record is before the Court and the parties have been given a full and fair opportunity to brief the sufficiency of the evidence. If the Court agrees with Simpson, there is no reason to waste time and resources with a new appeal,

which would be redundant. Simpson's convictions should be reversed and the remaining post-conviction claims – both in this habeas petition and the Rule 3.851 appeal – will be rendered moot. Death penalty convictions based on insufficient evidence have thankfully been relatively few and far between in Florida, and instances where the Court erroneously finds the evidence sufficient on direct appeal due to ineffective briefing are hopefully even more rare – perhaps only once every 35 years as this has not happened since *Wilson*. But this is such a case.

But even if the Court disagrees that Simpson has met the high standard of showing no reasonable jury could have found him guilty on this evidence, the merits arguments on this point should lay bare just how close this case was. That simple recognition will show that Simpson can establish the lesser burdens of prejudice on his remaining claims – whether that is the prejudice standard for the fundamental error review on the second issue raised in his habeas petition or the even lower standard of prejudice on the issues raised in the 3.851 appeal.

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

Just as Simpson respectfully suggests the Court can most efficiently dispose of this case by considering Issue I above in this habeas proceeding before tackling the issues raised in the 3.851 appeal, he also recognizes that the Court may find it efficient to go back to the 3.851 appeal before disposing of this second habeas

issue. Specifically, the second issue raised in the habeas petition is that counsel was ineffective in briefing challenges to the State's closing argument by (a) not presenting any argument under the fundamental error standard to show that the verdict must have been the result of the few improper comments raised on appeal and (b) failing to raise the most egregious comments.

Simpson addresses all of the same improper comments under this claim in his 3.851 appeal under his claim that trial counsel was ineffective for failing to object or otherwise respond to these comments at trial. As argued in his initial and reply briefs in that appeal, the standard of prejudice he must meet in that case is much lower because in that case he merely needs to show that had trial counsel acted effectively, there is at least a reasonable probability that the jury would have acquitted him, the trial court would have granted a mistrial, or this Court would have reversed based on the comments. If the Court agrees with how Simpson frames that issue, then the second issue raised in this habeas petition under the much stricter fundamental error standard will become moot. If Simpson cannot meet the IAC standard for failure to object or respond at the trial level, he could not meet the fundamental error standard applicable here.

Accordingly, while he adheres to his strong belief that he is entitled to relief on Issue 2 in this habeas proceeding, he otherwise relies on his petition and will not burden the Court with further reply on that issue here.

Respectfully submitted,

/s/ Sonya Rudenstine
Sonya Rudenstine
Florida Bar No. 711950
srudenstine@yahoo.com
224 NW Second Avenue
Gainesville, Florida 32601
(352) 359-3972
(866) 539-6617 facsimile

/s/ John S. Mills
John S. Mills
Florida Bar No. 0107719
jmills@mills-appeals.com
Thomas D. Hall
Florida Bar No. 310751
thall@mills-appeals.com
Courtney Brewer
Florida Bar No. 890901
cbrewer@mills-appeals.com
Jonathan Martin
Florida Bar No. 117535
jmartin@mills-appeals.com
service@mills-appeals.com (secondary)
The Mills Firm, P.A.
325 North Calhoun Street
Tallahassee, Florida 32301
(850) 765-0897
(850) 270-2474 facsimile

Attorneys for Petitioner

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following by email on November 22, 2019:

Jennifer A. Donahue
Assistant Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
Jennifer.donahue@myfloridalegal.com
capapp@myfloridalegal.com
*Counsel for Respondent*

Raoul G. Cantero
White & Case LLP
Southeast Financial Center
200 South Biscayne Blvd, Suite 4900
Miami, Florida 33131-2352
rcantero@whitecase.com
*Counsel for Amici the Innocence Project and the Innocence Project of Florida*

/s/ John S. Mills
Attorney

**CERTIFICATE OF COMPLIANCE**

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).

/s/ John S. Mills
Attorney