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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

As previously stated in the Appellant's Initial Brief, this is an appeal from the denial of Robert Gordon's Motion for Post Conviction Relief. This Reply Brief will address specific areas of Appellee's Answer Brief.

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.

SUMMARY OF ARGUMENTS IN REPLY BRIEF

REPLY ISSUE I

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TRIAL COUNSEL WAS INEFFECTIVE FOR ADVISING APPELLANT TO WITHDRAW HIS ALIBI DEFENSE AND TO PROCEED TO TRIAL.

REPLY ARGUMENT I

TRIAL COUNSEL WAS INEFFECTIVE SINGULAR LY AND CUMULATIVELY DURING THE GUILT PHASE OF THE TRIAL FOR HIS FAILURE TO REASONABLY INVESTIGATE AND PREPARE FOR TRIAL AND THEREFORE APPELLANT'S CONVICTION SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL.

The Appellee in its' Answer Brief attempts to side-step the issue of ineffective assistance of counsel by simply reciting the findings of the trial judge. To insure, however, that the issue is not too closely scrutinized, it attaches the failsafe name-tags of "second guessing" and "hindsight". The Appellee, just as the trial court, also argues that the bill presented by Mr. Love for 241.5 hours of work assured Mr. Gordon reasonably effective and competent representation. Such reliance is misplaced and is, tragically, an immeasurable distance from the truth. This Court has previously commented that "quantity does not necessarily reflect quality" *Rolling v. State,* 825 So. 2d 293,295 (Fla. 2002). When the actions of Mr. Love, or lack thereof, are properly examined, the result is the inescapable conclusion that trial counsel was so ineffective in the most crucial areas that there can be no reliability or confidence in the jury verdict.

Appellant, in his initial brief to this Court, referred repeatedly to the

"Schwartzberg Defense". In its' simplest terms and as a matter of review, the defense theory was that after co-defendant Meryl MacDonald left the residence, the victim, Dr. Davidson was alive. Leo Cisneros then entered, killed the Doctor, collected blood, hair and fiber samples and then, at a later time, "planted" the inculpatory evidence on clothing worn by Mr. MacDonald.(PC-R. Vol. VII, 856, 857,858) and (PC-R. Vol. VI, 786, 791, 793,794). It was never conceded that Appellant Gordon ever entered the apartment. (PC-R. Vol. VI, 802).

The single most crucial fact necessary for that defense was that Leo Cisneros did not have an alibi. If no one could prove where he was then no one could prove where he wasn't. If, however, he had a credible alibi, the defense would be an impossible defense. It would be a mockery that would so devastatingly insult the intelligence of the jury that neither defense counsel would have an ounce of credibility. Since that was to be the defense that Mr. Love would gamble the life of Mr. Gordon upon, the Appellant had a right to know if anyone could prove where Cisneros was. Mr. Love had an absolute duty by the barest of any standard to investigate and provide that information to Mr. Gordon. Any failure to investigate, find the answer as to where Cisneros was and discuss the

consequences with Mr. Gordon is unthinkable. The prejudicial magnitude of the failure to investigate that fact, assuming Mr. Cisneros had an alibi, is the recommendation that the death

penalty be imposed. Mr. Love simply never asked the question.

The "Schwartzberg Defense" did become that complete embarrassment because Mr. Cisneros had an alibi. Not just any alibi, but one found, confirmed and testified to by a state witness, Det. Celona, who happened to be the lead investigator. (T- 1946,47). Those facts were then argued by the prosecutor in closing arguments to the jury. (T- 2156-57). See *Demarest v. Price,* 905 F. Supp. 1432 (D. Colo. 1995) wherein trial counsel was found ineffective for, among other reasons, his failure to investigate or consider more than one defense theory. He chose, as did Mr. Love, to focus on a single defense strategy which was impossible. The Federal District Court also believed that if trial counsel would have "investigated the State's evidence and considered alternative defense theories, he could have presented the jury with reason to doubt the State's interpretation of its evidence". *Id* at 1450. In Mr. Gordon's case, the facts were also available to cause doubt to the States' interpretation of its' evidence.

At the evidentiary hearing, the trial court established in great detail through its' own questioning that alibi defenses presented by defendants usually don't

work and when the alibi witnesses are the friends or family of an accused the defense is weakened even further. (PC-R. Vol. VI, 806. The appellant suggests, however, that the opposite is also true. When alibi's are established, for someone not on trial, and

done so by credible sources, especially police officers who are investigating the case and then presented by the prosecution itself, then such alibi will be accepted as truthful with any further inquiry being unnecessary. In this case there was no further inquiry by either Mr. Schwartzberg or Mr. Love on that issue. (T- 1954). Mr. Love

simply watched the "Schwartzberg Defense" and his own credibility sink into the abyss.

Mr. Love was not without the general necessary investigative curiosity about alibi's. According to his own testimony and that of Mr. Schwartzberg, he continually told Mr. Gordon about the problems with an alibi defense and that the one suggested by Mr. Gordon had a "zero chance of success",(PC-R. Vol. VI, 783, 830,832,834,837), it was "not viable" and was "not going to fly" (PC-R. Vol. VII, 852, 886, 887, 889).

It is axiomatic to suggest just how crucial to the reasonable representation of Mr. Gordon that Mr. Love investigate the merits of the "Schwartzberg Defense"

and discuss the weaknesses with as much vigor as he did Mr. Gordon's' alibi. Had that been done, Mr. Gordon would have had the facts necessary to make crucial decisions. Without those facts, every decision made by Mr. Gordon was flawed and based on fatally incomplete, incorrect and incompetent advice.

The time to inquire as to the whereabouts of Leo Cisneros, if not evident in

police reports, is not during trial but rather from depositions or independent investigations. Mr. Love stated he had reviewed the depositions. (PC-R, Vol. VII,853). The location of Leo Cisneros, however, was referred to in the deposition of Det. Celona. (R. 203). The entire record is devoid of any discussion of that fact by Mr. Love with Mr. Gordon. The record is again devoid of any action by Mr. Love on behalf of Mr. Gordon to further investigate that fact. Again, the most single important fact, the foundation stone of the "Schwartzberg Defense", is ignored, either intentionally or negligently by Mr. Love. See *Troedel v. Wainwright,* 667 F. Supp. 1456 (S.D. Fla. 1986) wherein trial counsel was found deficient for not investigating facts which would have corroborated his defense theory. Mr. Gordon argues it is of equal or greater necessity that defects be investigated in the defense theory selected so as not to end in a catastrophic disaster.

The Supreme Court of the United States, in it's analysis of ineffective assistance claims relating to investigations, stated;

> "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances,

> applying a heavy measure of deference to counsel's judgments.
>
> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information"

Strickland v. Washington, 466 U.S. 668, 694 (1984)

What the Court has implied is that if counsel's decision not to investigate was caused by the defendant then such conduct would be an appropriate

consideration. In the instant case, however, there was no conduct on the part of Mr. Gordon that influenced the fatal failure. The "Schwartzberg Defense" was developed by Attorney Schwartzberg based upon what he believed to be in the best interest of his client, Merle MacDonald, only. He was allowed at joint conferences, however, to persuade Mr. Gordon that a unified defense would be best. (PC-R, VI. 788). It is argued that the true reason Mr. Schwartzberg pressed so strongly for the

unified defense was to insure his own agenda would have no loose ends. Mr. Love, after having been appointed shortly before trial, was persuaded by Mr. Schwartzberg to adopt the defense and did so without investigating its' merits.

In discussing basic duties that an attorney owes his client, the Supreme Court found particular duties to be " to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Srtickland v. Washington*, 466 US at 688. Once again, Mr. Love had

a duty to investigate the "Schwartzberg Defense" on behalf of Mr. Gordon and to inform him of the findings. This was not done and as a result, Mr. Gordon was denied his Sixth Amendment right to reasonable or effective representation as guaranteed through the Fourteenth Amendment under the Constitution of the United

States. The anticipated argument of the Appellee that the Court should not consider ineffective investigation because any action or inaction by Mr. Love was a strategic choice and therefore unchallengeable is without merit. The condition precedent requiring a "thorough investigation of law and facts" relevant to the "Schwartzberg Defense" simply never took place. Id. at 698.

It appears obvious that trial counsel's failure to uncover the simple fact that the location of Leo Cisneros at the time of the homicide was known, was so seriously deficient it was as if Mr. Gordon was represented by a member of the

prosecution's team. As a result, Mr. Gordon was prejudiced in a number of ways, one being that his attorney, having lost all credibility, could no longer function as an advocate. From that point on, Mr. Gordon stood alone. It also precluded meaningful strategic evaluations of other possible defenses and denied the use of defenses that would have mitigated or diluted the State's case against Mr. Gordon. In *Acker v. State*, 787 So. 2d 77, 83 (Fla. 2d DCA 2001) the trial counsel was found ineffective for his failure to "develop a coherent theory of defense" and for his own

introduction of "damaging testimony" in spite of other evidence against him such as motive.

It is without a single doubt that Mr. Love's insistence on the impossible

"Schwartzberg Defense" fell below the standard of representation guaranteed under the Sixth Amendment and played a significant role in not only Mr. Gordon's conviction but also the recommendation and sentence of the death penalty. His case should be reversed and remanded for a new trial.

Another form of prejudice to be addressed in the following argument was trial counsel's failure to seek a severance rather than expose Mr. Gordon to a doomed defense.

REPLY ARGUMENT II

TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE OF THE TRIAL FOR HIS FAILURE TO SEEK A SEVERANCE FROM THE CO-DEFENDANT, MERYL MACDONALD AND THEREFORE APPELLANT'S CONVICTION SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL.

The Appellee, once again, dismisses Mr. Gordon's claim of ineffective assistance arising from trial counsel's failure to move to sever his trial from that of Mr. MacDonald. The Appellee fails to point out, however, that Mr. Love never

filed a motion to sever. Appellee further dismisses Mr. Gordon's claim by relying on the trial courts comments at the evidentiary hearing that "I made it real clear to you all that there was no ground to sever". (PC-R. Vol. VI, 803). Appellee, assumes, that simply because the trial court made that statement, it must be true. Later however, something occurred that caused the trial court to find a valid reason to sever and to admit it was ready to grant the severance. That something was an alibi defense requested by Mr. Gordon. At the evidentiary hearing the trial court stated "... he could go forward with the alibi if that was what he wanted to do. But I would grant, in essence a severance". (PC-R. Vol. VI, 802). On June 6, 1995, however,

the first day of trial, it is clear that the court did not rule on the merits of Mr.

Schwartzberg's motion to sever when it stated, "without ruling on the merits then on the motion to sever at this time". (T. 5). It is suggested by Mr. Gordon that since

no argument was made no decision could have been made on the merits**.** While Mr. Schwartzberg made a few comments about conflicting evidence and confusion to the jury he did not address anything specific. (T. 4). Mr. Gordon points out that mere antagonistic defenses do not, as a matter of law, entitle a

moving party to a severance. See *Jeffries v. State*, 776 So. 2d 335 (Fla. 1st DCA 2001). Since the trial colloquy was so limited yet the trial judge, at the evidentiary, was so certain it would have granted a severance**,** it is argued that such assurance arose from testimony at the evidentiary hearing. Perhaps the best analysis is found in the trial court's opinion of the alibi defense in its' colloquy with Mr. Love concerning why the motion to sever was filed by Mr. Schwartzberg.

THE COURT: And isn't it true the reason he filed it is because he thought that the alibis stunk?

THE WITNESS: In so many words. He might have used stronger language, but yes.

THE COURT: I'm sure he did. And he wasn't going to have his client going to trial with that stinking alibi.

(PC-R. Vol. VII, 890).

At the evidentiary hearing, Mr. Schwartzberg testimony was prior to that of Mr. Love. He made clear his belief that the alibi would not be accepted by a jury and that the prejudice of the rejection would "spill over " to his client . He felt the lack of believability would effect the credibility of his defense. (PC-R. Vol. VI, 783, 784). Therein lies the legal basis for a severance upon which the trial court relied

although the court simply stated to Mr. Schwartzberg, " So with an alibi defense**,** you had a ground to sever, right? (PC-R. Vol. VI, 804, 812).

What both the trial court and the Appellee have failed to acknowledge is that if Mr. Love would have moved to sever, the court, under its' own theory would have had to grant the severance. Boiled down to its' simplest terms, the trial court was ready to sever the joint trial because it believed the alibi defense of Mr. Gordon lacked credibility and the rejection of the alibi would have spilled over to MacDonald. As previously discussed in Reply Argument I, the "Schwartzberg Defense" was doomed from its' inception and there the prejudicial spill over was actual**.** Had Mr. Love conducted an adequate investigation, he would have had an argument far stronger than that of Mr. Schwartzberg to justify a severance. This information was never given to Mr. Gordon. Prejudice attaches because the trial court, based upon its own reasoning, should have granted a severance had it been raised by Mr. Love.

The only testimony that places Mr. Gordon and the victim, Dr. Davidson, together, ever, is that of Susan Shore. At trial she testified that on the morning of January 25, 1994 she saw Mr. Gordon approach the doctor as he arrived in his car but never saw Mr. Gordon enter the apartment (T. 1567-68). Later, as Ms. Shore

and Mr. Gordon sat in their car, Meryl MacDonald returned and said he had the piece of paper, patted his stomach at which time Ms. Shore heard paper crinkle. (T-1571). Neither the testimony of Ms. Shore nor any DNA, fibre samples, shoe prints or anything else could place Mr. Gordon in the victim's apartment. Inherent in her testimony, however, was the conclusion that Mr. MacDonald went in the apartment. The DNA, the fibre samples and the shoe print worked together to dispel any doubt that Mr. MacDonald was in the apartment. In addition, for Mr. Schwartzberg to have credibility in light of that evidence, he had to concede that his client was in the apartment. (PC-R. Vol. VI, 801-02). In view of the same evidence, however, there was never a concession that Mr. Gordon entered the apartment. (PC-R. Vol. VI, 802). So the spill over effect that was of concern to Mr. Schwartzberg never took place. The spill over effect to Mr. Gordon, however, occurred as if brought in by dump trucks. Where was Mr. Love? How did this happen? Why did this happed? It happened because Mr. Love was ineffective in not moving for a severance when the

grounds existed. The prejudice to Mr. Gordon was a reliance on a defense that was

created for Mr. MacDonald necessitated because of the physical evidence against MacDonald. It can not and should not be argued that Mr. Gordon had a chance for a severance because of the alibi defense and waived it. He was never given the

crucial information that he had separate grounds for a severance. Instead of discussing strategy that would have been of benefit to Mr. Gordon, the strategy sessions were designed to ridicule his alibi defense so as to force a unified defense by convincing him there was no other alternative. Normally, the primary benefactor of a joint trial, as it also was in this case, is the prosecution. So once again the question is asked, which table was Mr. Gordon's trial counsel seated at?

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. In addition to all the physical evidence implicating

only Meryl MacDonald and the fact that Mr. MacDonald's entry into the victim's apartment was conceded, the jury could conclude that concession also applied to Mr. Gordon. The cumulation of that evidence alone denied Mr. Gordon the ability

"to achieve a fair determination of the guilt or innocence of 1 or more defendants" as contemplated by Florida Rule of Criminal Procedure 3.152(b)(1)(B).

Another justification for severance was that if Mr. Love would have objected to the introduction of DNA evidence and the Court would then have conducted the requisite Frye hearing, the evidence would have been excluded. While Mr. Schwartzberg could possibly have stipulated to its' introduction since he felt it important to his defense, it should have been excluded in the trial of Mr. Gordon. In *Miller v. State*, 756 So. 2d 1072 (Fla. 4th DCA 2000) the court held that " A motion to sever should be granted when the evidence sought to be admitted applies only to a co-defendant, but which may improperly influence the jury as to the charge against the other defendant".

Once again, Mr. Love's failure to seek a severance and to advise his client of the merits, singularly and cumulatively, when coupled with his misplaced reliance on the "Schwartzberg Defense", fell below the standard of representation guaranteed under the Sixth Amendment and played a significant role in not only Mr. Gordon's conviction but also the recommendation and sentence of the death penalty. His case should be reversed and remanded for a new trial.

REPLY ARGUMENT III

TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE OF THE TRIAL FOR HIS FAILURE TO CHALLENGE THE ADMISSION OF DNA EVIDENCE AND TO REQUEST A FRYE HEARING AND THEREFORE APPELLANT'S CONVICTION SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL.

Appellee began it's discussion of ineffectiveness of counsel based upon a failure to challenge the admissibility of DNA and to request a Frye hearing by implying that Appellant is now second guessing Mr. Love's trial strategy. It concluded its' argument by finding that no ineffectiveness can be found where trial counsel made an informed strategic decision after a careful review of law and facts.

While that may be a correct statement of the law if the trial strategy is based on thorough investigation, Mr. Gordon argues that ineffectiveness can and should be found where the strategy is founded on a seriously flawed and careless investigation.

One of Mr. Gordon's primary and very real concerns is that "the probative power of DNA typing can be so great that it can outweigh all other evidence at trial", *Hayes v. State,* 660 So. 2d 257, 262 (Fla. 1995). This Court has previously discussed that expert testimony based upon a scientific principle "...implies an infallibility..." . See *Flanagan v. State,* 625 So. 2d 827,828 (Fla. 1993). Since the State, from its' opening statement through its' closing argument led the jury to

believe that Mr. Gordon and Mr. MacDonald were joined at the hips, every effort

should have been made by Mr. Love to exclude the admission of DNA evidence. It was that evidence that placed Mr. MacDonald in the victim's apartment and the spill-over effect of that highly prejudicial fact left the jury with one conclusion, that Mr. Gordon was present in the apartment also.

In Florida, "The death penalty cannot be imposed on a defendant who does not kill or attempt to kill or does not intend to participate in or facilitate a murder", *Troedel v. Wainwright,* 667 F. Supp. 1456, 1466 (S.D. Fla. 1986). In the case of Mr. Gordon, there was no physical evidence, no scientific evidence, no statement or testimony that proved Appellant planned to or participated in the murder of Dr. Davidson. Mr. Love, therefore, had a duty, not to foster a unified defense wherein physical and scientific evidence was admitted but rather to attempt to exclude all such evidence especially where the case against his client was circumstantial. Instead, he neither challenged its' admissibility nor requested a Frye Hearing. Reliance upon a strategy not investigated should not and cannot be allowed to insulate an attorney's representation from being found deficient . Mr. Gordon argues

that the total failure by Mr. Love to subject the prosecution's scientific evidence to any "meaningful adversarial testing" violated his Sixth Amendment rights and made the "adversary process itself presumptively unreliable". See *Demarest v. Price,* 905

F. Supp. 1432, 1450 (D. Colo. 1995).

Mr. Gordon also contends that at the time of his trial the DNA evidence would not have been admitted without meeting the requirements set forth in *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923). This issue appears to have been affirmed by the trial court itself when it agreed that if a Frye Motion was conducted the DNA evidence wouldn't have come in (PC-R, Vol. VI, 797). In addition, Mr. Schwartzberg admitted that if the only DNA evidence was that of the victim, " I ... certainly would have filed a Frye motion at least to the statistical analysis under Brim". (PC-R. Vol. VI, 797). Mr. Schwartzberg also stated the decision not to file a Frye motion was his and was based on what he believed to be in the best interest of his client (PC-R. Vol. VI, 788, 792) and that he could not recall if that was a joint decision with Mr. Love. (PC-R. Vol. VI, 794).

It is argued by Mr. Gordon that the proponent of expert testimony has the burden of proving the general acceptance of both the underlying scientific principle and the testing procedure used to apply the principle. See *Murray v. State,* 692 So.2d 157, 161 (Fla. 1997) and *Ramirez v. State,* 651 So.2d 1164, 1168 (Fla. 1995). That was never done by the State. It was certainly never requested by Mr. Love even though it was clearly in the best interest of Mr. Gordon for him to do so.

Perhaps one reason, as stated in Mr. Gordon's initial brief, is that Mr. Love

was ill equipped to conduct a Frye Hearing. His response at the evidentiary hearing was completely inappropriate to the question asked and displayed a total lack of understanding as to the basic concept of substructures. (PC-R. Vol. VII, 900). In addition, he never retained an expert which would have enabled him to gain a better grasp of the subject (PC-R, Vol. VII, 901-904). Furthermore, he never deposed the State's DNA expert because, according to his testimony at the evidentiary hearing, he never saw or heard of Agent Vick until the agent took the stand to testify. (PC-R,

Vol. V, 661-62). In fact, it is also clear that he never had any meaningful discussion with Mr. Gordon concerning DNA (PC-R, Vol. 837-38). All of the above indicates a lack of through investigation, a total breakdown in attorney-client defense exploration and consideration and a careless disregard for the impact of scientific evidence on his client.

The main objective for the defense in a Frye hearing would naturally have been to exclude the DNA evidence. The benefit to Mr. Gordon of its' exclusion has previously been discussed. Appellee, however, has pointed out that the trial court's order denying post conviction relief disposes of the issue by finding that if a hearing

had been conducted it would have ruled against the defense. What Appellee fails to point out is that the trial court's hindsight ruling of what it might have done was

conditioned upon the same experts testifying in the 1995 trial as they did in the 2001

evidentiary hearing (PC-R, Vol. III, 453). Mr. Gordon suggests that such conclusion

is irresponsible since the only DNA expert who testified at his 1995 trial was Agent Vick. Mr. Gordon expresses even greater concern for the trial court's apparent decision to disregard case law when in response to Mr. Gordon during the evidentiary hearing concerning the issue of the FBI data base, the Court stated;

> "Does he understand that doesn't make one whit of difference here to me, that the testimony, the case law I mean, whether or not a database was accepted and what date it was accepted wouldn't alter an expert's opinion based on a database, whether it is accepted or whether it isn't accepted."

(PC-R. Vol. V, 677).

Again, the only DNA expert to testify was agent Vick. At the time of Mr. Gordon's trial, the scientific position on population frequency statistics appeared to be that "processes that did not utilize the 'ceiling principles' might not have satisfied the Frye test because those calculations did not take into account the possibility of population substructures. A sizable portion of the scientific community speculated that failure to account for population substructures made the "product rule" unreliable." *Brim v. State,* 695 So.2d 268, 272 (Fla. 1997). While this Court, in Brim, acknowledged that the scientific community changed its'

position in the 1996 NRC report, *Id.* at 272, Mr. Gordon argues that the report was published after his trial. See *Id.* at 269.

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The Appellant argues that regardless of what the State or Defense did or did not do, this Court established a procedural analysis that trial courts must make before admitting expert testimony. *Ramirez v. State*, 651 So.2d 1164, 1167 (Fla. 1995). That procedure was ignored by the trial court during his trial and such failure constitutes error. In *Arnold v. State*, 807 So.2d 136 (Fla. 4th DCA 2002), the District Court found that the trial court committed error by admitting DNA evidence without first conducting a Frye hearing. In *Timot v. State*, 738 So.2d 387 (Fla. 4th DCA 1999) error was also found for a failure to conduct a hearing prior to admitting the evidence but found the error harmless because the trial judge later ruled the evidence admissible. In Mr. Gordon's case, the error was not harmless, because the court never made the requisite inquiry or the requisite ruling. Mr. Gordon further argues that Mr. Love's failure to challenge the admission of the DNA evidence and conduct a Frye hearing coupled with the trial courts error denied him his constitutional due process right to present witnesses.

Assuming arguendo, that the Court would have conducted a Frye Hearing Mr. Gordon's argues that, *Vargus v. State*, 604 So. 2d 1139 (Fla. 1st DCA 1994) would have been controlling. If Agent Vick's testimony would have been similar to

Dr. Tracy it would have been subject to rejection since, in *Vargus,* the District Court declined to accept Dr. Tracy's position and followed the opposing view. (PC-R.

Vol. IV, 594, 600). In addition, Agent Vick's testimony at trial was confusing as to who personally performed the tests. (T. 1221, 1224, 1227-28) and Dr. Tracy testified at the evidentiary that he relied, in part, upon Agent Vick's testimony. (PC-R. Vol. IV, 577). Curiously, even Agent Vick acknowledged that within the scientific community there was a question of subcultures. (T. 1235). To further confuse the issue of who performed what test, Dr. Herrera, traveled to the FBI lab in Quantico, Virginia to inspect all of the records relating to the case. (PC-R, Vol. IV, 518, 519). He was surprised to learn that Agent Vick did not perform the "bench work" which seemed contradictory to Agent Vick's trial testimony which indicated he did the tests. (PC-R, Vol. IV, 555). At the evidentiary hearing, Dr. Tracy admitted that he did not know what tests were performed by Agent Vick or what tests were performed by others.(PC-R. Vol. IV, 602). That fact, alone, could have allowed the defense to prevail at a Frye hearing. That fact, also, coupled with conflicting experts, and the low numbers obtained in the tests would certainly have resulted in the DNA results being excluded.

For the reasons argued in both Appellant's initial brief and the reply brief,

Mr. Love's failure to depose the State's expert, his apparent failure to comprehend the basics of the substructure division within the scientific community, his failure to discuss DNA with Mr. Gordon, his failure to throughly investigate the

"Schwartzberg Defense", his failure to object to the admission of DNA evidence and his failure to require a Frye hearing fell below the standard of representation guaranteed under the Sixth Amendment and played a significant role in not only Mr. Gordon's conviction but also the recommendation and sentence of the death penalty.

REPLY ARGUMENT IV

TRIAL COUNSEL WAS INEFFECTIVE FOR ADVISING APPELLANT TO WITHDRAW HIS ALIBI DEFENSE AND TO PROCEED TO TRIAL AND THEREFORE APPELLANT'S CONVICTION SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL.

According to the early morning June 6, 1995 trial colloquy, the alibi defense of Mr. Gordon was not withdrawn until the day the trial was set to begin. (T. 3-6). In the same colloquy, Mr. Schwartzberg, in addressing his motion to sever, states;

> "In light of that fact and in light of obvious review of all the evidence and length of work that has been placed into this case by Mr. McDonald's attorneys and in fact conversation with Mr. MacDonald, it has become apparent to us that such an alibi might in fact subject Mr. MacDonald to an improper determination by a jury of the guilt or innocence of Mr. MacDonald in such that the alibi defense may be so conflicting with the evidence and testimony that the state is going to put forward here that it may cause confusion in the minds of the jury."

(T-4).

As previously stated, the above argument was presented by Mr. Schwartzberg. Had Mr. Love, however, properly investigated the case, then the above argument should have been made by Mr. Love. The alibi defense, regardless of Mr. Love's view of it and in light of the terminal condition of the "Schwartzberg Defense", should have been maintained. It is clear that Mr. Gordon wanted to go

forward with that defense because his notice to claim an alibi defense was filed May 26, 1995 and an amended alibi witness list was filed May 31, 1995. On the day preceding the trial, Mr. Schwartzberg delivered a courtesy copy of his motion to sever to the trial judge. (T-3). The only conclusion from the above facts is that Mr. Gordon was persuaded to replace the alibi defense with the Schwartzberg Defense. Mr. Gordon argues that if his attorney had informed him that Leo Cisneros had an alibi he would never have proceeded to trial with that defense and certainly would not have withdrawn his alibi defense on the morning of trial. His case would, therefore, have been severed and could have then been investigated further and additional options explored. The misleading advice provided to Mr. Gordon and upon which he relied caused him to agree to withdraw his alibi. The very act of that withdrawal prejudiced Mr. Gordon by denying him an affirmative defense in which witnesses were prepared to testify. Instead he was convinced to go forward with a

defense set to backfire.

Mr. Love's failure to provide the correct information which was discoverable and should have been obtained by Mr. Love denied Mr. Gordon the ability to make an informed decision. Providing misleading and incorrect information to Mr. Gordon fell below the standard of representation guaranteed under the Sixth Amendment and played a significant role in not only Mr. Gordon's conviction but also the

recommendation and sentence of the death penalty.

CONCLUSION

The belief held by Mr. Love in the "Schwartzberg Defense" resulted from his negligent or intentional failure to investigate the one fact upon which the defense was based, the location of Leo Cisneros at the time of the murder. The information was readily available based upon only a minimal diligent effort. Mr. Love's blinded reliance in that defense acted like an infectious disease that permeated every decision he made. Those decisions denied Mr. Gordon the opportunity of accentuating and attributing the highly inculpatory evidence to MacDonald and minimizing the affect of the evidence against himself as a result of its' circumstantial and peripheral nature. The record is filled with one missed opportunity after

another.

The prejudicial effect of Mr. Love's negligent dependence upon a defense that was no defense at all resulted in the jury viewing all the evidence against each defendant equally without the consideration of relative culpability. If Mr. Love had provided reasonably competent representation and the jury would still have found Mr. Gordon guilty of first degree murder, there were amble facts to argue relative culpability thereby receiving a recommendation of life.

Although Mr. Gordon has not specifically argued each issue of his Initial

Brief herein, he does not concede those points. Appellant, Robert Gordon, respectfully request that his conviction be reversed and that his case be remanded for a new trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief was provided

by U.S. Mail to Kimberly Nolen Hopkins , 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 March, 2003.

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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.

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