IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC02-1212
Lower Tribunal No.: 94-02958CFANO

ROBERT GORDON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

BARON W. GIVEN
Florida Bar No. 325244
P.O. Box 468
1301 Sixth Ave. W., Suite 104
Bradenton, Florida 34206
(941) 741-9778
Capital Collateral Registry

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Gordon's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850 and 3.851.

The following symbols will be used to designate references to the record in the instant case followed by the appropriate page number;

"T"	Trial Transcript;
"PP"	Penalty Phase Hearing;
"R".....	Record on direct appeal to this Court;
"HH"	Addendum Transcript of Record of Huff Hearing;
"PC-R"	Record of instant 3.850 and 3.851 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Gordon has been sentenced to death. He respectfully request the opportunity to discuss the seriousness of his claims through oral argument before this Court.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Other Authorities

STATEMENT OF THE CASE AND FACTS

I. Course of Proceedings and Disposition in Court Below

The Circuit Court of the Sixth Judicial Circuit, Pinellas County, Florida, pursuant to its' Sentencing Order (R. 2526-2543) entered the Judgments and Sentence at issue on November 16, 1995 (R. 2544-2546).

On March 21, 1994, Robert Gordon was one of three people indicted on one count of murder in the first degree (R. 6-7). His plea of not guilty was filed March 23, 1994 (R. 8).On April 27, 1994 the indictment was amended making Mr. Gordon one of five people indicted (R. 32-33). His plea of not guilty to the amended indictment was filed April 29, 1994 (R. 34).

The joint trial of Robert Gordon and Meryl McDonald was held from June 6, 1995 through June 15, 1995. The jury returned a verdict of guilty of murder in the first degree as to both Mr. Gordon and Mr. McDonald. (R. 2362-2364). A penalty phase proceeding was held on June 16, 1995, after which the jury recommended the

death penalty by a majority vote of 9 to 3 (R. 2402).

On direct appeal, the sentence and conviction of |Mr. Gordon was affirmed. Gordon v. State, 704 So.2d 107 (Fla. 1997).

On February 17, 1999, Mr. Gordon, pursuant to Fla. R. Crim. P. 3.850 and

3.851, filed his Motion For Post Conviction Relief requesting the lower court vacate the judgment, conviction and death sentence and order a new trial (PC-R. Vol. I, 1-20). On March 11, 1999 the court entered an Order To Show Cause (PC-R. Vol. I, 31) and on May 24, 1999, the State filed its Response (PC-R. Vol. I, 32-59) and exhibits (PR-R. Vol. I, II, 60- 406). After review of the State's response, the court, on June 3, 1999, ordered a hearing pursuant to *Huff v. State*, 622 So.2d 982 (Fla. 1993) and set the hearing for August 9, 1999 (PC-R. Vol. III, 407-408). After the hearing, the court entered an order on March 23, 2000 granting an evidentiary hearing to what the court identified as issues 3, 4, as to DNA, 5 and 9 but denied an evidentiary hearing as to what the court identified as issues 1,2,6,7,8,10,11 and 12 (PC-R. Vol. III, 411-412). Those issues were later summarily denied in the court's written order of April 20, 2002. The evidentiary hearing was conducted on February 15 and 16, 2001.

At the conclusion of the evidentiary hearing the court stated it did not want to hear closing arguments but would accept written closing arguments (PC-R . Vol

VII, 958). On April 20, 2002, the Court denied Mr. Gordon's motion for post conviction relief (PC-R. Vol. III, 437-479). Timely notice of appeal was filed on May 8, 2002 (PC-R. Vol. III, 489). This appeal is properly before this Court.

II. Statement of Facts

a. Facts introduced at Trial and Sentencing

The facts introduced in the trial of this case have been previously set forth by this Court in *State v. Gordon*, 704 So.2d 107, 108-110 (1998). By way of summary, Dr. Louis A. Davidson was found murdered in his St. Petersburg apartment on January 25, 1994. He and his wife had been involved in a bitter dissolution of marriage which involved the custody of a minor child. Shortly after the discovery of his body, the St. Petersburg Police Department placed his Wife, Denise Davidson, who resided in Tampa, under 24 hour surveillance. As a result of that action, the police obtained copies of Western Union money transfers from Mrs. Davidson made primarily to Mr. Gordon. Telephone intercepts and cellular phone records obtained by warrant primarily linked co-defendant MacDonald. The police also obtained various motel registrations placing Robert Gordon and MacDonald in Tampa at various times prior to and including the day before and the day of the homicide. Witnesses were also located in the Miami area who, on various dates, accompanied the two men to the Tampa Bay area. None of this

evidence, however, placed Robert Gordon at the scene of the homicide.

The conviction of Robert Gordon was obtained almost exclusively from the testimony of Susan Shore, whose only connection to the crime, according to her undisputed testimony, was that of driving Mr. Gordon and MacDonald to Tampa on

January 24, 1994 and then to St. Petersburg on the day of the homicide. In contrast, MacDonald's conviction resulted not only from the testimony of Ms. Shore but also as a result of the victim's DNA found on clothing worn by MacDonald. In addition, fibers found on the same clothing were consistent with materials in the victim's apartment. A shoe imprint at the scene, was also consistent with MacDonald's shoe.

There was absolutely no physical evidence placing Robert Gordon in the apartment of the victim. There was absolutely no testimonial evidence placing Robert Gordon in the apartment of the victim, including the testimony of Susan Shore. The testimony of Ms. Shore, however, did place both Mr. Gordon and MacDonald at the apartment complex at or near the time of the homicide. In addition, another witness, two buildings away, identified Mr. Gordon as being the person she saw in the company of a blond white female at the apartment complex.

Neither Mr. Gordon or MacDonald testified at trial. Neither counsel for Mr.

Gordon or MacDonald elected to put on any defense. In their joint trial, both Mr. Gordon and MacDonald were convicted of murder in the first degree.

During the penalty phase, Robert Gordon, presented three mitigation witnesses and MacDonald presented one. At the conclusion of the penalty phase each received a jury recommendation of the death penalty by the same vote of 9 to 3

Of the three remaining people indicted for the murder of Dr. Davidson,

Denise Davidson was convicted in a separate trial and sentenced to life. Susan Shore was allowed to plea to an accessory charge in exchange for her testimony and deported. Leo Cisneros remains at large.

b. Facts introduced at Evidentiary Hearing

To prove, among other things, that trial counsel had been ineffective, Mr. Gordon presented the testimony of Dr. Renee Herrera, Norma Rose, Flovia Tyrell and himself. To rebut the evidence of Mr. Gordon and his witnesses, the State presented the testimony of Dr. Martin Tracy, Ralph Phleiger, Detective Ronald Noodwang, Michael Schwartzberg and Robert Love.

Dr. Renee Herrera, an Associate Professor at the Department of Biological Sciences at Florida International University (PC-R. Vol. IV, 511) was permitted by the court at the evidentiary hearing to offer his opinion as an expert witness in the

fields of DNA population genetics and molecular biology (PC-R. Vol. IV, 517). He testified that he had reviewed the reports of FBI agent Michael Vick, who was the States's DNA expert at trial (TT, 1214). Dr. Herrera also went to the FBI headquarters in Quantico, Virginia so he could inspect and analyze materials not previously provided (PC-R. Vol. IV, 518). Included in the review was all the documentation the lab possessed, including the data base used by agent Vick to generate the probabilities (PC-R. Vol. IV, 519). The doctor identified certain

issues of concern which included that the probabilities generated were not "robust" but far below the current standards of expectation; that only three of the four slides looked at gave usable numbers (PC-R. Vol. IV, 523); and that the location of the bands of the material used could have been compromised by multiple donations (PC-R. Vol. IV, 528-29). He also believed that since the victim was of mixed racial origin the calculations could contain uncertainty up to two orders of magnitude in either direction (PC-R. Vol. IV, 535). Subgroups or substructures was another area of concern to Dr. Herrera due to the controversy within the scientific community as to their affect on population frequency calculations (PC-R. Vol. IV, 537-9). He opined that, because of all the issues that existed in this case, the testimony of agent Vick would not have been accepted within the general scientific community (PC-R. Vol. IV, 546-8). At this stage of the hearing, the court acknowledged it's own

concern over the substructure issue (PC-R. Vol. IV, 550). A final area of concern raised by Dr. Herrera was that the trial testimony of agent Vick implied that the agent performed the test upon which he testified. Dr. Herrera, however, believed the actual tests were performed by other lab technicians (PC-R. Vol. IV, 555).

At the conclusion of Dr. Herrera's testimony, the State was permitted to call it's expert, Doctor Martin Tracy, also a professor of biological sciences at Florida International University (PC-R. Vol. IV, 574-5). Dr. Tracy testified that he too had

reviewed the trial testimony of agent Vick but found no problem with how it was presented to the jury (PC-R. Vol. IV, 577). While he did not agree with how Dr. Herrera used the term " robust", he did understand what Dr. Herrera meant and agreed that evidence is more compelling when the odds are less frequent. (PC-R.Vol. IV, 579). He also testified that agent Vick's presentation of the ratio's with respect to each of the three major groups, Caucasians, African Americans and Hispanics, was consistent with the 1992 recommendation of the National Research Council. He acknowledged, however, that though all three would not apply to the victim and that the use of the three groups was not a scientific requirement but rather a logical one. (PC-R. Vol. IV, 580-8). Dr. Tracy next addressed Dr. Herrera's concern about missing bands on the ladders discovered when Dr. Herrera reviewed x-rays from the FBI files. He did not dispute the findings of Dr.

Herrera and in fact agreed, that missing bands may have made those ladders unusable. He dismissed the concern, however, by stating that while the x-rays examined may have had missing bands no one testified, including Dr. Herrera, that they were actually used (PC-R. Vol. IV, 582). In responding next to the issue of substructures, Dr. Tracy believed the issue began in a Florida case in which he testified. He admitted that in 1989, the scientific community did not know the impact of subcultures on frequency differences and attempted to explain his previous testimony (PC-R. Vol. IV, 585-7).

Dr. Tracy then went on to testify that, in addition to reviewing agent Vick's testimony, he too had reviewed lab reports, x-rays and data bases that agent Vick used. He opined that agent Vick's testimony would have met the Frye standard in because it was generally accepted in the scientific community (PC-R. Vol. IV, 589). In addition, he testified that he did his own calculations using different data bases and found his results to be consistent with those done by agent Vick (PC-R. Vol. IV, 593). When questioned, however, about the number of probes, Dr. Tracy admitted that from 1990 through 1995, the industry standard was four probes. He acknowledged that when these tests were done in 1994 agent Vick had four probes but only three were used because the fourth did not give interpretable results (PC-R. Vol. IV, 593).

The next witness presented on behalf of Mr. Gordon was his sister, Norma Rose (PC-R. Vol. V, 622).The thrust of her testimony was that Mr. Gordon and Ms. Tyrell arrived at her home in Miramar, Florida between 3:00pm and 4:00pm on January 25, 1994 for a family dinner (PC-R. Vol. V, 623-4). She explained that she had not informed Mrs. Obermeyer of that information because she was never asked but did tell Mr. Love (PC-R. Vol. V, 624-25). Ms. Rose testified that she had discussed the matter with Mr. Love on two occasions, once in his office and once during the trial. She admitted that she didn't realize the dinner was on January 25,

1994 until Ms. Tyrell had refreshed her recollection (PC-R. Vol. V, 628). She also testified, during cross examination, that she had been questioned by various law enforcement officers and specifically recalled telling Det. Celona that her brother was with her on the day of the crime (PC-R. Vol. V, 636).

The next witness to testify was Flovia Tyrell, who is the mother of Mr. Gordon's child. She explained in some detail how she knew the date of the dinner was January 25, 1994. She stated she had first seen Mr. Gordon in the morning when he picked her up for breakfast about 9:30am.. Then went to the beach on Key Biscayne (PC-R. Vol. V, 639-40). She also explained the circumstances of her interview with Mr. Love. As she told him about being with Mr. Gordon and even produced a beach picture of Mr. Gordon she said was taken the day of the crime,

Mr. Love only criticized her for stuttering (PC-R. Vol. V, 642-43). On cross examination, contrary to the State's implication, she testified she had in fact told various officers that Mr. Gordon saw his child regularly and that they had been together on January 25, 1994 (PC-R. Vol. V, 647). She also testified that she told Mr. Phleiger, an investigator for the public defender, that she was with Mr. Gordon. She did not recall telling anyone that they had gone to a tire store on January 25, 1994 (PC-R. Vol. V, 647-50).

An the evidentiary hearing, Robert Gordon's testified that during his first and

subsequent contacts with members of the Public Defender's office he maintained his innocence (PC-R. Vol. V, 652). He did the same with the police, who for four hours on the date of his arrest, attempted to question him (PC-R. Vol. V, 653-54). He denied knowing Denise Davidson, Dr. Davidson or having any dealings with Susan Shore and denied being with Merle McDonald on the date of the crime (PC-R. Vol. V, 655-56).

Regarding Mr. Love, who had become Mr. Gordon's trial counsel, Mr. Gordon recalled first meeting him about a month before trial when it was explained to him that a conflict had occurred with the Public Defender's Office which required the appointment of Mr. Love. Since the purpose of the meeting was introductory, the case was not discussed (PC-R. Vol. V, 657-59). Mr. Gordon

testified that at his second meeting with Mr. Love, when the case was discussed for the first time, he gave Mr. Love his alibi witnesses (PC-R. Vol. V 661) and repeatedly told him that he wanted to put on an alibi defense (PC-R. Vol. V, 663). When Mr. Gordon later learned that Mr. Love was not going to put on a defense he referred to "some very heated exchange " that took place between the two of them on more than one occasion (PC-R. Vol. V, 665). As a result of this apparent conflict and Mr. Gordon's adamant belief that he had to testify and tell the jury he was in Miami, he filed several motions to act as co-counsel (PC-R. Vol. V, 667). During one such

conflict, Mr. Love stated he wasn't going to waste his time locating witnesses and that Mr. Gordon could hire his own investigator (PC-R. Vol. V, 669). As the trial was set to get under way, Mr. Gordon agreed to withdraw his alibi because it was his understanding that Mr. Love would still put on a defense (PC-R. Vol. V, 684-9). It was only later that he learned that no witnesses would be called in his defense and he again became upset (PC-R. Vol. V, 667). He also testified that had he known that there was no physical evidence against him he never would have agreed to withdraw his alibi (PC-R. Vol. V, 668).

Mr. Gordon further testified that, at no time prior to trial, did Mr. Love ever discuss physical evidence or the existence of the State's expert witness, Michael

Vick. The first time Mr. Gordon became aware of agent Vick is when he took the stand. The same was true for state witnesses, Chris Allen and William Bodziak (PC-R. Vol. V, 661-62). Prior to trial, Mr. Love had never discussed hair, fibers, DNA, blood or clothing (PC-R. Vol. V, 663).

When questioned about the issue of severance, Mr. Gordon testified that, once again, Mr. Love never discussed the filing of a motion to sever or made any attempt to explain severance (PC-R. Vol. V, 668-69). In fact, Mr. Gordon testified that Mr. Love never discussed trial strategy with him at any time (PC-R. Vol. V, 678). To support that position, he referred to the close of the State's case where

Mr. Love announced he would not put on a defense and Mr. Gordon, once again, became very upset (PC-R. Vol. V, 672-73).

Since Mr. Gordon denied being in Pinellas County, he was cross-examined and asked to explain why three witnesses had identified him being at the victim's apartment complex to which he insisted that all three were lying (PC-R. Vol. V, 692-94). The state also inquired about witnesses who had received cellular calls from the Tampa area. Mr. Gordon stated the calls may have been made but not by him.. He, at the time of the crime, had his own cellular phone which was seized by the police. Since the calls on his phone were free, he had no need to use another phone (RC-R. Vol. V, 696-99).

The State then proceeded to question Mr. Gordon about his alibi and implied that he had given a different alibi to the Public Defender investigator, Mr. Phleiger, which involved being at a race track. He denied the implication of a different alibi and stated he had never talked to Mr. Phleiger because he learned Mr. Phleiger had been a police officer in St. Petersburg (PC-R. Vol. V, 701-4). When questioned about yet another alibi involving Tire Kingdom, he again affirmed that he had never told anyone anything about a tire store (PC-R. Vol.V, 705-6) and again insisted that he had given both his public defender and Mr. Love one alibi, that of being with Ms.Tyrell (PC-R. Vol. V, 706-7).

At the conclusion of Mr. Gordon's testimony no further witnesses were presented on his behalf. The State then called it's second witness, Ralph Phleiger, an investigator for the public defender's office who admitted he had previously worked for the St. Petersburg Police Department (PC-R. Vol. V, 721-22). Mr. Phleiger contradicted Mr. Gordon's testimony by indicating that he had met with and discussed certain facts with Mr. Gordon relating to where Mr. Gordon was on the day of the homicide. Among those facts was that Mr. Gordon had told Mr. Phleiger that he was at a racetrack and had placed a bet on a specific horse (PC-R. Vol. V, 722-25). The investigator testified that he went to the racetrack and that records revealed that the horse identified to him by Mr. Gordon did not race on

January 25, 1994 (PC-R. Vol. V, 727-29). In addition, he located a witness who recognized Mr. Gordon and commented that he was frequently seen with a white female with blond hair (PC-R. Vol. V, 729-30). Mr. Phleiger also testified that Ms. Tyrell told him that she was able to recall the events of January 25, 1994 because she recalled having tire work done on January 26, 1994. Mr. Phleiger went to Tire Kingdom where a receipt was produced under the name of Robert Gordon bearing the date of January 26, 1994 (PC-R. Vol. V, 731-32). Mr. Phleiger also confirmed that Ms. Tyrell had told him during their first conversation, in March of 1994, that Mr. Gordon had been with her at the beach on January 25, 1994 and that she had

also told that to the police.(PC-R. Vol. V, 739-40). Apparently, the date of January 25, 1994 was also reviewed as to a tire repair but the witness could not recall whether it was Mr. Gordon or Mr. Love who discussed it (PC-R. Vol. V, 731-32).

Detective Ronald Noodwang, on behalf of the State, testified that he interviewed Flovia Tyrell at least three times (PC-R. Vol. VI, 755). During the second interview, when he inquired as to where Mr. Gordon was on the day of the crime, she couldn't tell him nor remember the last time she had seen him (PC-R. Vol. VI, 757-63). In addition, he testified that on March 12, 1994 during his interview with Norma Rose, that when she too was asked if she had any information about Mr. Gordon she stated she had none (PC-R. Vol. VI, 769-70).

Michael Schwartzberg, who had been the trial counsel for Merle MacDonald, was questioned about conversations with Mr. Gordon and trial theories (PC- R. Vol. VI, 781). When he learned the general facts of Mr. Gordon's alibi defense he filed a motion to sever because he believed that if the jury rejected the defense it would prejudice his client. He had concerns about its believability in light of other expected trial testimony and its overall affect on credibility before the jury. He stated that he expressed his concerns in a meeting and suggested that Mr. Gordon should reconsider. Mr. Schwartzberg gave the impression this was a well thought out and reasoned meeting and when it was over, Mr. Gordon agreed to abandon the

alibi defense so he withdrew his motion (PC-R. Vol. VI, 783-4). Under cross examination, however, he guessed as to when the conversation took place and then admitted that he never moved to withdraw the motion to sever until the day of trial. It was the court who raised the issue and at that time it was addressed.(PC-R. Vol. VI, 789-90).

While responding to questions by the State about the unidentified DNA, Mr. Schwartzberg set forth what he believed the trial theory to be. He indicated that when Mr. Gordon and MacDonald had completed what they were hired to do, that of retrieving a document from the victim and then leaving, (PC-R. Vol. VI, 791)

that Mr. Cisneros and his associates entered the victims residence and killed him. Later, Cisneros planted evidence on the clothes worn by MacDonald. He stated that he and Mr. Love spent a lot of time putting the theory together (PC-R. Vol. VI, 786,794). It would appear, however, that the discussions of presenting a unified defense was to insure that neither Mr. Gordon or MacDonald would point the finger at the other. (PC-R. Vol. VI, 788-89).

When again questioned on cross examination about DNA as it related to trial strategy and the decision not to contest it's admission, Mr. Schwartzburg recalled having a brief discussion about the topic with Mr. Love and then, was only "pretty certain" of the discussion (PC-R. Vol. VI, 791). He went on, however, to

imply that the decision, on behalf of MacDonald, not to file a Frye motion was his decision alone. He was not going to suppress DNA evidence consistent with his defense theory of the case especially since no one had a DNA sample of Mr. Cisneros (PC-R. Vol.VI, 792-94). That testimony was followed by his admission that he did not recall if his decision was jointly made with Mr. Love (PC-R. Vol. VI, 794). When questioned about what he would have done if the blood had contained only the DNA of the victim, he stated,

> Then I definitely -- I mean, certainly would have filed a Frye motion at least as to the statistical analysis under Brim.

(PC-R. Vol. VI, 797).

The trial court, at this point, interjected questions and statements as appellant's counsel argued his position that if pre-trial rulings and motions on Frye would have been made, the evidence would have been excluded. The court agreed by saying, "That's true" (RC-R. Vol. VI, 797).

As Mr. Schwartzberg continued his testimony about the joint meeting with the attorneys, Mr. Gordon and MacDonald, he affirmed the position that his client had gone inside the victim's apartment but that it had never been conceded that Mr. Gordon entered the apartment (PC-R. Vol. VI, 801). He acknowledged that the

defense theory of Mr. Love was that Mr. Gordon was " merely present outside" (PC-R. Vol. VI, 802).

The trial court then began a barrage of leading questions of Mr. Schwartzberg with every appearance of a design to bolster his credibility as a trial attorney, to bolster his theory of defense and to make a mockery of Mr. Gordon's motion of ineffective assistance of counsel (PC-R. Vol. VI, 802-814).

The State called as its' last witness, Robert Love, who as a result of a conflict was appointed to represent Mr. Gordon approximately two months before

the trial date (PC-R. Vol. VI, 817-18). Mr. Love testified that in his review of the substantial work completed by the public defender that there appeared to be a number of inconsistent and therefore less credible alibis that involved different places such as the race track, a tire repair business and the beach. However, after discussions with Mr. Gordon, he employed another investigator to re-examine some of the alibis (PC-R. Vol. VI, 820 -21). His testimony reflected what his investigator had done. As a result, he had continuing discussions with Mr. Gordon that a jury would never believe that he was in Miami at the time of the crime (PC-R. Vol. VI, 822-26) and that he had a "zero chance of success" with his alibis (PC-R. Vol. VI, 830). At Mr. Gordon's direction, he filed a notice of alibi which included the different places since he claimed Mr. Gordon was still discussing them (PC-R. Vol. VI, 829). He

also stated that in spite of his beliefs regarding the alibi that if Mr. Gordon wanted him to go forward with it, he would have (PC-R. Vol VI, 834).

In response to questions about DNA, Mr. Love testified that based upon their defense it was his belief that the admission of the DNA would not hurt the case (PC-R Vol VI, 841). Interestingly, he also admitted that in his discussions with Mr. Gordon that he may never have used the term DNA (PC-R. Vol VI, 838).

When questioned about the theory of the case, Mr. Love, as Mr.

Schwartzberg before him, stated that MacDonald's entry into the victim's apartment was conceded and was for the purpose of retrieving a document. The murder was committed by Cisneros and/or others after MacDonald left. It was never acknowledged that Mr. Gordon went in and Mr. Love was not permitted to ever imply that. If anything, he was present outside only. (PC-R. Vol. VII, 856-858). When questioned about "mere presence", Mr. Love admitted he never placed that label nor attempted to develop a defense on mere presence because he did not believe it to be viable (PC-R. Vol. VII, 858). Even though he admitted there was no physical evidence placing Mr. Gordon in the victim's apartment, he stated that with all the other evidence taken as a whole (PC-R. Vol. VII, 861-2);

> there was not going to be anybody that would believe Mr. Gordon was just out looking and feeding the ducks.

(PC-R. Vol. VII, 861).

Mr. Love acknowledged that after his April 4, 1994 appointment to represent Mr. Gordon their first meeting was a simple introduction and he was unsure of how many other conferences there were (PC-R. Vol. VII, 868-69). In addition, he recalled receiving a witness list which included the name of FBI agent Michael Vick dated May 8, 1994. He also admitted that he had never deposed agent Vick. He did not believe any reports were attached and after having his memory refreshed

admitted the first he saw it was at the beginning of trial (PC-R. Vol. VII, 871-74). Again, when Appellant's counsel attempted to learn when Mr. Love first learned of the contents of the report the trial court answered for Mr. Love;

> His testimony, Counselor, is that he knew what they had against his client. FBI reports are notoriously late coming in. So you rely on the State, who gets phone call and says this is what they've got. And then they pick up the phone and say: "We've got you now. We've got your prints." You say, "Oh, you do?" "Yes. We've got the prints. The report will be forthcoming, and I'll get it to you as soon as I get it."

(PC-R. Vol. VII, 875-6)

After several exchanges, including more by the court, Mr. Love finally admitted that he could not recall whether he and Mr. Schwartzberg ever talked about DNA before the trial. (PC-R. Vol. VII, 879). He also testified that he could

not recall if he had the information about the unknown DNA prior to trial (PC-R. Vol. VII, 880). He did testify, however, that once the report was reviewed a decision was made that a Frye hearing was not necessary but could not recall how much time was used to discuss that decision. (PC-R. Vol. VII, 884-85). As questioning continued, Mr. Love testified he was familiar with both the *Vargus* case and the issues of substructures and ethnic groups (PC-R. Vol. VII, 899) but when asked to explain the concept of substructure within a specific ethnic group his

response was;

> As to how many millions or billions of people once they have done that and taken a test on as to DNA matching them up, whether it's Caucasian, African American, or any other particular area.

(PC-R. Vol. VII, 900)

As appellant's counsel attempted to pursue Mr. Love's obvious lack of understanding the court, once again, offered its comment;

> What difference does it make if he does or he doesn't?
> He didn't want it suppressed, is what his testimony is.
> So it wouldn't matter if he didn't even know what it was.

(PC-R. Vol. VII, 900-01).

During the State's re-cross of Mr. Love, a FBI lab report dated June 22, 1994 which indicated a DNA match was marked as exhibit 4 and introduced. It was

established that it had been provided to the public defender's office as additional discovery on June 29, 1994 (PC-R. Vol. VII, 928-30). In addition, the State produced from the record a transcript of the deposition of Detective Michael Celona dated September 9, 1994 in which he affirmed a DNA match with the victim. (PC-R. Vol. VII, 931-32).

As the evidentiary hearing was about to conclude, Mr. Gordon requested to

offer additional testimony. The thrust of it being that Mr. Love told him prior to agent Vick's testimony that he knew nothing of a DNA expert and left the courtroom to talk to him. Mr. Gordon also testified that Mr. Love never discussed any theory or strategy with him and lastly, that he had never seen an FBI report until provided to him by Appellant's counsel, Mr. Barrar. (PC-R. Vol. VII, 952-54.)

SUMMARY OF ARGUMENT

1. Mr. Gordon proved at the evidentiary hearing that he received ineffective assistance of counsel at the guilt phase of his trial for his failure to present an alibi defense. He established that witnesses were available and that trial counsel failed to call them.

2. Mr. Gordon proved at the evidentiary hearing that he received ineffective assistance of counsel at the guilt phase of his trial for his failure to request a Frye hearing and to challenge the admission of DNA evidence.

3. Mr. Gordon proved at the evidentiary hearing that he received ineffective assistance of counsel at the guilt phase of his trial for the failure to seek a severance. He established that all of physical evidence implicated his co-defendant while none implicated him and that a joint trial had no strategic or beneficial affect for him.

4. Mr. Gordon proved at the evidentiary hearing that he received ineffective assistance at the guilt phase of his trial for his failure to investigate and prepare for trial. He established that trial counsel was ill prepared to defend DNA issues.

Additionally, in light of all the evidence that supported a mere presence or minor involvement defense, his trial counsel failed to develop it, raise it or even discuss it.

5. The lower court erred in summarily denying Mr. Gordon's claim of ineffective assistance of counsel in jury selection.

6. The lower court erred in summarily denying Mr. Gordon's claim of ineffective assistance of counsel for failing to exclude the testimony of the primary witness. The court was aware that the State continued the prosecution against Susan Shore based upon insufficient evidence, if any, and that the State coerced a plea to a lesser offense without a sufficient factual basis. The Defendant was denied the opportunity to establish the factors affecting her testimony.

7. The lower court erred in summarily denying Mr. Gordon's claim of

ineffective assistance of counsel as it related to allowing opinion testimony. By denying an evidentiary hearing, Mr. Gordon was unable to establish that much of the trial testimony was based upon hearsay or evidence improperly allowed and contrary to the evidence code yet upon which the opinions were based.

8. The lower court erred in summarily denying a claim of ineffective assistance of counsel for failing to request a separate penalty phase jury. A separate jury, based upon the lack of physical evidence against Mr. Gordon and the overwhelming evidence of co-defendant MacDonald's presence would, because of the uncertainty, have recommended life over death.

9. The lower court erred in summarily denying a claim of ineffective assistance of counsel for failing to object to and seek a mistrial based upon the prosecutor's improper closing argument upon which the HAC factor hung.

10. The lower court erred in summarily denying a claim of ineffective assistance of counsel for not filing a motion based upon the destruction of evidence.

11. The lower court erred in denying an evidentiary hearing as to the State's violation of the Vienna convention.

12. The lower court erred in summarily denying an evidentiary hearing so that Mr. Gordon could show that agent Vick placed before the court perjured or misleading testimony as to who performed the DNA test and the results.

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN JURY SELECTION.

In it's order denying relief on this issue, the lower court attempted to set forth it's understanding of how jurors were randomly selected by computer**.** The court, however, in it's explanation proceeded to guess as to how the original jury pool was acquired when it indicated the pool was selected from "probably

registered voters" (PC-R. Vol. III, 440).

The lower court again erred by finding there could be no systematic exclusion of black jurors simply because the computer made a random selection from the entire jury venire. (PC-R Vol. III, 440). The fallacy of this reasoning is a simple and logical deduction. If the original source of the venire or pool is tainted so will be the result of any random selection. Again, if the court did not know the source of the jury pool on the date of Mr. Gordon's trial it could not and should not, without an evidentiary hearing, conclude that the systematic exclusion of blacks had not been occurring at that time.

Mr. Gordon respectively argues that trial counsel provided ineffective assistance of counsel in numerous ways regarding the issue of jury selection.

Trial counsel Love joined co-counsel in orally making an objection that the entire venire of 50 people did not contain any blacks pointing out that 7.5% of the population of Pinellas County was black (T. 27,28). Defense counsel was an experienced trial attorney at that time having practiced criminal defense for 21

years and having handled 15 to 20 first degree murder cases (PC-R. Vol. VI, 817-18). The very fact that the all non-black venire was noted indicates he was aware of a potential problem. The only action he took, however, was procedurally incorrect. The lower court candidly admitted that counsel may have been ineffective for his

failure to comply with Fla.R.Crim.P. 3.290 which required any challenge to the jury panel to be in writing (PC-R. Vol. III, 440). Mr. Gordon argues that one of the state witnesses, Jeanette Springer, who lived at the apartment complex where the murder occurred made a racial comment. During her January 26, 1995 deposition she eluded to the fact she took note of seeing a black man and white woman together because she was from the "school where it is odd "(R. 1499). Mr. Gordon believes that this statement should have alerted Mr. Love that race could be an issue. It is the position of Mr. Gordon that Mr. Love should have, as an experienced attorney, been aware of or anticipated a jury issue. Realizing that, he should have taken the proper steps or conducted the proper investigation to insure that a proper venire existed. This he failed to do.

The lower court, in it's summary denial, stated that Mr. Love could not have satisfied the requirements set forth in *Duren v. Missouri*, 439 U.S. 357, 364 (1979) any more than collateral counsel (PC-R. Vol. III, 440). That assumption is incorrect. The Supreme Court, in *Duren,* 439 U.S. at 364-66, gave by factual

examples a method to demonstrate how a source of jury pools might not be a reasonable representation of the community and a method to prove it. The tools and the knowledge were available but Mr. Love, as noted by this Court, failed to make any attempt to comply. *Gordon v. State*, 704 So.2d 107, 110 (Fla. 1997).

The lower court's denial of an evidentiary hearing denied Mr. Gordon the opportunity to show that trial counsel's performance in jury selection fell below the standard set forth in *Strickland v. Washington,* 466 U.S. 668, 686-687 (1984).

ARGUMENT II

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO MOVE TO EXCLUDE OR SUPPRESS THE TESTIMONY OF SUSAN SHORE.

The only testimony that places Mr. Gordon and the victim, Dr. Davidson, together, ever, is that of Susan Shore. On the morning of January 25, 1994 she saw Mr. Gordon approach the doctor as he arrived home but never saw either of them enter his apartment (T. 1567-68).

Ms. Shore was one of the five people indicted for the first degree murder of the doctor (R.32-33). On January 26, 1995, after 10 months in jail, she was released.(T. 1616-17). Approximately one week before the trial, Ms. Shore was offered a plea agreement allowing her to plea to accessory after the fact with a

condition that she be deported (T. 1624-25).

Without the testimony of Susan Shore, the State's ability to obtain a conviction of Mr. Gordon was non existent. Her credibility should have been one of Mr. Love's greatest priorities. Her motivation to testify should have been

another. Coerced testimony should have, without any doubt, been examined. Every effort should have been made to, at most, exclude her testimony or at least, to discredit it. For the most, Mr. Love did nothing. His performance was inadequate and far below the acceptable standard.

The Supreme Court has established two prongs when evaluating a claim of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense. *Strickland* at 693. For the reasons set forth above and those that follow, Mr. Gordon believes he has met the above standards.

Related to this discussion is the fact that courts, unfortunately and with some regularity, are forced to remind prosecutors that there duty is not to obtain convictions but to seek justice and that "he or she must exercise that responsibility with the circumspection and dignity the occasion calls for." *DeFreitas v. State,* 701 So.2d 593,600 (Fla. 4th DCA 1997). This Court has described the frequency of the prosecutorial misconduct to be unacceptable and has begun to refer some matters to

the Florida Bar for disciplinary proceedings. See *Ruiz v. State,* 743 So.2d 1 (Fla. 1999). Mr. Gordon, while recognizing the conduct he complains of to be different than what the courts commonly face, believes it equally, to be an ethical violation.

A review of the complete trial testimony of Susan Shore, which in reality equates to the State's only evidence against Ms. Shore, fails miserably to establish her culpability as a principal to the first degree murder of Dr. Louis Davidson (T. 1510-1662). While true she was indicted, the State had an ethical obligation to discontinue an unwarranted prosecution. Mr. Gordon suggests that for their own self interest they kept her under the threat of a first degree murder conviction with the knowledge they could never obtain a conviction. The lower court was of the same opinion when it said;

> it is doubtful the State could have prosecuted Ms. Shore for the crime of murder in the first degree. Frankly, I think they were fortunate to get her to plead to any criminal charge arising out of her involvement in this case.

(PC-R. Vol. III, 442)

The lower court did not feel that was an issue or that the State had done anything wrong. The court, however, only addressed the policy of allowing someone to plea to a lesser offense in exchange for needed testimony but missed the actual misconduct (PC-R. Vol. III, 443). The point is, it should have been an issue had Mr.

Love investigated. The type of conduct complained of causes a breakdown in the integrity of the system by keeping an innocent person under the threat of death or

life in prison. For reasons unknown to Ms. Shore, she was released on January 26, 1995, well before the trial of Mr. Gordon (T. 1627). There was no more or no less evidence against her. It is hard to conceive that the State would have agreed to the release of someone charged with first degree murder to live in an apartment even though her freedom was somewhat restricted (T. 1626). The entire ten month period of incarceration on a charge based on insufficient evidence and the continuation of that charge until after her testimony smells of misconduct. Mr. Love did nothing. Under cases that speak of the duty of a defense attorney to investigate the case and to become intimate with the details, Mr. Love failed completely. See *Lovett v. Florida,* 627 F.2d 706 (5th Cir. 1980), *Rummel v. Estelle,* 590 F.2d 103 (5th Cir. 1979), *Squires v. State,* 558 So.2d 401 (Fla. 1990) and *Overton v. State*, 531 So.2d 1382 (Fla. 1st DCA 1988). Nowhere in his entire testimony at the evidentiary hearing of what he did, what his investigator did or during conferences he claims to have had with Mr. Gordon was this matter discussed (PC-R. Vol.VI, 817- 846 and Vol. VII, 850-943). Mr. Gordon suggest that the continued prosecution of Ms. Shore was the equivalent of malicious prosecution and may very well have tainted her testimony. Mr. Love had an obligation to investigate the unwarranted

prosecution, the release prior to a plea agreement, the agreement to release, the

reason for deportation, all or some of which, may have been grounds for the suppression of or to discredit the testimony of Ms. Shore.

The lower court's denial of an evidentiary hearing denied Mr. Gordon the opportunity to show that trial counsel's performance in moving to suppress or discredit the testimony of Susan Shore coupled with his failure to investigate prosecutorial misconduct fell below the standard set forth in *Strickland v. Washington,* 466 U.S. 668, 686-687 (1984).

ARGUMENT III

THE LOWER COURT'S RULING FOLLOWING THE POST CONVICTION EVIDENTIARY HEARING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT AN ALIBI DEFENSE WAS ERRONEOUS.

It is reasonable to assume that when requested to explain your whereabouts many people, without some form of verification, would not know where they were on a specific date and time. It is further reasonable to assume they might have ideas of places they were within the time frame. If incarcerated, they must depend on others for investigation and verification. That is the position that Mr. Gordon found himself in.

At the evidentiary hearing there was testimony from Mr. Love that interviews

had been conducted with Mr. Gordon and others from which it was inferred that

Mr. Gordon had presented different alibis which were inconsistent. Mr. Love, however, did not say Mr. Gordon conveyed different alibis to him. (PC-R. Vol. VI, 820-21). As a result of not being able to corroborate an alibi, Mr. Love repeatedly advised Mr. Gordon that in his opinion a jury would never believe an alibi defense (PC-R. Vol. VI, 825-6, 830). Interestingly, he pointed out that no one gave credibility to the alibi defense except Mr. Gordon (PC-R. Vol. III, 843). By that statement it is clear that Mr. Gordon wanted to use an alibi. It is also equally clear that Mr. Love did not for reasons that will be addressed under the severance and investigation arguments. Suffice it to say that Mr. Love had become determined to join in the defense suggested by counsel for MacDonald. This commitment to that defense theory caused Mr. Love to put the interest of MacDonald before those of Mr. Gordon.

On May 4, 1994, approximately one month before trial, Mr. Love filed a notice of intent to claim alibi which included the name of Flovia Tyrell (R. 1894). He testified that the notice was filed at the direction of Mr. Gordon (PC-R. Vol. VI, 827). Once again, a clear indication that Mr. Gordon intended to present an alibi. On May 31, 1994, now only 6 days before the trial, Mr. Love filed an amended alibi witness list (R. 1914), a further indication that Mr. Gordon still intended to present an alibi defense. Neither notice, however, included the name of Mr. Gordon's sister,

Norma Rose, although she had been interviewed by Mr. Love. During that interview she informed him that she had seen Mr. Gordon on the day of the murder (PC-R. Vol. VI, 865).

Another concern is that Mr. Love testified he had reviewed all of the public defender's initial investigation conducted by Ralph Phleiger which he found to be extensive. He, in fact, admitted that Mr. Phleiger was the only one he spoke and dealt with (PC-R. Vol. VI, 819). Mr. Phleiger, however, testified that his initial interview with Mr. Gordon took place immediately after the March 1994 appointment of his office. During that interview Mr. Gordon told him he had been at the beach with Ms. Tyrell on January 25, 1994 (PC-R. Vol. V, 740). Additionally, he testified that in March he also interviewed Ms. Tyrell who stated she had spent January 25, 1994 at the beach with Mr. Gordon (PC-R. Vol. V, 738-39). In her response to his question about that date, she stated she recalled the date because she had gone to Tire Kingdom the following day (PC-R. Vol. V, 731). Mr. Phleiger then testified that he went to Tire Kingdom and confirmed that work had been done on January 26, 1994 (PC-R. Vol. V, 732). The Tire Kingdom work performed on January 26, 1994 was, therefore, not an inconsistent alibi as Mr. Love presented (PC-R. Vol. VI, 829), but an event that allowed Ms. Tyrell to be certain of the beach date. In regards to any other potential alibis that may have been given

to Mr.

Phleiger or Mr. Love, and referred to in the State's written closing argument (RC-R. Vol. III, 431-33), they were privileged communications which would not have come to the attention of the State or the jury.

It would appear that from the first interview of both Mr. Gordon and Ms. Tyrell that each provided a consistent alibi with Tire Kingdom serving as a time reference. At the evidentiary hearing, that alibi was again confirmed by Mr. Gordon (PC-R Vol.II, 652, 667,668) and Ms. Tyrell (PC-R. Vol. II, 640-1). Ms. Tyrell also testified that, following the beach, she and Mr. Gordon had dinner at the home of Norma Rose in the evening (PC-R. Vol. II, 640-41). Ms. Rose, again confirmed the dinner on January 25, 1994 and testified she informed Mr. Love of this at the meeting in his office (PC-R. Vol. II, 624-25). She also testified under cross examination that it was Ms. Tyrell who refreshed her memory as to the date of the dinner (PC-R. Vol. II, 628). In addition, she stated she was present during the trial and had spoken to Mr. Love (PC-R. Vol. II, 626). She was therefore available to testify.

It appears that from the above testimony that a consistent alibi had been presented at the beginning of Mr. Gordon's representation by the public defender by both Mr. Gordon and Ms. Tyrell. Mr. Love felt it necessary, however, to

describe it the alibi in the following manner;

> It was horrible. It was something not to be pursued. Period. I don't care if Ms. Tyrell would have offered ten more different explanations for it or whoever would have done whatever else. It was not going to fly, in my opinion. Period. End of the story. I don't care what else would have been involved. It was -- it was idiotic to pursue that, in my opinion.

(PC-R. Vol VII, 942).

What Mr. Love has actually said is that the theory developed by the attorney for MacDonald, that Mr. Gordon and MacDonald entered the victims apartment, retrieved something and left before Cisneros or others entered and committed the murder, could not be maintained if an alibi was presented. This was the only defense available to MacDonald in light of the physical evidence. It was clearly not the only defense available to Mr. Gordon and if anything, was the most prejudicial to him.

In *Wike v. State*, 813 So.2d 12 (Fla. 2002), the defendant argued ineffective assistance of counsel for failing to present a viable defense. The State argued that at the evidentiary hearing, the alibi witness testified contrary to Wike by stating she was not with him and therefore he could not establish prejudice. The trial court denied relief. This Court found that the trial court's decision was based on competent, substantial evidence and rejected Wilk's claim..

While Mr. Gordon's issue is similar to Wilk's, the facts are not. Here,

the alibi Of. Mr. Gordon was consistent from his first interview. All other

information alleged to have come from him was privileged. His witnesses were consistent from the time of their interviews with Mr. Phleiger. Both alibi witnesses, at the evidentiary hearing were again consistent. Mr. Gordon does not suggest the alibi would be easy. He understands that before a jury, family members do not carry

the same weight as neutral parties. He also understands that, according to Det. Noodwang, who testified at the evidentiary hearing, that on March 11, 1994 when he asked Ms. Tyrell if she knew where Mr.Gordon was on the day of the homicide, she said no (PC-R. Vol. VI, 764-65). The Detective admitted, however, that he was not aware that Ms. Tyrell had told Mr. Phleiger on March 8, 1994 that Mr. Gordon was at the beach with her (PC-R. Vol. VI, 765). It is Mr. Gordon's position that the use of the March 11, 1994 statement for impeachment was severely weakened by the March 8, 1994 statement.

Mr. Gordon argues that Mr. Love's decision not to put on an alibi was done solely to insure the that defense theory discussed above would remain intact. This so called strategy inured only to the benefit of MacDonald. Mr. Love's continued insistence on it constituted deficient performance. He further argues that the failure to place before the jury an available viable alibi prejudiced the defense therefore

meeting both requirement of *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The remaining point centers on the withdrawal of the alibi defense and the

circumstances that surrounded it. Mr. Love testified that the decision to drop the alibi was, in the end, that of Mr. Gordon. (PC-R. Vol. VI, 834). He describes, however, a meeting with six people present to discuss the alibi (PC-R. Vol. VI, 830-31, 835-36). He further states it was clear to Mr. Gordon what he and everyone else thought about the alibi (PC-R. Vol. VI, 834) and that he continued to attempt to convince Mr. Gordon of the trial strategy (PC-R. Vol. VI, 838). The question presented is whether the withdrawal of the alibi was freely and voluntarily made after full disclosure.

A review of the trial transcript reveals that Mr. Schwartzberg had his motion to sever hand delivered to the trial judge the day before trial (T. 3). That supports Mr. Gordon's position that he had not agreed to withdraw his alibi. At some point between June 5, 1994 and June 6, 1994, the morning of trial, it appears from the colloquy between the trial judge and Mr. Gordon that he agreed to withdraw the plea (T. 3-6). However, in light of the attempts to convince Mr. Gordon of their theory of the case as discussed above, coupled with his unfamiliarity with the system, his withdrawal can not be said to be voluntary. Add to that his testimony wherein he stated he did not understand. He believed if the alibi was withdrawn Mr.

Love would still put on a defense. He argues to this Court, as he did at the evidentiary hearing, that he never agreed that no defense would be placed before the

jury.(RC-P. Vol. V, 665-67).

To avoid repetitive argument, Mr. Gordon respectfully requests this Court to consider the entire severance argument of Argument V, as it relates to Mr. Gordon's ability to make an informed decision to withdraw his alibi.

Despite the lower court's ruling, it is clear that trial counsel was ineffective if failing to present an alibi defense. Mr. Gordon is entitled to a new trial.

ARGUMENT IV

THE LOWER COURT'S RULING FOLLOWING THE POST CONVICTION EVIDENTIARY HEARING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE ADMISSIBILITY OF DNA EVIDENCE AND TO CONDUCT A FRYE HEARING WAS ERRONEOUS.

The joint trial strategy developed by Michael Schwartzberg, trial counsel for co-defendant MacDonald, was that Mr. Gordon and MacDonald were hired to retrieve a document from the victim, Dr. Davidson. After they completed what they were hired to do, Mr. Cisneros, having his own plan, along with his associates, entered the apartment, killed the doctor and later planted evidence on clothing worn by MacDonald (PC-R. Vol. VI, 786, 791). Mr. Schwartzberg and Mr. Love

reached an agreement among themselves that a unified defense was best (PC-R. Vol. VI, 788). Mr. Schwartzberg also believed that because there was DNA that could not be matched to Mr. Gordon, MacDonald, or the victim that the admission of the DNA

bolstered his case (PC-R Vol. VI, 786, 791-92). He also testified that the decision not to file a Frye motion was exclusively his (PC-R. Vol. VI, 792), although he may have discussed it briefly with Mr. Love (PC-R. Vol. VI, 791). Mr. Gordon argues to this Court that it was also important to Mr. Schwartzberg and his client, that after considering all the facts, they needed Mr. Gordon at the scene with MacDonald or the defense would not work. It is also suggested to this Court that Mr. Schwartzberg had to insure that Mr. Gordon would not testify against MacDonald.

As stated above, the decision not to challenge the admission of DNA was made by Mr. Schwartzberg with respect only to the best interest of his client, MacDonald. The issue of concern, however, is whether that decision was in the best interest of Mr. Gordon. Mr. Gordon argues to this Court that the unified defense was not in his best interest and for reasons to be discussed latter, Mr. Love's insistence on the that defense, once again constituted deficient performance in accord with *Strickland v. Washington*, 466 U.S. 668 (1984) . Mr. Love may very well have been convinced by Mr. Schwartzberg that the unified defense was

the best possible defense. The lower court has set forth an excellent and very convincing review of how the facts tie in to the unified defense presentation (PC-R. Vol. III, 454-458) and those same facts may have blind sided Mr. Love.

The primary reasons for the necessity of the Scwartzberg defense was that;

(1) physical evidence in the form of DNA, hair and fiber evidence, along with a shoe imprint placed MacDonald in the victims apartment; and (2) The DNA from blood samples taken from clothing worn by MacDonald matched that of the victim and also contained an unknown source (T. 1211-1297, 1174-1210). Hence, a path to Cisneros. MacDonald had no other viable defense. This was it, as weak as it was. However, that was not the case with Mr. Gordon. There was absolutely no physical evidence placing him in the apartment (T. 1211-1297). Mr. Gordon did not need MacDonald to be part of his defense. Other defenses were available.

The State, from it's opening statement, where Mr. Gordon and MacDonald were introduced as the two people responsible for the murder, set the scene and established the trail. At every stage, the two were treated as one (R. 2256-2320). Mr. Gordon suggests that perception evaded the entire trial and where neither defendant put on a defense, all the physical evidence introduced against Mr. MacDonald was used against Mr. Gordon. The admission of DNA evidence had a devastating effect on Mr. Gordon.. Since the admission of DNA, combined with

the testimony of an expect, has the effect of being conclusive proof, Mr. Love's failure to move to exclude the evidence prejudiced Mr. Gordon to such an extent that the second requirement of *Strickland,* 466 U.S. at 687 has been met.

The lower court in, denying relief, made an additional finding, by stating it would have found that the testimony of the DNA expert at trial would have past the requirements set forth in *Frye v. U.S.,* 293 F. 1013 (D.C. Cir. 1923). The court reasoned that based on the evidentiary hearing testimony of Dr. Tracy, that by the June 6, 1995 trial date, the concerns of the affect of ethic substructures on population frequency raised in *Vargus v. State,* 640 So.2d 1139 (Fla. 1st DCA 1994) had dissipated. Mr. Gordon takes issue with this finding since the court arrived at it by inappropriate means, the assertion of one biased expert. The standard requires a determination, by the judge, that the basic underlying principles of scientific evidence have been accepted by the relevant scientific community. *Brim v. State,* 695 So.2d 268, 272 (Fla. 1997). Furthermore, "in applying the *Frye* criteria, general scientific recognition requires the testimony of impartial experts or scientists" *Ramirez v. State,* 810 So.2d 836, 851 (Fla. 2001). Dr. Tracy can hardly be said to be impartial since he was one of the experts who testified in *Vargus* wherein the Court declined to follow his position (PC-R. Vol. IV, 594, 600).

Additionally, there were no Florida judicial opinions, scientific or legal publications considered by the lower court. Mr. Gordon argues that it was error for the court to make a ruling on admissibility based upon one expert especially when the defense expert was not in agreement.

ARGUMENT V

THE LOWER COURT'S RULING FOLLOWING THE POST CONVICTION EVIDENTIARY HEARING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE TO SEVER WAS ERRONEOUS.

Trial counsel for MacDonald believed that a severance was necessary only when considered in relation to the alibi defense sought by Mr. Gordon. He believed it to be so weak that if presented to, and rejected by a jury, that such rejection would prejudice his client (PC-R. Vol. VI, 783) and (T. 4-5). The trial court was of the same belief since it was prepared to grant the severance if the alibi was not withdrawn. (PC-R. Vol. VII, 890) . The testimony of Mr. Love indicates his only discussion regarding a severance also centered around the alibi defense (PC-R. Vol. VII, 889). What is so disturbing and so missing was any discussion with Mr. Gordon by Mr. Love about the possible benefits to him of a severance. Mr. Love testified as to the content of his discussion. The fact that a severance might be in the best interest of Mr. Gordon was never even raised (PC-R. Vol. VII, 889). Such

a complete lack of the most minimal representation on that issue alone coupled with the consequences that followed satisfy every *Strickland* requirement because, at that point, Mr. Gordon had no legal representation. Mr. Love was so possessed with

the Schwartzberg defense theory, that every decision he made inured to the benefit

of MacDonald and to the detriment of his own client, Mr. Gordon.

It has been inferred that Mr. Gordon was insistent on going forward to trial and that a severance would have meant a delay (PC-R. Vol. VI, 784-85). Perhaps, if someone had taken the time to inform Mr. Gordon of the pros and cons of a severance and the extreme flaw in the Schwartzberg defense, an informed decision could have been made. Mr. Gordon respectfully requests this Court to consider the entire severance argument as it relates to Mr. Gordon's ability to make an informed decision to withdraw his alibi along with Argument IX.

As previously discussed, the trial court was ready to grant a severance. If the MacDonald trial went first, Mr. Love could have observed the merit of the defense theory and made adjustments, if warranted. He could have refined his alibi defense or abandoned it based on other factors he might learn. It is suggested that if the defense were later withdrawn for other reasons there would have been no false statements made to the court. Mr. Gordon could have used a portion of the

Schwartzberg defense but modified it to indicate MacDonald alone entered the apartment. No evidence placed Mr. Gordon inside. If the DNA evidence was admitted he could have then argued Cisneros joined MacDonald. Under any of those theories, even if convicted based on other circumstantial evidence under the principal theory, the death penalty, in all likelihood, would not have been imposed.

The mere presence defense, another defense ignored by Mr. Love, was supported by the lack of physical evidence and the testimony of Jeanette Springer (T. 587-606) and Nathan Wherry (T. 620-27) both residents of the same complex as the victim. Needless to say, any of these theories could have been diminished in a joint trial where MacDonald could have refuted or contradicted them. In summary all of these defenses should have been explored yet were never even discussed.

Another related area of concern is that the only motion to sever that was filed was that of Mr. Schwartzberg (T. 3). Independent of the alibi issue, a motion to sever should have been filed on behalf of Mr. Gordon. None was (T. 6), which once again, indicates Mr. Love never discussed the merits of a severance with Mr. Gordon.

The lower court, in it's order denying relief, indicated that without the alibi, Mr. Gordon had no grounds for a severance and if presented, it would have been denied (PC-R. Vol. III, 460).

It is suggested that if Mr. Gordon had effective assistance of counsel and had made the appropriate argument the lower court's hindsight ruling would not have been correct. Under Florida Rule of Criminal Procedure 3.152 (b)(1)(A), a severance of defendants may be ordered when it is appropriate to promote a fair determination of the guilt or innocence of the defendants.

Mr. Gordon is aware that a severance is not necessary when evidence is "presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence." *Coleman v. State,* 610 So.2d 1283, 1285 (Fla. 1992) (quoting *McCray v. State,* 416 So.2d 804, 806 (Fla. 1982). In *Coleman* however, none of the co-defendants blamed the other. Id. at 1285. This Court seemed to indicate that if the defendants had blamed each other and had used antagonistic evidence toward the other that a severance may have been appropriate, Id. at 1285. That also appears to be the Second Districts interpretation in *McLean v. State*, 754 So.2d 176, 179 (Fla. 2d DCA 2000). Mr. Gordon is aware, however, that the simple desire of one defendant to point the finger at the other is, standing alone, insufficient grounds for a severance. See *Jeffries v. State*, 776 So.2d 335 (Fla. 1st DCA 2001). Mr. Gordon argues that the facts of his case are more in line with the facts of *Crum v. State,*

398 So.2d 810 (Fla. 1981) and therefore supported a severance. This Court had previously found the problem in *Crum,* which justified the severance, was not an antagonistic defense but rather that one co-defendant had induced the other to believe their defenses would be completely consistent. After jeopardy attached, one changed his defense prejudicing the trial preparation of the other. This Court

indicated that severance might not have been appropriate if there had been no prior inducement or sufficient notice before trial of the defense change. See *Jones v. Moore,* 794 So.2d 579 (Fla. 2001). In this case, Mr. Love had only been appointed approximately 8 weeks before trial. By the time he had reviewed all the prior work of the public defender and completed his own, the trial had arrived. Had he correctly presented the benefits of severance to his client along with viable defense theories geared toward, a not guilty by mere presence, a lesser included based on other facts or a non-death sentence based upon a lesser degree of participation, the Schwartzberg unified defense theory would have been out the window leaving MacDonald in the same precarious position as Mr. Crum.. See *Crum v. State*, 398 So.2d 810 (Fla. 1981) This is especially true since MacDonald's case would have been tried first (PC-R. Vol. III, 460-61).

Without again repeating the trial pages, record pages and evidentiary hearing pages, the was an abundance of evidence to support numerous defenses or in the

alternative an alibi, any of which would have justified a severance. The failure of Mr. Love to discuss these options with his client demonstrated a profound deficiency in his performance. His utter failure to seek a separate severance on his own or to accept the severance because of the alibi again constituted a deficiency in his performance. Removing those defenses from the consideration of the jury took

from Mr. Gordon the very real probability that, even if convicted as charged, the sentence would have been life over death.

"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." *Strickland v. Washington,* 446 U.S. 668, 687 (1984).

Despite the lower court's ruling, it is clear that trial counsel was ineffective in failing to move for a severance independent of the alibi or, in the alternative, to

maintain the alibi and accept the severance. Mr. Gordon is entitled to a new trial.

ARGUMENT VI

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF FOR FAILURE TO OBJECT TO OR STRIKE THE OPINION TESTIMONY OF MARY ANDERSON AND MICHAEL CELONA.

The somewhat short direct testimony of Mary Anderson (T. 1803-1822)

went a long way in permitting Det. Michael Celona to establish the general physical location of the cellular phone of Denise Davidson as it moved about throughout the state and circumstantially linked its use to MacDonald and Mr. Gordon (T. 375-76, T. 1860- 1903). It is argued by Mr. Gordon that without her testimony, Det. Celona would not have had the information from which to make his interpretations. Mr. Love made no objections to the testimony (T. 1803-1822) and offered no cross-examination (T. 1822).

Mr. Gordon argues that the testimony of Ms. Anderson and the introduction of evidence through her was subject to attack. To begin with, Ms. Anderson testified that she is the director of security (T. 1804). There was no testimony presented by the state that permitted the introduction of business records such as the account of Denise Davidson (T. 1804) or cell sit maps (T. 1814) as exceptions to hearsay consistent with the requirements of Section 90.803 (6) Florida Statutes.

Without quoting the requirements dealing with records of regularly conducted business activity, suffice it to say, there was no testimony other than her position. The record is also absent of any stipulation by the parties for the admission although neither defense attorney objected (T. 1803-1822). As pointed out above, Mr. Love made no objections and permitted evidence that was highly prejudicial to his client. In addition, Ms. Anderson testified to an agreement reached by different phone

companies and the purpose of the agreement (T. 1808). This testimony was clearly hearsay, yet again, no objection was made. As her testimony continued, she addressed the topics of cellular phones being small transmitters and the limited amount of power to cell sites, clearly now progressing into expert testimony (T-1813, 1816). Still, no objections. Had objections been made by Mr. Love, some or all of this evidence should have been excluded pursuant to the evidence code (See Section 90.803 (6) Florida Statutes) or because some of her testimony was clearly beyond her expertise. See *Jordon v. State,* 694 So.2d 708 (Fla. 1997).

When Detective Michael Celona testified about the chronological tracking of the cellular phone belonging to Denise Davidson and the general physical location of that phone every time a call was made he did so from the business records and maps introduced through Mary Anderson.

Mr. Gordon argues to this Court that the testimony would not have been possible but for Mr. Love's failure in excluding it. Mr. Gordon also argues that even if the evidence had not been excluded, the interpretation of cellular phone records, cell site locations and cellular dumping exceeded the type of opinion testimony permitted from ordinary police experience. A review of the cases in the State's Response to Order to Show Cause (PC-R. Vol. I, 48) in support of a police officer's opinion testimony dealt with true ordinary police experiences such as a crime scene

explanation, recoil marks from a rifle and tire tread comparisons. See *Floyd v. State,* 569 So.2d 1225, 1332 (Fla. 1990); *Jones v. State,* 440 So.2d 570, 574 (Fla. 1983); and *Peacock v. State*, 160 So.2d 541 (Fla. 1st DCA 1964), cert. den; 168 So.2d 148 (1965). Again, Mr. Gordon argues that the mechanics of cellular phone technology is not an ordinary police experience especially in the absence of testimony to the contrary of which there was none.(T. 1860- 1903).

The failure of Mr. Love to challenge the testimony of Ms. Anderson and the evidence introduced through her demonstrate a deficient performance of counsel for which Mr. Gordon suffered prejudice. The failure of Mr. Love to challenge the testimony of Detective Celona demonstrate a deficient performance of counsel for which Mr. Gordon suffered prejudice.

The lower court's denial of an evidentiary hearing denied Mr. Gordon the opportunity to show that trial counsel's performance in failing to object to or moving to strike the opinion testimony of Mary Anderson and Detective Michael Celona fell below the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 686-687 (1984).

ARGUMENT VII

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO SEEK A SEPARATE PENALTY PHASE JURY.

When this issue was addressed during the Huff hearing, the following remarks were made by the court;

> So, as I said, they have – may have raised it late. And sometimes after the death penalty is imposed they think of things they wished they'd have raised and raise them. That doesn't alter the fact that there has got to be some basis for granting it. I didn't see one then, haven't seen one now, and therefore counsel can't be ineffective for failing to raise something that wouldn't have been granted.

(HH. 1057).

> All right. But as I said, I think even more important is that, ah – this is a matter that he would not have gotten– There really wasn't any basis here. These two were either together or they weren't there at all. And if they were together, pretty tough to point the finger at one as opposed

> to the other, since neither of them ever testified and nobody will ever know exactly what went on in that house.

(HH. 1058).

What is worth noting from the first quote above is that the court suggested it might have granted a timely request for separate penalty phase juries if there was a sufficient reason. The implication of the second quote explains why the court felt that basis did not exist. The fact remains, however, that not seeing it does not mean it didn't exist.

Mr. Gordon request that this Court adopt all of his previous arguments and

subsequent arguments, especially those which demonstrate that various defenses existed. At least two defenses, that of mere presence and that of a lesser participation would have permitted pointing the finger at MacDonald. Due to all the previously discussed physical evidence placing MacDonald in the apartment, it is highly improbable that MacDonald would have ever pointed the finger at Mr. Gordon. Attempting to make those arguments to the jury on behalf of Mr. Gordon while MacDonald made the Schwartzberg defense argument would have produced so much confusion in the minds of the juries that they would not have been able to make a fair determination of guilt or innocence.

ARGUMENT VIII

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO SEEK A MISTRIAL BASED ON PROSECUTORIAL MISCONDUCT DURING CLOSING.

"A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence:" *Ruiz v. State,* 743 So.2d 1 (Fla. 1999). This Court in *Ruiz,* expanded on the impact of improper comments made by a prosecutor by pointing out that prosecutors, by representing the government, are clothed with

an air of believability. Id. at 4. This Court has also recognized that the use of closing arguments by a prosecutor, "to inflame the minds and passions of the juries so that their verdict reflects an emotional response" is improper. *Bertolotti v. State,* 476 So.2d 130, 134 (Fla. 1985).

The misconduct goes far beyond that addressed in the summary denial and warrants discussion. Mr. Gordon argues to this Court that the effect of improper comments made by a prosecutor is further heightened when such comments are made in the penalty phase as occurred in his trial. What impact the improper comments had on the jury is unknown. That unknown answer did not prejudice the

State but may very well have shifted a majority vote of life to that of death. Here, a prosecutor told the jury that the defense argument that the victim was unconscious was hog wash; that the victim begged for mercy; and that he cried out when he was bound and gagged. The prosecutor continued by asking the jury to think about the victim being held down, coming up, being held down. He asked them to think about it again. He told the jury they knew how long it took to fill a bath tub up and that the victim had to listen for twenty minutes to the tub fill knowing his life was going to be taken. The prosecutor then informed the jury that those facts constituted the aggravating circumstance of heinous, atrocious and cruel.(PP. 77-82). The problem is that non of those facts were in evidence. The prosecutor created his own script

which was later prohibited in *Urbin v. State*, 714 So.2d 411, 421 (Fla. 1998). When objected to, the lower court allowed the prosecutor to continue finding he was only making reasonable inferences (PP. 78). Interestingly, this Court disagreed. See FN9, *MacDonald v. State,* 743 So.2d 501 (Fla. 1999).

It is the position of Mr. Gordon that counsel's performance was deficient for his failure to object throughout the argument on this issue and to move for a mistrial. Mr. Gordon argues that the jury found the aggravating factor of heinous, atrocious and cruel by considering facts not in evidence. It is highly probable that

this may have been the most serious of the aggravating factors and the one which tilted the recommendation from life to death. The prejudice that fell upon Mr. Gordon by the deficient performance of counsel is immeasurable.

The lower court's denial of an evidentiary hearing denied Mr. Gordon the opportunity to show that trial counsel's performance in failing to object and move for a mistrial fell below the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

ARGUMENT IX

THE LOWER COURT'S RULING FOLLOWING THE POST CONVICTION EVIDENTIARY HEARING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO THROUGHLY INVESTIGATE AND PREPARE WAS ERRONEOUS.

The lower court in its denial of this issue refers by way of record references to the work performed by all parties in the representation of Mr. Gordon even to the fact that he billed the county for 241.50 hours (PC-R. Vol. III, 466-469). It has been held however, that a " determination whether reasonably effective assistance of counsel was rendered requires an inquiry into the totality of the circumstances". *Carbo v. United States,* 581 F.2d 91, 92 (5th Cir. 1978). Time, therefore, is but one circumstance. While it is true that a defendant is "not guaranteed an errorless attorney", he does have "the right to be represented by counsel reasonably likely to

render and rendering reasonably effective assistance. *Herring v. Estelle,* 491 F.2d 125, 127 (5th Cir. 1974). Mr. Gordon points out that while investigation, examination and preparation are other circumstances, they again are not complete. Somewhere in this inquiry into the totality of circumstances must be an exploration of all the defenses that may lend themselves to the facts or lack of facts. Somewhere in this inquiry must be the presentation and discussion of these defenses with the accused. Even this may still not be sufficient. In Mr. Gordon's case the exploration, the presentation and the discussion were woefully lacking. The answer of why has been previously discussed. Mr. Love wanted only one defense, the flawed Schwartzberg defense. Neither that defense nor joint trial was in the best interest of Mr. Gordon. Mr. Gordon, rather then reargue what has already been

presented asked this court to consider in this issue all the arguments presented under Arguments II, III, IV, and V.

Without the necessity of any record references or case sites common sense would suggest that DNA evidence can be overwhelmingly compelling. It would seem what would follow in a case with such evidence is that it would be discussed with the client. Was it? The lower court must have accepted the testimony of Mr. Schwartzberg and Mr. Love about making a strategic choice not to challenge it, and as previously cited, both attorneys stated Mr. Gordon was present at these strategy

sessions. The following colloquy between Mr. Love and collateral attorney Mr. Barrar certainly casts doubt on the credibility of that assertion;

> Q. Okay. And at some point in time,
> did you discuss with him the DNA evidence in this case.
> A. Yes, sir.
> Q. Okay. Tell us about that.
> A. I talked with Mr. Gordon. We all talked about things. I don't know if I ever used the exact words "DNA" .....

(PC-R. Vol. VI, 837-38).

How is it possible in a case with an expert DNA witness not to use the term DNA? The answer may be as Mr. Gordon testified to. He never knew anything about agent Vick until he took the stand (PC-R. Vol. V, 661-62). The State, in it's written closing attempted to diffuse this issue by reference to a bond hearing where

blood was discussed. (PC-R. Vol. III, 423).Two points, (1) Mr. Love was not appointed yet, and (2) the term "DNA" was never used. (R. 61-83). The following, however, was said;

> Mr. Schaub: On those sneakers is blood, on the sweatshirt is blood.

(R. 71)

> The Court: The only thing that you started to mention and maybe you I didn't hear it, but you indicated there was blood on the shoes and on sweatshirt that was in the motel. Whose shoes, whose sweatshirt and whose blood?

> Mr. Schaub: I believe what we're going to find based upon the hairs. I believe the blood is coming back to Dr. Davidson.

(R. 74)

Throughout the entire bond hearing, that was it. Hardly enough to infer that Mr. Gordon was then, or ever, aware of DNA evidence or it's implications.

Another indication of the lack of competent counsel regarding the issue of DNA was uncovered during the evidentiary hearing when Mr. Love was asked if he was familiar with the concept of substructure within a specific ethnic group and then asked to describe it. He answer revealed a total lack of understanding. It left no doubt why he did not pursue a Frye hearing nor that he ever had an intelligent discussion of DNA with Mr. Gordon. (PC-R. Vol. VII, 900).

It is not suggested that a lawyer have an in depth knowledge about the intricate details of complex issues at the beginning or even the end of a trial, especially when those areas require testimony from an expert witness. It is suggested, however, that somewhere along the way, either through discovery, research or consultation with an expert, that the attorney have at least a basic grasp of the subject matter so as to effectively communicate the significance of, or lack of, to his client. It is evident that Mr. Love never had the knowledge at the beginning of trial, during trial or after the trial to have a meaningful conversation

with his client upon which critical choices could be made.

Mr. Gordon insist that this Court be made aware of his other allegations of improprieties concerning the testimony of agent Vick. While numerous exhibits were introduced into evidence through agent Vick,(T. 1211-1239) there was one notable exception, the lab report verifying a DNA match to the victim. Mr. Gordon argues that a lab report exist that is dated June 13, 1994, signed by A. Lynch which indicates there was no match. He believes this report shows that agent Vick committed perjury and that the DNA should have been excluded. He argues that Mr. Love was deficient for not demanding to see the DNA report and therefore not discovering the report by. A. Lynch.

Another missed opportunity for Mr. Love was the defense of “mere

presence”. It might be argued that the defense had no merit. After a discussion with Mr. Gordon it might have been discarded. Unfortunately, once again, such a discussion never took place because Mr. Love did not believe it to be a viable defense. (PC-R. Vol. VII, 858). He believed in the Schwartzberg defense, that both Mr. Gordon and MacDonald entered the apartment to get a document and then left. Cisneros and others then entered to commit the murder. (PC-R. Vol. VII, 858). Another reason given by Mr. Love was that “there was not going to be anybody that would believe Mr. Gordon was just out looking and feeding the ducks” (PC-R.

Vol. II, 861). But in a sense, on the morning of January, 25, 1994, that is what the substance of the eyewitness testimony was. Excluding the ducks, both witnesses observed Mr. Gordon, walking, sitting, talking or playing ball with Ms. Shore on a grassy knoll by the lake. (T. 589, 622-23). There was nothing sinister in their actions. The only other eye witness was Ms. Shore herself. The substance of her testimony, while at the apartment, was that MacDonald was the first to leave and the last to return at which time he indicated he got the paper and patted his shirt. Although she did see Mr. Gordon speak to Dr. Davidson, she never saw Mr. Gordon enter or exit his apartment. In addition, he showed no physical or emotional signs of being in a violent struggle as the State had suggested took place (T.1564-71, 1628). As previously noted and cited, there was no physical evidence that

placed Mr. Gordon in the apartment. The same was not true of MacDonald. There was hair, fiber, a bloody shoe print and MacDonald's recovered clothing with blood that DNA matched to the victim.

The point that Mr. Gordon argues is that the "mere presence" defense was supported by testimony, physical evidence and the lack of physical evidence. The physical evidence, but for the unidentified DNA, did not, however, support MacDonald's defense which Mr. Love chose to adopt. Of equal importance is that

the “mere presence” defense would have allowed Mr. Gordon to point the finger at MacDonald, and Cisneros if necessary, all of which would have been supported by the evidence.

Mr. Gordon acknowledges from the trial testimony that there was substantial circumstantial evidence from cellular phone records, Western Union transfers and prior trips to Tampa Bay all of which was summarized in the State’s closing argument(T. 2081-2159). Mr. Gordon, argues however, that the circumstantial evidence alone would not have resulted in a conviction of first degree murder nor the death recommendation that followed if he had been successful in shifting the focus to MacDonald. It appears, however, that Mr. Love made the strategic choice that Mr. Gordon not be given that opportunity. The failure of Mr. Love to candidly discuss this theory with his client constituted such a severe deficiency in his

performance of which the jury recommendation of death was the natural result.

Another defense that was available to Mr. Gordon was that of an accomplice to some crime other than murder and/or that his participation in the crime was relatively minor. Once again, there was substantial evidence to support this. Equally significant is that much of the circumstantial evidence could have been argued to support this minor role. Mr. Gordon could have been receiving the wire transfers on behalf of MacDonald who, afraid of being linked to the money, used a

trusted friend as a go-between. The same argument could apply to the trips to Tampa. In further support was the fact that most of the conspiratorial meetings between MacDonald, Davidson and Cisneros excluded Mr. Gordon. Ms. Shore testified as to meetings that excluded Mr. Gordon (T. 1534,1537) as did Clyde Bethel (T. 1354, 1379, 1392-93). Why? Because the ultimate plan was never revealed to him. He was a pawn, somewhat like Ms. Shore. Those arguments were never made to the jury because the trial options were never discussed with Mr. Gordon. His life was on the line yet his attorney failed to investigate and plan defenses in which the existing evidence, the lack of evidence and the inferences from both, could have benefitted Mr. Gordon and certainly prevented the jury recommendation of death. Again, Mr. Gordon was never given the opportunity to have any type of discourse regarding the accessory/minor role defense although it would, in all likelihood, have provided the

most effective defense against a conviction of first degree murder and certainly would have negated a recommendation of death. The Schwartzberg defense, by it's very theory, placed Mr. Gordon in the victim's apartment. In other words, if MacDonald was there so was Mr. Gordon and the physical evidence placed MacDonald there. That theory should never have been placed before the jury in light of all the circumstantial evidence because it made Mr. Gordon an equal

participant and all but guaranteed the conviction as charged and a jury recommendation of death.

Once again, Mr. Gordon points out that the Schwartzberg defense was designed for MacDonald because it was his only defense. The addiction Mr. Love had for that defense prevented the development and presentation of other viable defenses which would not have resulted in a death recommendation. He, for some unknown reason, chose to pursue a defense that was not in the best interest of his client. He pursued a defense that defies logic. He asked the jury to believe that Cisneros, after the murder, planted evidence on the clothing of MacDonald (T.2175). To suggest to a jury that one co-conspirator intentionally planted evidence on a fellow co-conspirator enters the realm of absurdity. It gets worse, however, and moves from being absurd to being impossible. Det. Celona testified at trial he had verified through various means that Cisneros could not have been at the victim's

apartment at the time of the murder (T. 1946). The jury, therefore may have viewed the defense as so ridicules that they would have discounted the entire defense argument. The total lack of believability in that defense was so prejudicial to Mr. Gordon that he could never have received a fair trial absent a severance.

Mr. Gordon suggests that the above argument along with those incorporated

from previous arguments do not fall within the category of hindsight but rather represent the results of reasonable investigation and preparation by a competent counsel to which he was entitled.

Despite the lower court's ruling, it is clear that trial counsel was ineffective for failing to investigate, develop and present a viable defense and fell below the standard set forth in *Strickland.* Mr. Gordon is entitled to a new trial.

ARGUMENT X

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO SEEK TO EXCLUDE RESULTS OF TESTS WHERE THE MATERIAL TESTED HAD BEEN DESTROYED.

The State has cited numerous cases in it's response to order to show cause which support it's position that the unavoidable destruction or consumption of evidence during testing is not a violation of due process. The State also includes in the response, *Arizona* v. *Youngblood,* 488 U.S. 51 (1988) which requires the

defendant show bad faith in the failure to preserve. (PC-R. Vol. I, 56).

Mr. Gordon argues that the only evidence that the entire sample was consumed came from the testimony of agent Michael Vick. His credibility, therefore, becomes relevant not only to the tests results but whether the entire

consumption was necessary. Mr. Gordon, rather than repeat prior arguments, adopts those arguments that reflect Mr. Love's lack of knowledge in the field of DNA and the fact that he never discussed DNA with him. As a result of Mr. Love's lack of knowledge, he was not and did not conduct a reasonable cross examination of agent Vick, in fact, he conducted no cross examination at all. As a result, the credibility of

agent Vick was not tested. It was not learned until the evidentiary hearing that although he testified at trial that he performed the tests (T. 1221, 1224, 1227-28) that they may very well have been performed by others (PC-R. Vol. IV, 555) and therefore, never disclosed to the defense. It should be pointed out that while he did admit at trial that the "cutting" was done by technicians (T. 1226) it was never followed up on. As stated above, the only evidence that was introduced justifying the consumption of evidence was placed before a jury by an individual that may not have performed the test or been even present. As a result of the failure of Mr. Love to inquire and challenge the testing, the credibility of agent Vick remains suspect. Mr. Gordon suggests that in light of the above facts the testimony was misleading,

perjurious and casts doubt on the validity test result itself.

The lower court's denial of an evidentiary hearing denied Mr. Gordon the

opportunity to show that trial counsel's performance in failing to move to exclude the results of tests where the substance tested was destroyed fell below the standard set forth in *Strickland v. Washington,* 466 U.S. 668, 686-687 (1984).

ARGUMENT XI

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT THE STATE OF FLORIDA VIOLATED HIS ENTITLEMENT TO CERTAIN RIGHTS ESTABLISHED BY THE VIENNA CONVENTION.

In 1963, the United States and several other nations signed the Vienna Consular Relations ("VCCR"). The treaty codified long-standing customs regarding

consular relations, and provided important rights to foreign nationals facing criminal prosecution outside their own country. Vienna Convention Consular Relations April 24, 1963 (1970) 21 U.S.T. 77, T.I.A.S. 6820, 21 U.S.T. 77. The United States Senate ratified the treaty in 1969 and as a result it became binding on the states under the Supremacy Clause of the United States Constitution. U.S. Const. Arts. VI, cl. 2. See also *Foster & Elam v. Neilson,* 27 U.S. (2 Pet.) 252, 314 (1829).

Prior courts addressing violations have implied that a petitioner would be entitled to a remedy if he could demonstrate prejudice. *See Faulder v. Johnson,* 81

F.3d 515 (5th Cir. 1996) and *Breard v. Green,* 523 U.S. 371 (1998). A recent decision from the World Court, however, held that in cases involving "prolonged detention or severe penalties" foreign nationals are entitled to remedies. The court rejected the prejudice standard when it stated that;

> It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LeGrands were in effect prevented by the breach of the United States from exercising them, had they chosen to do so.

Germany v. Unites States, 2001 I.C.J. 104

There can be no doubt that Mr. Gordon, as a Jamaican citizen, had a right to contact the Jamaican Consulate and the Jamaican Ambassador after his arrest. That right was denied to him. Clearly, Mr. Gordon believes he was appointed counsel that was ineffective and ill-prepared. If he had benefit of other counsel, there would have been no conflict and thus no need for substitution of counsel eight weeks before trial.

The lower court's denial of an evidentiary hearing denied Mr. Gordon the opportunity to show a violation of article 36 of the VCCR and to establish a showing of prejudice.

ARGUMENT XII

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT HIS DUE PROCESS RIGHTS WERE VIOLATED AS A RESULT OF A CONSPIRACY TO PRESENT FALSE EVIDENCE BY STATE AND FEDERAL AUTHORITIES.

It is argued by Mr. Gordon that the manner in which this case was conducted,

from beginning to end, was foul. The testimony of the primary witness, Susan Shore, the only witness to place him at the scene was obtained by threat and malicious prosecution. In the interest of brevity, this Court is asked to consider Argument II in its entirety**.**

The sample from which known DNA and unknown DNA was obtained was either consumed or destroyed and the witness who offered the testimonial explanation may not have been present. Mr. Gordon insists that the testimony of agent Vick was a fraud upon the court. He argues that the false and misleading testimony, the missing lab report coupled with the inconsistent report later discovered by. Mr. Barrar made the admission of the DNA results, improper and highly prejudicial. Again, this Court is asked to consider Argument IV and X in their entirety.

Trial counsel had an opportunity to sever the trial of Mr. Gordon from that

of

MacDonald. He refused to do so offering the explanation that the Schwartzberg defense presented the best defense. In view of other defenses available and the greater likelihood of success his union with Mr. Schwartzberg begs the question of trial counsel's true motivation. Mr. Gordon asked this Court to consider

Arguments

V and IX.

In summary, Mr. Gordon argues that the conduct of Mr. Love and Mr. Schwartzberg established than an agreement existed for the exclusive benefit of MacDonald.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing facts and arguments, there can be no confidence in the verdict, the sentence or the judgement. The lower court improperly denied Mr. Gordon's rule 3.850 and 3.851 relief. This Court should order that his conviction and sentence be vacated and remand for a new trial, an evidentiary hearing, or for such other relief as this Court deems proper.

_____

BARON W. GIVEN
Florida Bar No. 325244

P.O. Box 468
Bradenton, FL 34206
Telephone 941/741-9778
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief was provided by U.S. Mail to Candace Sabella, Esq., Department of Legal Affairs, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607 and Robert Gordon, 123911; Union Correctional Institution, P4207-S; 7819 NW 228th Street, Raiford, Florida 32026-4440 this _____ day of October, 2002.

_____

BARON W. GIVEN
Florida Bar No. 325244
P.O. Box 468
1301 Sixth Ave. West, Suite 104
Bradenton, FL 34206
Telephone 941/741-9778
Facsimile 941/741-9788
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

BARON W. GIVEN
Florida Bar No. 325244
P.O. Box 468
1301 Sixth Ave. West, Suite 104
Bradenton, FL 34206
Telephone 941/741-9778
Facsimile 941/741-9788
Attorney for Appellant