IN THE SUPREME COURT OF FLORIDA

ROBERT IKE COMBS,	:	
Appellant,	:	CASE NO. 68,477
v.	:	
STATE OF FLORIDA,	:	
Appellee.	:	

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

corrected

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF DEFENDANT-APPELLANT

Defendant submits this reply brief in support of his appeal from the denial of his 3.850 motion.[1] We will discuss the facts and law relevant to particular contentions in the appropriate sections of this reply brief.

Preliminary Statement

Throughout its brief, the State repeats the contention that trial counsel Simpson's testimony that he made various "tactical" decisions effectively insulates his conduct from judicial review. However, the fact is -- as shown in Deft. Br. and in this brief -- that Simpson's "decisions" that are challenged on this appeal were not erroneous choices among alternatives, based on knowledge of those alternatives, but rather were legally

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1 Abbreviations used in Defendant-Appellant's opening brief ("Deft. Br.") will be employed herein. The brief of Appellee State of Florida ("the State") will be referred to herein as State Br.

unacceptable "decisions" to do nothing: not to investigate, not to secure information to enable him to cross-examine effectively, not to seek expert assistance, not to try to impeach the State's critical witness, not to see whether evidence existed that could humanize his client in the eyes of the sentencing jury. They are not entitled to any judicial deference. Rather, they constitute prejudicial ineffective assistance of counsel.

A. 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

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

The State's characterization of Simpson's decisions not to investigate the relationship between Perry and Gaye Lynn as "tactical" (State Br. 16) is illustrative of the fallacies in the State's position. Perry was the State's key witness at trial. The defense presented no witnesses other than defendant. Investigation for and presentation of evidence that would undermine Perry's credibility should have been a crucial part of defense counsel's preparation for trial. A "decision" not to make an effort to learn whether such evidence existed -- not even to look in the most obvious places -- is not entitled to any judicial deference.[2]

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2 The State's characterization of the defense at trial as an "alibi defense" (State Br. 16) does not somehow relieve defense counsel of his obligation to seek out evidence helpful (footnote continued)

As shown at Deft. Br. 17-18, Simpson's testimony was to the effect that he did not investigate the Gaye Lynn-Perry relationship because he believed his client was guilty -- a factually and legally unacceptable "reason" (Deft. Br. 18-26). Simpson's testimony as to what he did not do renders meaningless his contention that his belief in his client's guilt "did not affect the vigor" of his efforts (State Br. 17-18).

The State's various other contentions are equally meritless. That people with knowledge of the Gaye Lynn-Perry relationship did not come forth and volunteer it (State Br. 12) is irrelevant: diligent counsel may not wait passively for information to come to him; he must seek it out. Had he done so, he would have secured at the very least the facts presented at the 3.850 hearing (Deft. Brief 15 n.7).[3]

The State attempts to minimize the impact of the testimony adduced by defendant at the 3.850 hearing by pointing to various facts to which Gaye Lynn's family members did not testify, due

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to defendant. This was a case of Bobby's testimony versus Perry's. Defense counsel could not ignore the possibility that Perry had a motive to and might have committed the crime.

3 That the people with this knowledge were not in town (State. Br. 3, 12) did not mean that they were not locatable; as they testified, they could have been located (Deft. Brief 15 n.7). The State's reference to "attempts to contact" Mrs. Parks being "unsuccessful" (State Br. 12) is based on an account of one purported attempt to reach her by Perry, who had an obvious motive to lie. In fact, Mrs. Parks' testimony demonstrated that Perry really did know how to reach her, by telephone and by letter (R. 133). Moreover, Mrs. Parks testified without contradiction that many others in Bonita Springs knew how to reach her (R. 76), and that police Sgt. Mitar, in response to her request, said he would notify her of defendant's trial (R. 81), but never did (R. 75-76).

to lack of knowledge (State Br. 3, 15). But the fact that they had no direct knowledge of who killed Gaye Lynn does not diminish the impact of what they did know, and did testify to (Deft. Br. 6-7, 14-17).

The State's conclusory assertions that defendant's showings of prejudice "are pure speculation" (State Br. 11, 15) and that the testimony adduced at the 3.850 hearing "does not tend to refute Perry's story" (State Br. 13) are themselves speculation, and are flatly contrary to common sense. To the contrary, this evidence at the very minimum creates a reasonable doubt as to defendant's guilt. See Deft. Br. 16-17.[4]

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

The State's argument that defendant is not entitled to relief on the basis of the testimony presented by Dr. Spil is predicated almost entirely on the fallacious statement that "whether Perry was ever unconscious in the medical use of the term is unknown" (State Br. 19). The State relies for this proposition on the fact that Dr. Spil could not say, based on his recollection of a patient seen over five years earlier, that Perry had been unconscious (R. 123-25). However, Dr. Spil did testify that if the events that Perry himself described as having happened to him really did happen to a person, that

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4 This Court's affirmance of the conviction (cited at State Br. 15) does not refute defendant's arguments. Neither this Court nor the trial jury had the benefit of the evidence presented at the 3.850 hearing.

person was indeed unconscious (Deft. Br. 28). The State's contention that "laymen" may not use the term "unconscious" properly (State Br. 19-20) is completely beside the point: if the facts described by Perry were true, he was unconscious (according to Dr. Spil), and if he was unconscious he would not have remembered the events preceding his shooting (again according to Dr. Spil). The term that Perry may have used to described his condition is irrelevant.

The State's argument that if Dr. Spil had testified at trial as he did at the 3.850 hearing, his testimony "likely would have been met by conflicting testimony from State experts" (State Br. 20) is pure speculation devoid of any evidence in the record. There is not the slightest bit of evidence that conflicting views exist on the subjects on which Dr. Spil testified, let alone that the State would have adduced any. However, the fact that the State now suggests that, if Dr. Spil had testified at trial as he did at the 3.850 hearing, it would have felt compelled to seek out contrary expert testimony eloquently demonstrates the importance of Dr. Spil's testimony.[5]

The State's boilerplate recitation of its position that defendant's assertion of prejudice "calls for enormous speculation as to what effect such testimony might have had on the jury" (State Br. 20) hardly requires discussion in a case where, as here, the omitted evidence would have shown the State's only

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5 The State's position is especially ironic in view of the fact that it called Dr. Spil as a witness at the trial (CR. 716).

eyewitness not to be telling the truth as to critical facts. If the State were correct in its assertion that defendant has not shown prejudice here, then it is hard to imagine any case in which a defendant could ever show prejudice.[6]

2. Counsel Failed to Perform Effectively Concerning Handwriting Issues

The State seeks to minimize the importance of the handwriting issues by contending that its own expert testified that the results of his examination were "inconclusive" (State Br. 2). This is a misstatement. As the State itself concedes, the very purpose of its presentation of expert testimony on this subject was "an effort to identify [defendant] as the person who wrote the note found in the van" (State Br. 2).[7] As shown at Deft. Br. 31-32, the jury -- recognizing the State's effort -- most likely understood the expert testimony to mean that defendant did write the Note.

Simpson could, and should, have shown this testimony to be completely erroneous, and he could have done so merely by securing assistance in cross-examination (Deft. Br. 33-34) -- with no risk whatsoever of aiding the State's case. The State's

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6 The State's position would appear to be that in order to show prejudice, a defendant must adduce the testimony of members of the trial jury that their verdict would have been different but for trial counsel's ineffectiveness. That is not the law.

7 The State characterizes as "inconclusive" Mrs. Tytell's testimony that "it is highly, highly probable that Gaye Lynn . . . was the writer of the Note" (R. 1173; State Br. 27), thus demonstrating the State's misunderstanding of the meaning of the word "inconclusive."

position now is that Simpson chose not to engage in a "technical" cross-examination (State Br. 24), but the distinction that the State now draws between a "technical" and "nontechnical" examination is utter speculation, without any support in the record. Moreover, in the case cited by the State for the proposition that "technical" cross-examination may not be necessary, Knott v. Mabry, 671 F.2d 1208 (8th Cir. 1982), the court found a "technical" cross-examination to be unnecessary because the "non-technical" cross-examination that actually was employed was so effective (id. at 1213-14). Here, by contrast, the three questions that Simpson asked on cross-examination accomplished absolutely nothing (R. 821).

Simpson's supposed tactical decision to rely upon the State's expert's "inconclusive" results (State Br. 4, 23) was simply never made. Simpson went into the trial not knowing what the State's expert would testify to (Deft. Br. 31-33).

The State misleadingly characterizes Mrs. Tytell's stipulated testimony to be that she "was unable to conclude that [defendant] did not write the note" (State Br. 4, 25). In fact, she did conclude, to at least an "almost certain[ty]," that he did not write the Note (Deft. Br. 32 and n.23). The State would apparently require all of defendant's proof to be presented in absolutely conclusive terms before it could be used to create a reasonable doubt in the minds of the jurors. Similarly, the State says that Tytell could "only" testify that Parks probably wrote the Note (State Br. 4; see also id. 27). Again, such

evidence, if presented at trial, would likely have established a reasonable doubt.

Again, the State argues that Tytell's expert testimony, if presented at trial, might have been challenged by the State (State Br. 25). The State had an opportunity to cross-examine Tytell, and to present contrary evidence if it had any (R. 358-59). Having chosen not to do so, it cannot now speculate about what it might have done.

The State argues that proof that defendant did not write the Note would not have changed the verdict (State Br. 25-26). Defendant showed that it would have (Deft. Br. 30). Moreover, (a) the State would not have "presented expert testimony in an effort to identify [defendant] as the person who wrote the note," as it concedes it did (State Br. 2), unless the State believed that such testimony would assist its case; and (b) the State would not now suggest that it would have made the effort to challenge Tytell's testimony unless it were significant. The State cannot now be heard to contend that this was an immaterial "collateral" issue.

3. Counsel Failed To Perform Effectively Concerning Gunshot Residue Analysis

The State erroneously contends that its expert testified that the results of GSR analysis were inconclusive (State Br. 2). In fact, he testified -- wrongly -- that the GSR swabbing could not be, and therefore was not, analyzed (CR. 813).

Simpson failed to pursue any investigation, and therefore never learned that the swabbing could have been analyzed, and the results could have exculpated his client.

That Prof. Nicol could not testify to the facts surrounding the particular GSR swabbing in this case (State Br. 5, 29) is irrelevant.[8] The State's destruction of evidence (the swabbing itself) had precluded him from examining it, and requires application of the rules of law discussed at Deft. Br. 40-41.[9]

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

1. Counsel's Ineffectiveness At The Guilt Phase Requires That Defendant's Sentence Be Set Aside

The State relies upon this Court's affirmance of the sentence in contending that Simpson's ineffectiveness at the guilt phase does not require reversal of the sentence. However, this Court did not have the benefit of the evidence adduced at

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8 The State, which elsewhere accuses defendant of engaging in speculation, twice contends that a false exculpatory result could have been reached here because a person wearing a glove when he shoots a gun might not have GSR on his hand (State Br. 29, 30), although there is not the slightest evidence in the record that defendant was wearing a glove when, according to Perry, he shot Gaye Lynn.

9 The State makes the policy argument that it should not "be required to preserve evidence forever in anticipation that it might someday become useful in a collateral post-conviction proceeding" (State Br. 31). However, in order to hold for defendant on this point, this Court need not hold that every breathalyzer test used in connection with every conviction for driving while intoxicated must be preserved forever. This is a capital case. In capital cases, post-conviction proceedings are virtually inevitable. The State's obligation to preserve evidence in these cases imposes only a minor burden, tiny in comparison to the monumental stakes at issue in such cases.

the 3.850 hearing. More importantly, neither did the sentencing jury. If the jury had heard this evidence, it likely would have recommended a life sentence, which could not properly have been overridden. Tedder v. State, 322 So.2d 908 (Fla. 1975).

2. Counsel's Ineffectiveness At The Sentencing Phase Requires That Defendant's Sentence Be Set Aside

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

The State does not try to defend Simpson's statement that the death penalty should not be imposed, but "not because of any particular thing about Robert Ike Combs," and the statement is indeed indefensible. Rather, the State essentially argues that, in context, the statement probably had little effect.

It is hard to imagine how this statement -- the last statement the jury heard from Simpson -- could not have had enormous impact. Contrary to the State's contention, Simpson had not earlier "emphasized" defendant's age and that he had been drinking and using drugs (State Br. 2) -- he merely mentioned these facts almost in passing (CR. 1127). But more significantly, nowhere did he advise the jury of anything favorable about defendant -- such as his lack of criminal record. Therefore, when Simpson told the jury that there was nothing in particular about defendant that warranted leniency, his argument was consistent with the balance of his presentation, and devastatingly prejudical to his client.

The State purports to distinguish the principal case relied

upon by defendant, 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), by contending that various other factors present there led to the court's conclusion of ineffectiveness (State Br. 38). However, a review of the court's opinion plainly reveals that it independently relied for its finding of ineffectiveness on counsel's statements that there was nothing good he could say about the defendant. Douglas therefore is precisely on point. But even if this case did not exist, general principles of law compel the conclusion that counsel who tells the jury, in the context of a proceeding designed to enable him to show his client's good side, that his client has no good side, acts ineffectively and prejudices his client.

b. Counsel Failed To Seek Out And Present Evidence

The State fails to respond to most of the arguments presented in this section of defendant's brief (Deft. Br. 48-55), instead relying only on Simpson's testimony that he did not wish to present as witnesses the few people of whose existence he happened to be aware (State Br. 40). But contrary to the State's assertion (State Br. 41), Simpson did not "explore[] and examine[] the possibility of using character evidence . . . and [make] an informed choice between reasonable alternatives." Rather, Simpson acknowledged that he did not seek out character

witness (R. 280). That he decided against calling the few people of whom he was "aware" who could have served as character witnesses (see R. 329) cannot justify his complete failure to conduct an investigation to see whether appropriate character witnesses -- such as those presented at the 3.850 hearing -- existed.[10] Absent such an investigation, he had no way of knowing whether better witnesses existed. The law is clear that his failure to present evidence whose existence he did not even try to find out about is not entitled to judicial deference. The State's contention that Simpson made a "tactical" decision is thus simply wrong. The fact is that he made no investigation, and could not and did not know who was available to testify.

The State contends that Simpson "could" reasonably conclude to be concerned about "opening the door for harmful cross-examination or rebuttal evidence" (State Br. 41). However, the State gives no clue as to the nature of any supposedly available rebuttal evidence. As for cross-examination, Simpson's grudging answer, "That's always a consideration. Yes, sir" to the State's leading question, "Did you also feel that by calling character witnesses you might open the door on the State impeaching those character witnesses?" (R. 301), hardly shows that this was a factor in Simpson's thinking. But even if it was, it would be so utterly irrational on the facts of this case as to

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10 Simpson's testimony makes clear that the people of whom he was "aware" were people he came upon in a different context (R. 257). He did not seek them out (R. 280).

warrant no judicial deference: the questions that the State asked the character witnesses at the 3.850 hearing that went beyond the unfavorable material already adduced at the guilt phase related to such matters as juvenile offenses and tattoos -- matters that could not possibly have given the jury a worse impression of the man whom it had just convicted of murder. By contrast, much of what those witnesses testified to would have given the jury a better impression of him -- would have distinguished him from convicted murderers who had no redeeming qualities and would have given the jury persuasive reason to recommend sparing his life.

The State argues that defendant was not injured by Simpson's ineffectiveness because the mitigating testimony presented at the 3.850 hearing was "innocuous" (State Br. 44). The kind of evidence that the State calls "innocuous" the United States Supreme Court calls "essential" (Deft Br. 50 n.47). Particularly in a case where defense counsel saw fit to tell the jury that there was no "particular thing" about his client that warranted leniency, counsel's failure to let the jury know in any way that defendant had a very good side[11] constituted prejudicially ineffective representation.[12]

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11 Although the State notes that the trial court found in mitigation that defendant had no significant history of criminal activities (State Br. 44), it fails to note that the jury was not made aware of this critical fact.

12 The State purports to distinguish Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). However, defendant cited this case as support for his contention that Simpson's ineffectiveness caused him prejudice (Deft. Br. 49 n.45, 50 n.46). The State's purported distinction (State Br. 42) does not discuss the

(footnote continued)

CONCLUSION

For all the foregoing reasons, and those set forth in the Brief of Appellant, 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: July 13, 1987

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prejudice issue at all. The cases principally relied upon the State are distinguishable. In Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985), counsel's decision not to present character witnesses was upheld based on the facts that counsel discussed the matter in depth with defendant, defendant told him to "leave his family out of it," and counsel conducted at least a partial investigation. In Griffin v. Wainwright, 760 F.2d 1505, 1514 (11th Cir. 1985), vacated, ___ U.S. ___, 106 S. Ct. 1964, 90 L.Ed. 2d 650 (1986), counsel's office did make an investigation. In Mulligan v. Kemp, 771 F.2d 1436, 1443-44 (11th Cir. 1985), the character witnesses whom counsel had planned to call were revealed as potential perjurers.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of the attached Reply Brief on the State of Florida by causing a copy to be sent by United States mail to the office of James A. Young, Esq., Assistant Attorney General, Park Trammell Building, Suite ~~907~~ 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 13th day of July, 1987.

MARVIN R. LANGE