IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA

EMANUEL AARON GISSENDANNER JR.,

Petitioner,

VS. **CASE NO. CC-01-350.60-Q**

STATE OF ALABAMA,

Respondent.

ORDER ON PETITION FOR RELIEF FROM CONVICTION OR SENTENCE

This cause, coming on to be heard, is submitted for an order on the pleadings and evidence submitted at an evidentiary hearing held August 10 through August 12, 2009. Petitioner, Emanuel Aaron Gissendanner Jr., Gissendanner hereinafter, is represented by Kirkland & Ellis LLP of Los Angeles, California, and the State is represented by the State of Alabama, Office of the Attorney General.

The undersigned Judge presided over Gissendanner's trial. The court finds the procedural history outlined in Gissendanner's "First Amended Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure" filed June 26, 2009, to be accurate and adopts it for purposes of this order. As stated in Gissendanner's "procedural history", the Alabama Court of Criminal Appeals affirmed Gissendanner's conviction and sentence of death on March 3, 2006. The State's Answer to Gissendanner's Petition has adopted by reference the statement of facts contained in the court's opinion. This court finds that statement of facts to accurately reflect

the facts upon which Gissendanner was convicted, sentenced to death, and upon which the Alabama Court of Criminal appeals affirmed both the conviction and sentence.

As provided in Rule 32.3, *Alabama Rules of Criminal Procedure*, Gissendanner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle him to relief. The State has the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, Gissendanner has the burden of disproving its existence by a preponderance of the evidence. This court recognizes the burden of proof provided in the Rule and has applied it as the standard for its decision. No ground of preclusion has been pled by the State.

There are general principles of law quoted hereinafter applicable to a determination of ineffective assistance of counsel (IAC). The court finds these principles to be current and has applied them to the facts to reach its conclusions.

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from

a breakdown in the adversary process that renders the result unreliable." Strickland v. Washington, *466* U.S. 668, 687 (1984).

". . . , [T]he proper standard for attorney performance is that of reasonably effective assistance." Id.

"Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the Defendant, and hence counsel owes the client a duty of loyalty, ... From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id., at 688.

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id.

"No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id., at 688-689.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct

from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption the counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id., at 689.

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. ... "... , [T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id., at 690

" . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed in all the circumstances, applying a heavy measure of deference to counsel's judgment." Id., at 690-691.

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the

judgment. . . . [T]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." Id., at 691-692.

"The defendant must show that there is a **reasonable probability** that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A **reasonable probability** is a probability sufficient to **undermine confidence in the outcome**." Id., at 694. (emphasis added).

" . . ., [A] court hearing an ineffectiveness claim must consider the **totality of the evidence** before the Judge or jury. Some of the factual findings would have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, offering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudiced inquiry must ask if the Defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." Id., at 695-696. (emphasis added).

Having duly considered all of the above the court makes the following finding of facts and law and enters the following judgment. Because the court has found many of the facts and much of the law cited by Gissendanner in his briefs to be true, accurate and applicable, a large part of this order is taken directly from those briefs either verbatim or paraphrased.

I. Defense Counsel's Performance Was Deficient.

Honorable Bill Kominos, Kominos hereinafter, and Honorable Joseph J. Gallo, Gallo hereinafter, or collectively, defense counsel or trial counsel hereinafter, represented Gissendanner at trial. Kominos documented at most nine hours spent with Gissendanner in the more than 2 years between the time he turned himself over to the police for questioning pertaining to the victim's car and the time of his capital murder trial. See Hr'g Ex.3(Kominos timesheets) at 003-577-580 (showing 5 total meetings on 6/26/01 (2.5 hours), 6/27/01 (1.5 hours), 7/3/01 (1 hour), 1/8/03(1 hour) and 7/31/03(3 hours). No time at all was documented with Gissendanner after the first week of his custody for more than 18 months, until January 2003.

At the Rule 32 hearing, Kominos verified that these time sheets accurately reflected his time spent with Gissendanner to work on his defense. See Hr'g Tr. 38.18 ("By signing it, I'm committed to that"); id. At 38:19-21("Q: And it's an accurate description of the services that you rendered? A: Yes."); id. at 79:15-21 (verifying that the only thing the Court can look at to determine how much time he spent is the sworn timesheet). While Kominos

testified that he would sometimes visit with Gissendanner if they were at the Dale County Jail to see another client, Kominos stated that during those visits, he did not have Gissendanner's files with him. See Hr'g Tr. At 78:19-79:2.

Gallo, responsible primarily for the mitigation phase, similarly documented at most 7.7 hours spent with Gissendanner in 4 meetings over the more than 2 years before trial. Hr'g Ex. 45 (Gallo timesheets) at 003-566-567 (showing 4 total meetings on 6/26/01 (2.3 hours), 7/3/01 (1 hour), 7/24/01 (2 hours, only some spent with client); and 1/15/03 (2.4 hours, only some spent with client). No time at all was documented with Gissendanner after the first month of his custody for more than 17 months, until January 2003. Mr. Gallo also verified at the Rule 32 hearing that his timesheets represent the only way to know how much time he spent putting together Gissendanner's defense. Hr'g Tr. At 91:6-94:11.

At most 3 hours was spent by defense counsel interviewing two potential witnesses for the defense, and no such interview took place until more than 18 months after Gissendanner's arrest for murder (see Hr'g Ex.3 (Kominos timesheets) at 003-579-580 (two conferences with A. Sitz on 1/10/03 (1 hour) and 4/16/03 (1 hour); conference with Gissendanner's father on 6/12/03 (1 hour)). No time was spent interviewing the witnesses that the State had disclosed would be testifying for the prosecution. See id. Furthermore, while trial counsel sought – 15 months after Gissendanner's arrest – funds for the use of an investigator for 30 hours (see Hr'g Ex. 4(9/30/02 Motion for Funds)), and while that request was promptly granted (Hr'g Ex.5(10/7/02 Order)), that investigator eventually spoke with only two potential witnesses – Pete Cole and

Albert Sitz – and used at most 4.75 hours in actually speaking with those potential witnesses. See Hr'g Ex.6 (Investigator timesheets) at 003-568 (showing in-county interview with Pete Cole (a portion of the 2.25 hours billed that day) and interview with Albert Sitz (a portion of the 2.5 hours billed that day).

Thus, outside of a limited meeting with Gissendanner's father, trial counsel did not speak with any of the factual witnesses who provided testimony at the Rule 32 hearing, even though each was available and even though two of them were disclosed as State witnesses before the trial commenced:

- Joshua "Anton" Gissendanner, Hr'g Tr. At 173:9-13, 176:6-19; 207:18-208:1 (no one from his brother's legal team attempted to contact him).

- Rebecca Gissendanner. Id. At 268:18-269:23 (her son's attorneys never contacted her to discuss the facts of the case.)

- Olympia Gissendanner. Id. At 492:6-493:1 (her brother's attorney never contacted her).

- Charles Brooks. Id. At 471:12-16 (would have been willing to share information if he had been contacted by trial counsel).

- State witness Kim Gissendanner. Id. At 498:11-15 (her ex-husband's attorney never contacted her prior to trial).

- State witness Pastor David Brown. Id. At 150:5-152:23; 164:5-23 (testimony regarding his three attempts to contact Kominos without being questioned about his factual knowledge).

These witnesses – including witnesses the State disclosed would be part of its case against Gissendanner – had

important evidence they were willing to share that trial counsel could easily have discovered to discredit the State's case and to support Gissendanner's defense.

While trial counsel knew that the State would be providing expert testimony in the fields of fingerprinting, handwriting analysis, pathology and DNA evidence, they did not confer with or retain any experts who would have helped prepare a defense to such testimony and who would have offered their own analysis as part of the defense's case in the guilt phase.

Alabama Courts have held that effective representation consistent with the Sixth Amendment involves the independent duty to investigate the circumstances of the crime. See State v. Terry, 601 So.2d at 164; see also Dill v. State, 484 So.2d 491,497 (Ala. Crim. App. 1985). In Terry, the Court found that where trial counsel failed to investigate possible witnesses identified by the defendant – even when trial counsel reasonably believed that the defendant was attempting to "fabricate witnesses to procure perjured testimony" – that failure amounted to ineffective assistance of counsel. Id. at 164. The Terry Court held that even if counsel believed that defendant was providing witnesses who would lie on his behalf, the Constitution still required counsel to independently investigate those witnesses to determine "whether their testimony was fabricated or would be beneficial to [defendant's] defense." Id. Terry held that "[e]ffective representation consistent with the Sixth Amendment involves the independent duty to investigate and prepare." Id.

Similarly, in Dill, the Alabama Court of Criminal Appeals found that at a minimum "[e]ffective representation hinges on adequate investigation and pre-trial preparation

.....[A]s a general rule an attorney must investigate a case in order to provide minimally competent professional representation." Dill, 484 So.2d at 497. The Dill Court relied on the ABA Guideline's requirement that "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in event of conviction." Id. (quoting the AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 4.1("The Defense Function") (2d ed.1980) (internal quotations omitted)). In capital cases, the ABA guidelines establish that the fallibility of witnesses and evidence and the severity of the potential punishment "underscore[] the importance of defense counsel's duty to take seriously the possibility of the client's innocence, to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses." ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Commentary on Guideline 10.7(2003).

The duty to independently investigate the facts and circumstances of a case is based on the principle that without investigating plausible lines of defense, an attorney cannot make reasonable and informed strategic decisions going forward. Dill, 484 So.2d at 497 (citing House v. Balkcom, 725 F.2d 608, 617-18 (11th Cir. 1984)("Pretrial investigation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation. . . . In this regard, the Eleventh Circuit has enunciated the rule that effective representation,

consistent with the sixth amendment, also involves 'the independent duty to investigate and prepare.'")).

"[C]ounsel has a duty to make reasonable investigations or to *make a reasonable decision that makes particular investigations unnecessary*." Rogers v. Zant, 13 F. 3d 384,386 (11th Cir. 1994) (citing Strickland v. Washington, 466 U.S. 668, 690-61 (1984) (emphasis in original)). Here, defense counsel neglected their investigative duties and failed to interview potential witnesses, family members, or State's witnesses. There was no reasonable decision that made their investigation unnecessary.

Consistent with the Sixth Amendment's requirement that counsel conduct an independent investigation of the case, trial counsel has a fundamental "duty to interview potential witnesses." Rummel v. Estelle, 590 F. 2d 103,104 (5th Cir. 1979) (quoting Von Moltke v. Gillies, 332 U. S. 708,721(1948)). "An attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. State, 596 F. 2d 1214, 1217 (5th Cir.1979) (vacated on other grounds by Ala. V. Davis, 446 U.S. 903 (1980)). The failure to investigate witnesses – including eyewitnesses and alibi witnesses – has been held to be unconstitutional, and to constitute IAC. See id.; see also Futch v. Dugger, 874 F. 2d 1483,1486-1487 (11th Cir.1989) (failure to investigate possible eyewitness held to be IAC).

Furthermore, trial counsel has a duty to investigate a defendant's acquaintances, especially when an alibi defense is being raised. See Bryant v. Scott, 28 F. 3d 1411, 1415 (5th Cir.1994). And, the ABA Guidelines also require trial counsel to interview "neighbors, friends and acquaintances

who knew the client or his family." ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Commentary on Guideline 10.7.

Here, family members, friends and acquaintances were never interviewed by defense counsel. In multiple contexts, courts have found IAC where counsel failed to investigate or interview the identified acquaintances of a defendant, where such investigation would have led to the discovery of important evidence. See Code v. Montgomery, 799 F. 2d 1481,1483 (failure to adequately interview defendant's mother or defendant's girlfriend); Baxter v. Thomas 45 F.3d 1501, 1513 (11th Cir. 1995) (failure to interview defendant's sister, neighbor, and social worker).

Applying the above cited law to the finding of facts this court concludes that defense counsel's performance was deficient.

II. Defense Counsel's Deficient Performance Prejudiced the Defense.

Beginning with the opening statement, the State argued that Gissendanner lived in the abandoned trailer in Johntown where victim's possessions were found. See, e.g., Trial Tr. at 824:10-22 ("They [victim's possessions]were found with his clothes, some of his personal effects"). The State's witnesses testified about the victim's items and Gissendanner's clothing being collected together. Id. at 1183:22-1184:18. And the State argued in closing that Gissendanner's possessions were found along with the victim's in the abandoned trailer. Id. at 1519:8-14, 1525:10-14. The defense did not challenge and discredit this allegation, which connected Gissendanner with items

that had likely been with victim at the time of her murder, such as her purse and its contents.

Had defense counsel spoken with Gissendanner's family and neighbors and reviewed documents available to them, they would have been able to offer evidence tending to create a reasonable doubt in the state's theory that Gissendanner stayed in the trailer. For example, Gissendanner's brother would have been able to offer testimony that Gissendanner did not reside in the trailer. See Hr'g Tr. At 197:30-199:3 (testimony that Gissendanner was staying at his girlfriend's trailer at the time of victim's death; see Hr'g Ex. 33A (showing that girlfriend's trailer on map of Johntown).

Failing to interview family members, including a defendant's mother, father, and brother, despite knowing that they may have been witnesses to the crime or could have provided testimony in support of an alibi defense, has been held by the Eleventh Circuit to be IAC. See Code, 799 F. 2d at 1483. In Code, trial counsel only bothered to telephone one witness identified by defendant, despite knowing that an alibi was the only possible defense. Id. at 1483. The one witness telephoned was defendant's mother, but trial counsel failed to ask her if she could provide an alibi for defendant, if she knew of the defendant's whereabouts at the time of the crime, or if she knew of other witnesses who could provide an alibi. Id. "Under these circumstances we conclude that a competent attorney relying on an alibi defense would have asked Code's mother if she could corroborate the alibi, would have subpoenaed a reluctant witness whom he thought could provide an alibi and would have asked either the witness or

the defendant if there were other alibi witnesses." Id. at 1483-84.

The ABA Guidelines applicable to capital murder cases establish that prevailing professional norms require defense counsel to interview a defendant's family. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Commentary on Guideline 10.7 ("[b]arring exceptional circumstances, counsel should seek out and interview potential witnesses, including . . . members of the client's immediate and extended family.").

Morever, photos of the abandoned trailer and reports of the forensics testing on evidence collected from the abandoned trailer would have further undermined any assertion that Gissendanner was living there. For example, a sheet and some clothing (grey shirt and khaki pants) were found in the abandoned trailer's closet along with the white bucket containing the victim's purse and papers from the car's glove box. Those items of clothing and the sheet were never tied to Gissendanner at trial and no forensic evidence matched him to these items that were found simultaneously with the victim's possessions. See Hrg's Ex.26 (photograph of white bucket and unidentified clothing found in trailer closet); Hr'g Ex. 83 at 004-1390 (log of contents of trailer listing as first items the pants, shirt, and bed sheet found in the rear bedroom closet along with the white bucket containing the victim's possessions); Hr'g Tr. (L.Stewart) at 366:2-9 (shirt and pants never identified at trial). Clothing and a bedsheet in the trailer belonging to another person discredits the argument that Gissendanner was living in the trailer, particularly when nothing belonging to Gissendanner was found at the trailer when the police first searched it.

Significantly, identifiable latent fingerprints were lifted at the trailer site and on items contained in the white bucket, and none of those fingerprints matched Gissendanner. See Hr'g Ex. 66 (fingerprint report) and Hr'g Ex. 67 ("corrected" fingerprint report); see also Hr'g Tr. (L. Stewart) at 342:9-13 ("Q: And no other fingerprints, not from the carport, not from the evidence, not from the trailer. No other fingerprints lifted in this case tied to Gissendanner? A: That's correct."); see *id*. at 348:9-350:24 (no items fingerprinted from abandoned trailer linked to Gissendanner's prints).

Defense counsel did not investigate these facts of the case, which they could have done with or without expert assistance, and thus were unprepared and unable to present to the jury the testimony and forensic evidence that Gissendanner was not staying at the abandoned trailer. The presentation of such evidence would have tended to create a reasonable doubt in the State's theory that Gissendanner stayed in the trailer.

The theft of the victim's Oldsmobile car was a possible motive for Gissendanner to murder the victim. The fact that her car was stolen was proven without dispute. It was also undisputed that Gissendanner had previously been to the victim's house with Pastor David Brown to perform yard care. However, had defense counsel interviewed Pastor David Brown, they would have been able to undermine this theory through evidence that Gissendanner could not have seen the Oldsmobile at the house, as it was always locked in the garage underneath the home in the garage basement. See Hr'g Tr. (D.Brown) at 155:3-156:7 (Oldsmobile always locked under house in garage); see id. at 159:13-16; 159:24-160:6:

Q Okay. Now, how many times had Emanuel,Jr. been to Ms. Snellgrove's house with you to do yard work?

A Just once, about 2 1/2 hours.

. . . . . .

Q And when you were over there, was the garage door shut?

A Yes. He couldn't see that car. I couldn't see that car. We didn't see that car but this car here [the blue Escort in the carport]. And –

Q Did you ever go into the garage while you were there?

A No, huh-uh, no,no,no.

Pastor Brown was available to speak with defense counsel (see Id. at 165:20-24), and had in fact attempted several times to speak with Kominos, but trial counsel failed to ask him about his factual knowledge of the events even though he was on the list to be a State witness. Id. at 150:5-152:20. Had they spoken with Pastor Brown, defense counsel could have discredited the State's theory that Gissendanner had seen the victim's car while working at her house and returned to steal the car. This evidence would have tended to create reasonable doubt in the State's theory of a motive to commit the murder.

In order to try to establish a timeline and means for the crime that could implicate Gissendanner, the State attempted to prove that Gissendanner arrived early Friday morning at the victim's home, found her outside on the carport, and beat her severely around the head and the neck in the carport and then removed her Oldsmobile from the garage. See Trial Tr. at 825:9-11 ("this man killed Ms. Snellgrove for her car and her money and her body that he

abducted."). There was no evidence of anyone breaking into or being present in the victim's home (see Hr'g Ex. 34 (Preliminary Hearing) at 52:11-16), and the State introduced evidence of a scheduled 8:00 a.m. breakfast at Ann's Restaurant tending to prove the victim would have been in her carport and preparing to drive her car. See Trial Tr. at 887:6-15.

Because defense counsel failed to investigate, they failed to discover and call at trial alibi witnesses to support their strategy of an alibi defense. Witnesses who would have easily been discovered could have testified that they saw Gissendanner in Johntown on Friday morning during a period of time in which the crime was shown by the State's evidence to have been committed. There was also evidence that could and should have been discovered through a basic investigation that would have demonstrated to the jury the lack of any physical evidence tying Gissendanner to the crime scene.

Members of Gissendanner's family were available to testify and would have been able to inform the jury that they saw Gissendanner in Johntown that Friday morning. See Hr'g Tr. (E. Gissendanner Sr.) at 219:6-220:18 (saw Gissendanner at his Johntown house when he woke up at 7:10 a.m.); see also Hr'g Tr. (J. Gissendanner)at 184:18-187:15 (saw Gissendanner at parents' house well before 8:00 a.m., and saw him again after 8:15 a.m., still at the house). Such testimony, in particular that coming from Gissendanner's father – who even the prosecutor described at trial to the jury as a well-respected man (Trial Tr. at 1412:7-8,1413:12-13) – was easily available to defense counsel had they spoken with these family members, and such evidence would have tended to create a reasonable doubt at

trial that Gissendanner was at the victim's home on that Friday morning.

Moreover, Gissendanner's father and brother, as well as Charles Brooks (another Johntown resident) saw Buster Carr and not Gissendanner driving the victim's Oldsmobile into Johntown on the morning of June 22, 2001, which further supports Gissendanner's alibi defense. See Hr'g Tr.(E. Gissendanner Sr.) at 218:26-229:21 (testimony re seeing Buster Carr in a white car in Johntown at 7:10 a.m. on Friday, June 22, 2001); Hr'g Tr. (J. Gissendanner) at 176:20-195:21 (testimony re seeing Buster Carr several times in Johntown in the white car); Hr'g Tr. (C. Brooks) at 468:3-469-11 (testimony re seeing Buster Carr in white sedan on Friday morning around 7:00 a.m.).

Where trial counsel plans to pursue an alibi defense, it is incumbent upon counsel to effectuate an adequate investigation, including interviewing possible alibi witnesses or individuals who could lead to alibi witnesses. See Code, 799 F.2d at 1483-1484. The ABA Guidelines also require defense counsel to seek out and interview potential alibi witnesses. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Commentary on Guideline 10.7 ("Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including but not limited to: . . . (2) potential alibi witness.").

Had defense counsel reviewed documents available to them and/or consulted with a crime scene forensics expert about those documents, they would have been able to further cast doubt on the state's theory by explaining to the jury that none of the considerable amount of physical evidence collected at the victim's home had been linked by the State

to Gissendanner. No fingerprints collected from the carport, the garage door, or the padlock on that door linked to Gissendanner. See Hr'g Tr.(L. Stewart)at 334:4-335:9; 353:8-354:16-20 (of the dozens of identifiable latent prints submitted to fingerprint testing from the carport and for all the other identifiable latent prints lifted off items submitted for fingerprint testing, not one latent print belonged to Gissendanner) see id. at 336:19-337:1 (of all the fingerprints submitted for testing, only the inked patent print on the back of the check Gissendanner admitted to cashing was originally found to be one of his fingerprints); id. at 341:17-342:13. See also Hr'g Ex. 66 (original fingerprint report, with no latent prints in the case matched to Gissendanner) and Hr'g Ex. 67 (inexplicably "corrected" fingerprint report, identifying only one latent print – from the car he admitted driving – as a match to Gissendanner). See Hr'g Tr. at 341:4-16. See also 345:9-346:2:

> Q . . . . [H]ow many latent lifts of value were there that were analyzed?
>
> A I calculate 24 finger or palm prints that were lifted and developed of value, and none of them were identified as matching Gissendanner.
>
> Q So of every latent of value, just to be clear since we're coming back from the break, every latent print of value that was collected at the crime scene in this case and turned over, the only latent print that matched was the print inside the car he was driving?
>
> A Not only the crime scene but also the evidential items that were sent to the laboratory where prints were developed. In all of those cases there were none of them that had fingerprints or palm prints that were identified to Gissendanner other than the two that we spoke about.

Crime scene forensics expert Larry Stewart, long time head of the U.S. Secret Service Forensics Laboratory, testified that the inexplicably altered fingerprint report was very troubling (see Hr'g Tr. (L. Stewart) at 338:5-340:11), as such an unexplained alteration reflects a deviation from standard procedures. Id. at 343:23-344:15 (as lab supervisor, he would have disciplined any technician who issued such an unexplained, altered report). Moreover, the item from the car on which an altered fingerprint finding was made was one for which no chain of custody existed. Id. at 340:12-341:3. Defense counsel could have used this testimony in a motion to exclude the "corrected" report. Had the defense investigated the case through review of documents and/or retention of a forensics expert, they could have educated the jury about the lack of any fingerprints from the crime scene tying to Gissendanner (such as the latent fingerprints from the garage door and the padlock (see Hr'g Tr. (L. Stewart) at 353:8-354:20, 354:6-20)), and this would have tended to create a reasonable doubt that Gissendanner was at the victim's home that Friday morning and took the Oldsmobile from her garage.

Moreover, none of the trace evidence collected at the carport scene was ever tied to Gissendanner, even though many types of evidence were collected. See Hr'g Ex. 79 (police notes on evidence collected at carport crime scene), Hr'g Ex. 83 (list of trace evidence collected at carport crime scene). Indeed, no trace evidence in this capital murder case was tested by the state to show a link to Gissendanner. See Hr'g Ex. 85 (letter from crime lab saying it had been instructed not to test trace evidence);

see also Hr'g Tr. (L. Stewart) at 363:22-364:19. For example, hair and fibers collected at the carport were not tested or otherwise shown to connect to Gissendanner (see Hr'g Tr.(L. Stewart)at 374:10-21), and vacuum bags containing the trace evidence from the carport ground were not tested or otherwise shown to connect to Gissendanner (id. at 374:22-375:9). Thus, no trace evidence at the crime scene tied to Gissendanner – a fact that trial counsel could have shared with the jury had they reviewed documents and/or retained a forensics expert. Such an expert could have testified that in a murder investigation, standard procedure is to run tests on trace evidence that has been collected. See Hr'g Tr. (L. Stewart) at 386:21-25 ("Q: [I]n your years as a forensic expert have you seen or been part of any murder investigation which trace evidence was not examined? A: No."). Had these facts proving that none of the evidence collected at the carport was linked to Gissendanner been presented to the jury, it would have tended to create a reasonable doubt as to his presence there at the time the crime was committed and as to his guilt of the offense.

Had defense counsel investigated the autopsy report and consulted with a pathologist, they could have offered evidence that there was no discernable cause of death. See Hr'g Tr. (M. Peitruska) at 123:12-124:3:

> Q You've reviewed the report, correct?
>
> A Yes, I have.
>
> Q And the report states that the cause of death is a severe head and neck injury, correct?
>
> A Correct.

> Q In your expert opinion and having reviewed the report, what in the report would support the State's determination that the cause of death was a severe head and neck injury?
>
> A There's absolutely no data in this report that suggests that there's a severe head and neck injury. The only head and neck injuries that they could possibly identify are the slippage of the skin. The putrefaction and decomposition of the soft tissues and factures of the neck that were postmortem. They were not ante mortem.

The expert pathologist at the evidentiary hearing explained that while decomposition does occur first in the area of the body where there is an opening, and thus maggot infestation around the head and neck could reflect a laceration in the skin at some point (id. at 124:16-22), this was a body that had undergone serious postmortem injuries, including a broken neck and broken ribs. Id. at 132:20-133:4. There was simply no evidence during the autopsy of any ante mortem lacerations or other trauma. Id. at 132:12-15; see also, generally, Hr'g Ex. 36 (autopsy report). The expert pathologist explained that the autopsy did not uncover blood in the brain, abrasions or factures on the skull, bruising or bleeding in the skin around the neck, a broken hyoid bone, or any indicators of blows to the head or neck sufficient to cause death. See Hr'g Tr. (M. Pietruska) at 124:23-131:22 (discussing Hr'g Ex. 36); id. at 132:8-11 ("There's no evidence of – there's no scientific evidence to suggest that there's trauma, ante mortem trauma, to either head or neck or other body parts."); id. at 134:6-9 ("I believe that just about any pathologist looking at this autopsy report would have to opine as I believe, that there's no evidence of trauma in this case."). Defense counsel could have used such

testimony in an attempt to prove that there was no evidence of how the victim came to die.

The State's evidence tended to prove that the victim's body was placed inside the Oldsmobile trunk, after which he drove toward Johntown at around 6:45 in the morning. See Trial Tr. at 819:21-24. One of the most important pieces of the State's case was the testimony of Shirley Hyatt that, while on her way to the Friday morning garage sales, she had seen an unidentified black man, near the victim's home, driving a white Oldsmobile with a dark top. See Trial Tr. at 892:2-893:8. This was the only evidence that put Gissendanner in the vicinity of the victim's home. Furthermore, it was the only evidence tending to show that the car was stolen by a black man rather than a white Buster Carr. The easily discoverable and very available testimony of Pastor Brown who, from this court's observation makes a very credible witness, would have been critical evidence tending to create a reasonable doubt of Gissendanner's guilt. This is particularly true when it is considered that Hyatt had never identified the driver to be Gissendanner. See Trial Tr. at 900:8-10 ("Q: Do you see this person here in the courtroom at all? A: I couldn't tell you."). Had defense counsel interviewed State's witness Pastor Brown during the times he tried to speak with them, they would have learned that Brown could have and would have testified that another black man had been seen in the victim's neighborhood driving the same type of Oldsmobile car. See Hr'g Tr. (D. Brown) at 167:6-168:7 (saw a black man driving by in a car "just like hers" two times when he was working at the victim's home).

As previously noted, had defense counsel interviewed Gissendanner's father and brother about the days in

question, they could have introduced credible alibi testimony at trial that Gissendanner was in Johntown at his parents' home in the morning of Friday, June 22, 2001. See Hr'g Tr. (E. Gissendanner Sr.)at 219:6-220:18 (saw Gissendanner at his Johnstown house when he woke up at 7:10 a.m.); see also Hr'g Tr. (J. Gissendanner) at 184:18-187:15 (saw Gissendanner at parents' house well before 8:00 a.m., and saw him again after 8:15 a.m., still at the house.). These times provide an alibi for Gissendanner during the time when witness Shirley Hyatt first told the police she had seen a black man driving a white and black car.

Had counsel reviewed Ms. Hyatt's June 28, 2001, police interview (which had been made available to them) as part of their basic investigation of the State's case, they would have known that in the days after the event, she claimed to have seen the unidentified black man driving "a white and black car" at around 7:25-7:30 a.m., a time during which Gissendanner's alibi witnesses firmly put him in Johntown. See Hr'g Ex. 14 (Hyatt Police Interview Transcript) id. at 1 ("I'd say the time I got up to James Street it was probably, I'd say twenty or twenty-five after seven, cause the yard sale started like at eight, and I usually go a little early."), id. at 2 ("That was probably around seven-thirty."). Also clear in the police interview was the fact that Ms. Hyatt, in the few days after her "sighting", could not describe any specific details about the appearance of the black male driver, such as his hair. See id. at 2 ("Q: Could you tell anything about his hair? A: No, I couldn't.").

When at the trial more than two years later Ms. Hyatt recollected seeing the car at a different time (between 6:30 a.m. and 6:45 a.m., see Trial Tr. at 892), had they

investigated the State's case, defense counsel then could have impeached her with her earlier statements to emphasize to the jury that she had originally claimed the time she saw the victim's car with a black driver was at around 7:25-7:30 a.m.. See also Hr'g Ex. 34 (Preliminary Hr'g Tr.) at 16:7-18:5 (police officer July 18, 2001, testimony to Court confirming that Ms. Hyatt claimed to have seen the unidentified large black man at 7:25-7:30 a.m.). Moreover, had defense investigated her original statements, they could have impeached her statements at trial that the driver had "kind of bushy hair" (Trial Tr. at 900:5), like Gissendanner's hair, as she clearly had no such information when she spoke with the police in June 2001. See Hr'g Ex. 14 at 2 (could not identify anything about driver's hair). This would have tended to create doubt in her testimony at trial.

Furthermore, from a basic investigation and interview of readily available witnesses defense counsel could have presented testimony that several persons in Johntown saw another person, Buster Carr, driving the victim's car in and around Johntown that morning, and such testimony from these witnesses would have further discredited Hyatt's testimony and tended to create reasonable doubt with the jury. These witnesses and their testimony is more specifically detailed below.

Defense counsel failed to investigate the documents provided to them and to consult with a forensics expert to find that the physical evidence did not support the State's theory that a fatally injured person with head and neck wounds had been transported in the trunk of the Oldsmobile. Photographs never shown to the jury, but in defense counsel's possession at the time of the trial, show the

interior of the Oldsmobile trunk as it was found; those photographs show a clean trunk with no visible blood on the carpeting covering the floor and walls of the trunk. See Hr'g Exs. 28, 29 and 43 (photographs of trunk interior). With severe head and neck injuries, as posited by the State, extensive bleeding should have occurred both at and immediately after death. See Hr'g Tr. (M. Pietruska) at 134:20-1135:21. But cuttings taken from the floor of the trunk showed no evidence of any trace of blood. See Hr'g Ex. 39 at 109-120 (no DNA detected in reddish-brown stains from trunk mat), Hr'g Tr. (L. Stewart) at 403:7-404:16. And no other trace evidence collected from the car trunk was tested. See Hr'g Ex. 85 (letter confirming that no trace evidence was to be tested), see also Hr'g Tr. (L. Stewart) at 406:9-407:2:

> Q With these DNA findings would you, in your expert opinion, expect that a body had been transported in the trunk of the Oldsmobile?
>
> A The trace evidence would have been very supportive of that had a body been transferred. You can find trace evidence in many ways. We've actually looked in a trunk in the past years after a crime has occurred to try to find trace evidence in support of a body being in a trunk. Even if you wrap a body and you do all kind of things to make it so that there's no transfer, many times there are transfers. So you'd be looking for things like hair or body fluid or something like that.
>
> Q And what was the result for the test on the trunk floor mat when it was sent for DNA testing?
>
> A It came back negative and the trace was never examined.

Had defense counsel used the documents and consulted with a forensics expert as part of a basic investigation into the

State's theory, they could have discredited the State's contention that the victim's body had been placed inside the Oldsmobile trunk. Since the State had no other theory about how the victim's body was transported to the pond, this would have tended to create a reasonable doubt of Gissendanner's guilt.

The State's theory of the case on which Gissendanner was convicted had him drive the victim to Gunter Pond, drag her body over a barbed wire fence to a ravine near the pond (see Hr'g Ex. 9 at 100-206), and then cover her body with branches he cut with a knife left in the car. See Trial Tr. at 1147:20-1175:14. The State offered testimony from a policeman that the knife in question had sap on it and "fresh cuts" that were made when Gissendanner hacked at the tree branches. See Trial Tr. at 1174:20-25, 1215:21-1217:3. Had defense counsel reviewed the documents and physical evidence, consulted with a forensics expert, or reviewed the testimony from the preliminary hearing, they would have discovered substantial evidence to discredit the State's theory that Gissendanner had driven the victim to Gunter Pond and covered her body with tree branches.

The trace evidence collected from the pond area was never connected to Gissendanner. See Hr'g Ex. 9 (pond diagram, at Bates No. 100-206) (listing hair found on barbed wire fence, soil samples, and footprint recovered along path body was taken to the ravine). The wallet that was found along that same path to the ravine was tested for fingerprints, and the identifiable prints found on that wallet did not link to Gissendanner. See Hr'g Tr. (L. Stewart) at 347:5-348:6 (wallet was dusted for prints, none of Gissendanner's prints were found). Moreover, tire tracks visible at the pond scene were never tested against the

tires of the Oldsmobile, and no soil sample comparisons were run. Id. at 378.21-380:11, see also Hr'g Exs. 16 (tire prints at pond) and 30 (photograph of Oldsmobile tire). Had defense counsel investigated the facts behind the State's theory, they could have pointed out to the jury that none of the pond scene evidence implicated Gissendanner. This would have tended to create a reasonable doubt of Gissendanner's guilt.

At trial, the State alleged that Gissendanner had used the knife found in the Oldsmobile to cut all the branches covering the victim's body at the pond. See Trial Tr. at 1175:1-14. The non-forensics-expert police officer on the stand told the jury that he could identify "fresh scrapes" and sap on the blade that would have come from cutting at the branches. Id. at 1215:8-11. The State then offered one small branch into evidence that had originated from a tree at the ravine, and the police officer told the jury that it was apparent where the knife had hacked the branch before it was broken into two pieces. Id. at 12:15:21-1217:3. Had trial counsel consulted with a forensics expert, they could have discredited this evidence about the knife being the instrument which cut any of the branches. A forensics expert or another with expertise in metals could have presented evidence that wood cannot make cuts into a metal knife blade. See Hr'g Tr. (L. Stewart) at 391:12-393:4. See also id. at 391:18-24:

> Let me first define what a fresh cut means. To put a mark on something like the blade of a knife, you have to have a material that's harder than that knife. So in the case of a stainless steel or a metal, it has to be something harder than that that's going to cause a tear or a cut or a break in the knife.

No lab testing was done that showed any sap on the knife or, if there was, that the sap was consistent with the branch admitted at trial. See Hr'g Ex.92 (photograph of tree branch showing sap oozing from it); see also Hr'g Tr. (L. Stewart) at 396:6-398:3 (no testing done on knife and wood from branch, police officer's trial testimony that knife cut the sole branch in evidence had no basis in fact). Had trial counsel conferred with anyone or reviewed the physical evidence the State planned to use at trial, they could have been prepared to show the jury that no credible evidence connected the knife that Gissendanner admitted to possessing to the scene where the body was found. Moreover, the officer that testified at trial that the knife had hacked the branches covering the body testified at the preliminary hearing in July of 2001 that several trees had actually been sawed in half to cover the body. See Hr'g Ex. 34 at 22:24-23:4:

> A There were several trees, small pine trees cut down and appeared to be sawed half in two and then broke and placed over her body.
>
> Q How was the body actually found?
>
> A The body was in a ravine on her back. She was covered with several trees.

This testimony was readily available for defense counsel to use in cross-examination of the officer for impeachment purposes, however, defense counsel failed to do so. This prior inconsistent statement would have tended to create doubt in the officer’s testimony.

As a result of defense counsel's failure to investigate and failure to prepare, the obvious

importance of introducing several photographs of the many large branches and trees that covered the victim's body was not recognized and they were not introduced into evidence. See Hr'g Exs. 19, 20, 21, 22, 23, and 24 (photographs of trees and limbs covering body in ravine). In fact, several large sections of trees were found on top of the victim's body (see e.g., Hr'g Exs. 21 and 22). This evidence would also tend to discredit the State's theory that Gissendanner harvested these branches and limbs with the knife that was found. This evidence was made especially important because of defense counsel's second chosen defense that Buster Carr was an alternative suspect. In addition to other evidence linking Carr to the crime there was available evidence to show that Carr was a professional tree trimmer.

The State charged Gissendanner with felony forgery (for which he received a life sentence) and alleged that Gissendanner made out to himself one of the victim's checks that he then cashed on Saturday morning, June 23, 2001. See Trial Tr. at 823:5-824:3, 1493:13-16. The State retained a handwriting expert who authorized a report and appeared at trial to testify against Gissendanner. See Hr'g Ex. 97 and Trial Tr. at 1309:19-1331:16. While defense counsel knew that the State would be putting the bank cashier and a handwriting expert on the stand, they did nothing to investigate the forgery allegations. Had they investigated the facts and consulted with an expert, defense counsel could have presented evidence which would have discredited the State's evidence in this area and would have tended to create a reasonable doubt of Gissendanner's guilt.

A bank teller who was a State's witness testified that Gissendanner had been to the bank previously to cash checks from the victim. See Trial Tr. at 1152:10-21. Defense counsel failed to interview the bank teller. Had defense counsel interviewed the bank teller and done a basic investigation into the victim's checking account, they would have found proof that, in fact, no other checks had ever been made out from the victim to Gissendanner. See Hr'g Ex. 31 (Wachovia Bank declaration that it searched the victim's checks from 1998 to 2001, and found no checks made out to Gissendanner other than the check in question in this case). Defense counsel made no such request to the victim's bank. See Hr'g Tr. (B. Kominos) at 66:2-17. The bank teller's testimony, which was left uncontradicted and was clearly erroneous, tended to create a fictitious prior relationship between Gissendanner and the victim, tending to eliminate reasonable doubt of Gissendanner's guilt. See Trial Tr. at 1152:15-25. Had defense counsel interviewed the bank teller and subpoenaed the bank records to challenge the State's evidence it would clearly have diminished its credibility and impact and would have tended to create reasonable doubt of Gissendanner's guilt.

Knowing that the State would put a handwriting expert on the stand, defense counsel failed to interview the expert and did not retain its own handwriting expert to rebut the State's allegations that Gissendanner altered the entries on the front of the check. Knowing that the State would put an expert before the jury to say that Gissendanner forged the front entries on the check, in a case in which the sole evidence of the forgery count was the check itself, defense counsel failed to consult

with or retain anyone who could refute the State expert's arguments (see Hr'g Tr. (B. Kominos) at 54:20-55:2).

At the Rule 32 hearing, defense counsel attempted to explain away the failure to consult a handwriting expert by admitting that he believed handwriting analysis to be a "sham". See Hr'g Tr. (B. Kominos) at 69:2-25. Defense counsel felt the jury "should make a determination as to whether the handwriting was Gissendanner's and not listen to what some so-called expert regarding handwriting has to say". Id. Furthermore, defense counsel failed to interview a readily available witness, Gissendanner's ex-wife, Kim Gissendanner, who was familiar with her ex-husband's handwriting and would have testified that the writing on the check did not resemble Gissendanner's. See Hr'g Tr. at 510:23-511:9.

Had defense counsel retained a handwriting expert, they could have presented the jury with evidence tending to create a reasonable doubt that Gissendanner was the person who forged the check. At trial, the State's expert testified that it was 70-75% likely and 90% likely that Gissendanner wrote sections of the check in question. See Trial Tr. at 1326:14-16; id. at 1323:23-1324:3. However, the document analysis expert at the habeas hearing explained that the State's expert was wrong to make such findings based on the limited handwriting on the check. In fact, the Rule 32 handwriting expert opined that the handwriting on the front of the check was probably not Gissendanner's, and that there simply was not enough evidence to make it likely that Gissendanner had forged the front of the check that he endorsed and cashed.

From the testimony of the handwriting expert at the Rule 32 evidentiary hearing, the court finds that a

defense handwriting expert at trial would have been able to offer testimony tending to discredit the testimony of the State's expert. For example, even saying that the victim did not write her own signature on the front of the check is too strong a statement when based on only four sample signatures by the victim. See Hr'g Tr. (L. Stewart) at 424:3-16. In a similar vein, the State expert's overreaching opinions based on too little evidence placed far too high a likelihood on Gissendanner being the author of the front of that check. The State's expert discounted Buster Carr or his wife Peggy Carr as being authors of the check (see Hr'g Ex. 97), and showed the jury a few small portions of samples authored by Gissendanner to claim that there were similarities only between Gissendanner's samples and the forged check. See Trial Tr. at 1313:7-13, 1329:25-1330:8. However, the expert at the habeas hearing pointed out that Buster Carr's writing showed similarities with that on the forged check. See Hr'g Tr.(L. Stewart) at 424:17-425:12:

> Q Okay. So let's go to [State expert opinion] Number 2. Number 2 was an opinion that he had that the Q1 maker's signature was not written by the author of the Jimmy Lee Carr or the Peggy Carr handwriting standards. Did you have an opinion related to that point?
>
> A Yes, I did.
>
> Q And what is your opinion about that finding?
>
> A Again, although I agree with him that there is a likelihood that Peggy Carr did not write any material on the check, I disagree with them on the possibility of Jimmy Lee Carr or Buster Carr having written portions of the check. He noted many reasons for that conclusion. And I went through and looked at the same evidence, and I was able to show

> indications that were opposite of what he said. So examples, when he said that only Emanuel Gissendanner would write a letter a particular way, I found examples where Jimmy Lee Carr wrote the letter the same way.

See also Hr'g Ex. 102 (L. Stewart) demonstratives. For example, Buster Carr's handwriting demonstrated a vertical, elongated "C" such as that in the "Concrete work" portion of the check (see id. at 6; see also Hr'g Tr. (L. Stewart) at 426:3-16). And samples from Buster Carr show a "k" with characteristics of that on the forged check. See Hr'g Ex. 102 at 7-8; see also Hr'g Tr. (L. Stewart)at 426:20-427:9. Further, Buster Carr was the only author of the check samples whose "dollars" went off the baseline and whose slash between 39/100 resembled that on the forged check. See hr'g Ex. 102 at 9-10; see also Hr'g Tr. (L. Stewart)at 427:13-428:5. Moreover, there were consistencies between how Buster Carr wrote his numbers and those that appeared on the forged check. See Hr'g Ex. 102 at 11,13; see also Hr'g Tr. (L. Stewart) at 431:5-17. Obviously, the testimony of similarities between Buster Carr's handwriting and that on the check would have supported Gissendanner's defense of Carr being an alternative suspect for the commission of this crime.

The habeas handwriting expert would have been able to inform the jury of other problems with the State's proposition that Gissendanner was 70%-90% likely to be the author of parts of the front of the check. See Hr'g Tr. (L. Stewart) at 434:20-437:4 (explaining why the high likelihoods attributed to Gissendanner were incorrect and problematic). A central problem was that the State's expert opined that up to three different persons wrote parts of the front of the check (see Trial Tr. at

1317:14-16), but then went ahead and considered the portions of the check together as a whole. Such a contradictory approach could have been challenged by a defense expert tending to discredit the State's contention that Gissendanner was the author of the forged check front. See Hr'g Tr. (L. Stewart) at 432:1-19:

> A . . . It was considered as a whole. In other words, he – he had contradictory information. At one point he said that he was looking at the items as individual items. But then he would use all the items together to reach a conclusion. So you can't have it both ways. Once you originally look at a questioned document like you have in this case with a bank check, and you make the determination that you have the possibility of multiple writers, then you have to segregate those writings and consider them separately. And that done, you have very very limited writing here. You have – you have one or two words or a few numbers that are then comparable to another document. That makes the actions necessary to reach an elimination or an identification extremely difficult and in many cases impossible.

Moreover, the fact that the State expert ignored discrepancies that he himself had noted between Gissendanner's handwriting and the check in question is also something that a defense expert could have emphasized. See Hr'g Tr. (L. Stewart) at 438:5-24; see also Hr'g Ex. 102 at 14-15 (discrepancies). A defense expert also could have highlighted for the jury the fact that the State expert had no opinion about who could have written portions of the front of the check, such as the dollar amount of $927.39. See Hr'g Tr. (L. Stewart) at 439:12-16.

Thus, had defense counsel investigated the State's theory of Gissendanner forging the check, and consulted with and/or retained a document analysis expert who could have pointed out the problems with the State expert's report, it would have tended to create a reasonable doubt of Gissendanner's guilt of forgery. Moreover, Gissendanner's account of events – that he did not forge the check – would have been bolstered, which would have made more believable his testimony related to the capital murder charges.

In the previous pages, and in some to follow, the court has noted several experts who could have been, but, were not, called to testify on the Defendant's behalf. Case law and ABA Guidelines establish the duty to consult with and/or offer defense experts when the State will offer its own experts. Trial counsel not only has a duty to interview State's witnesses, including experts the State plans to offer, but also is required to consult with competent experts to see whether expert testimony at trial could counteract the State's experts. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES Commentary on Guideline 4.1 ("investigating a homicide is uniquely complex and often involves evidence of many different types. Analyzing and interpreting such evidence is impossible without consulting experts - whether pathologists, serologists, micro analysts, DNA analysts, ballistics specialists, translators, or others.").

The Alabama Supreme Court recently held that defense counsel's failure to offer a competent expert on a pivotal issue to counteract a State's expert

would be IAC. See Ex parte Hinton, No. 1051390, 2008 WL 4603723, at *4(Ala. October 17, 2008)(in a case where the only evidence of guilt was presented by the State's ballistics expert, remanding to the trial court for a determination of the competency of the defense's expert ballistics witness). Similarly, in Conwell v. Woodford, the Ninth Circuit determined that IAC had occurred when trial counsel neither called a forensic pathologist to testify at trial, nor consulted with a pathologist to determine whether the State's theory of the victim's cause of death was sound. 312 Fed. Appx. 58, 59-60(9th Cir. 2009). The Conwell Court further held that the decision to rely solely on cross-examination of the prosecution's expert forensic pathologist was not a reasonable strategic choice because it was not based on a thorough investigation of the available options. Id. See also Miller v. Anderson, 255 F.3d 455,459 (7th Cir.2001)(finding IAC where a central issue was whether the defendant had been at the scene of the crime and where defense counsel failed to retain any experts, noting that "[a] DNA expert and a tread mark and footprint expert would have [] testified [that the defendant had not been at the scene]"); Steidl v. Walls, 267 F. Supp. 2d 919,936 n.5 (C.D. Ill.2003)(finding IAC where defense counsel did not consult experts to investigate whether the knife claimed by the prosecution to be the murder weapon was consistent with the victim's wounds); Couch v. Booker, Civ. No. 2:06:15119,2009 WL 2835740, at *11(E.D. Mich. Sept 3, 2009)(failure by trial counsel to provide materials and reports to and consult with appointed

expert pathologist to rebut a medical examiner's findings as to the cause of death in a homicide case was held to be IAC).

A reasonably basic investigation would have undercut the State's proposition that Gissendanner's clothing found at the abandoned trailer, with victim's blood found on one sock, proves his guilt. This evidence was very condemning because the natural inference to be drawn from this evidence was that Gissendanner had physical contact with the victim. Other than a fingerprint in the car Gissendanner admitted to driving and another inked fingerprint Gissendanner admitted to placing at the teller's request on the check that he cashed, the only physical evidence the State presented tying Gissendanner to the crimes of which he was accused was this sock on which the State alleged a drop of the victim's blood had been found, and the State relied heavily on this sock. See, e.g., Trial Tr. at 1282:8-1286:14; 1491:12-24. Because the drop of blood on the sock was essentially the State's entire physical evidence case against Gissendanner, defense counsel was particularly obligated to investigate that sock and to challenge and discredit wherever and however legally possible the State's theories regarding this piece of evidence. Reasonably effective defense counsel who had conducted a basic investigation could have discredited the State's proposition that the sock proved Gissendanner's guilt. This would have tended to create a reasonable doubt of Gissendanner's guilt.

Defense counsel would have discovered evidence tending to create a reasonable doubt through a basic

factual investigation questioning how the sock came to the police's attention. While the victim was still missing, late in the evening of Saturday, June 23, 2001, police had searched the abandoned trailer and found some of the victim's possessions in a white bucket (next to a shirt, pants and bed sheet never tied to Gissendanner). See Hr'g Ex. 83 at 004-1390-93. As defense counsel did point out through one of their two supporting witnesses at trial, the clothing (which included the sock) was not found until a return trip to the abandoned trailer on Tuesday, June 26, 2001. See Trial Tr. at 1345:1-1350:19; 1350:22-1351:4. However, defense counsel failed to investigate any further this unexplained appearance of the clothing.

While the officer at trial testified in August 2003 that he found the clothing in the trailer's bathroom (see id., a review of the police documentation from 2001 shows that the clothing was actually recovered from the front porch of the trailer. See Hr'g Ex. 81 (list of evidence collected on June 26, 2001, at 2:00 p.m., documenting that clothing and shoes were collected from front porch); see also Hr'g Ex. 9 at 100-204 (police map of trailer, showing presence of shirts, shoes, underwear, and pants on the front deck of the trailer). Had they investigated further, defense counsel could have explained to the jury that someone other than Gissendanner had to put the clothes at the trailer.

Had they spoken with Gissendanner's mother, defense counsel would have learned that she remembered finding those clothes on the bathroom floor of her house days before they arrived at the trailer, and

that she placed the clothes in a hamper on her unenclosed front porch. See Hr'g Tr. (R. Gissendanner) at 274:6-9 (recognizing the clothing in evidence at trial, "I knew that was the clothes that I had took out the bathroom and put on my front porch because they were wet. And the pants and stuff that they brought out, I recognized it."). Id. at 275:18-276.7:

> Q And how did you know that the clothes that were Aaron's clothes or Emanuel's clothes that you had put on the porch?
>
> A Because, you know, I knew – I picked it up off the bathroom floor, and I knew because it was big pants, and I know at that time he – you know, I washed his clothes, and I'm his mother and I see about him and I knew his clothes.
>
> Q So you had experience with the clothes in the past?
>
> A Right.
>
> Q And you were familiar with those particular clothes?
>
> A Right.

Gissendanner's mother would have further explained that she put the clothing in a hamper on the porch before she left with her husband to pick up Gissendanner from Montgomery and bring him back to Ozark so he could turn himself in for questioning relating to the Oldsmobile he had been driving. Id. at 274:10-275:1. When Gissendanner's parents picked him up, they went straight to the police station in Ozark, and Gissendanner had no access to the clothing on his parents' porch before he turned himself in. Id. at

275:2-17 (parents took Gissendanner straight to police station); see also Hr'g Tr.(E. Gissendanner, Sr.) at 246:19-25 (did not stop between Montgomery and police station).

If this seemingly credible testimony were believed, someone other than Gissendanner took and handled the clothes and then placed them on the front porch of the trailer crime scene where they would have been, and in fact were, easily found. But, because defense counsel had not investigated and spoken with Gissendanner's family, they were not able to bring to the jury's attention the fact that someone else had placed that clothing at the trailer to be found by the police, and that the same someone could have tampered with any of that clothing, including the sock later found to have a drop of blood. This would have supported Gissendanner's defense that another was guilty of the crime, and it would have tended to create a reasonable doubt as to his guilt. Yet, defense counsel failed to perform the most basic of factual investigations by interviewing Gissendanner's family with whom he lived. Id. at 268:18-269:23.

If defense counsel had consulted with a forensics expert regarding the sock and the location of the victim's blood on the sock, they would have discovered evidence to offer to show that the location of the blood on the sock would be an unlikely place for the only blood evidence from a brutal murder and body transport. See Hr'g Tr. (L. Stewart) at 409:17-22 (noting "it's important to note where the stain is and relationship to where it would be if a person had a shoe on: Is it at the bottom of the sock inside the

shoe, or is it at the top of the sock, you know, outside of the shoe, is it a smear or is it a droplet".) It would have also been brought to defense counsel's attention that Gissendanner's shoes had none of the victim's blood on them, even though they had earlier tested positive for components of blood. See Hr'g Tr. (L. Stewart) at 403:9-404:16 and 409:5-6; see also Hr'g Ex. 39 at 109-120 (cuttings from outside of shoe had no DNA blood). Nor did the other clothing identified by his mother and others as being his have any blood. See Hr'g Ex. 37 at §6 (pants submitted); §7 (boxer shorts negative for components of blood); §12 (two shirts tested negative for components of blood).

In a case where the State's theory involved Gissendanner inflicting severe blows to the victim's head and neck (which are vascularized areas that would have significant bleeding (see Hr'g Tr. (M. Pietruska) at 135:1-4) and then carrying her body to a ravine and throwing it in, the absence of blood evidence on Gissendanner's clothing that showed up at the abandoned trailer was a subject for inquiry and investigation in conjunction with the small amount of the victim's blood found on the single sock. Had defense counsel retained a forensics expert to review the case, it is likely that these issues would have been identified and presented to the jury to discredit the State's case. Such evidence would have tended to create a reasonable doubt of Gissendanner's guilt.

Furthermore, if defense counsel had consulted with a forensics or DNA expert, they would have come to understand the significance that there was no finding of Gissendanner's DNA on the sock where the

victim's blood was found. The sock, which was placed at the trailer by someone other than Gissendanner, was tested for Gissendanner's DNA at the same time it was tested for the victim's DNA, and that test came back negative. See Hr'g Ex. 39 at 109-120 ("Emmanuel Gissendanner could not be the source of the bloodstains from the . . . sock"). See also Hr'g Tr. (L. Stewart) at 408:23-409:1 ("The DNA analysis which was done subsequent to that indicated the sock could not have gone back to Emanuel Gissendanner as far as the DNA."). The likely fact that this sock was placed at the crime scene by someone other than Gissendanner when considered along with the fact that there was none of Gissendanner's DNA found on the sock tends to create a reasonable doubt of Gissendanner's guilt.

There were chain of custody problems with some of the State's physical evidence which went undiscovered and unpresented because of defense counsel's failure to investigate. See e.g., Hr'g Tr. (L. Stewart) at 323:20-324:1. These deficiencies in the State's case would have been discovered through investigation and consultation with a forensics expert. The chain of custody related to the sock had problems which would have tended to create a reasonable doubt as to its reliability. The packaging for the sock (see Hr'g Exs. 95A-D) displayed the same ribbed tape closure that was a problem with the packaging discussed in relation to Hearing Exhibit 63. See Hr'g Tr. (L. Stewart) at 321:15-322:10:

> A [W]hat I was trying to get to, also, is the seal that's at the top of that pouch, it looks like ribbed tape that you would get from a hardware store. That is conceivably okay to use

> on a bag. It's not the best. You should always use something like evidence tape that will show a tear in it if somebody opens up the package when they're not supposed to. And they were also supposed to put their initials and date across the bag across the tape to indicate who put that tape on there, and I don't see that existing there.
>
> Q And again, I think you said the concern is that if evidence isn't properly sealed and bagged and is transported together what can happen if it's all transported together to a lab.
>
> A Well, you have cross contamination of evidence. . . .

See Hr'g Exs 95A-D (photographs of sock and its bag with ribbed tape and no signature across tape). Moreover, after the chain of custody entries that the sock was put in the bag on June 27, 2001, there is not another entry in the chain of custody log. See Hr'g Ex.95A. While clearly the sock was taken from the bag for cuttings and several examinations during its years in the lab, and then somehow made it back to Ozark for trial, no chain of custody exists. A forensics expert could have explained the concerns with such a faulty chain of custody. See Hr'g Tr. (L. Stewart) at 315:9-316:1:

> Q So why is that a matter of concern if you're conducting a forensic analysis to not have a document of chain of custody for something that comes to be used at trial?
>
> A It refers to something that the standards call deleterious examination or deleterious contamination of evidence. That's D-E-L-E-T-E-R-I-O-U-S. That means the possibility exists that if something is not packaged properly, or there isn't a proper chain of custody on it, it's a

> possibility that things like trace evidence could be transferred. Things that are in the package originally could come out of the package, other things could go into the package, and you could contaminate your evidence or make it useless at trial.

Reasonably effective assistance from defense counsel would have included these challenges to the change of custody issues pertaining to the sock and other evidence through investigation and the use of a forensics expert, all of which would have tended to create a reasonable doubt of Gissendanner's guilt.

There is no question that trial counsel did not consult with or retain defense experts, even knowing that the State would offer experts in DNA, fingerprinting, handwriting, and pathology. Had trial counsel retained experts, the jury's attention could have been directed to chain of custody issues challenging the State's physical evidence.

Trial counsel failed to investigate these chain of custody issues, and presented no evidence or argument to the jury questioning the chain of custody of the State's evidence. The standard for evaluating the chain of custody of evidence at trial was set forth by the Alabama Supreme Court:

> "The chain of custody is composed of 'links'. A 'link' is anyone who handled the item. ***The State must identify each link from the time the item was seized***. In order to show a proper chain of custody, the record must show each link and also the following with regard to each link's possession of the item: (1)[the] receipt of the item;(2)[the]ultimate disposition of the item, i.e., transfer, destruction, or retention; and (3)[the]safeguarding and handling of the item between receipt and disposition. If the State, or

> any other proponent of demonstrative evidence, fails to identify a link or fails to show for the record any one of the three criteria as to each link, the result is a 'missing' link, and the item is inadmissible."

Ex parte Holton, 590 So.2d 918,920(Ala.1991) (citations omitted) (emphasis added). Thus, in Ex parte Cook, 624 So.2d 511(Ala.1993), for example, the Alabama Supreme Court held that a link in the chain of custody of certain evidence (cigarette butts and socks) was missing even though a Birmingham police officer testified that she had directed another officer to collect the evidence and had watched the officer collect it. The Alabama Supreme Court held that the evidence was inadmissible because "the State did not establish when these items were sealed or how they were handled or safeguarded from the time they were seized until Rowland [a forensic serologist at the Alabama Department of Forensic Sciences] received them." 624 So.2d at 514. Similarly, in Lee v. State, 748 So.2d 904(Ala.Crim.App.1999), overruled in part on other grounds, a conviction was overturned when the State failed to establish the chain of custody on evidence: "To reiterate, there is no testimony reflecting where the substance was kept or how it was kept before it was presented to Cannon. Nor was there any evidence that when the substance was received at the lab it was packaged so as to be tamper-resistant."

Here, had defense worked with an expert familiar with forensic lab procedures, they would have known to challenge the physical evidence on chain of custody grounds. Even if the evidence had not been excluded, presenting the chain of custody problems to the jury

would have tended to create a reasonable doubt regarding the State's circumstantial evidence and Gissendanner's guilt.

Defense counsel failed to interview State witnesses and review their prior statements taken by police investigators. The statements were inconsistent with some of the witnesses' testimony and could have been used for impeachment of condemning evidence. Had defense counsel met with any of the witnesses from Clio with whom Gissendanner spent part of Friday morning, June 22, 2001, they would have learned that the women from Clio had told the police that Gissendanner never said where he acquired the Oldsmobile, which was inconsistent to their later trial testimony when they each testified Gissendanner had acquired the car from an older white woman. See Hr'g Ex. 11 (Police Interview of Felicia Caple) at 4("Q: But he never told you who he bought the car from? A: Ugh-ugh. . . ."), compare to Trial Tr. 955:9-12 (Felicia Caple testimony that "he just said he bought it from an old lady, some lady, I don't know. . . ."), Hr'g Ex. 12 (Police Interview of Shanteena Richards) at 3 ("Q: Did he tell you who he bought it from? A: Ugh-ugh. . . . "), compare to Trial Tr. at 939:10-19 (Shanteena Richards testimony that "He said he had just bought the car from a woman. . . He said an older white woman."), Hr'g Ex. 13 (Police Interview of Hattie Richards) at 3 ("Q Okay, did he say who he bought the car from? A: No, he didn't ever say who he bought it from but he had just said he had just bought it."); compare to Trial Tr. at 921:6-21 (Hattie Richards testimony that Mr. Gissendanner told

her he bought the car from an old woman). Had defense counsel investigated before trial, they would have been able to recognize such discrepancies in testimony and then effectively cross-examined the State's witnesses. See also Hr'g Ex. 14 (Shirley Hyatt Police Interview Transcript) at 2 (saw black male driver at 7:30 a.m. whose hair she couldn't describe), compare to Trial Tr. at 892 (Shirley Hyatt recollects seeing the car sometime between 6:30 a.m. and 6:45 a.m.) and id. at 900:5 (describing the driver as having "Kind of bushy hair: like Gissendanner's). Had defense counsel effectively investigated and then cross-examined these State's witnesses with their prior inconsistent statements, it would have tended to create a reasonable doubt as to Gissendanner's guilt.

During opening statements, defense counsel asserted that Gissendanner would be raising an alibi defense: "[t]he evidence that we will present at the end of the State's case will show you that not only ... that Emanuel Gissendanner didn't do this, he couldn't have done it." Trial Tr. at 826:20-24. Defense counsel then informed the jury that Buster Carr was the man who gave Gissendanner the victim's car. Id. at 827:23-828:25. Defense counsel, however, was ineffective in assisting Gissendanner in presenting these defenses. Despite the fact that there was substantial credible evidence which would have been discoverable through a reasonable basic investigation, the only evidence presented to establish Gissendanner's alibi was Gissendanner himself. Defense counsel failed to develop or support their theories of defense that Gissendanner had an

alibi, that Buster Carr was the individual that gave him the victim's car, and that Buster Carr was the more likely suspect. Emanuel Gissendanner Sr. with whom Gissendanner resided, was an eyewitness who was defense counsel's main family contact. See Hr'g Tr. (E. Gissendanner Sr.) at 73:6-16. Emanuel Sr. testified at the Rule 32 evidentiary hearing that he had only a 20-minute conversation with Kominos prior to his son's trial, and, during that conversation, defense counsel did not ask any factual questions about what Emanuel Sr. knew about his son's activities on that Friday morning. Id. at 249:24-251:19. Counsel's own time records further verify Emanuel Sr.'s testimony – only one entry references a meeting with "Defendant's Father." See Hr'g Ex. 3 at 003-580.

Emanuel Sr. would have testified that on the morning of Friday, June 22, 2001, he woke up at 7:10 a.m. at his house on Route 27 across from Johntown. See Hr'g Tr. (E. Gissendanner Sr.) at 218:24-219:15. Emanuel Sr., got out of bed, and walked down the hall when he heard someone in the kitchen. Id. at 219:16-20. Emanuel Sr. saw Gissendanner in the kitchen getting a drink of water. Id. at 219:21-220:18. Emanuel Sr. greeted his son and then went to the front door to see if his mentally handicapped brother, Stanley, was on the front porch waiting for the Vivian B. Adams school bus. Id. at 221:17-222:17. Emanuel Sr. saw Stanley waiting for the bus, and he also saw his other son Joshua "Anton" Gissendanner sitting in his car in the front yard smoking a cigarette. Id. 222:18-223:6. Emanuel Sr.'s, testimony places Gissendanner in Johntown around 7:00 a.m., the same time that under

the State's theory he was allegedly at or just arriving at the victim's house. This testimony would have clearly conflicted with the prosecution's theory, and was crucial to Gissendanner's alibi defense.

Emanuel Sr.'s testimony would have bolstered Gissendanner's story and would have been credible because Emanuel Sr. is a person with a strong and positive reputation in the community. Emanuel Sr. is a veteran of the first Gulf War, Id. at 212:17-213:17, and a preacher and superintendant of Sunday school at the Church of Ozark, Id. at 212:7-16. At trial, the prosecutor himself stated that Mr. Gissendanner's father "is a fine man" (see Trial Tr. at 1412:7-8) who enjoys a good reputation (id. at 1413:12-13). Defense counsel affirmed Emanuel Sr.'s excellent reputation at the Rule 32 evidentiary hearing, testifying that Emanuel Sr. had a reputation for truthfulness and was viewed "in the community as someone who's honest and respected." Hr'g Tr. (B. Kominos) at 45:3-10. As a result of defense counsel's failure to conduct a basic investigation through a factual interview of Emanuel Sr., he was never called to testify as an alibi witness. The testimony of Emanuel Sr. would have tended to create a reasonable doubt of Gissendanner's guilt.

Defense never interviewed Gissendanner's brother, Joshua "Anton" Gissendanner. Anton would have testified that he was with Gissendanner in Johntown on the morning of Friday, June 22, 2001. At the Rule 32 evidentiary hearing, Anton testified that he spent Thursday night at his girlfriend's house on Johntown Road in Johntown. See Hr'g Tr. (J. Gissendanner) at

178:2-11. Anton got up around 6:30 a.m., and headed over to his parents' house to check his mail. Id. at 181:10-25. Anton testified that he saw his father coming out of the home. Id. at 184:18-21. At about the same time, Anton saw his brother. Id. at 184:21-25. After Anton checked his mail, he went back outside and joined his brother, who was sitting on the family's picnic table under a large tree in the side yard. Id. at 185:1-23. After speaking with Gissendanner for two or three minutes (see id. at 185:16-23), Anton left to take his daughter to school. Id. Anton testified that it takes 15-20 minutes to drive his daughter to school, and that he drops her off several minutes before 8:15. See id. at 186:2-15. After dropping his daughter off around 8:00 a.m., Anton drove back to Johntown and rejoined his brother at the picnic table at "a little after eight." Id. at 186:16-187:13. Such testimony would tend to prove that Gissendanner was at his family home that morning, not in Ozark at the victim's home.

Due to defense counsel's failure to investigate and interview Gissendanner's immediate family members, who were available during the two years between Gissendanner's arrest and his trial, the jury was never made aware that two eyewitnesses could corroborate Gissendanner's alibi that he was in Johntown at his parents' house on the morning of June 22, 2001. The Eleventh Circuit has held that the U.S. Constitution requires "a competent attorney relying on an alibi defense" to conduct a basic investigation into the facts of the case. Code, 799 F.2d. at 1483-1484 (trial counsel relying on an alibi defense

provide ineffective assistance of counsel by failing to ask a parent if they could corroborate the alibi, by failing to subpoena any witness who may provide an alibi, and by failing to ask the Defendant or any other witness if anyone else was available who could corroborate the Defendant's alibi). Gissendanner's father and brother could have corroborated his testimony and provided the alibi offered in defense counsel's opening statement. Confidence in the outcome of this trial is undermined because this testimony was not presented to the jury for their consideration

Defense counsel also failed to investigate their theory that Buster Carr gave Gissendanner the victim's car that Friday morning or the implication that Buster Carr was thus a person tied to the murder. In his police interview of Thursday, June 28, 2001, Buster admitted to being in Johntown more than once on Friday, June 22, 2001. See Hr'g Ex. 58 at 3 (Buster describing how he drove "straight out to Johntown" on that Friday morning on his way to work), id. at 4 (describing how he returned to Johntown later that day) ("the last time I was out [in Johntown]. Let's see, we come through over there, I think it was Friday and all my brothers. He told me he was gonna need another helper. And I run to the edge of the railroad down there and right back out."). Then later in the same interview, after earlier admitting to buying drugs in the past at the red brick Gissendanner home (id. at 4), he finally concedes in the June 28 interview that he was at Gissendanner's red brick Johntown home "last week" to buy drugs at that house. See id. at 5. Had Buster been called as a witness by

the defense, he would have had to admit to the facts within his police interview or be impeached by those statements, either of which would have been favorable to Gissendanner's defense.

Joshua "Anton" Gissendanner would have provided testimony that Buster was indeed a crack addict who had been coming to Johntown for years to purchase drugs. See Hr'g Tr. (J. Gissendanner)at 182:19-183:10:

> Q How do you know Buster Carr?
>
> A He had been to the neighborhood on previous occasions buying drugs in the neighborhood from me and my brother and a couple more people.
>
> Q You'd sold him drugs before?
>
> A Yes, sir.
>
> Q Had your brother sold him drugs before?
>
> A Yes, sir.
>
> Q You had seen your brother sell him drugs before?
>
> A Yes, sir.
>
> Q How long had Buster been coming to Johntown to buy drugs?
>
> .....
>
> A He had been coming for years.

Emanuel Sr. defense counsel's main contact with the family, had volunteered to counsel that his son had been given the car by Buster Carr. See Hrg's Tr. (E.Gissendanner Sr.) at 250:8-251:19. Defense counsel, however, never followed up with Emannuel Sr. regarding Buster Carr. See id. at 251:20-252:12. Had defense

counsel investigated Buster's drug habits, his trips to Johntown, and looked for people who may have seen him in Johntown during the relevant times, they would have learned that at least three Johntown residents saw Buster Carr driving the victim's car in Johntown on Friday, June 22, 2001. See Hr'g Tr. (E. Gissendanner Sr.)at 218:26-229:21(testimony re seeing Buster Carr in a white car in Johntown at 7:10 a.m. on Friday, June 22, 2001.); Hr'g Tr. (J. Gissendanner)at 176:20-195:21 (testimony re the events on the morning of Friday, June 22, 2001), Hr'g Tr. (C. Brooks) at 468:3-469:11 (testimony re seeing Buster Carr in white sedan on Friday morning sometime around 7:00 a.m.) Their testimony provides details of the sightings that would have bolstered the defense's theory and tended to create a reasonable doubt of Gissendanner's guilt.

Emanuel Sr., a credible witness, would have testified that after seeing Gissendanner in the kitchen at 7:10 a.m. that Friday morning, he went to his front door to check on his handicapped brother. See Hr'g Tr. (E. Gissendanner Sr.) at 221:17-222:17. Looking out his front door, Emanuel Sr. saw his other son, Anton, sitting in his car smoking a cigarette. Id. at 222:18-223:9. As he was about to turn back in to his house, Emanuel Sr. noticed a white car with a "bluish" top stopped at the stop sign across the railroad tracks from his house. Id. at 223:22-224:10. Emanuel Sr. recognized the driver of that car as Buster Carr. Id. Emanuel Sr. had a clear view of Buster Carr because the window of the white car was rolled down and Buster's arm was hanging out of the window. Id. at 224:15-226:5. Emanuel Sr. knew Buster

and his brother, Bobby Carr, from his work at the veterinary clinic in Ozark. Id. at 225:3-14. Had defense counsel presented this evidence, it would have tended to create a reasonable doubt of Gissendanner's guilt.

Defense counsel failed to interview Gissendanner's brother regarding the events of that Friday morning. Joshua "Anton" Gissendanner could have testified regarding the drug trade in Johntown, and how Buster Carr was a repeat customer of all of the drug dealers in that area. Id. at 180:21-195:21. Not only was Anton intimately familiar with the drug trade in Johntown, he was an actual eyewitness to Buster Carr driving a white car with a dark-colored top in Johntown that Friday morning. Id. at 182:5-183:21 (Anton's testimony stating he saw Buster Carr driving a white car with a blue top in Johntown around 7:00 a.m. on Friday, June 22, 2001). Anton's testimony further corroborates Gissendanner's testimony and reinforces Emanuel Sr.'s account of that Friday morning. Had this evidence been presented to the jury, it would have tended to create a reasonable doubt of Gissendanner's guilt.

Defense counsel failed to interview Charles Brooks, a friend of Gissendanner who was known to have been with Gissendanner later in the afternoon of June 22, 2001. Trial Tr., p. 1082:21-1083:7-10(Emanuel C. Gissendanner's testimony that Charles Brooks was with Gissendanner in the "hole" on the evening of Friday, June 22, 2001.). If asked, Mr. Brooks would have told defense counsel that he saw Buster Carr in a white car at a gas station near Johntown around 7:15 a.m. on

Friday, June 22, 2001. See Hr'g Tr. (C. Brooks) at 468:3-469:11. In addition to being an eyewitness to Buster Carr driving a white car that Friday morning, and support for Gissendanner's story that he had been given the car by Buster, Brooks would have made a credible witness. Brooks has no criminal record (see id. at 466:21-22) and is a member of the National Guard. See id. at 467:10-14. His testimony would have corroborated Gissendanner's story, reinforced Emanuel Sr.'s and Anton's accounts of that Friday morning, and tended to create a reasonable doubt of Gissendanner's guilt.

If asked, Gissendanner's brother would have told defense counsel that people often pawned objects to the Johntown drug dealers when they did not have money for drugs. See Hr'g Tr. (J. Gissendanner) at 187:23-188:12; id. at 188:10-12 ("Q: Have you seen people pawn cars before for drugs? A: I have."). He knew that his brother had accepted a car as a pawn for drugs in the past. Id. at 189:5-8. And he would have been able to inform defense counsel that he actually saw Buster Carr pawning the victim's car to Gissendanner later that same morning. Id. at 190:15-195:15 (Anton's testimony about Buster's visits to the Gissendanner home for drugs, culminating in Gissendanner accepting a pawned white car with a blue top).

Similiarly, Mr. Brooks could have testified that when he saw Gissendanner driving the victim's car later on Friday evening, that Gissendanner told him that Buster Carr had pawned it to him for drugs. Id. at 469:22-470:21; 471:1-11:

Q What did you say to Emanuel Gissendanner, Jr., about the fact that he was driving that car?

A I had told him that I had seen Buster on that same vehicle earlier. It look to be the same vehicle. And that if it was in his possession earlier, that he need to try to find him and return it to him.

Q Do you know how Emanuel got that car from Buster Carr?

A Yes.

Q How did he get it?

A He told me that Buster - -

.....

Q You can answer the question.

A He told me that he, Buster, had pawned it to him.

.....

Q Did Josh Gissendanner ever talk to you about Buster pawning the car to Emanuel?

A Yes.

Q And what did he tell you?

A Well, same thing that I told E[manuel]. He told me that he told E[manuel] that he needs to get the vehicle back to him as soon as possible or whatever.

Q Did Josh talk to you about the fact that Buster pawned the car to his brother Emanuel for crack?

A Yes.

Such testimony would have bolstered Gissendanner's testimony that he received the car from Buster, and it

would have contributed to create a reasonable doubt of Gissendanner's guilt.

Through reasonably effective assistance of counsel a basic investigation would have revealed that Buster Carr worked as a professional tree trimmer. See Hr'g Tr. at 225:17-18(Emanuel Sr.'s Testimony: "They [Buster and his brother] were tree trimmer or tree cutters. They cut down trees for a living"). And it would also have disclosed that Buster had recently cut some trees for the victim. See Hr'g Tr. (D. Brown) at 163:7-15:

> Q Did he tell – did you hear [Buster] say that he had done tree work at Ms. Snellgrove's house?
>
> A Yes. He said he worked with the fellows who got that tree, taken that tree down. Two trees taken down back there. I wasn't there the day they took them down. I came later on my schedule to do the yard. I came later after the tree was down and part of it was moved and gone and everything.

A presentation of this evidence to the jury would have tended to create a reasonable doubt of Gissendanner's guilt.

Had defense counsel interviewed Gissendanner's brother and other Johntown residents, they would have learned that after purchasing his drugs in Johntown, Buster was known to smoke his crack cocaine at the end of Crittenden Street on the path up from Gunter's Pond, where the victim's body was discovered. See Hr'g Tr. (J. Gissendanner) at 193:17-194:18 (testimony that he had personally followed Buster down Crittenden Street and observed him smoking crack cocaine there). Joshua Gissendanner would have told them that he saw

Buster Carr early Friday morning drive toward Crittenden Street, and that he was driving the victim's car and being followed by two other men in a white work truck. Id. at 183:11-21:

> Q You say you saw Buster Carr that morning in Johntown in a white car?
>
> A Yes, sir. As I – when I passed him and I made it to the stop sign, I observed a white dump truck, something like a work truck that he would normally come on. But he was not driving that truck. It was two other guys on that truck, and they was moving at a slow speed. And I remember pulling out in front of them. And instead of them following me, they went the same way that Buster went on the white car.

See also id. at 183:22-184:15 (describing direction cars were going). Moreover, during the several times that morning that Buster reappeared seeking drugs, he then was seen heading back toward Crittenden Street. Id. at 192:11-20. Had defense counsel interviewed Gissendanner's brother, he could have been called to testify to this evidence, which would have tended to create a reasonable doubt of Gissendanner's guilt.

Finally, Gissendanner contends with regard to the guilt phase of his trial that defense counsel was ineffective for their failure to move for a change of venue, which a basic investigation would have shown to be required. The court finds the facts recited on pages 63-65 of Gissendanner's Closing Argument Briefing to be proven to the court's reasonable satisfaction by a preponderance of the evidence. The court further finds that an investigation required of effective assistance of counsel would have disclosed

these facts which would have, in turn, required a motion by defense counsel for a change of venue. However, having personally observed the jury selection process, the court is not persuaded that Gissendanner was prejudiced by defense counsel's failure to move for a change of venue.

Applying the above cited law to the finding of facts this court concludes that defense counsel's deficient performance prejudiced the defense.

III. Defense Counsel's Failure to Investigate Rendered Their Assistance in the Mitigation Phase Constitutionally Inadequate.

Defense counsel's duty to investigate applies equally to the guilt phase and the penalty phase of a criminal case. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003) Guideline 10.7 ("Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.") Though "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up," attorneys must make an informed decision when deciding whether or not to investigate. Rompilla v. Beard, 545 U.S. 374, 383 (2005). That is because, as the Eleventh Circuit has put it, "our case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Baxter, 45 F.3d at 1514 (quoting Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991)).

Failure to conduct reasonable investigation into mitigating factors relevant to the penalty phase can lead to a finding that defense counsel provided ineffective assistance of counsel. See e.g. Rompilla, 545 U.S. at 383 (defense counsel's failure "to examine the court file on [their client's] prior conviction" constituted ineffective assistance of counsel because they knew that the prosecutor planned to establish his prior convictions as an aggravating factor during sentencing); Wiggins v. Smith, 539 U.S. 510, 524 (2003) (defense counsel provided ineffective assistance of counsel where they stopped investigating based on only "rudimentary" information they gathered from a "narrow set of sources."); Williams v. Taylor, 529 U.S. 362, 395-98 (defense counsel deficient where they had no strategic reason for failing to investigate and present mitigation evidence of their client's childhood).

Here, defense counsel failed to investigate and interview family and friends who would have provided important information for the penalty phase. There were family and friends easily discoverable and available who would have been willing to testify favorably for Gissendanner in the penalty phase. Defense counsel did not speak with them, gather information and determine who would provide the best evidence of Gissendanner's humanity to the jury and the Court. Defense counsel apparently decided with no investigation that Gissendanner's father and ex-wife would provide the best testimony. But had they investigated and interviewed family members and friends to assess who would be the best mitigation

witnesses, they would have developed testimony and evidence tending to convince the jury to sentence Gissendanner to life in prison rather than death.

Rebecca Gissendanner, Gissendanner's mother, was willing to make herself available to speak with her son's lawyers. See Hr'g Tr. (R. Gissendanner) at 268:18-24. Had they spoken with her, they would have learned information that could have been used as non-statutory mitigating circumstances. For example, Rebecca could have humanized her son through information that Gissendanner was loveable, dependable, and close to his children, nieces and nephews. Id. at 279:15-280:3.

> Q And if you had been asked to testify at trial, you could have said a lot about your son; isn't that right?
>
> A Yes, ma'am.
>
> Q Well, maybe you can tell some of that now. Can you describe Aaron as a child?
>
> A He was very easygoing, loveable, dependable. He was always there for me. When I went to college he helped me spell words that I couldn't spell. He was smart. And most of all, he was the one that always been there with me and helped me with my grandbabies.
>
> Q Was Aaron good with children?
>
> A Yes, ma'am, he was.

See also id. at 281:10-22 (describing games Gissendanner would play with his nieces and nephews; 284:12-21 (describing good interactions between Gissendanner and his children). In fact, Rebecca would have told Gissendanner's defense counsel that in the

years before the trial, she and his daughters visited him every Sunday, and that he had maintained a close relationship with his entire family even while incarcerated. See id. at 286:11-287:15 (also noting that family members and Gissendanner's daughters travel to Atmore every month or so to visit him since his incarceration on death row). Because defense counsel failed to ask anyone about such relationships, they were not able to strategize a mitigation presentation that would have educated the jury about Gissendanner's family relationships.

Rebecca could also have told trial counsel about her son's sacrifice of a future in college football in order to stay home and marry his pregnant girlfriend. Id. at 282:21-283:9. She would have let them know about his good and kind heart. Id. at 288:7-23. And all of this testimony would have come from not just a mother, but a devout church-goer who took her children, including Gissendanner, every week to Wednesday night services, Friday night services, and Sunday morning and evening services. Id. at 272:10-273:7; 279:18-288:23. Rebecca would have testified about such information – which was never put before the jury – had counsel asked. Id. at 279:15-25, 280-288. The testimony of Gissendanner's mother would have tended to convince the jury to recommend life without parole instead of the death penalty.

Olympia Gissendanner, Gissendanner's sister, was willing to make herself available to speak with her brother's lawyers and testify at this trial. See Hr'g Tr. (O. Gissendanner) at 492:7-23. She would have testified that she did not think her brother had the

personality or character to have committed the acts of which he was accused. Id. at 493:2-9. Moreover, had counsel spoken with Olympia in 2001, or any time before the 2003 trial, she would have shared with them family photographs and childhood pictures of Gissendanner with siblings and his mother – photographic evidence that defense counsel could have put before the jury to further humanize Gissendanner and show his connection with his family. Id. at 487:25-489:24; see also Exhibit 117 (three photographs of Gissendanner with family).

Olympia also could have spoken as a loving younger sister who had felt protected by Gissendanner. See id. at 486:10-19. Moreover, she could have spoken as an aunt who knew that her nieces had a good father in Gissendanner. See id. at 491:2-18:

> Q Olympia, have you spent a lot of time with [Emanuel] when he's around his daughters?
>
> A Yes, sir.
>
> Q And those daughters are Keke and Kewe?
>
> A Yes, sir.
>
> Q Does he have any other daughters?
>
> A He have another daughter named Alexis.
>
> Q And when you've been around [Emanuel], have you been able to observe what his relationship is like with them when you've been around them?
>
> A Yes, sir.
>
> Q And what kind of relationship is that?

A He always had a good, loving, caring relationship with his daughters.

Q Did he see them a lot? Was he around them a lot?

A Yes, a lot.

This evidence would have tended to persuade the jury to impose a sentence of life without parole rather than the death penalty.

Pastor David Brown, the Gissendanner family pastor, also wanted to testify on behalf of Gissendanner, and tried to meet with defense counsel to say he was willing to testify on his behalf. See Hr'g Tr. (D. Brown) at 150:5-152:20. Pastor Brown's testimony would have tended to convince the jury to recommend a sentence of life without parole rather than the death penalty.

Applying the above cited law to the finding of facts, this court concludes that defense counsel's failure to investigate rendered their assistance in the mitigation phase constitutionally inadequate.

IV. The State Violated Gissendanner's Constitutional Rights When It Withheld Favorable Evidence From Defense Counsel.

In Brady v. Maryland, 373 U.S. 83,87(1963), the United States Supreme Court stated that, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Evidence favorable to the defense includes evidence that would affect the jury's

determination of the credibility of the witnesses. Giglio v. United States, 405 U.S. 150,154(1972). The mandate to turn over favorable evidence extends to both the determination of guilt or innocence and the sentencing proceeding. Brady, 373 U.S. at 87; Ex parte Monk, 557 So.2d 832,837 (Ala.1989). The withholding of favorable evidence is grounds for the reversal of a conviction. See Monk, 557 So.2d at 837; Ex parte Womack, 541 So.2d 47,61-62 (Ala. 1988).

Gissendanner contends that his constitutional rights were violated because the State never revealed any information to defense counsel that some witnesses were being paid for their testimony in court on behalf of the State. The court is not reasonably satisfied from the evidence that anyone other than Kim Gissendanner received any type of compensation for appearing in court. The court finds that the amount paid Kim Gissendanner was to reimburse her for lost wages. Gissendanner has failed to prove to the reasonable satisfaction of the court that Kim Gissendanner's testimony was material either to guilt or punishment or that Gissendanner suffered any prejudice as a result of the State's failure to disclose as alleged.

On November 5, 2001, this court entered a discovery order for Gissendanner's capital murder trial. "Open file discovery" was ordered from the State and was defined as any and all evidence obtained from the State's investigation of this case through any agency or individual and in any form. State expert Steven Drexler's full handwriting report was never turned over to defense counsel. It was

subsequently obtained through discovery in this Rule 32 proceeding by his counsel in March 2009 after their direct contact with Mr. Drexler. See, e.g. Hr'g Ex. 2 (Full Drexler Report) at 109-155-156; id. at 157-158 (A. Peterson letter documenting contact with Steven Drexler). The full report finally obtained contains more than 30 model checks each written out by Gissendanner, Buster Carr, and Buster Carr's wife, Peggy. See id. at 109-181-210. Under this court's trial discovery order, the State had an obligation to turn over the evidence collected from Gissendanner and Buster Carr.

A critique of Mr. Drexler's analysis would require examination of the same writing samples that he considered. See Hr'g Tr. (L. Stewart) at 420:25-421:18. When the habeas expert was able to review the Buster Carr writing samples, he found similarities with the writing on the forged check that would have been important to bring to the jury's attention in order to create reasonable doubt. See e.g. Hr'g Tr. (L. Stewart) at 424:17-425:12 (finding that there were indications that Buster Carr wrote in similar ways to the writing on the forged check); see also Hr'g Ex. 102 (L. Stewart demonstratives).

For example, Buster Carr's handwriting demonstrated a vertical, elongated "C" such as that in the "Concrete work" portion of the check (see id. at 6; see also Hr'g Tr.(L. Stewart) at 426:3-16). And samples from Buster Carr show a "k" with characteristics of that on the forged check. See Hr's Ex. 102 at 7-8; see also Hr'g Tr. (L. Stewart at 426:20-427:9. Further, Buster Carr was the only author

of the check samples whose "dollars" went off the baseline and whose slash between 39/100 resembled that on the forged check. See Hr'g Ex. 102 at 9-10; see also Hr'g Tr. (L. Stewart) at 427:13-428:5. Morever, there were inconsistencies between how Buster Carr wrote his numbers and those that appeared on the forged check. See Hr'g Ex. 102 at 11, 13; see also Hr'g Tr. (L. Stewart) at 431:5-17.

But none of these points could be developed by the defense without Buster Carr's handwriting samples, which were not part of the truncated handwriting report sent to them by the State without the handwriting sample evidence in Drexler's notes. See Hr'g Ex. 97 (3-page handwriting report provided to defense counsel). Moreover, the never-provided report also included Drexler's notes, including a page that showed an unexplained alteration of initial findings that Gissendanner "probl"(or probably) wrote the date and numerical amount, to a downgraded "Indie" (or indications). See Hr'g Ex. 2 (full report) at 109-179.

The State's failure to turn over this key exculpatory evidence of Drexler's file and Buster's writing samples is particularly significant, because the forged check was the main piece of evidence used to convict Gissendanner of possession of a forged instrument in the second degree, for which he received a life sentence, and was also key evidence in the State's murder case against him.

As previously noted, the State was required to disclose this information under the discovery order. The evidence which the State failed to disclose was *Brady* material in the forgery and capital murder

prosecution, and its non-disclosure by the State violated due process. This evidence would have been favorable to Gissendanner and would have been relevant and material to key issues at his trial. Where the State fails to comply with its obligation to provide the defense with exculpatory or impeaching evidence, the accused is denied a fair trial and the conviction must be reversed. See Ex parte Willingham, 695 So.2d 148, 149-150 (Ala. Nov. 8, 1996)(conviction reversed where State failed to provide defense counsel with information that could impeach State witness); Ex parte Brown, 548So.2d 993,994-995 (Ala.1989)(conviction reversed where State failed to disclose evidence uncovered by the State after discovery process had been completed).

Applying the above cited law to the finding of Facts, this court concludes that the state violated Gissendanner's constitutional rights when it withheld favorable evidence from defense counsel.

CONCLUSION

Based upon a consideration of the totality of the evidence the court concludes that there is a reasonable probability that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. It is clear to this court that this probability is sufficient to and, in fact does, undermine confidence in Gissendanner's conviction and death sentence.

JUDGMENT

It is, therefore, ordered that Gissendanner's petition for relief under Rule 32 of the *Alabama Rules of Criminal Procedure* is granted, and that the Constitutions of the United States and the State of Alabama require that Gissendanner be granted a new trial and a new sentence proceeding.

Done this the ____ day of March, 2010.

_____
Kenneth W. Quattlebaum
Circuit Judge
33rd Judicial Circuit