IN THE SUPREME COURT OF FLORIDA

ROBERT IKE COMBS,	:	
Appellant,	:	
v.	:	CASE NO. [illegible],477
STATE OF FLORIDA,	:	
Appellee.	:	

APPEAL FROM THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

BRIEF OF APPELLANT

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STATE OF FLORIDA,	:	
Appellee.	:	

BRIEF OF DEFENDANT-APPELLANT ROBERT IKE COMBS

Defendant-appellant Robert Ike Combs ("defendant" or "Bobby") appeals from the denial of his motion, pursuant to Fla. R. Crim. P. 3.850, to vacate, set aside, or correct his conviction and sentence ("3.850 motion").

PROCEDURAL HISTORY

In April 1980, defendant was convicted and sentenced to death in the Circuit Court of the Twentieth Judicial Circuit for Lee County ("trial court") for the murder of Gaye Lynn Parks. He was also convicted of robbery in connection with the same incident. This Court affirmed his murder conviction and, by a 4-3 vote, his sentence of death.

In 1983, defendant filed (and amended) his 3.850 motion, attacking his murder conviction and death sentence on grounds including ineffective assistance of trial counsel (R. 387-462, 470-551).[1] The State consented to the addition of one paragraph

1 The following abbreviations are used herein to refer to the (footnote continued)

(R. 766-69). Two further motions to amend (including one that, inter alia, attacked defendant's robbery conviction) were, respectively, denied and not specifically acted upon (R. 6-8, S. 8-9, R. 862-1148).

On November 28-29, 1984, an evidentiary hearing (the "hearing" or "3.850 hearing") was held, at which defendant presented evidence -- including evidence adduced through members of Gaye Lynn Parks' family -- in support of his contentions (R. 1-362). The hearing was adjourned pending the parties' stipulation to additional testimony (stipulation at R. 1149-80). On February 17, 1986, the trial court denied the 3.850 motion, without findings of fact or conclusions of law (R. 1404). This appeal followed (R. 1405-07).

STATEMENT OF RELEVANT FACTS

This section contains an overview of the principal facts relating to Bobby's trial. To facilitate the presentation of the facts, we discuss in detail the facts relating to trial counsel's conduct in the appropriate sections of the "Argument."

A. THE BASIC FACTS

On the morning of June 2, 1979, Gaye Lynn Parks ("Gaye Lynn") died of gunshot wounds. Robert Leighton Perry ("Perry") told the police that Bobby shot her. The gun or guns from which

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record. References to the record on appeal from the denial of the 3.850 motion are to "R. _____." References to the Corrected Supplemental Transcript of Record are to "S._____." References to the record on appeal from defendant's conviction and sentence (in Case No. 59,425) are to "CR. _____."

the shots were fired was (or were) never located (CR. 602). Perry's truck, in which he and Gaye Lynn had ridden earlier, was found a distance from the scene of the killing, with a note ("the Note") on the steering wheel, reading, "My Battrery [sic] is dead so don't worry about us love ya" (CR. 692, 748; trial exh. 82; S. 39).

That morning, Bobby was arrested. After his arrest, the police asked him whether he wanted to provide a swabbing from his hand for gunshot residue (GSR) analysis (after explaining the test to him). He consented (CR. 777).

Bobby was initially represented by the Public Defender's Office (R. 256). After a conflict arose in that office, Joseph Simpson ("Simpson") replaced it as Bobby's attorney (id.).

B. THE FACTS CONCERNING THE TRIAL

At trial, Perry was the principal witness against Bobby. He testified that: At about midnight on June 1, 1979, he went to a bar in Bonita Springs (CR. 397-98). Bobby asked him for a ride home (CR. 401). Later, Gaye Lynn (Perry's girlfriend) arrived. Perry, Gaye Lynn and Bobby all left (with Darryl, a friend), and eventually (after dropping off a car and Darryl) the three rode in Perry's truck (CR. 406-07, 523). Gaye Lynn and Perry asked about acquiring marijuana or cocaine; Bobby told them that he could obtain cocaine (CR. 410). They stopped at Bobby's house briefly (CR. 411), then went to purchase the cocaine (CR. 413-17). Bobby bought it and Perry paid for it (CR. 418-21). They then headed for a party, parking the truck

at a clearing in the woods (CR. 424-26) and going on foot (with Gaye Lynn barefoot) through the woods at Bobby's direction (CR. 426-29). Bobby then revealed a gun and ordered Gaye Lynn and Perry to lie down. Bobby asked Gaye Lynn for the cocaine; she threw it into the bushes; Bobby shot her in the head; Perry lunged towards Bobby; Bobby shot him; and Perry blacked out. Upon awakening, with his face in the mud, Perry was flat on his stomach, with Bobby sitting on his legs going through his pockets. Perry played dead, holding his breath for several minutes. While playing dead he heard another shot, then heard Bobby walk away (CR. 429-42, 493). He later saw someone drive off in the truck (CR. 447-48).

Perry was the only purported eyewitness. The State also called as witnesses (among others) the following:

-- A handwriting analyst, Ronald Dick, who testified to his comparison of the handwriting in the Note with Bobby's known writing that

> . . . I was not able to reach any definite conclusion. There are some significant similarities there which indicate to me they may have been written by the same person, but I don't feel that the evidence is conclusive. There are some differences that I can't account for, they could be due to the unusual conditions under which this writing was executed or they could indicate a different person, I'm not certain (CR. 818).

The State asked Mr. Dick to illustrate what he had found, whereupon Simpson interposed that he did not see a need to go further. The State did not pursue the illustrations (CR. 818-20). There was virtually no cross-examination (CR. 821).

-- A GSR expert, Robert Kopec, who testified that he did

not analyze the swabbing taken from Bobby's hand, because the two bullets that had been recovered from Gaye Lynn's body did not contain both barium and antimony, and without both elements, "there is no way for me to interpret what I see" (CR. 813). There was no cross-examination (CR. 814).

-- Dr. Samuel Spil, who had examined Perry after the shooting, and who testified about his examination (CR. 717). Simpson's cross-examination was very brief (CR. 719-20).

Bobby was the only witness called for the defense. He testified, in response to Simpson's questioning, that after having between 12 and 20 beers between 8 A.M. and midnight on June 1 (CR. 834), he asked Perry and his friend Darryl for a ride home from the bar (CR. 835). Later, Gaye Lynn arrived, and all four left together (CR. 837). After leaving Darryl off, Bobby, Perry and Gaye Lynn smoked marijuana (CR. 839-41). Gaye Lynn and Perry asked where they could get more; Bobby said he did not know, but he did know where they could get cocaine. Perry agreed and the three of them drove to the home of Bobby's friend, where Bobby got some cocaine. After arranging for Perry's payment, the three went to Bobby's home. Bobby went to sleep, and Perry and Gaye Lynn left (CR. 841-51).

The jury convicted Bobby of first degree murder and robbery, after having been instructed that it could convict of first degree murder if it found either premeditated murder or felony murder (CR. 976). The trial court's instructions to the jury are discussed in greater detail at pp. 41-43, infra.

At the penalty phase, Simpson called no witnesses and pre-

sented no evidence, nor did he argue that the State had not proved the existence of aggravating factors. He merely read an article on the nature of electrocution, said that Bobby was young and had had drugs and beer, and stated:

> I would ask you to spare his life. I am not begging, I am simply asking you to spare it, not because of any particular thing about Robert Ike Combs, but because I feel the death penalty is too gruesome a punishment. (CR. 1125-31; emphasis added).

The jury recommended, and the judge imposed, the death sentence (CR. 1138, 1180). The trial court's instructions on sentencing are discussed at pp. 56-58, infra.

This Court affirmed the judgment and sentence, with three dissents with respect to the sentence of death.

C. THE FACTS THAT COUNSEL AND THE JURY NEVER LEARNED

At the 3.850 hearing, defendant adduced the following facts, which Simpson had not sought out (as we show hereafter) and which the jury never learned. The significance of these facts will be discussed at the appropriate sections of the "Argument," infra.

Gaye Lynn's Relationship With Perry:

1. Gaye Lynn's relationship with Perry -- which had lasted approximately two years (R. 45-46, 62) -- was a violent one. Gaye Lynn told her family that Perry used to beat her; that Perry gave her a black eye; that Perry gave her a bruise. Gaye Lynn's mother and aunt saw, respectively, the black eye and the bruise (R. 25-27; 48; 56; 63-64).

2. Gaye Lynn was in love with somebody else, Timmy Sine

(R. 29, 47, 65), and had, for some time, been planning to break up with Perry. Indeed, she had recently moved out from living with him. She was planning to break off slowly so he would not react violently (R. 26-28, 48, 65-66).

3. Gaye Lynn told her sister on the afternoon before she died that she was planning that evening to tell Perry that she was not going to move to another city, Avon Park, with him the next day, as he anticipated, because she was in love with someone else (R. 30-31).

4. Later that evening -- the night she died -- Gaye Lynn was seen "yelling and screaming" at Perry to "leave her alone, to quit following her" (R. 31).

5. Gaye Lynn's father told his other daughter (Gaye Lynn's sister) that on the morning of the last day of her life, he had seen Gaye Lynn hysterical, crying, and screaming, and that Gaye Lynn had said she was afraid for her life (R. 33).

Perry's Likely Fabrication: Based on medical principles, Perry was almost certainly not telling the truth. If his description of waking up with his face in the mud was true, he almost certainly could not have remembered the events preceding his shooting.

The Note: It is almost certain that Bobby did not write the Note, although the State's evidence suggested that he did.[2]

The Gunshot Residue Swabbing: The GSR swabbing taken by the police but never analyzed could have been analyzed, and

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2 The trial court erroneously excluded evidence that Gaye Lynn probably wrote the Note. See pp. 36-37, infra.

could have exculpated Bobby.

SUMMARY OF ARGUMENT

Facts establishing very serious doubts as to Bobby's guilt were never presented to the jury. Facts establishing that Bobby is not an appropriate candidate for execution were never presented to the jury or to the trial court.

Because, as we will show, Bobby did not receive the effective assistance of counsel at either the guilt phase or the sentencing phase of his trial, confidence in the outcome of both phases is so undermined as to require that his conviction and sentence be set aside.

At the guilt phase: Simpson failed to investigate in obvious, critical areas. Such investigation would have enabled him to adduce evidence tending to show that Bobby was not guilty because his accuser, Perry, probably was. Had Simpson investigated, he would have been able to present, through Gaye Lynn's mother and sister, devastating evidence of serious friction between Gaye Lynn and Perry that pointed directly to Perry as the likely killer, and at the very minimum created a reasonable doubt as to Bobby's guilt. The State relied heavily below on the "explanation" proffered by Simpson at the 3.850 hearing for his admitted failure to investigate: that Simpson, relying (inter alia) upon a hearsay statement contained in the Public Defender's file to the effect that Bobby said that he shot Gaye Lynn, had concluded that his client was guilty, and that further investigation would not be useful. We show below that, for many

reasons -- including the complete unreasonableness of Simpson's conclusion -- the explanation that he testified to is inadequate both factually and legally to justify his ineffectiveness.

Had Simpson investigated, he also would have been able to adduce medical evidence, entirely independent of evidence concerning Gaye Lynn's relationship with Perry, showing that Perry -- the State's key witness -- very probably did not testify truthfully. With Perry's testimony thus discredited, acquittal would have been virtually assured.

Simpson was ineffective also for his failure to take any steps to prepare to counter the State's effort to tie Bobby to the Note and thereby to support Perry's version of the facts. He thereby permitted the State to present -- without challenge and without rebuttal -- damaging, but misleading, testimony. Had he acted effectively, he not only could have neutralized the State's evidence, but also affirmatively assisted the defense.

Similarly, he was ineffective for his failure to follow up on Bobby's willingness -- despite the adverse effect that Bobby knew it could have had on him if he were guilty -- to take a gunshot residue test. If Simpson had acted effectively, he could have developed evidence that might have been completely exculpatory.

Other failures at the guilt phase are discussed below.

At the penalty phase: Simpson did virtually nothing to prepare for the sentencing phase -- despite his ostensible belief in his client's guilt -- and was therefore able to do little more in response to the State's contentions than to read

the jury a description of an electrocution. Simpson compounded his failure to present any evidence to humanize his client and show his good side (although much evidence was available) by effectively telling the jury that there was no particular reason to spare his client's life. These failures (as well as others to be discussed below) constitute prejudicial ineffectiveness.

ARGUMENT

THE COURT BELOW ERRED IN NOT HOLDING THAT DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE AND THE PENALTY PHASE

A. STANDARD BY WHICH COUNSEL'S PERFORMANCE IS MEASURED

A defendant asserting ineffective assistance of counsel must show that

(1) "counsel's representation fell below an objective standard of reasonableness,"[3] and

(2) but for counsel's failures, "there is a reasonable probability that . . . the result of the proceeding would have been different."

Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defendant need not show that the result of the proceeding would more likely than not have been different, but only "a probability sufficient to undermine confidence in the outcome," id. at 694. The gravity of the

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3 The trial court suggested, erroneously, that the standard is whether counsel acted "responsibly or irresponsibly" (R. 349). Given the absence of the findings of fact and conclusions of law required by Fla. R. Crim. P. 3.850, it must be presumed that this error as to the proper standard tainted the trial court's adjudication.

charges is relevant to the determination of effectiveness.[4]

Investigation is a critical element of representation and is incorporated into the standard by which performance is measured:

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland v. Washington, supra, 466 U.S. at 690-91.[5]

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4 E.g., Knight v. State, 394 So.2d 997, 1001 (Fla. 1981) ("in applying [the effectiveness] standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances"); House v. Balkcom, 725 F.2d 608, 615 (11th Cir.), cert. denied, 469 U.S. 870 (1984) ("seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance") (emphasis in original).

5 The American Bar Association Standards For Criminal Justice ("ABA Standards") -- which the Supreme Court has referred to as "guides to determining what is reasonable," Strickland v. Washington, supra, 466 U.S. at 688 -- confirm that adequate investigation is vital:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.

ABA Standards, Standard 4-4.1 (1980). The standards were adopted by the ABA in February 1979, before Bobby's trial. See also similar language in the 1974 Standards, American Bar Association Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4.1.

B. DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

1. Counsel Failed To Investigate And Present Evidence Tending To Establish Defendant's Innocence

At trial, Perry gave the only testimony directly linking Bobby to the shooting. At the 3.850 hearing defendant showed that (1) Simpson failed to investigate adequately the facts surrounding Perry, and (2) if he had investigated he would have been able to show (a) a likelihood that Perry shot Gaye Lynn, and (b) a likelihood that Perry's testimony was untrue. A showing of either such likelihood would probably have resulted in acquittal; both together would almost surely have. The trial court erred in not granting defendant's Motion on this ground.

a. Counsel Failed To Investigate And Present Evidence Of The Relationship Between Perry And Gaye Lynn

i. Counsel's Omissions Resulted In Serious Prejudice To Defendant

As noted above, Bobby was initially represented by the Public Defender's Office. An investigator from that office (Ken Walker) made one effort to "contact anybody that might have any information about the crime," and located one person who was related to one or both of Gaye Lynn and Perry (R. 338). After seeing that person at a tavern, Mr. Walker told his office "that further investigation was necessary" (R. 339). At the hearing, Mr. Walker testified that he wanted to "[c]ontact[] relatives and friends of the victims and also the Defendant and tried to

find out -- try to trace the events of the day prior to the crime and tried to locate the crime scene" (id.). He did not do so (R. 349), and no attorney or investigator acting on behalf of Bobby ever contacted Gaye Lynn's closest relatives (R. 34-35, 76, 49-50, 57).

After Simpson was appointed to replace the Public Defender's Office, he did not hire an investigator (R. 255-56). He made no effort to speak to Gaye Lynn's family (R. 256). He spoke to three people whose names were volunteered by Bobby's family (R. 256-57), but who testified at depositions taken by the State that they were not close friends of Gaye Lynn or Perry (R. 257-61; S. 52 [line 19-24]). Beyond that, he did not attempt to explore the Gaye Lynn-Perry relationship (R. 262).

Simpson thus made virtually no effort to learn about the relationship between Gaye Lynn and Perry. In so doing, he failed to pursue the most obvious investigation open to him; given Bobby's denial to Simpson that he shot Gaye Lynn (R. 277), Simpson must have hypothesized -- as he was obliged as defense counsel to do -- that the killing occurred other than as the State alleged. The most obvious manner was that the State's one eyewitness was himself responsible. This would be plausible in any case involving one alleged eyewitness and an isolated locale, but so much more so when that alleged eyewitness was involved romantically with the victim. Simpson obviously did think about this, for he criticized the State for not considering Perry a suspect (CR. 923). Simpson did virtually nothing, however, to investigate this possibility, which he himself sug-

gested at trial, and hence could adduce no evidence to show Perry's responsibility. Criticism is not enough: effective representation demands investigation.

Investigation was also mandated into the activities of the victim on the last day of her life (or a longer period) -- a standard investigative tool employed for the very purpose of determining whether anything about her final activities would shed any light on the way in which she died.

Such investigation is especially required where the failure to perform it is not based on a tactical decision. Here, there was no reasoned decision by Simpson to pursue one plausible line of defense rather than a different one. The defense at trial consisted of (1) Bobby's testimony that he was not at the scene of the killing; and (2) argument that the State had not proved its case. This is completely consistent with pursuing an investigation into the Gaye Lynn-Perry relationship and/or an investigation into the events of the last day of Gaye Lynn's life.

Simpson's failure to investigate adequately resulted in his failure to learn, and to adduce in evidence, facts casting very serious doubt on Perry's story. If he had tried either to trace the victim's activities on her last day, or to learn about the relationship between Perry and Gaye Lynn -- obvious lines of inquiry in any homicide case, and certainly in one involving a boyfriend, a girlfriend and a third party, where one of the three claims to be the only eyewitness against the survivor of the other two -- the obvious people to start with would have been Gaye Lynn's closest relatives, including two with whom she

spent parts of her last day.[6] They would have told him the facts set out at pp. 6-7, supra.[7]

If Simpson had been aware of these facts, he could have presented evidence[8] that Gaye Lynn was planning to tell Perry on the very night she died that she loved Timmy Sine and was not going to move with Perry to another city[9] the next day.[10] On that same night, in fact, Gaye Lynn screamed at Perry to stop

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6 Simpson was aware that Perry testified in deposition that Gaye Lynn spent time with her aunt, Patricia Nelson (whom Perry mistakenly referred to as her cousin), on the evening of her last day (S. 83 [line 20] - S. 84 [line 1]).

7 Each of them (a) could have been located in a reasonable investigation (R. 35, 50, 57-58, 76) and (b) was in Bonita Springs at the time of the trial or willing to come to the trial in Ft. Myers (R. 35, 50, 57, 81).

8 At the 3.850 hearing, the trial court held that some of the testimony of Gaye Lynn's relatives would have been inadmissible at Bobby's trial as hearsay (R. 24-25). The scope of this ruling is uncertain, because the trial court did not rule specifically with respect to each item of testimony. Therefore, we indicate in footnotes our belief as to the scope of the ruling. Where we believe that the trial court intended to hold particular testimony inadmissible, we state why this was error.

All of this evidence would, at the very least, have been admissible at the sentencing phase of the trial. § 921.141(1), Fla. Stat.; Perri v. State, 441 So.2d 606, 607-08 (Fla. 1983); Alvord v. State, 322 So.2d 533, 538-39 (Fla. 1975), cert. denied, 428 U.S. 923 (1976); see also Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979).

9 Perry's trial testimony confirms that he was planning to move to Avon Park the next day (CR. 395, 409, 417).

10 This evidence is hearsay, but it is clearly admissible as a statement of the declarant's intent, when offered to prove her subsequent conduct. See § 90.803(3)(a)(2), Fla. Stat.; Jones v. State, 440 So.2d 570, 577 (Fla. 1983); Bowen v. Keen, 154 Fla. 161, 17 So.2d 706, 711 (Fla. 1944); Jenkins v. State, 422 So.2d 1007 (Fla. 1st DCA 1982). We believe that the trial court's ruling did not hold this evidence inadmissible.

following her and to leave her alone.[11]

The jury, if it heard this, would probably have concluded that it was just too coincidental to be believed (beyond a reasonable doubt) that Gaye Lynn was killed in Perry's presence by someone else on the very night that (if she carried through on her plan) she told Perry that she was not going to move away with him because she loved another man -- and after she was seen screaming at Perry.[12]

In addition to this testimony, the facts show that the Gaye Lynn-Perry relationship had been violent[13] and that Gaye Lynn

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11 This testimony is not hearsay, as it is not offered to prove the truth of the contents of Gaye Lynn's screams. Even if it were hearsay, it would be admissible evidence of spontaneous statements or excited utterances. § 90.803(1), (2), Fla. Stat. We believe that the trial court's ruling did not hold this evidence inadmissible.

12 Also, the contrast between Perry's testimony that it was not unusual for Gaye Lynn to go barefoot (CR. 510) and that she willingly went into the woods barefoot (CR. 427), and her sister's testimony that Gaye Lynn did not go barefoot, and went so far as to wear shoes and socks at the beach (R. 28), would only strengthen the likelihood that the jury would not believe Perry beyond a reasonable doubt.

13 The trial court's ruling that this evidence would have been inadmissible is error. (1) Gaye Lynn's spontaneous, voluntary statements to her family are admissible under the res gestae doctrine. Monarca v. State, 412 So.2d 443, 445 (Fla. 5th DCA 1982), quoting Washington v. State, 118 So.2d 650 (Fla. 2d DCA 1960). (2) The 6th and 14th Amendments to the U.S. Constitution compel admissibility of this critical evidence, even if inadmissible under state hearsay rules, under the due process rubrics of the "right to summon witnesses" [Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Wilkerson v. Turner, 693 F.2d 121, 123-24 (11th Cir. 1982)] and the "right to confront witnesses" (in this case, to discredit Perry, the key State witness) [McKinzy v. Wainwright, 719 F.2d 1525, 1528 (11th Cir. 1983); Coxwell v. State, 361 So.2d 148, 150 (Fla. 1978); see also Davis v. Alaska, 415 U.S. 308, 315-21, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)]. (footnote continued)

said on the day she died that she feared for her life.[14] If the jury had learned this, acquittal would have been almost assured.

ii. Counsel's "Explanation" For Not Conducting An Adequate Investigation Is Inadequate

Simpson testified he "didn't feel there was a need to get involved in what type of relationship existed between the two victims," he "didn't feel that was the correct procedure to follow" (R. 262). He testified that he did not try to learn about the Gaye Lynn-Perry relationship

> [b]ecause of my initial involvement in the case, of what I thought to be the correct facts in the case based upon the investigative reports furnished to me by the Public Defender's Office, their polygraphist and summaries, and the facts of the case I was able to discover in taking depositions and this sort of thing (R. 262; emphasis added).

He said that he believed "the correct facts in the case" to be that Bobby shot Gaye Lynn and Perry (R. 308-15). He testified that this belief was based upon (inter alia) a report included in the Public Defender's office file of an interview with defendant, conducted by Ken Walker.[15] He continued:

> In that interview Ike Combs acknowledged shooting both Robert Perry and Gaye Lynn Parks. He acknowledged shooting them with his armed .22 magnum revolver. The magnum part is particularly important because of the fact that I don't believe the crime laboratory ballistics came back until 2 weeks or so after that statement had been given to Mr. Ken Walker and I thought it highly unlikely Mr. Combs could guess as to the type of ammunition used, that being .22 versus .22 magnum. And I had that statement given by Mr. Combs to Mr. Walker coupled with the polygraph result already introduced today by Dan Jerz who I have the

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(3) At minimum, it is admissible to show Gaye Lynn's state of mind: one reason for her intent to break up with Perry.

14 See note 13, supra.

15 At his deposition prior to the 3.850 hearing, however, Simpson did not "specifically name Mr. Walker" (R. 307).

> greatest respect for, working several years with him. In that polygraph Mr. Jerz confirmed the fact that Mr. Combs did, in fact, shoot these two individuals and he was lying when he said he didn't shoot them. . . . (R. 308-09).[16]

Simpson thus testified that he believed his client was guilty and that he therefore did not investigate to seek to adduce evidence that might assist the defense. We show in the succeeding sections that (a) Simpson's contemporaneous actions show that he did not rely on his ostensible belief in his client's guilt as his reason not to investigate; (b) even if he had so relied, any such reliance would have been unfounded; and (c) even if well-founded, an attorney's belief in his client's guilt cannot, as a matter of law, justify the failure to investigate.

(A) Counsel's Contemporaneous Actions Show That He Did Not Rely On His Ostensible Belief In His Client's Guilt As His Reason Not To Investigate

Simpson's testimony at the 3.850 hearing that he believed his client to be guilty and therefore did not investigate the Gaye Lynn-Perry relationship is contradicted by the undisputed record of his actions prior to and at trial.

Most telling, Simpson called Bobby as a witness and questioned him in the conventional way, as one would a truthful witness. If Simpson had been so convinced of Bobby's guilt that he could feel (albeit improperly) relieved of an obligation to

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16 We discuss the polygraph results at p. 22, infra. We note here the caveat that appears on the Public Defender's Office Request for Polygraph Examination Form, which Simpson had: "The polygraph is a supplement to a good investigation, it DOES NOT take the place of an investigation" (S. 53) [capitals in original].

investigate, he would not have questioned him in this fashion. See generally Nix v. Whiteside, ___ U.S. ____, 106 S.Ct. 988, 89 L.Ed.2d 340 (1986). Nor, if Simpson were certain that Bobby had perjured himself when, in his testimony, he denied killing Gaye Lynn, would Simpson have argued to the jury, as he did, that Bobby's testimony was credible (CR. 926, 963, 964).

Simpson's stated conclusion that he saw no need to investigate the Gaye Lynn-Perry relationship -- indeed, that such an investigation would be "counterproductive" (R. 315) because of his supposed knowledge of the true facts -- is also contradicted by his pretrial conduct: he did speak to, and listed as witnesses, three people thought by defendant's family to know about that relationship (R. 256-57). When they denied such knowledge (R. 258-61; S. 52, lines 19-24), he did not do the obvious thing: try to find people who did know about that relationship. He just dropped the subject.

Additionally, at trial he questioned both Perry and Bobby about an argument between Perry and Gaye Lynn on the night of her death (CR. 506, 846), further showing his recognition of the importance of the Gaye Lynn-Perry relationship.

Finally, as noted above, Simpson argued to the jury that the State should have considered Perry a suspect (CR. 923). If Simpson's asserted belief in his client's guilt did not prevent him from making this argument, it would not prevent him from investigating to see whether he could back up his naked argument with evidence.

Simpson's actions thus prove that he was not convinced of

his client's guilt, and that he did know it was important to pursue the Gaye Lynn-Perry relationship. He simply made no effort to do so.

(B) Even If Counsel Had Relied On His Ostensible Belief In His Client's Guilt, Any Such Reliance Would Have Been Unfounded

Simpson's effort to validate his own failure to investigate by reference to his ostensible belief in Bobby's guilt included his testimony (quoted at pp. 17-18, supra) that conveyed the impression that the Ken Walker report stated that Bobby had confessed to a murder. In fact, it contains no report of a confession to any crime. Rather, a synopsis of Mr. Walker's report (so identified by Simpson, R. 327-28) -- provided to Simpson by the Public Defender's Office and upon which he testified he relied (R. 284) -- states:

> The defendant's version is quite different [from the State's] and puts the defendant in fear of death or grave bodily harm when he fired the shots.
>
> * * *
>
> The defendant alleges that he accompanied the "victims" into the wooded area at their request to check on some plants that PARKS had growing there. While walking into the woods, PERRY allegedly placed an object in the defendant's back and told the defendant . . . . "Don't move or I'll rip your back out."
>
> At this point, the defendant struck backward with his elbow, temporarily disabling PERRY and reached for a pistol that he, the defendant, carried in his waistband. Victim PARKS at that time allegedly shined a flashlight she was carrying into the defendant's face, grabbed some object from the ground (a stick or club or something) and started toward the defendant in a threatening manner. The defendant, believing he was in danger, fired at PARKS, struck her and killed her. In the meantime, PERRY had recovered from the elbow punch and headed toward the defendant. The defendant then shot PERRY.

* * *

> The defendant maintains he only used force when he was attacked and believed the attack was a serious one. (S. 54) (emphases added).

Thus, the Walker report revealed a statement that Bobby acted in self-defense (which, if true, would require acquittal). Incredibly, Simpson, who claimed at the 3.850 hearing to recall the precise caliber of bullets used in the shooting and the date of the Walker report vis-a-vis that of a ballistics report five and a half years earlier, claimed not to remember this (R. 322-23).

For Simpson to rely on the Walker report in order to convince himself of his client's guilt, he would have to do more than to ignore the fact that that Walker report did not reflect a confession to a murder. He would also have to choose to rely on one portion of one hearsay report in his files when his client had repeatedly stated something different: Simpson would have to ignore the fact that he knew of or had in his files Bobby's consistent denials of his involvement in Gaye Lynn's death -- a denial to the police when he was arrested (S. 67-82); a denial to the Public Defender's polygrapher (S. 55); a denial to Simpson himself (R. 277); and (later) a denial at trial. Notwithstanding this consistent record of Bobby's denials, Simpson -- despite his role as Bobby's advocate -- apparently chose instead to credit the one statement in his files that indicated some involvement, he chose to misread this statement as a confession, he chose to believe that Bobby was guilty, and he chose to act on that belief by not seeking evidence that

might convince him (or, more importantly, the jury) to the contrary.

Just as Simpson misread the Walker report, so did he misconstrue the polygraph report. Simpson testified that that report "confirmed the fact that Mr. Combs did, in fact, shoot these two individuals and he was lying when he said he didn't shoot them" (R. 309). However, the polygraph report (S. 55) did not confirm that Combs shot anyone; rather, it was completely ambiguous. The polygraph examination apparently tested the statement set forth in the Walker report that Bobby had shot Perry and Gaye Lynn in self-defense (S. 53-54). It concluded that he did not (S. 55). However, the examination did not appear to test the truth of Bobby's statement that he was never even in the woods that evening and never shot anyone. Simpson had no basis, therefore, for concluding that Bobby was guilty of the crime charged.[17]

In addition to this selective reading of the Walker report and the polygraph report, in order to convince himself of Bobby's guilt, so as to enable him to attempt to justify his failure to prepare, Simpson would have to disregard all possibility that he could adduce evidence linking Perry to the killing, and focus instead entirely on facts that he thought linked his client to the killing; he would have to assume repeatedly the correctness of the State's position. He would have

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17 Moreover, the polygraph report stated on its face (S. 55-56) that the result must be regarded as "qualified," because of the examiner's belief that a number of factors tended to make Bobby an unsatisfactory polygraph subject.

to ignore entirely the fact that after his arrest, Bobby voluntarily gave gunshot residue swabbings from his hands (CR. 777) -- providing evidence that could exculpate him if innocent, but inculpate him if guilty -- hardly the act of a guilty man, as Simpson himself recognized in his examination at trial of the police officer who had secured the swabbings (id.). He would have to disbelieve his client's denial of firing a gun (R. 277), in favor of the account set out in the Walker report, despite the possibility that a truly innocent person, accused for the first time of a serious crime, could panic and, in his panic, provide what he thought would be an account more likely to be accepted than a truthful denial of any involvement. See also Mitchell, The Ethics of The Criminal Defense Attorney -- New Answers to Old Questions, 32 Stanford L. Rev. 293, 297 n.12 (1980) ("for a variety of factual and emotional reasons, innocent people do sometimes confess guilt").[18]

Only by selectively considering the evidence and viewing the few facts that were uncovered in the worst possible light would Simpson be able to conclude, as he claims to have done, that his client was guilty. Such a conclusion -- particularly

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18 Also, Simpson would have to fail entirely to consider explanations other than his client's guilt for facts that he deemed incriminating -- for example, that defendant might have learned of the type of gun or ammunition used in the shooting from his brother (who had received a gun with a .22 magnum cylinder and .22 magnum ammunition on the afternoon of June 1 (CR. 730, 736-37), had placed it in his drawer that evening (CR. 737), and who knew on June 2 that the police were unable to find the gun when they searched the house on the morning of June 2 (CR. 739-40); who knew that defendant had been arrested for the killing; and who could figure out that the gun from his drawer would be suspected as the murder weapon).

when reached by an attorney appointed to defend a client -- is patently unfounded.

(C) Even If Counsel Had Had a Well Founded Belief That His Client Was Guilty, He Would Be Obligated To Investigate

Counsel's duty to investigate exists even in the face of a confession.[19] At the very least, the development of facts concerning the circumstances of the crime can serve to lead to conviction on a reduced charge, or to a more lenient sentence.

> Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions. Such information may lead the prosecutor to defer or abandon prosecution and will be relevant at trial and at sentencing.

ABA Standards, Standard 4-4.1, Commentary (emphasis added).

This alone compels the conclusion that Simpson's explanation was inadequate, as a matter of law. But there is much more reason. Here, there was no confession. The duty to investigate that exists in the face of a confession a fortiori exists when there is none.

Simpson testified that he did not regard an investigation into the Gaye Lynn-Perry relationship as required because "of what I thought to be the correct facts in the case" (R. 262)

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19 "The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." ABA Standards, Standard 4-4.1. Virtually identical language exists in the 1974 Standards, supra note 5. See also United States v. Baynes, 687 F.2d 659, 667 (3d Cir. 1982) ("an attorney is obligated to examine potentially exonerating evidence even if the accused has admitted his guilt"); Rummel v. Estelle, 498 F. Supp. 793, 796 (W.D. Tex. 1980) (same).

(emphasis added). He thus took it upon himself to serve as judge and jury. Not surprisingly, he did not uncover facts inconsistent with his beliefs, because he did not look for them. His belief in his client's guilt became a self-fulfilling prophecy. As in Eldridge v. Atkins, 665 F.2d 228, 235 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982), where the Court held that counsel was ineffective:

> Counsel did not investigate because he conclusorily decided that [his client] was guilty and that further investigation would not do any good.
>
> Thus, defense counsel's preparation and subsequent trial strategy was based in part upon his own conclusory decision that [his client and another] were the two robbers. Once he made that conclusion it is easy to see why he failed to investigate further . . . . (emphasis in original).

It is not counsel's job to determine guilt or innocence. "[I]t is the responsibility of the jury, and not the defense counsel, to draw conclusions of this sort." United States v. Baynes, supra, 687 F.2d at 667. When counsel acts as fact-finder, he does not render effective assistance.[20]

Even if defense counsel believes in his client's guilt, he can elicit truthful evidence to persuade a jury that guilt is not clear beyond a reasonable doubt. Simpson did recognize that, whatever his opinion, there were arguments to be made to attempt to tie Perry to the crime: he argued that the State should have considered Perry a suspect (CR. 923). As noted above, just as his conclusion of his client's guilt did not

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20 Obviously, an attorney may have an opinion concerning his client's guilt. Defendant addresses here not Simpson's stated belief in his client's guilt, but his failure adequately to investigate notwithstanding that belief.

prevent him from arguing that perhaps Perry was guilty, so it should not have prevented him from investigating to see whether he could support his argument with evidence.

Ken Walker, whose report Simpson claims to have relied upon for his decision not to investigate, knew that it was necessary to investigate further (see pp. 12-13, supra); the Public Defender's office, whose polygraph Simpson claims to have relied upon for his decision not to investigate, knew that a polygraph examination does not take the place of an investigation (see n.16, supra). The law is clear that even if counsel is certain of his client's guilt, he has an undiminished duty to investigate. Simpson's belief could not (see pp. 20-24, supra), and demonstrably did not (see pp. 18-20, supra), rise to that level of certainty. For the many reasons set forth above, his failure to conduct an adequate investigation constitutes ineffective assistance of counsel, "undermin[ing] confidence in the outcome" of the trial, and requiring setting aside the conviction.[21]

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21 The trial court also erred in denying defendant's motion, made during preparation for the 3.850 hearing, for discovery of Veterans' Administration service records of Robert Perry. (Defendant's Motion to Obtain Service Records, dated June 3, 1983 [R. 465-68, 469]; Renewed Motion to Obtain Service Records, dated July 31, 1984 [of record on appeal, pursuant to this Court's Order of Nov. 13, 1986, but not paginated; see also R. 738]). Defendant showed in support of his motion that reason exists to believe that Perry was treated in Germany while in the service for his use of drugs. See Affidavit of Asa D. Sokolow in Support of Defendant's Renewed Motion to Obtain Service Records. (See also the testimony of Cindy Turski [Gaye Lynn's sister] at the 3.850 hearing that Perry "was into drugs really bad" (R. 26-27).) This information is highly material to an assessment of Perry's behavior on the night of the shooting, and to his credibility. Drug use is highly relevant to credibility
(footnote continued)

b. Counsel Failed To Investigate And Present Further Evidence Of Perry's Likely Fabrication

As noted earlier, after the shooting, Perry was examined by Dr. Samuel Spil (CR. 716-17). Dr. Spil's "progress notes," which Simpson had in his files (R. 264), read in relevant part as follows:

> Patient is 25 years old w/M. States that this early morning was shot in the left temporal region. Caliber 22. Girlfriend shot too (Death). (S. 27).

Simpson apparently saw that the notes raised a serious question as to whether Perry was telling the truth, for he wrote in the margin: "How Perry aware of caliber" (R. 264-65). Simpson obviously realized that a person being shot at would have no idea what caliber bullet was being used. If Perry knew the caliber, it was probably because his gun had been fired, or he had handled the gun.

A reading of the note, in context, suggests that Perry told Dr. Spil the caliber of the bullets; however, it was not free of ambiguity. Dr. Spil might have reached his own conclusion as to the caliber. The only way to know would be to ask him, which, incredibly, Simpson did not do, even though the State listed him as a trial witness (S. 66). He did not speak to or depose him (R. 263), and barely cross-examined him (and not at all on this

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determinations. E.g., United States v. Fajardo, 787 F.2d 1523, 1527 (11th Cir. 1986); United States v. Smith, 692 F.2d 658, 661 (10th Cir. 1982), cert. denied, 459 U.S. 1200 (1983). If Simpson had been aware of the apparent magnitude of Perry's drug problem, his cross-examination of Perry could have been devastating. The trial court erred in not allowing defendant to obtain Perry's service record in order to establish Simpson's ineffectiveness in not pursuing this line of inquiry. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

point) (CR. 719-20). Simpson does not recall why he did not undertake these critical duties (R. 263-64).

If Simpson had had even a brief discussion with Dr. Spil, he would have learned that the events in all likelihood could not have occurred as Perry testified, because Perry's testimony was in all likelihood self-contradictory. Dr. Spil testified at the hearing that:

-- a person who reports that he was shot in the head, does not remember hitting the ground, but remembers waking up with his face in the mud was (if his report was truthful) unconscious (R. 116, line 13 to 117, line 22);

-- a person rendered unconscious would never remember the event that caused unconsciousness (R. 129, lines 19-22); a person who can recall the entire sequence of an accident was not rendered unconscious by it (R. 113, lines 5-7);

-- it is "very difficult" for a person who was unconscious to "conceive that he was shot after he gets up" (R. 121, lines 13-15);[22]

-- a person who regains consciousness may be able to piece together (by "composition," not by memory) a general idea of what had happened (R. 127, lines 6-18);

-- typically, a blow to the head would result in "temporal global amnesia," where a person acts appropriately after regaining consciousness but later has no recollection of his actions (R. 115, line 16 to 116, line 12).

At trial, Perry testified to being shot, being unconscious, and waking up with his face in the mud (CR. 438). Yet he also testified in great detail to the events immediately preceding the shooting (e.g., CR. 429-440), including the words each person spoke, the expression on Bobby's face, the position of

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22 There appears to be a missing word in the transcript a few lines later in this testimony of Dr. Spil. It is believed that R. 121, lines 19-20 should read:

> "statement, then there needs to be some kind of immediate memory loss to the event."

each person, how the gun was held, and how Bobby was acting. He then testified that on regaining consciousness, he found Bobby sitting on his legs, and played dead by not breathing for three to five minutes. Finally, he testified to what happened immediately after he woke up (CR. 439-49, 493).

Dr. Spil's testimony shows that Perry was probably untruthful. If the description of waking up with his face in the mud was true, he was unconscious. But if he was unconscious, he would not have remembered the events preceding his shooting. While he might have been able to piece together generally what had happened, he could not have truthfully testified to the details. He would not recall being shot. He would not be able, upon regaining consciousness, to remember what had happened and therefore to perceive danger and to "play dead." And a person in his position would typically not recall his actions after the shooting.

If Simpson had spoken with Dr. Spil, he would have learned of these concepts and could have presented them to the jury (through Dr. Spil or another expert). This would have been of enormous value, for it would have demonstrated that the State's only eyewitness was probably not telling the truth as to the case's most critical testimony.

Simpson's failure to pursue the one possibly devastating lead he developed is inexplicable. He has no explanation, and it cannot be deemed strategic: there was no risk in pursuing it. Undermining the State's only important witness (and most likely alternative suspect) was Simpson's most crucial job, and

his failure to pursue his idea concerning Perry's knowledge of the caliber was ineffectiveness. But, even if Simpson had not had that idea, his failure to speak to Dr. Spil nevertheless would be ineffectiveness: Dr. Spil was one of the few people who could discuss Perry's condition after the shooting, and it was counsel's job to find out all that he could to try to undermine that witness, particularly when the State listed Dr. Spil as a witness. Counsel's lack of curiosity as to what he would testify to is ineffectiveness.

2. Counsel Failed To Perform Effectively Concerning Handwriting Issues

a. Counsel Failed To Show That Defendant Did Not Write The Note

Simpson completely defaulted as to the Note, and the impression was conveyed to the jury that critical evidence supported the State's case. Any of the actions Simpson could have taken would have negated this erroneous impression.

The Note was found in Perry's truck, near Bobby's home (CR. 559, 562, 616). It was highly significant evidence: if it were in Bobby's handwriting, this would tend to corroborate Perry's testimony that Bobby drove off in the truck (CR. 448), and thus was its last driver. But if it were in somebody else's handwriting, this would be consistent with Bobby's testimony that Perry and Gaye Lynn dropped him off at his home and he went to bed (CR. 849) -- consistent with, for example, the battery dying (as the words "My Battrery [sic] is dead . . ." suggest) while Perry and Gaye Lynn were driving away from Bobby's home.

After finding the Note, the State submitted it, along with Bobby's known writing, for testing (S. 45). The State's analyst, Ronald Dick, stated in a written report that there were "significant similarities between [Bobby's writing and the Note] which indicate that they may be of common authorship, but it is not possible to reach a definite conclusion with the material available for investigation" (S. 46-47). Mr. Dick requested more samples of Bobby's writing (id.), and four days before trial, the State took such samples (CR. 767-68), in a session that Simpson attended (R. 329).

Although Simpson received Mr. Dick's report (R. 268-69), he did not take his deposition (R. 267), or receive a written report of any analysis of the last-minute samples taken from Bobby (R. 269-70; S. 48), nor did he retain or consult with an independent expert (R. 266, 268, 273). He testified that it was his general practice to speak to out-of-town experts "during one of the recesses in the trial," but did not specifically recall any conversation with Mr. Dick (R. 268), and was under the erroneous impression that Mr. Dick was from the FBI (R. 267; S. 46-47).

Although Bobby told Simpson that he did not write the Note (R. 273), Simpson decided "alone" not to have an independent expert compare the Note to Bobby's writing (R. 273).

At the trial, the State tried to persuade the jury that Bobby wrote the Note, although it had no evidence to this effect. Mr. Dick, the State's expert, testified that he found evidence suggesting that Bobby "may have been" the writer of the

Note, although he reached no "definite conclusion" (CR. 818). The jury probably understood this ambiguous and misleading testimony to mean that Bobby probably wrote the Note: Mr. Dick was, after all, called by the State; he described the similarities between Bobby's writing and the Note as "significant" (CR. 818); Simpson interrupted his testimony to question the need for elaboration (CR. 819-20), suggesting concern that the testimony was harmful; and Simpson failed to clarify the issue, by cross-examination or otherwise -- never even adduced Bobby's testimony that he did not write the Note. Thus, what the jury heard seemed to connect Bobby to the truck, appearing to provide objective support for Perry's story.

In fact, as proved at the 3.850 hearing by the presentation of unchallenged evidence (the stipulated testimony of expert questioned document examiner Pearl Tytell), it is almost certain that Bobby did not write the Note (R. 1168-69).[23] But for Simpson's ineffectiveness, this fact would have been adduced at the trial.

When Simpson received Mr. Dick's initial report (R. 268-69), noting "significant similarities" between the Note and Bobby's writing and requesting more samples to permit further analysis (S. 46-47), he was obligated to attempt to understand the significance of Mr. Dick's observations, and to learn the results of the proposed further analysis. He did none of this,

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23 Indeed, if Bobby was under the influence of alcohol and/or drugs on the night of June 1-2, 1979, at the time when, according to the State's theory of the case, the Note was written -- as he was (CR. 834-35, 840, 849) -- then he can definitely be eliminated as the writer of the Note (R. 1168-69).

even after Bobby's writing samples were taken four days before trial. When the trial began, he had no idea what Mr. Dick would testify, and certainly no ability to cross-examine him. His cross-examination (CR. 821) thus accomplished nothing.

If Simpson had investigated,[24] he would have learned how he could have acted effectively. He would have learned that he needed more detail of the basis for Mr. Dick's beliefs.[25] He would have learned that (1) if Mr. Dick had found "some differences that [he couldn't] account for" -- as Mr. Dick did find, according to his testimony at trial (CR. 818), too late for Simpson (who had not deposed him) to learn its significance -- the writer of known writings can generally be eliminated, either definitely or to some degree of probability, as the writer of the questioned document; (2) a finding of "significant similarities" is meaningless, without knowing whether they are "class" or "individual" features; (3) Mr. Dick had presented a paper, stating that the presence of dissimilarities could lead to a conclusion of elimination (R. 1161-62).

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24 Such investigation must include (if it is necessary to permit counsel to become familiar with the technical area in question), consultation with an expert. E.g., State v. Peek, CF 78-0445, slip op. at 10-11 (Fla. 10th Cir. Ct. Nov. 2, 1983) (annexed hereto); Rogers v. Israel, 746 F.2d 1288, 1294-95 (7th Cir. 1984); Mauldin v. Wainwright, 723 F.2d 799, 800-01 (11th Cir. 1984); accord, Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980).

25 An expert questioned document examiner would have told Simpson that it would be necessary to learn, inter alia, (1) whether the "significant similarities" of which Mr. Dick wrote were "class" or "individual" similarities; (2) whether there were dissimilarities; (3) how skillful the writings were; (4) whether Mr. Dick had considered the effect of alcohol and/or drug ingestion (R. 1156-1158, 1160).

If Simpson had prepared to cross-examine, he likely would have led Mr. Dick to conclude that Bobby probably did not write the Note. Questioned document identification is an objective discipline: the facts would be recognized by any trained questioned document examiner (R. 1156, 1158). Therefore, there is no reason to believe that Mr. Dick would have failed to acknowledge the facts described by Mrs. Tytell had he been asked about them.[26] This would likely have resulted in acquittal: it would have created more than a reasonable doubt that Bobby was the last occupant of the truck, and hence that events occurred as Perry testified.

In addition to preparing for cross-examination, Simpson should have considered having the Note analyzed independently. After learning that Mr. Dick found "some differences that [he couldn't] account for" (CR. 818) -- which means Bobby could probably be eliminated as the likely writer (R. 1161) -- he should have consulted with Bobby, and obtained his approval to secure independent analysis.[27] Thus, if Simpson had acted

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26 The text of a paper that Mr. Dick presented (R. 1161-62) shows that he would have agreed with the principle explained by Mrs. Tytell that a finding of "differences that [one] can't account for" means that the writer of the known writings can be eliminated, either definitely or to some degree of probability, as the writer of the questioned writing (R. 1161).

27 An attorney is obliged to consult with his client on important decisions. Strickland v. Washington, supra, 466 U.S. at 688; ABA Standards, Standards 4-3.8, 4-5.1(a), 4-5.2(b); United States v. Moore, 529 F.2d 355, 358 (D.C. Cir. 1976). Indeed, at least one court has recognized the obligation to permit the client to make critical decisions (United States v. Williams, 631 F.2d 198, 206 (3d Cir. 1980) (Adams, J., dissenting on an issue not reached by the majority), cited with

(footnote continued)

properly, an independent analysis would have been obtained, and the fact that Bobby almost certainly did not write the Note would have been before the jury.[28]

Simpson's asserted reasons for his failures are meritless. First, he testified that he did not retain an independent expert because "the FBI handwriting expert could not zero in on the handwriting" (R. 267). This cannot justify Simpson's failure: (1) Simpson's belief that Mr. Dick's result was inconclusive could have been based only on his initial report (his only written report), which is all that Simpson had prior to trial. That report requested further samples from Bobby. In failing to obtain assistance or conduct discovery after reading the report, Simpson gambled that the State would not follow up on its expert's request, or that the further samples would not alter Mr. Dick's conclusions. Even after the samples were taken, Simpson did not learn the results of their analysis until the day of Mr. Dick's testimony -- if at all.[29] (2) In any event, as shown at

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apparent approval in United States v. Baynes, supra, 687 F.2d at 667 n.7. If Simpson had permitted Bobby to make (or, at minimum, to have input into) the decision, Bobby surely would have given the go-ahead. For when, on the morning of his arrest, he was confronted with a similar problem -- whether to permit a GSR swabbing to be taken from his hand -- he permitted it. (See p. 3, supra.) Simpson concedes that Bobby denied to him that he wrote the Note (R. 273).

28 In addition to its impact on the jury, this conclusion would have had an impact on Simpson's other preparation. It would have confirmed that Bobby was telling Simpson the truth about at least one critical piece of evidence when he denied writing the Note. This should have led Simpson to reconsider the possibility that he was telling the truth about his lack of involvement in the killing.

29 Simpson does not specifically recall any conversation with Mr. Dick (R. 267-68), who was not from the FBI (CR. 815).

pp. 32-33, there was no way to know whether Mr. Dick's report was inconclusive, or whether his trial testimony would be, without examining him.[30]

Simpson's second asserted reason for performing no pre-trial investigation as to the Note was "that Mr. Combs did, in fact, shoot [Perry and Gaye Lynn]," and he did "not want to get other experts the State might use to prove up its case," or "renew [the State's] interest in the [N]ote and become a battle of experts" (R. 302-03, 309, 311, 314). This is no justification. As shown above, Simpson's belief was unfounded, or, at the very least, insufficiently founded to justify his failure to pursue investigation that might establish Bobby's innocence. But even if it had been adequately grounded, Simpson's belief would still be irrelevant (at least to his decision not to prepare to cross-examine). Even a guilty defendant is entitled to effective cross-examination if he goes to trial; a fortiori, so does a defendant whose "guilt" is merely established in the mind of his attorney. Preparing for cross-examination does not create a risk of producing harmful evidence.[31]

b. Counsel Failed To Obtain And Have Analyzed Gaye Lynn's Handwriting

At the 3.850 hearing, defendant introduced samples of Gaye

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30 Simpson's interruption of Mr. Dick's testimony (CR. 819-20) -- notwithstanding the risk that the jury would assume that he was trying to prevent unfavorable testimony -- shows that he recognized that that testimony was not really neutral, but was in fact harmful to his client.

31 Additionally, the decision not to secure independent analysis cannot be justified because he did not discuss it with Bobby. See note 27, supra.

Lynn's writing (S. 10-20), but was precluded from adducing the results of expert comparison between her writing and the Note. The basis for trial court's ruling (R. 356-37) appeared to be that in light of Simpson's testimony, evidence of Gaye Lynn's possible authorship was irrelevant. The trial court erred. Simpson was ineffective in not securing Gaye Lynn's writing,[32] and not consulting with Bobby to decide whether to have it analyzed (see n.27, supra).

If it had been analyzed, counsel would have learned, and been able to present to the jury, the fact that (as set out in the testimony of Mrs. Tytell, stipulated to for purposes of offer of proof, but excluded from evidence) Gaye Lynn probably wrote the Note (R. 1170-73). This is extremely significant: (1) it is further proof that Bobby did not write the Note; and (2) it, along with the Note's contents, and the fact that it was found on the steering wheel (where it would not likely have been left for long periods of time) suggests that the Note was written when the truck's battery died after Perry and Gaye Lynn left Bobby's home -- facts consistent with Bobby's testimony and inconsistent with Perry's.[33]

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32 If Simpson had consulted with an expert, he would have been told to attempt to secure samples of writing of other possible writers of the Note (R. 1163). Gaye Lynn's mother would have been able to provide such samples prior to trial (R. 131-32).

33 Even if the Note were written by Gaye Lynn at an earlier time, the fact that she wrote it would have been devastating evidence for the defense: Perry apparently told the police he had not seen the Note (R. 292) -- an incredible story, since the Note was found on his steering wheel (CR. 692). If Simpson had known that Gaye Lynn had probably written the Note, he could have shown the probability that Perry lied to the police.

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Anything Simpson could have done -- preparing to cross-examine; analyzing Bobby's handwriting; securing Gaye Lynn's handwriting -- would have enabled the jury to learn the true facts about the Note. Instead, he did nothing and permitted the State to convey the impression that Bobby wrote it. His failures, individually and collectively, constitute ineffectiveness. The trial court erred in not granting defendant's Motion on this ground.

3. Counsel Failed To Perform Effectively Concerning Gunshot Residue Analysis

Bobby willingly gave the police a GSR swabbing, after the GSR test was explained to him (CR. 754, 777). He was willing to have the test done even though a positive result could have been highly damaging.

Despite Bobby's denial to Simpson of having fired a gun (R. 277), his willingness to put himself in serious jeopardy if he were guilty, and his obvious confidence that he would be exculpated, Simpson unilaterally decided not to pursue the matter when the State's report (which Simpson received; R. 274-275) stated that the GSR could not be analyzed (R. 276). In fact, it could have been analyzed, and could have completely cleared Bobby.

The report of the State's analyst, Mr. Kopec, stated:

> The submitted gunshot residue collection swabs are considered to be unsuitable for analysis. .22 caliber ammunition manufactured by CCI does not contain both elements Barium and Antimony which are required for a meaningful analysis. No conclusion, therefore, can be reached

as to whether the subject did or did not fire or handle a weapon. (S. 50).

Counsel giving serious thought to this report could not have taken its result at face value, for many questions would have arisen: Isn't there lead in GSR? Wouldn't the absence of lead from Bobby's hands be significant? Doesn't the report suggest that CCI bullets produce at least one of barium or antimony? Wouldn't a finding of no barium or antimony be exculpatory?

Counsel facing these questions and seeking expert advice would have learned that Mr. Kopec's conclusion "is not borne out by the research of others in the field" and that analysis "might" be helpful to the defense (R. 190). He would then have had to consider the risks of proceeding. As explained above (n.27, supra), the decision whether or not to perform the GSR analysis should be made by defendant himself; at minimum, he must be consulted as to whether to proceed. Bobby doubtless would have chosen, or advised, to proceed with analysis. When he was faced with the same option, on the day of his arrest, he chose to proceed with the test. Yet Simpson, without even consulting him (R. 276), chose not to pursue any investigation (even to simply consult with an expert; R. 273, 275).[34] This conduct constitutes ineffective assistance.[35]

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34 Simpson did not take Mr. Kopec's deposition (R. 274), and has no specific recollection of speaking to him [he may have spoken to him, but not until a break at trial (R. 275)].

35 Simpson's explanations for his failure are meritless because: (1) he did not discuss this critical matter with Bobby (let alone permit Bobby to make the decision), in violation of his obligation (see n.27, supra); (2) his explanation that he believed that Bobby shot Gaye Lynn and Perry (R. 274) is (footnote continued)

No one can know now what a GSR analysis would show because the swabbing no longer exists. (See pp. 40-41, infra.)

At the 3.850 hearing, Professor Nicol, defendant's witness, explained the types of results that could have been found if the swabbing still existed, and how these would have been interpreted. He explained that a finding of significant levels of magnesium, sodium and calcium (elements present at the beach, where, according to the testimony, Bobby spent time on June 1 [CR. 834]), but no barium, antimony, lead, copper, or zinc, on the GSR swabbing would lead to the conclusion that it was "unlikely" that Bobby had fired a gun since leaving the beach on June 1 (R. 190; background testimony at R. 176-178, 186-89).

The State did not call any expert of its own at the 3.850 hearing to challenge Professor Nicol's conclusions.

It is undisputed, but not in evidence due to an erroneous ruling of the trial court (R. 352), that the GSR swabbing was destroyed by the State shortly after the trial [S. 37, ¶ 4].[36] The State's destruction precludes the analysis about which Professor Nicol testified. But as a matter of law it must be presumed that such analysis would have yielded results favorable to defendant, for two reasons: (1) the destruction of evidence

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no excuse for failure to prepare for trial (see pp. 17-26, supra); (3) his belief that the State's report was inconclusive (R. 276) does not excuse a failure to seek out exculpatory evidence.

36 Because the fact of the destruction of the swabbing is relevant to the issue of prejudice and essential to defendant's showing of prejudice, it is admissible in evidence; the trial court erred in excluding it.

creates a presumption that the evidence would have been unfavorable to the destroyer;[37] and (2) the State has an obligation to preserve evidence to permit preparation of defense.[38]

Here, the material that was destroyed was highly relevant and potentially completely exculpatory. The State's destruction mandates the presumption that its analysis would have been favorable to defendant. This result would have mandated acquittal -- it would have corroborated Bobby's denial of firing a gun -- and thus requires reversal.[39] The trial court erred in not granting defendant's Motion based on Simpson's ineffectiveness as to the swabbing.

4. Other Failures

Trial counsel submitted no requests for instructions at either the guilt or sentencing phase of the trial (CR. 960; R. 282, lines 1-2 [question garbled in transcription]).

At the trial, there was testimony that defendant had been drinking heavily (12-20 beers) and using marijuana and cocaine

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37 E.g., Knightsbridge Marketing Services, Inc. v. Promociones y Proyectos, S.A. 728 F.2d 572, 575 (1st Cir. 1984); United States v. Sonderup, 639 F.2d 294, 299 (5th Cir.), cert. denied, 452 U.S. 920 (1981); United States v. Sanchez, 603 F.2d 381, 385 (2d Cir. 1979); United States v. Remington, 191 F.2d 246, 251 (2d Cir. 1951), cert. denied, 343 U.S. 907 (1952); Taylor v. Hilton, 563 F. Supp. 913, 921 (D.N.J. 1982).

38 State v. Counce, 392 So.2d 1029, 1030 (Fla. 4th DCA 1981); Budman v. Florida, 362 So.2d 1022, 1026 (Fla. 3d DCA 1978); United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971).

39 If the swabbing existed today, it could be analyzed because the principal elements of GSR do not deteriorate (R. 184-85). The trial court precluded further questioning on this subject.

(CR. 834-35, 840, 849), and was "pretty high" (CR. 851). But Simpson never requested, and the Court did not give, an instruction that the jury could consider whether defendant was too intoxicated to form the requisite intent to commit murder or robbery[40] -- even though his intoxication (from drugs or alcohol) clearly might have convinced the jury that he had not been shown beyond a reasonable doubt to possess that intent. See Gurganus v. State, 451 So.2d 817, 822-23 (Fla. 1984); Cirack v. State, 201 So.2d 706, 709 (Fla. 1967).

Counsel's failure to request a clearly appropriate instruction that could well have led to acquittal constituted prejudicially ineffective assistance of counsel. E.g., Arrowood v. Clusen, 732 F.2d 1364, 1371-72 (7th Cir. 1984). His explanation for this omission -- that the court prepared the instructions (R. 282) -- can hardly suffice to excuse his failure, especially in view of his recognition that he had an opportunity to propose changes to the court-prepared instructions (R. 317).[41]

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40 The trial court's instructions (CR. 976-77) improperly omitted the specific intent element of robbery. See n.41, infra.

41 Simpson was ineffective for still other reasons. He failed to object to the indictment and/or conviction of first degree murder on the ground that Florida's felony-murder theory is unconstitutional. He should have done so. Under the Florida theory of felony murder, when the killing "occurs during the commission of a felony, the law presumes the element of premeditation . . . ." Fleming v. State, 374 So.2d 954, 956 (Fla. 1979). This presumption violates the constitutional mandate that the State has the burden of proving every element of an offense and cannot rely on conclusive presumptions to meet this burden. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

(footnote continued)

* * *

For all of the foregoing reasons, the trial court erred in failing to set defendant's conviction aside.

C. DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE

At the outset, we note that this matter is before this

Simpson failed to (a) request a charge that specific intent is an element of robbery, or (b) object to the charge that was given (CR. 976-77) on the ground that it impermissibly omitted this element. These failures constitute ineffectiveness because they permitted the jury to (a) convict of robbery and felony-murder without finding all of the elements of robbery [e.g., Bell v. State, 394 So.2d 979 (Fla. 1981)], and (b) to convict of felony-murder without being required to find intent either to kill or rob, in clear violation of law [e.g., Adams v. State, 341 So.2d 765, 768 (Fla. 1976), cert. denied, 434 U.S. 878 (1977) (malice aforethought element of felony-murder "is supplied by the felony")]. [The verdict did not specify whether it was based on a premeditated or felony-murder theory (CR. 996). Therefore, in reviewing a challenge to the instructions regarding felony-murder, the review must be conducted as if only felony-murder were charged, as it cannot be known which theory the jury adopted. Franklin v. State, 403 So.2d 975 (Fla. 1981) (reversing for failure to define underlying felony, where both felony-murder and premeditated murder were charged, notwithstanding trial counsel's failure to object).] As noted in text, Simpson's explanation for his failure to request charges is inadequate. He does not recall why he did not object to various charges (R. 282).

Simpson also apparently failed to request additional peremptory challenges and individual sequestered voir dire, which are designed to insure a fair and impartial jury. (Simpson stated that he did not recall whether he made these requests (R. 282-83), and the trial transcript does not reflect any such requests.) His failure constitutes an additional basis for a conclusion of ineffectiveness.

The trial court did not act explicitly on defendant's motion for leave to amend his 3.850 motion to allege the omissions set out in the first two paragraphs of this footnote. (See Motion for Leave to Amend and for Related Relief, dated June 14, 1985 ("Motion for Leave to Amend"), Exhibit B ¶¶ 131B, 131C [R. 895-96].) See also pp. 56-59, infra, discussing other allegations contained in the Motion for Leave to Amend.

Court as a case involving the death penalty by the closest of margins: this Court affirmed the sentence of death by only a four to three vote. If any of the many arguments concerning the sentence that are presented in this brief had been presented on direct appeal, and been accepted by only one of the four judges in the majority, the imposition of the death penalty would have been reversed.

1. Counsel's Ineffectiveness at the Guilt Phase Requires That Defendant's Sentence be Set Aside

Counsel's ineffectiveness at the guilt phase, even if not thought to require setting aside the conviction, requires setting aside the sentence. The possibility that the sentencing phase would be needed makes Simpson's explanation for his failure to investigate adequately even more meritless. Even if belief in a client's guilt could possibly excuse a failure to seek facts to adduce at the guilt phase, it is utterly irrelevant at sentencing, where guilt is a given. Counsel must investigate to find mitigating circumstances, or to counter the State's attempt to prove aggravating circumstances, either of which may be found in the circumstances of a crime.

If the sentencing jury and judge had been made aware of the evidence presented at the 3.850 hearing,[42] even in the unlikely event that they still would have determined that Bobby killed Gaye Lynn, they nevertheless probably would have concluded that

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42 Even if the evidence that the trial court held to be inadmissible were indeed inadmissible at the guilt phase, it is clearly admissible at the sentencing phase. See n.8, supra.

Perry's account of the details of the events was not fully accurate. They likely would have concluded that the killing involved sex, or drugs, or jealousy, or rage, or some motive other than the robbery that was the State's theory. They likely would have rejected the death penalty as inappropriate to the crime.[43]

2. Counsel's Ineffectiveness at the Sentencing Phase Requires That Defendant's Sentence be Set Aside

A consideration of Simpson's performance at the sentencing phase alone must result in the conclusion that he was not effective, and that Bobby was prejudiced.

Simpson called no witnesses and presented no evidence. He did not argue that the State had not proved beyond a reasonable doubt the existence of aggravating factors. Instead, he read an article about execution, pointed out that defendant was young and had had drugs and beer, and concluded by saying:

> I would ask you to spare his life. I am not begging, I am simply asking to spare it, not because of any particular thing about Robert Ike Combs, but because I feel the death penalty is too gruesome a punishment. (CR. 1131 [emphasis added]).

Simpson testified that he did not seek out character wit-

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43 Also, they would probably have found "doubt . . . raise[d] to a sufficient level that, though not enough to defeat conviction, might convince a jury and a court that the ultimate penalty should not be exacted, lest a mistake may have been made." King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), cert. denied, ____ U.S. ____, 105 S. Ct. 2020, 85 L.Ed.2d 301 (1985). We respectfully request this Court to reconsider its rulings that such doubt cannot justify a refusal to impose the death penalty [e.g., Buford v. State, 403 So.2d 943, 953 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982)], and to recognize that, while a jury may find a defendant guilty beyond a reasonable doubt, some genuine doubt may still exist, sufficient to warrant refusal to impose the death penalty.

nesses to call at sentencing (R. 280).

Simpson testified as to his failure to present evidence:

> . . . I had what I thought to be a very valid approach of reading to the jurors a report that had been furnished by the Jacksonville Citizens Against The Death Penalty, which goes into what occurs with the individual. I feel by reading that to the jurors that would have much more impact than my just calling people to say how good the Defendant was, how good a son or this type of testimony. (R. 279).

He testified further on cross-examination:

> . . . I personally did not want to dilute what I thought would be the effect of reading that particular pamphlet to [the jury] [by presenting character witnesses]. (R. 301).

He testified as to his failure to argue that various aggravating circumstances were inapplicable:

> That was not my approach to this case. My approach was what I took. (R. 281).

Similarly, he explained his failure to discuss mitigating circumstances in any detail:

> A. I didn't take the mitigating circumstances by mitigating circumstance. If you recall I argued his age and one thing or another, but specifically did I argue mitigating factors, no, I did not do it in that fashion.
>
> Q. Do you recall why you did not do it in that fashion?
>
> A. It was not the way I decided to handle the case. (Id.).

Finally, he discussed his statement that the jury should spare defendant's life "not because of any particular thing about Robert Ike Combs, but because I feel the death penalty is too gruesome a punishment" as follows:

> . . . because of trying to convey to the jury the gruesomeness of the death penalty, and trying to impress on them why they should not return a recommendation of death. (R. 280).

The need for effective assistance of counsel at sentencing is as great as the need at the guilt phase. See Strickland v. Washington, supra, 466 U.S. at 686-87; ABA Standards, Standard 4-8.1, Commentary. See also ABA Standards Relating to the Administration of Criminal Justice, Sentencing Alternatives and Procedures, Standard 5.3(e) (1974):

> The defense attorney should recognize that the sentencing stage is the time at which for many defendants the most important service of the entire proceeding can be performed.

(Same language in 1980 Standards, Standard 18-6.3(e).)

Simpson's performance was ineffective for many reasons:

a. Counsel Told The Jury That There Was No Reason For Leniency

His statement that the death penalty should not be imposed, but "not because of any particular thing about Robert Ike Combs," is an incredible, highly prejudicial, concession that Bobby was not worthy of mercy or leniency. What could be more damaging to a defendant than his own counsel volunteering that nothing about him warrants the jury's consideration? Complete silence would have been more effective. The Eleventh Circuit has said, "a vital difference exists between not producing any mitigating evidence and emphasizing to the ultimate sentencer that . . . there is no mitigating evidence."[44] Simpson's prof-

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44 Douglas v. Wainwright, 714 F.2d 1532, 1557 (11th Cir. 1983), vacated and remanded in light of Strickland v. Washington, 468 U.S. 1206 (1984), reinstated on remand, 739 F.2d 531 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985); see also King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and remanded in light of Strickland v. Washing-
(footnote continued)

fered explanation for his statement -- that he tried to convey the gruesomeness of the death penalty -- overlooks the obvious fact that he could talk about how gruesome an execution is without conceding this defendant's lack of particular merit. Simpson's statement was so destructive of his client's position as to itself require setting aside his death sentence, without the need to consider any of the other failures discussed below.

b. Counsel Failed To Seek Out And Present Evidence

The damage caused by Simpson's statement that there was nothing to be said for Bobby was aggravated by his failure to present any evidence, even though many witnesses were available. In addition to Bobby's mother, who testified at the 3.850 hearing about his childhood, his hobbies and his work, members of the community, young and old, who had been friendly with and worked with Bobby, and for whom he had worked, testified at that hearing that he was a good, kind person, a solid, reliable worker, who went out of his way to help others -- exactly the evidence the Supreme Court had in mind when it spoke of need to consider "the facts and circumstances of the individual," Spaziano v. Florida, 468 U.S. 447, 460 n.7, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and exactly the evidence that is often

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ton, 467 U.S. 1211 (1984), reinstated on remand, 748 F.2d 1462 (11th Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 2020, 85 L.Ed.2d 301 (1985) (ineffectiveness proved when, inter alia, counsel "made a closing argument that may have done more harm than good"); cf. Holmes v. State, 429 So.2d 297, 300 (Fla. 1983) ("[i]nstead of arguing that the crime was not heinous, atrocious, or cruel, defense counsel conceded the existence of this questionable aggravating circumstance").

decisive in favor of life over death.[45] Defendant presented:

-- Mary Bishop, a 45-year old woman whose daughter (who was "very important" to her) dated Bobby and who "thought an awful lot" of Bobby; and who supervised Bobby's work at the plant house at G&G Farms, and found his work "excellent"; indeed, she testified that he volunteered to do work beyond what was required for his job (R. 141-55);

-- Blanche Carpenter, Bobby's 80-year old next door neighbor, who thought that he was "the nicest neighbor boy I ever did have," and who testified to the types of help that Bobby offered her and her husband (R. 156-64);

-- Robert Floyd, a 37-year old man employed in 1980 as the manager of G&G Packing, who supervised Bobby's work as a loader and box stacker at G&G Packing and found him to be a very good, reliable worker who got along with his co-workers; Mr. Floyd "always respected" Bobby and trusted Bobby to take care of his children while he and Bobby's father were fishing together (R. 211-17);

-- Christine Sansmark, a 38-year old woman who is "like a mom" to the neighborhood children, and who thought Bobby was "one great boy" (R. 218-22);

-- Sophie Guptill, Ms. Sansmark's 22-year old daughter, who testified to Bobby's mowing lawns for people in the community and helping his father fishing (R. 223-28).

Simpson had spoken to none of these people (except defendant's

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45 See, e.g., Blake v. Kemp, 758 F.2d 523, 534 (11th Cir.), cert. denied, ____ U.S. ____, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985) (defendant satisfied the prejudice requirement of Strickland v. Washington, supra, in proffering, at the habeas corpus hearing, four persons, in addition to his mother, who "could have testified to the effect that Blake was a man who was respectful towards others, who generally got along well with people and who gladly offered to help whenever anyone needed something"); Thompson v. State, 456 So.2d 444 (Fla. 1984) (jury could rely on testimony of defendant's mother and wife that he was a good son, husband and father); Washington v. State, 432 So.2d 44, 48 (Fla. 1983) (where father and grandmother "testified that appellant had been a good person, had helped support his disabled parents, and had never before committed an act of violence," jury recommended life, but trial court sentenced to death, death sentence reversed, for jury could properly rely on testimony of family members); McCampbell v. State, 421 So.2d 1072 (Fla. 1982) (considering, inter alia, employment record, prison record, and family background, in upholding jury's recommendation of life sentence).

mother), had made no effort to learn of their existence. Their testimony would have put the lie to counsel's suggestion that there was no "particular thing about Robert Ike Combs" to warrant sparing his life. Their testimony would have humanized him and shown him to be respected and well-liked by responsible members of his community. Until the penalty phase, all the jury knew about Bobby is that he was now a convicted murderer, who used drugs. Simpson could and should have shown the jury that he had a good side, and substantial redeeming features.[46] The members of the jury had no inkling of those good qualities, and Simpson, compounding the damage done by his statement to the jury, never let the jury know that they existed. The facts that Simpson never learned and never presented would have argued powerfully for leniency, and probably would have resulted in a life imprisonment verdict. Simpson's failure to do so deprived Bobby of his constitutionally mandated right to an adequate sentencing hearing.[47]

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46 See Blake v. Kemp, supra, 758 F.2d at 535 ("the available mitigating evidence 'might have demonstrated to the jury that the petitioner was not the totally reprehensible person they apparently determined him to be. Certainly they would have provided some counterweight to the evidence of bad character which was in fact received'") (quoting District Court opinion).

47 See, e.g., Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 2645 n.7, 86 L.Ed.2d 231 (1985) ("capital sentencer . . . makes the . . . 'unique, individualized judgment regarding the punishment that a particular person deserves'") (quoting Rehnquist, J., concurring in Zant v. Stephens, 462 U.S. 862, 900, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (emphases added); Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each

(footnote continued)

Simpson's reliance on an article discussing electrocution cannot justify his conduct, for many reasons:

(a) He did not even investigate whether there existed any appropriate witnesses. His decision to rely entirely on an article, no matter what witnesses existed or what they could testify to, was based on ignorance of the facts, and constitutes ineffectiveness. If Simpson had learned that an 80-year old neighbor existed who would have testified to Bobby's helpfulness, it is inconceivable that he would not have called her as a witness.

Counsel's duty to investigate facts relevant to sentencing is as important as the duty to investigate as it relates to guilt. See ABA Standards, Standard 4-4.1, quoted at n.5, supra. In a case involving the death penalty, the sentencing phase is as important as, or even more important than, the guilt phase. In order to distinguish among those convicted of capital crimes, to choose those relatively few for whom death is deemed appropriate, the Supreme Court "has insisted that the sentencing decision be based on the facts and circumstances of the individual and his crime." Spaziano v. Florida, supra, 468 U.S. at

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defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases") (emphases added); Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) ("in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death") (emphasis added; citation omitted).

460 n.7.[48] "Without that information, a jury cannot make the life/death decision in a rational and individualized manner." Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985), cert. denied, ____ U.S. ____, 106 S.Ct. 582, 88 L.Ed.2d 564 (1986). Counsel has a duty to present to the jury the facts and circumstances of the individual and his crime that make the death penalty unsuitable for that particular defendant.[49] Counsel simply cannot do this without investigation.

In Tyler v. Kemp, supra, the court held trial counsel ineffective when he merely spoke to a defendant's relatives and asked if they knew anything relevant, and did not specifically explain the sentencing phase and the importance of mitigating evidence, where evidence in mitigation existed. Similarly, in Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986), the court held trial counsel ineffective when he "made little effort to investigate possible sources of mitigation evidence." Simpson did even less than did trial counsel in these cases.[50]

Simpson's failure to investigate is especially egregious in view of his professed belief that Bobby was guilty. If this was

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48 See also n.47 supra.

49 See Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986), holding counsel ineffective for failure to present mitigating evidence: "The key aspect of the penalty trial is that the sentence be individualized, focusing on the particularized characteristics of the individual. Here the jurors were give no information to aid them in making such an individualized determination." (citation omitted).

50 See also Johnson v. Kemp, 615 F. Supp. 355, 359 (S.D. Ga. 1985), aff'd on the District Court opinion, 781 F.2d 1482 (11th Cir. 1986) (ineffective assistance when counsel's ostensible search for mitigating evidence "not reasonably designed to uncover available mitigation evidence").

so, then it was especially critical for Simpson to prepare for the penalty phase, because it was likely that there would be a penalty phase.

(b) Simpson could not even be sure that the court would permit him to read the article. Other courts have held such arguments improper. E.g., Shriner v. State, 386 So.2d 525, 533 (Fla. 1980), cert. denied, 449 U.S. 1103 (1981). Simpson apparently recognized this, for he asked at the beginning of the sentencing phase for permission to make the argument (CR. 1118-19). He gambled that the court would allow his argument; if it had not, he would have been left with nothing at all to say, because he had failed to look for witnesses.

(c) Simpson's decision to forego presenting evidence in addition to reading the article was utterly irrational. If the jury and court would be swayed by the article (which itself was highly improbable; see the next paragraphs), they would necessarily be swayed even more by evidence showing that an individual liked by his neighbors and loved by his parents was the candidate for what was described in the article. It defies reason to contend that such evidence could have detracted from the article's effectiveness. A very similar failure was held to constitute ineffective assistance in Holmes v. State, 429 So.2d 297, 301 (Fla. 1983), where this Court focused on the fact that "[i]nstead of concentrating on the particular mitigating aspects of the case, defense counsel made a general argument against

capital punishment. . . ."[51]

(d) The jury was death-qualified (e.g., CR. 105-14). Its members had already agreed that, under appropriate circumstances, they could impose the death penalty.

(e) Simpson did not object to erroneous instructions permitting the jury to consider only the statutory mitigating circumstances (see p. 56, infra). Thus, he permitted the jury to be told that it could not even consider the argument that he made.

(f) Because in Florida the trial court may overrule the jury's recommendation of life when that recommendation is not based on "valid mitigating factor[s]," Lusk v. State, 446 So.2d 1038, 1043 (Fla.), cert. denied, 469 U.S. 873 (1984), counsel must be concerned not only with convincing the jury -- however important its verdict is -- but must also attempt to convince the court, that this particular case does not warrant death. A general article could not have such effect. This Court's rule in Tedder v. State, 322 So.2d 908 (Fla. 1975), which limits the trial court's ability to override the jury's sentence, permits the trial court to override a jury recommendation of life when counsel has relied on "matter not reasonably related to a valid ground of mitigation." See Thomas v. State, 456 So.2d 454, 460 (Fla. 1984). Indeed, this Court has explicitly approved a trial court's override of a life recommendation where "the jury might

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51 See also ABA Standards, Standard-4.1, Commentary: "The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals . . . ."

well have been swayed by defense counsel's reading of an 'extremely vivid and lurid' description of an electrocution to the jury." Porter v. State, 429 So.2d 293, 296 (Fla.), cert. denied, 464 U.S. 865 (1983).

Because of Simpson's failure to investigate, his failure to present evidence cannot be regarded as tactical. But even if it were, it was so patently unreasonable as to be entitled to no weight.

c. Counsel Failed To Argue Concerning Aggravating And Mitigating Circumstances

Simpson made no effort to argue the inapplicability of aggravating circumstances, and virtually none to argue the existence of mitigating circumstances. This was hardly a case that cried out for capital punishment: he could have argued persuasively that the evidence did not establish a "heinous, atrocious and cruel" murder; he could have argued persuasively that Bobby's lack of significant criminal record -- to which he did not even advert -- warranted leniency.[52] Such arguments would have been obvious upon cursory perusal of the statute. The failure to make them constitutes prejudicial ineffectiveness. See Holmes v. State, 429 So.2d 297, 300 (Fla. 1983).[53] Counsel's explanation for these failures (p. 46, supra) -- in

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52 The trial court found that Bobby had no significant history of prior criminal activity. (CR. 1179).

53 See also Johnson v. Kemp, 615 F. Supp. 355, 361 (S.D. Ga. 1985), aff'd on the District Court opinion, 781 F.2d 1482 (11th Cir. 1986) ("the Court considers it error for counsel to have failed to put [defendant's] clean record before the sentencing jury").

substance, that he did not make these arguments because he chose not to -- sheds no light on his reasons, and is entitled to no weight.

d. Other Failures

The many other examples of ineffectiveness at the sentencing phase are, for the most part, sufficiently discussed in the 3.850 Motion and Motion for Leave to Amend. However, a few of these failures are worthy of particular attention.

Simpson failed to object to an instruction limiting the jury's consideration of mitigating circumstances to three of those set out in the statute (CR. 1133), in plain violation of Lockett v. Ohio, supra, and failed to request an instruction advising the jury that it could consider all facts in mitigation -- even after he focused his presentation on an argument unrelated to the statutory mitigating circumstances. (See discussion at Motion, ¶¶ 104, 81-88 [R. 512, 501-05].)[54] Simpson's explanation for his failure to request instructions is inadequate (see p. 42, supra), and he does not recall why he did not make objections (R. 282).

Simpson failed to object to instructions (a) permitting the jury to count robbery as an aggravating circumstance, when it was already an element of felony-murder, and (b) permitting the jury to find as two aggravating circumstances the duplicative

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54 The propriety of the court's instruction was raised on direct appeal. However, this Court's review, where objection had not been properly preserved at trial, was pursuant to a "fundamental error" standard. Therefore, the rejection of such argument by this Court cannot be dispositive here.

circumstances that the crime was committed while defendant was engaged in the commission of a robbery, and that the crime was committed for pecuniary gain -- in plain violation of Provence v. State, 337 So.2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). (See Motion for Leave to Amend, Exh. B, ¶¶ 108C, 80B-C; Exh. D, ¶¶ 108A, 88A [R. 889, 887-88, 902, 901].)

Simpson failed to move to exclude a juror who stated that he was committed to imposing the death penalty for premeditated murder. (See CR. 109-10; no objection noted in the record.) He does not recall his reasons for this failure (R. 282-83). See Motion ¶¶ 106, 111-14 [R. 512-15] for further elaboration. See also Thomas v. State, 403 So.2d 371 (Fla. 1981).

For a discussion of Simpson's other failures, we respectfully refer the Court to the appropriate sections of the Motion and Motion for Leave to Amend, relating to (i) failures to request instructions,[55] (ii) failures to object to instruc-

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55 Counsel failed to request any instructions at the sentencing phase (CR. 1118-35). He should have requested several, in addition to those discussed in text: (a) limiting applicability of the "heinous, atrocious and cruel" aggravating circumstance (see Motion ¶¶ 104, 57-58 [R. 512, 490-92]); (b) advising the jury that it had the right to recommend a sentence of life imprisonment even if it found aggravating circumstances (see Motion ¶ 107 [R. 512]); (c) limiting the jury's right to consider aggravating circumstances to those (i.e., none) of which the State had given notice (see Motion ¶¶ 104, 97 [R. 512, 508-09]); (d) requiring the jury to find a specific intent to rob and/or kill as a prerequisite to recommendation of the death penalty (see Motion for Leave to Amend, Exhibit B, ¶¶ 108 D, 114 A, B [R. 889-90]); (e) adequately instructing the jury concerning the function of mitigating circumstances (see Motion for Leave to Amend, Exhibit B, ¶ 107 [R. 888-89]).

See p. 42 supra, concerning Simpson's explanation for his failure to request instructions.

tions,[56] and (iii) other failures.[57]

The failures discussed in this section amounted to ineffectiveness. Facing a possible death sentence, defendant was entitled to his counsel's vigilance in insuring proper instructions and maximum safeguards of fairness. He did not receive it. Simpson was utterly passive, apparently resigned that there was nothing to be done. As we have shown above, there was much to be done. The failure to take any of these steps cannot be regarded as a strategy decision worthy of deference: it cannot be supposed that any counsel would make a conscious decision not to insist on proper instructions and safeguards to minimize the chance of imposition of a death sentence.

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56 Simpson did not object to any instructions given at the sentencing phase (CR. 1120). He should have objected to the following, in addition to those discussed in the text: (a) requiring mitigating circumstances to outweigh aggravating circumstances in order for jury to recommend life sentence (see Motion ¶¶ 108, 89 [R. 512, 505-06]); (b) submitting aggravating circumstances that had no basis in the record (see Motion ¶ 105 [R. 512]); (c) limiting and directing the jury to consider three specific aggravating circumstances (see Motion ¶ 104 [R. 512]); (d) permitting the jury to recommend the death penalty without finding a specific intent to rob and/or to kill (see Motion for Leave to Amend, Exhibit B, ¶¶ 108D, 114A-B [R. 889-90]).

Simpson does not recall why he did not make objections (R. 282).

57 Simpson's representation was ineffective in that he failed to raise various other objections to imposition of death penalty. See Motion ¶¶ 110, 116-118, 120-123 [R. 513, 515-16, 517-18]. (The point raised by ¶ 116 was asserted in a motion to dismiss submitted by Simpson's predecessor (CR. 1012-1020), and denied with leave to renew (CR. 1031). Simpson did not renew this motion. He does not recall why not (R. 283).) Simpson also provided ineffective assistance with respect to defendant's sentence for robbery. See Motion for Leave to Amend, Exh. E, ¶ 147C (R. 904).

The failures discussed at pp. 45-58, individually and collectively, were highly prejudicial. Especially in light of Simpson's near-total default in his presentation to the jury, the conclusion is compelled that if Bobby had received the effective assistance of counsel, his sentence would have been different. The trial court therefore erred in not granting defendant's Motion to set aside his sentence.[58]

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58 The trial court erred in denying defendant's motion to set aside his sentence for additional reasons other than ineffectiveness of counsel: (1) The jury was permitted to convict Bobby of first degree murder on a felony-murder theory without having to find any intent to commit the underlying felony of robbery (CR. 974, 976-78). At sentencing, the jury was not told that it was required to find intent to commit a crime -- robbery or murder -- as a prerequisite to recommendation of the death penalty (CR. 1131-36). Imposition of the death penalty without a finding of such intent violates the Eighth and Fourteenth Amendments to the United States Constitution and Art. I, §§ 9 and 17 of the Florida Constitution. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). (See Motion for Leave to Amend, Exh. B, ¶¶ 114A-B [R. 889-90].) This ground is properly cognizable on a 3.850 motion. The ruling in Enmund, supra -- a ruling of major constitutional magnitude -- occurred after the trial and appeal in this action. See Buford v. State, 492 So.2d 355 (Fla. 1986). (2) The trial court also erred in not granting defendant's motion to set aside the death sentence on the ground that the Florida death penalty is racially motivated and has a disproportionate impact on those who kill white victims (Motion for Leave to Amend, Exh. C, ¶ 118A [R. 899]), or, at minimum, in not granting defendant's motion to take discovery on this point (Motion for Leave to Amend, ¶ 13 [R. 865]).

Defendant respectfully requests that this Court also consider the allegations contained in his Motion and Motion for Leave to Amend other than those relating to ineffectiveness of counsel.

CONCLUSION

For all the foregoing reasons, the trial court erred in denying defendant's Motion and in not setting aside his conviction and sentence. This Court should reverse the trial court's order, and set aside defendant's conviction and sentence.

Respectfully submitted,

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Dated: November 25, 1986

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of the attached Brief on the State of Florida by causing a copy to be sent by courier to the office of Michael J. Kotler, Esq., Assistant Attorney General, Park Trammell Building, Suite 804, 1313 Tampa Street, Tampa, Florida 33602, and John W. Dommerich, Esq., Assistant State Attorney, Twentieth Judicial Circuit, Post Office Drawer 399, Fort Myers, Florida 33902, this 28th day of November, 1986.

MARVIN R. LANGE