IN THE SUPREME COURT OF FLORIDA

KEN E. LOTT,

Appellant,

v. Case No. SC04-1814

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

AMENDED ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

A. Trial Facts

Appellant was indicted for one count of first degree murder on May 20, 1994. (T. 190-191). Although initially represented by a public defender, appellant hired private counsel, Joel Spector who filed his notice of appearance on June 2, 1994. (T. 202). The guilt phase of appellant's trial began on April 24, 1995. (T. 1-1230).

Appellant did not testify during the guilt phase. Prior to a verdict being rendered, the trial court inquired as to appellant's decision not to testify and appellant's satisfaction with his attorneys. (T. 1212). Appellant told the trial court it was a joint decision made by him and his attorneys not to testify. He also expressed satisfaction with his attorneys' services and indicated that they did not do anything that he didn't want them to do. (T. 1212-1213).

On direct appeal, this Court affirmed appellant's convictions, setting forth the following summary of facts:

> On the morning of March 28, 1994, Rose Conners was found murdered, lying unclothed in the master bedroom of her home. The right side of Conners' throat had been slashed, her larynx had been fractured, she had been struck in the head with a blunt object and she had a single stab wound in the back. There were duct tape lines on her legs, arms, and face suggesting that Conners was bound and gagged prior to being killed and that the tape was removed after her death. There were bruises on Conners' arm

matching the imprint of a set of pliers found at the scene. The medical examiner testified that the blow to Conners' head in combination with the pressure to her neck rendered her unconscious. The blow to Conners' head was inflicted anywhere between a few minutes and thirty minutes before her neck was cut. The injury to her neck, which partially cut the jugular vein, was the cause of Conners' death. The medical examiner estimated that Conners died sometime between 2 p.m. on Saturday, March 26, 1994 (the last time Conners was known to be alive), and 5 p.m. on Sunday, March 27, 1994. Although there was no evidence of sexual battery found by the medical examiner, there was significant bruising in the thigh area, suggesting that pressure had been applied to force her legs apart. Conners had a defensive wound on her right thumb. Abrasions were found on Conners' elbows and knees and her torn panties were found underneath a bed in another bedroom of her house.

When Conners' sister went through Conners' effects, it was discovered that Conners' diamond tennis bracelet was missing. In April of 1994, Lott offered to sell a gold ring and a diamond tennis bracelet to David Pratt, a friend, but Pratt refused the offer. Sometime after Easter of 1994, Lott went over to Robert Whitman's house and stated that he had some jewelry, which included a gold ring and a diamond tennis bracelet that came from a robbery and murder in Jacksonville, that he wanted to get rid of. A week later, Lott returned to Whitman's house and told Whitman that Lott and a friend, Ray Fuller, had killed Rose Conners. Lott told Whitman that he and Fuller had been using "crystal meth" and cocaine, and when they ran out of money and drugs they decided to rob Conners. Lott knew Conners because a few months before he had provided lawn services to her. Lott and Fuller planned to have Fuller tie, gag, and blindfold Conners since she did not know Fuller. However, Conners saw Lott when she escaped from the house and Lott had to come out from the bushes where he was hiding to catch her and bring her back inside.

Lott told Whitman that Conners had no cash--only gold and jewelry. Lott said that he beat Conners because she was fighting like a mad dog when he grabbed her

and brought her back into the house. Lott said Conners begged him not to kill her and offered to sign her car over to them and take them to the bank to get money. Lott also told Whitman that he had to kill Conners because she knew him and would send him to prison. He said he cut Conners' throat with a boning or fillet knife. Lott also said that he returned to Conners' house that night and cleaned up the scene.

In May of 1994, Robert Whitman contacted the Orange County Sheriff's Department and reported what he had been told by Lott. The sheriff's department devised a plan to have Whitman meet with Lott regarding the stolen jewelry. At this meeting Whitman told Lott he would sell the jewelry for him and then gave Lott $600 for the jewelry. When Lott drove off, sheriff's deputies pursued him and took him into custody.

In addition, the State submitted fingerprint, shoe print, and fiber evidence establishing Lott's presence at the scene and proof that Lott was in possession of Conners' diamond tennis bracelet, ring, and ATM card shortly after the crime. The State argued that Lott used a pair of pliers on Conners' arm when questioning her about her valuables and her PIN number for her ATM card. Photographs taken by Conners' bank established that Lott used Conners' ATM card to retrieve money from a cash machine on Sunday, March 27, 1994. Coworkers of Lott's wife testified that Lott's wife was seen wearing Conners' tennis bracelet subsequent to Conners' death.

Because all of the evidence of what occurred during the murder consisted of testimony by Whitman concerning what Lott told him, Lott predicated his defense on the theory that he was set up by Whitman. Whitman admitted that he had been convicted of three or four felonies. He further admitted that he had been supplying drugs to Lott. Whitman also said that twenty-three years ago Lott had informed on him and gotten him in trouble with the law. Lott asserted that Whitman made up the story of Lott murdering Conners because Whitman wanted revenge for that incident.

Lott v. State, 695 So. 2d 1239 (Fla. 1997). The jury convicted appellant of first degree murder.

This Court provided the following summary of the penalty phase:

> At the sentencing phase, the jury recommended death by a unanimous vote. Lott later testified at a sentencing hearing held pursuant to Spencer v. State, 615 So. 2d 688 (Fla.1993), that he had been in Conners' master bathroom in February of 1994 giving her advice about plantings outside her window, and that is how his palm print came to be on the sink. He had no explanation for the existence of prints in the other bedroom or his shoe prints in another part of the house. Lott also admitted that he was the person who used Conners' card at the ATM, but he contended that he got the card and the PIN number from Whitman and did not notice that Rose Conners' name was on the card.
>
> The trial court found that the following aggravators applied to Lott: (1) he had a previous conviction for a violent felony based on three prior armed robbery convictions and one prior attempted escape conviction; (2) the murder was committed during the commission of a burglary and/or kidnapping; (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (4) the murder was committed for pecuniary gain; (5) the murder was especially heinous, atrocious, or cruel (HAC); and (6) the murder was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification (CCP). The trial court also found that the following mitigators applied: (1) the murder was committed while Lott was under the influence of extreme mental and emotional disturbance (given considerable weight by the trial court); (2) Lott's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (given considerable weight by the trial court); (3) that Lott suffered from drug addiction (given considerable weight by the trial court); (4) that Lott contributed to his community

> through volunteer work (given slight weight by the trial court); (5) that Lott was helpful to his parents as a child and an adult (given some weight by the trial court); and (6) that Lott maintained steady and gainful employment (given some weight by the trial court). The trial court found that the aggravating circumstances outweighed the mitigating circumstances and followed the jury's recommendation that Lott be sentenced to death.

Lott, 695 So. 2d at 1241-42.

Lott's motion for postconviction relief was summarily denied by the trial court. An appeal was taken to this Court and following oral argument, this Court held that Lott was to be given an evidentiary hearing. Lott v. State, 839 So. 2d 698 (Fla. 2003). This appeal follows the evidentiary hearing held on between July 26 and July 28, 2004 before the Honorable Alan Lawson, Circuit Judge.

B. The Evidentiary Hearing

(i) The Trial Attorneys

Joel Spector testified that he has been practicing criminal defense law for "thirty two years." (V-5, 404). Spector worked as a prosecutor for a few years but has concentrated in criminal defense work. He handled four murder cases prior to Lott's case, but Lott's was his only capital murder case. (V-5, 404-05). Spector attempted to have an experienced second chair attorney appointed but the court denied his request. (V-5, 406). He contacted Scott Richardson and he agreed to assist as

second chair. (V-5, 406). He was involved in the case for the "bulk of work prior to trial." (V-5, 407). Spector said that since Lott's case was a capital case it was his top priority. (V-5, 407).

As for Lott's potential alibi, Spector related a story provided by Lott about him showing his wife where he had been incarcerated in Starke. Bartle, his investigator, went to Starke and the surrounding area to check on the alibi. Bartle was a former police officer and an investigator with considerable experience. (V-5, 408). He followed up all leads on the alibi, attempting to find people who might have remembered seeing Lott. (V-5, 408). A motion for payment of fees documented Bartle's travel to Starke and St. Augustine, for a total of nine hours. (V-5, 409). Spector debriefed Bartle when he got back, but did not recall a written report. (V-5, 410).

Bartle went to Starke and also went to a restaurant looking for "waitresses and so forth." (V-5, 411-12). Spector testified about the report he received back from Bartle:

> Okay. Well, one of the reasons for him going up there was to try to find a guy at a fruit stand that had seen Mr. Lott at a time that was relevant, and he couldn't find any such person. The other thing was that Mr. Lott had visited a restaurant. I think it was in St. Augustine. I'm not sure. Anyway, I think the records here indicated it was a Sonny's, a Sonny's Restaurant. And as I recall, and I'm saying it's to

> the best of my recollection, that Mr. Bartle went to the restaurant and could not locate a waitress nor anyone that recalled seeing Mr. Lott at the time.

(V-5, 416).

Spector testified that he had no support for Lott's alibi other than Lott or his wife. (V-5, 417). At least initially, Tammy, Lott's wife, did support Lott's alibi defense. (V-5, 417). However, at some point, Spector became aware that Tammy would not be available to support Lott's story. (V-5, 417). In fact, Tammy called Spector and told him that she didn't want to testify: "Well, she said to me -- said to me, I'm not going to lie anymore and I'm not going to testify." (V-5, 418). Once she said that she wouldn't lie for "Kenny anymore" that's all Spector needed to hear. (V-5, 455). Once a witness "goes south" on him, he would not call her to testify. (V-5, 455). At that point the whole strategy seemed to fall on its face, she was the chief eyewitness to the alibi, but then he "couldn't produce any of it." (V-5, 418). That left Spector with Lott "alone" with no one to support his story. (V-5, 418).

Spector disagreed that he did not follow up on leads relating to Lott's potential alibi defense: "…Because I feel that we -- and when I say we, I mean myself and Ed Bartle, followed up every possible lead that we had in every direction. And so I don't think it's accurate at all to say that we were

supplied the names of alibi witnesses and didn't follow up and investigate that." (V-5, 485).

Spector testified that he had another potential alibi witness, Lott's mother, who talked to Lott on the phone. (V-5, 428). The time was Sunday morning and it was a relevant time based upon a witness near the victim's house hearing a scream. So, Spector did present a residual part of the alibi defense at trial. (V-5, 428). Lott's mother testified at trial and the defense tried to tie it to the time the witness heard something. (V-5, 428-29).

Spector was aware that Whitman was an important witness in the case. He also recalled in discovery receiving information that the police had checked into or verified Whitman's alibi. (V-5, 435). He was provided with statements from Whitman's wife and two friends which was taken into consideration on how to handle Whitman. (V-5, 435). Also, a statement from Deland Auto Parts showing that they in fact did sell Whitman the engine he was supposedly putting in his truck. (V-5, 439). In fact, Bartle's bill shows that he did go out and investigate the Deland Auto Parts part of Whitman's alibi. (V-5, 440). With Tammy refusing to support Lott's alibi, Spector attempted to shift more responsibility over to Whitman. (V-5, 437). He tried to show Whitman was a known liar. (V-5, 437-38).

Spector recalled a name Ray Fuller, who, according to Whitman, Lott committed the murder with. (V-5, 443). He did not recall sending Bartle to investigate this individual because it would probably not result in any favorable information. (V-5, 444). However, Bartle, from his billing records, either attempted to locate Ray Fuller or in fact found him. (V-5, 445).

Spector recalled the taped conversation between Whitman and Lott was an obstacle in this case. The transcript showed Lott negotiating the sale of jewelry. And, the transcript appeared to show Lott asserting ownership over the jewelry. (V-5, 447).

Early on Spector recognized the need for a mental health expert and moved the court for appointment of an expert. (V-5, 418). This motion was filed on October 28, 1994, four or five months prior to the guilt phase. (V-5, 419). Dr. Dee administered a number of tests and reported back that Lott had frontal lobe damage. Spector discussed with Dr. Dee the impact upon a person of such a condition. (V-5, 420). Such brain damage affected a person's impulsivity and interferes with internal controls which inhibit acting out. (V-5, 420-21).

Bartle provided Dr. Dee with some background information, including witness interviews or depositions. Bartle's bill reflected an interview with Lott's family members for three

hours. (V-5, 431). Spector thought that he set it up for Bartle to gather background information from family members and provide it to Dr. Dee. (V-5, 432). Spector did not recall Dr. Dee ever asking him for anything. (V-5, 432). But, when he met with Dr. Dee in person, he recalled Dr. Dee asking for some additional information. (V-5, 433). They discussed what he needed and what he would do. (V-5, 433). Also, Bartle reported back to Spector that he had in fact met with Dr. Dee. Id.

Dr. Dee was an important penalty phase witness for the defense. He demonstrated that Lott's head injury resulted in an impairment in his brain function, resulting in a problem with impulse control. (V-5, 450). Spector thought that Dr. Dee's testimony was effective and resulted producing or establishing the mental health mitigators. (V-5, 450). They were found and given considerable weight by the judge. However, the mental health mitigators "didn't carry the day." (V-5, 451).

In his personal interaction, Spector found Lott to have a hair trigger temper. (V-5, 421). In fact, he recalled an incident at the jail where Lott showed a temper flash which Spector felt uncomfortable with. (V-5, 422). Lott's temper was a factor to consider when determining whether he should testify at trial. (V-5, 422). Lott was accused of an extremely violent

act, and the last thing he wanted was to show the jury a temper or propensity for violence. (V-5, 422).

On whether Lott would testify, Spector did not have Tammy's support and didn't have the support of anyone in North Florida who could say they observed Lott during the relevant time frame. (V-5, 423). In addition to his demeanor, Lott's criminal history was significant and "certainly didn't want any of that to get out." (V-5, 423-24). Also, the potential that the nature of his prior record could be revealed was a significant risk, it would "have been very damaging to his defense." (V-5, 424). Another factor to consider was the prosecutor, Jeff Ashton, was a "sharp guy" and incisive. "He's just too sharp to mess around with, you know?" (V-5, 451). "And the idea of him not testifying, I think if I had to do it all over again I would do it the same way." (V-5, 511).

Spector was aware that Lott initially wanted to testify but they discussed the matter in light of later developments. Spector discussed the issue with a number of lawyers because it was such a big case, and he wanted all the input he could get. (V-5, 425). Ray Goodman, in particular [an experienced criminal defense lawyer], took the view that Lott should not testify. Spector agreed with Goodman and Goodman indicated he would like to speak with Lott. Spector agreed because he thought Lott

might benefit from the additional input. (V-5, 426). Lott, Richardson, and Goodman all agreed that it would be a bad idea for Lott to testify. (V-5, 426). It had a possible benefit, but, "had much more possible detriment too his defense." (V-5, 426). Lott ultimately agreed with the decision not to testify. (V-5, 426). "I guarantee that if he insisted after that that he wanted to testify, then I would have put him on… That's his decision after my best advice, then, okay." (V-5, 426-27).

Richardson and Spector divided responsibility for the trial, with Spector handling voir dire, opening, and penalty phase closing argument. Scott would do the motion for judgment of acquittal and closing argument. (V-5, 452-53, 503). Spector could not recall whether or not Richardson cross-examined any witnesses. (V-5, 453). Spector denied that closing argument was simply thrust upon Richardson: "I have to say it was absolutely nonsense to say that I ever told Mr. Richardson that I don't know what to say and so you do the closing argument. I have to categorically deny that as nonsense. It's not true." (V-5, 453). As far as Spector could recall, they had good relations and he was glad to have Richardson on board. (V-5, 454). He was shocked to hear some of this stuff as "unbelievable." (V-5, 454). It was absolutely untrue to say that Richardson was pressured or coerced into doing the closing

argument. (V-5, 454). "That's something we agreed upon. I would never force a person into something like that in my case, let alone a murder case. That's ridiculous. That's just ridiculous." (V-5, 509).

Spector did have an independent latent print examiner look into whether or not the latent fingerprints taken from the victim's home were reliable. (V-5, 429). However, Spector did not look into whether or not the victim's PIN number and credit card came in one envelope or separate mailings. (V-5, 473-74). Spector recalled that Lott simply said he got the PIN number and card from Whitman and that Whitman "got them from a mailbox." (V-5, 474). Spector did not see how checking into whether or not the bank sent the PIN and card in separate envelopes "would have helped my case." (V-5, 474). In fact, Spector did not think it was in his interest to check with the bank. (V-5, 474).

Scott Richardson testified that he was an attorney specializing in criminal law. (V-4, 320). He was brought in to assist Spector approximately two to three months prior to trial. (V-4, 320). He handled some depositions in Deland and then acted as a second chair. (V-4, 321). He went to the jail to talk to Lott between three and five times. (V-4, 322). Spector was with him on one occasion. (V-4, 322). When he interviewed

Lott, he was provided with information on a fruit stand in Starke. (V-4, 323). However, Richardson did not know if investigator Bartle went to check out the fruit stand. (V-4, 324). Lott also mentioned a Sonny's Barbeque in St. Augustine and described some people from the restaurant. (V-4, 325). The time frame for the murder allowed for a couple of days. (V-4, 326).

Spector did not seem enthusiastic about the alibi defense because he did not want to put Lott on the stand and have him testify. (V-4, 326). Nor, according to Richardson, did Spector seem to have enthusiasm about tracking down the witnesses to support the defense. (V-4, 326). In Richardson's view, Spector was upset with Lott for not taking any plea deals and apprehensive about taking the case to trial. (V-4, 327).

Richardson became concerned at trial when Spector did not have any cross-examination for the State's forensic expert and stood up to ask questions. (V-4, 329). Richardson did not feel he had enough information to conduct an effective cross-examination of the witness. (V-4, 329). In preparation for trial they had short meetings, talking over lunch and "some short meetings with investigator Bartle. (V-4, 329). Spector did not seem to have a defense strategy. (V-4, 331).

At some point during trial, Ray Goodman, another defense attorney, was contacted or made contact with Spector and Lott. (V-4, 332). Lott wanted to testify but there was never a consensus among the attorneys on having Lott testify. Richardson felt that Lott had to testify in order to get an alibi into evidence. (V-4, 333). And, Richardson, in his personal experience, more often than not, calls the defendant to the stand. (V-4, 333). Spector, however, was concerned because Ashton was the prosecutor and it would be like "quote, poking a dog in a cage." Spector did not feel Lott would do well on the witness stand. (V-4, 334).

Lott did not argue the point with Spector, but he always wanted to testify. (V-4, 334). He did recall a colloquy with Lott prior to the verdict. (V-4, 334). In Richardson's opinion, Lott did not receive an effective defense. (V-4, 336). Richardson testified that no effort was made to prepare for the penalty phase prior to the guilty verdict. And, did not believe that an expert had been hired prior to the verdict. (V-4, 337). Although Spector took notes during the trial, Richardson did not know if he had anything prepared for closing argument. (V-4, 338). Richardson gave the closing argument but could not say he was "prepared." (V-4, 338). At the end of each day, however, he admitted that he and Spector would discuss what took place

during the course of the trial.[1] (V-4, 338). Richardson was only paid $3,500 for his work on the case. (V-4, 339).

Richardson met with Lott's mother a number of times and he discussed Lott's whereabouts with her during that period of time. (V-4, 340). On cross, Richardson admitted the records showed he was on the case for some five months prior to the trial. (V-4, 342). Therefore, he was not hired or brought into the case immediately prior to trial. (V-4, 342). The defense attorney file reflected Bartle billing for going to St. Augustine on November 4th. (V-4, 345). Another bill reflected Bartle interviewing FDLE technicians. (V-4, 351). Another bill reflected the appointment of a fingerprint expert. (V-4, 352-53). Richardson admitted that after reviewing fingerprints and fiber evidence that Spector could have concluded that this avenue was not a good one to pursue. (V-4, 354).

Richardson was confronted with a motion to appoint Dr. Dee to examine Lott dated October 28, 1994, which is about the same time he came into the case. (V-4, 354-55). It is possible he forgot how early Dr. Dee was appointed due to the fact it has been almost ten years. (V-4, 355). And, he was shown a bill from Dr. Dee showing various dates prior to trial. In fact, Lott was examined in January of 1995, months prior to the actual

[1] Richardson also acknowledged that both he and Spector took notes during the trial.

trial. (V-4, 354-55). Richardson agreed that it's "possible" that he knew back in 1994 some of these things were happening and that he had simply forgotten. (V-4, 356). For example, Richardson was not aware that Bartle had provided a summary of Lott's personal history for Dr. Dee. (V-4, 358). Nor was he aware that Bartle spent an hour talking to Dr. Dee about matters or issues important to Dr. Dee's evaluation. (V-4, 358). "There may have been a great deal of things going on that I was not aware of or that I might have forgotten." (V-4, 359).

Richardson admitted that both he and Mr. Spector discussed with Lott the issue of him taking the stand. (V-4, 359). Originally, Tammy Lott was a witness to Lott's alibi. (V-4, 360). However, she decided that she didn't want to testify. Tammy said something to the effect that "she was done with Mr. Lott and was not the least bit interested in coming to testify for him." (V-4, 361). It seemed like the defense learned this some 30 or 45 days prior to trial. (V-4, 361). There was no fact Richardson was aware of that could have been brought out with the shoe and fiber evidence that could have made a difference in the outcome of the trial. (V-4, 362).

Richardson did recall that Bartle found a Ray Fuller prior to trial. (V-4, 362). He did not recall what Fuller might have told Bartle. (V-4, 362). He was satisfied with how the Fuller

issue was handled. (V-4, 363). Spector called a number of defense witnesses in this case. (V-4, 364). And, he prepared a number of witnesses prior to trial. Id. Richardson also admitted that he gave a full closing argument in this case. (V-4, 364). Richardson could not think of a fact or argument he omitted during closing that might have changed the outcome. (V-4, 365-66). Nor has he learned of any facts since trial that would have made a difference. (V-4, 366).

Richardson was familiar with Ashton and that "poking a dog in a cage" is an accurate description of the outcome of cross-examination from Mr. Ashton. (V-4, 367). It might be a problem in particular for an impulsive and memory deficient defendant. (V-4, 367). Also, you would have to consider the fact that Lott had been convicted of multiple felonies. (V-4, 369). Those were factors which any competent attorney would consider in deciding whether or not to put a defendant on the stand. (V-4, 367). Richardson admitted that Lott did finally, after talking with Spector and Goodman, agree that he would not testify. (V-4, 368). That's why Richardson did not intervene in court during the colloquy when Lott admitted that it was his decision not to testify. (V-4, 369).

As he testified in court during the evidentiary hearing, Richardson did not know if any one could support Lott's alibi or

what witnesses would testify to if called. (V-4, 385). He never talked to Mr. Jones. (V-4, 386). The defense does not need to file a notice of intention to claim alibi unless the State requests it. (V-4, 389).

(ii) Mental Health Expert

Dr. Henry Dee testified that he is a licensed clinical psychologist and has been practicing in Florida since 1972. (V-3, 195). He has also been qualified as an expert in neuropsychology in Florida courts in excess of a one hundred times. (V-3, 195). In 1994 Dr. Dee was asked to evaluate Ken Lott by his attorney, Mr. Spector. (V-3, 197). He was asked to conduct a neuropsychological evaluation of Lott and produce mitigating evidence if Lott should be found guilty. (V-3, 197). Dr. Dee was sent some background information on Lott on May 16, 1995. (V-3, 198).

Dr. Dee administered a battery of tests to Lott to evaluate his brain function and detect evidence of brain damage. (V-3, 199). He administered an intelligence test, the Weschler, which also measures the verbal and non-verbal areas of brain function. (V-3, 200). Lott scored a 91 but had a significant discrepancy between his verbal and non-verbal score. Id. Such a discrepancy can reflect cerebral damage. He also tested memory function which showed a 76 score which is lower than he would

expect for someone with Lott's intelligence. (V-3, 201-02). He concluded that Lott had brain damage impacting the left hemisphere of the brain. (V-3, 202-03). Also, the visual testing suggested some left hemisphere damage, confirming the findings on the other tests. However, the Benton test of right/left orientation was normal. (V-3, 204). Lott became frustrated with the Wisconsin Card Sorting test and did not complete it. Dr. Dee's opinion at the time of trial was that he had frontal lobe damage. (V-3, 204).

In addition to background information from Bartle, Dr. Dee also obtained the same type of information from Lott himself. (V-3, 205). He was provided two additional pieces of information, a deposition from a cousin, Randy Nellis, and a deposition of his wife. (V-3, 205-06). Those two items did not really help him though. (V-3, 206).

In 2000, Dr. Dee was retained by collateral counsel to retest Lott. (V-3, 206). He was supplied with more information, including prison records, criminal history, and medical records from the jail. He also was provided testimony from his mother, aunt, and stepfather from the original trial. (V-3, 206). Dr. Dee did not state that this additional material changed or altered his opinion from the original trial: "Well, I don't know that it would change my diagnosis or opinion, but

it certainly bolstered it." (V-3, 207). The information he thought was important was that at 18 months of age Lott was involved in an auto accident and hit his head on the windshield. He was hospitalized at MacDill Air Force Base. (V-3, 207). Lott was in the hospital for two weeks. This was information gleaned from the [penalty phase] testimony of Lott's mother. (V-3, 207). He was given information at the time of trial from Lott that he was involved in a motorcycle accident at the age of 16 and hit a telephone pole. (V-3, 207-08). The earlier accident would have helped him because on cross-examination, prosecutor Ashton pointed out that Lott displayed antisocial behavior before the age of 16. (V-3, 209). Lott's brain damage affects his ability to control his behavior. (V-3, 213).

At the time of trial, Dr. Dee recalled that the prosecutor, Mr. Ashton, provided him with additional criminal history of Lott, adding to the criminal versatility score on the HARE test measuring psychopathy. (V-3, 214). Dr. Dee testified to brain injury, memory impairment, and, increased impulsivity at the time of trial. (V-3, 214-15).

On cross-examination, Dr. Dee noted that his bill reflected four hours of evaluation and an hour for a consultation with the defense investigator, Mr. Bartle. (V-3, 216). Dr. Dee read from a report from the time of trial which included background

information on Lott, including the fact he was "involved in an auto accident at age two or three and was treated at MacDill Air Force Base." (V-3, 217). The report stated that they [defense team] were in the process of obtaining the records which were archived in St. Louis. (V-3, 217). At the time Dr. Dee examined Lott he had been in practice for twenty years. (V-3, 219).

Dr. Dee's bill charged for four hours of preparation, including review of department of corrections records. (V-3, 220). So, he did have records for background before he testified and revised the score on the PCLR. [HARE] (V-3, 220-21). The information was not tainted simply because it was provided by the State. (V-3, 221). Also, Dr. Dee billed for seven hours preparation for the trial, including reviewing records and a PSI which contained a "lot of detailed information on this history in there." (V-3, 222). That pre-trial review included seven hours worth of material to "review and think about." (V-3, 223). The material provided by Mr. Ashton was pretty lengthy and extensive. (V-3, 225). The notes from the 1970 go cart theft PSI stated, in part: "Defendant shows no remorse. Defendant has worst attitude I've seen in a number of years. Hates mother. Doesn't think much of his stepfather.

Several driver previous minor offenses. Mother describes him as being resentful. State prison two years." (V-3, 225-26).

Lott also had a conviction for assault with a deadly weapon, larceny of a motor vehicle, conspiracy to escape and attempt to escape, "in which the corrections officer was beaten, bruised, wounded, ill treated." (V-3, 226). PSI indicates numerous previous vandalism, minor crimes. (V-3, 227). Also, included in that material was an FBI file which listed "15 offenses, all property crimes. Breaking and entering, auto thefts. 1973." (V-3, 228). The report noted that Lott was not motivated, that he was immature, and a trouble maker under need of close supervision. The DOC report considered him "explosive, has poor impulse control, low frustration level, personality trait disturbance. Antisocial explosive." (V-3, 228). In 1985, Lott violated probation, and was sentenced to five years in prison, took money from a secretary, armed with a knife, armed robbery and sentenced to 20 years by Judge Green. (V-3, 228-29).

Based upon his first evaluation, Dr. Dee agreed that Lott was an impulsive person. And, that was consistent with Lott's history. (V-3, 229). And, he found that Lott had memory impairment. (V-3, 231). He thought that Lott's memory about

everyday events, or events which are not striking might be impaired. (V-3, 233).

Dr. Dee was of the opinion at the time of trial that Lott suffered from brain damage and that it was appropriate for the court to find it existed in this case. (V-3, 234). And, Dr. Dee acknowledged that he was aware of Lott's earlier injury, but, did not have the records to show the extent of it. (V-3, 234). His mother's testimony at the penalty phase provided that information. (V-3, 235). Dr. Dee was told that the records could not be obtained. (V-3, 235). At the time he testified during the evidentiary hearing, Dr. Dee still had not seen any records from either injury claimed by Lott. (V-3, 235-36).

Dr. Dee reviewed his penalty phase testimony and agreed that he testified that both statutory mental mitigators applied in this case. (V-3, 239). Dr. Dee thought it appropriate that the court would find based upon his testimony that brain damage was entitled to considerable weight as a mitigator. (V-3, 236).

Dr. Dee administered the Hare Psychopathy Check List and agreed that Lott met the criteria to be classified a psychopath. (V-3, 239). He described the condition for the court:

> It's generally thought to be a person, the description of a person who basically functions very impulsively in a very self-centered way with little in the way of conscience or little in the way of guilt feelings, and who has a certain glibness and charm in their personal presentation and so forth. They typically have

> extensive criminal histories. In fact that's part of the rating. That's part of the criminal versatility I was referring to earlier. And I think it's preserved in the literature by the term psychopath and sociopath…

(V-3, 240).

(iii) Lay Witnesses

Elmer Jones testified that he lived and operated a fruit stand in Starke in 1994. (V-1, 12-13). On weekends he would open between eight and nine o'clock in the morning and stay there until six o'clock in the afternoon or later depending on traffic. (V-1, 14). He was not contacted regarding Ken Lott in 1994. It was not until 1999 or 2000 that he was contacted by anyone concerning Mr. Lott. (V-1, 15). He was shown a photograph of Lott and said: "Oh, the best that I can remember, I mean, it's hard to remember it's been so long ago, but I have seen this fellow and talked to him." (V-1, 15). He thought he must have talked with him at his fruit stand. (V-1, 15). Jones thought he recognized Lott from a photograph shown to him by collateral counsel's investigator, however, Jones testified: "When you talk to 50 or 100 people a day, you know, it's been so long ago, it's hard to say, but I do remember this fellow." (V-1, 16). Jones thought that if someone had talked to him back in 1994 his memory would have been better. (V-1, 16).

For what little Jones could remember, he talked to this fellow [Lott] about fishing. "Now it's hard to say for sure, but I believe that we talked about fishing, and I believe Lake Okeechobee comes into my mind somewhere." (V-1, 18). He could not provide a specific time or date of their conversation, but it was a Saturday or Sunday because that's when the stand was open. (V-1, 18). He also thought a truck [Lott's] looked familiar but "I couldn't bet my life on it, you know[.]" (V-1, 19). In fact, Jones acknowledged he could not really even put a range of time on when he might have talked to this individual. (V-1, 20-21). It was when he had the older trailer, sometime before 1996. (V-1, 21). The following colloquy occurred between the prosecutor and Jones:

> Q: So it could have been any time from the early eighties up until 1996?
>
> A: Uh-huh, uh-huh.

(V-1, 21).

Ken Lott testified that when he was growing up he was shuttled around to various "kinfolk" because he did not like living with his stepfather.[2] (V-1, 30). The stepfather, according to Lott, used to beat him up a lot. (V-2, 31). He

[2] Lott testified over the State's objection that he was not listed on the defense witness list and that the State had no opportunity to depose him. (V-1, 24). The court allowed the State to depose Lott and the defense investigator DeLoach. (V-1, 24).

suffered surface injuries, bumps, bruises, etc., from the beatings. Lott was sent to a psychiatrist when he was twelve years old. After that, he was sent to live with an aunt in Lakeland. (V-2, 31). His stepfather would beat him as punishment when he was "bad" as a child. (V-2, 33). The stepfather would throw a tantrum when he forgot to feed the dogs or something like that. (V-2, 33). Lott ran away from home a lot and sometimes stayed away for a couple of days. (V-2, 34).

When he was young, a horse kicked him in the head. According to his mom, he was only two or three years old at the time. (V-2, 31-32). He also suffered a head injury from a motorcycle accident back in 1969. (V-2, 32). Lott claimed he woke up unconscious in the hospital after the accident. Id.

While he was in jail after his conviction Lott admitted that he saw Dr. Henry Dee. (V-2, 34-35). He saw him before he was convicted and took "some kind of tests." (V-2, 35). Lott testified that he saw Dr. Dee maybe six months before he want to trial. (V-2, 37). He answered a lot of questions about his life. (V-2, 35). Lott admitted he told his attorneys about the abuse but claimed that "it wasn't a whole lot said about it, you know?" (V-2, 35). Lott also admitted that he told Dr. Dee about the abuse. (V-2, 35). Lott saw Dr. Dee again in 2000 at

the request of collateral counsel. (V-2, 36). Dr. Dee gave him more tests and "stuff." (V-2, 36).

During the penalty phase of his trial Lott recalled information coming out that he broke into churches as a juvenile. (V-2, 37). Lott claimed they didn't break into the church, that it was unlocked and walked inside, got wet, and some of the boys he was with put thumbtacks on the seats. (V-2, 37-38). Lott claimed he did not steal anything, but, that he got the carpet wet when he got out of the "baptism thing, you know." (V-2, 37-38). He asserted it was just one church and that it was just "curiosity as a kid." (V-2, 38).

Regarding the other incidents of law breaking, Lott claimed he just did some joy riding and committed robbery "out of fear." (V-2, 39). Lott claimed he robbed a convenience store out of fear of some "dude" who was after him. Lott knew he needed to get out of the state and "had been drinking and shooting drugs." (V-2, 39).

Lott testified that he first started using drugs in 1972, smoking pot and doing acid. (V-2, 39). In 1974, Lott started shooting crystal meth, "crank." (V-2, 39). Lott claimed he used drugs pretty much every day, "up until my arrest, you know." (V-2, 39). Lott told defense attorney Spector about his addiction to cocaine, which he claimed he also used on a weekly

basis. (V-2, 40). He drove a tractor trailer and also had a landscaping business to conduct back in 1994 and therefore would use cocaine mainly on weekends. Lott claimed he was pretty straight during the week. (V-2, 41). Lott claimed that back in 1994 before Ms. Conners was murdered he lived week to week with a lot of bills, overhead, two automobiles, a home, kids to take care of. (V-2, 41). Lott was working driving a big rig hauling frozen orange juice up until the time he was arrested. (V-2, 42).

Lott first met Rose Conners when he had a landscape contract to take care of common grounds for her condo complex. He lost the contract in August or September of 1993, but claimed he kept Rose on as a customer. (V-2, 43). But, he said it was too far to drive [Daytona to Deland] for one or two customers and had to drop her. (V-2, 43). He started mowing her lawn in 1992 and worked until the end of 1993. (V-2, 45). Lott also claimed that he did maintenance work for her on the fence around her home, and, went inside to "move some computer stuff." (V-2, 45-46). He also claimed he traded out plants and stuff every 90 days. He said that occurred in the house, not around the pool area. (V-2, 46). Lott claimed that he had been in her house some eight times, every 90 days. (V-2, 47). Lott said he moved Rose's computer in September of 1993. (V-2, 47-48).

Lott testified that he "bumped" into Rose at Jimbo's Restaurant, on the outside of her sub-division some seven to ten days before her murder. (V-2, 47-48). He was calling a friend of his [the Godloves] from a pay phone but, his friends were not in. (V-2, 48). He went into the store/restaurant then back to the phone where he had seen her walk out and said "[h]ello." (V-2, 48). They talked for a few minutes then Rose went to her car and "she went to crank her car and it didn't crank." (V-2, 50). Rose told Lott she thought she needed a battery but "ain't gotten around to getting it." (V-2, 50). Lott claimed he did not have jumper cables with him but that Rose told him she had some back at her house. (V-2, 50). Lott claims he drove her back to her house, got her jumper cables and started her car. Then Lott followed her back to her house because he claimed, she had some work for him to do. (V-2, 50-51). She wasn't happy with Lott's cousin, Randy, who was now mowing her lawn. (V-2, 51). Lott looked at the lawn and shrubbery and went in the front door to place the jumper cables back inside. (V-2, 51). Then, Lott claimed he went to the garden window off of the master bedroom. He stayed in the master bedroom or bath for "ten, fifteen minutes possibly." (V-2, 52). Lott asserted he leaned up on the sink and he attempted to show how he might have left his prints on the master bathroom sink. (V-2, 53-54). He

gave her "[s]ome -- some ideas to give her on what we could do to improve that area there." (V-2, 52-53).

His meeting with Rose occurred, according to Lott, a "week to ten days before the murder." Lott claimed he was having an affair with Kim Godlove and that's why he called on the phone, to make sure her husband Steve wasn't home. (V-2, 53).

Lott claimed that Whitman, a person he has known since fifth grade or so had been to Rose Conners' home with him. He went over with him a couple of times: "I had give him a little work, you know." (V-2, 55). Whitman needed a job, was on government welfare and had a little pension. (V-2, 55). Lott claimed he used to pay Whitman under the table, giving him work two or three times a week. (V-2, 56). He claimed that Whitman was with him when he moved some furniture for Rose with another friend. However, Lott could not remember the name of the other "friend" who helped him move Rose's furniture. (V-2, 56).

Lott testified that his parents hired Joel Spector in June of 1994. (V-2, 57). Lott testified that he saw Spector maybe seven times but that might "be stretching" it. (V-2, 57). Lott claimed that these meetings last "thirty" minutes "tops." (V-2, 57). But, added that maybe the first meeting lasted about forty five minutes to an hour. (V-2, 57). Spector told Lott that he had trial experience and that he used to be a prosecuting

attorney. (V-2, 58). According to Lott, Spector told him that he handled a bunch of murder cases and that his record was pretty good. (V-2, 58-59). A lot of his cases were pled out and Lott stated that his wife had heard he was a good attorney. (V-2, 59).

Lott told Spector about his alibi for the Saturday and Sunday of the murder. Lott then recounted his alibi during the evidentiary hearing. On March 26th, Saturday, Lott claimed he left home with his wife and went over to Bill Snodderly's house, the person whose truck he drove. (V-2, 60-61). He took the truck home later that evening and visited his parents who lived right down the road from Bill. (V-2, 62).

Lott claimed that he was back at home at 11:00 that evening and that he [and his wife, supposedly] rented videotapes. (V-2, 67). He claimed that he had to sign something to rent video tapes from Blockbuster and that he provided this information to Spector. (V-2, 68).

Lott claimed he talked to his mother that Sunday morning about taking care of chores at the house while they were gone. (V-2, 70). After speaking with his mother, he put fishing poles in the back of his truck then went back to Roger's to check on

one of his tires. (V-2, 70).[3] Lott said it was Saturday morning, repeating it again, but after prompting by the trial court, Lott claimed: "Excuse me. What am I thinking? Sunday morning." Lott claimed that Robert wasn't there but one of his employees was, "Bob." (V-2, 74).

Lott asserted that he and his wife proceeded to the St. Johns to do a little fishing but "[d]idn't catch nothing." (V-2, 76). The fish weren't biting so, according to Lott, "we didn't really hang around." (V-2, 76). They drove up through Palatka then wanted to show her [his wife] Raiford in Starke where he was incarcerated in the seventies. (V-2, 78). They stopped at a "Stop N Go," gassed up there and spent about ten minutes at the store. (V-2, 78-79). They went east toward St. Augustine and stopped at a stand owned by Jones where he got peanuts. (V-2, 79). Lott claimed that he did not buy any home made relish because it was not labeled and he was not sure about the "hygiene part of it" (V-2, 81). Lott testified that he stopped there at about 1:00 and they stayed there for about twenty minutes. (V-2, 80). Lott said they talked about fishing in Lake Okeechobee where Lott claimed he did some "'gator hunting, you know." (V-2, 82). Lott claimed he told Spector

[3] Lott identified a picture of his truck and writing on the back, admitting that he sent it to his postconviction investigator, Michele Harper, not Joel Spector.

about the fruit stand and described the gentleman he talked to. (V-2, 82). Spector told Lott that he would send someone up to look into it. (V-2, 83-84). Lott said Bartle could not find the fruit stand he talked about. (V-2, 84).

Lott claimed that he went to St. Augustine because his parents were going to be there and if the motor home had broken down or something, they couldn't reach him. So, Lott claims he told Tammy that they might as well swing by there and "see if they're there." (V-2, 85). Lott claimed they went to the Beachcomber resort and saw that they were there. However, they did not see his parents because "they'd have had me the rest of the day." (V-2, 86). And, Lott explained, they had to get back because they were picking someone up later that evening. (V-2, 86). From there, they went to Sonny's BBQ in St. Augustine for a bite to eat. (V-2, 86-87). He thought they were there about 2:30 pm and he paid cash for the meal. (V-2, 87). Lott claimed he described the waitress who waited on them for his lawyer or the investigator, Bartle. (V-2, 88).

From Sonny's, Lott testified that they drove down the coast to Daytona. They got there close to five o'clock in the afternoon. (V-2, 89). Lott claimed he went back over to Roger's or the garage. (V-2, 89-90). He was on his way to Duggin's place when Lott claimed he came upon Whitman off of

Exit 54 in Deland. Whitman was on foot and said his truck had broken down in Longwood in Volusia County. (V-2, 90, 129). Lott took Whitman to his house and got a chain, then headed back on I-4 to Longwood. (V-2, 91). Whitman's truck, according to Lott, was at a Tenneco gas station. This station was perhaps eight miles from Rose Conner's house. (V-2, 91). Lott claimed he towed Whitman's truck from Longwood back to Deland using a chain. (V-2, 92).

On the way back from Longwood, Lott said that Whitman showed him some mail, which included a credit card and another letter with a "credit thing." (V-2, 93). The letter had a PIN number and a $3,500 credit limit. (V-2, 93). The name on the card was Rose Conner's. Whitman explained how he obtained the card. (V-2, 93). They went to an ATM and Bob was in the truck. Lott admitted that he used the ATM card in Conner's name to get cash. (V-2, 94). While Lott used the card, he claimed he gave the money to Whitman. Whitman gave Lott $50.00 for using the card. (V-2, 94). Lott was using cocaine that day, riding around with Tammy. Lott claimed he used the card because he was high and Whitman said Rose was out of town. (V-2, 94). Lott remembered that he had previously told Whitman that Rose frequently traveled out of the area. (V-2, 95). Lott testified

that his truck windows are tinted and that it was like “you’re in a cave, you know?” (V-2, 96).

Lott claimed he was alone with Whitman in the evening until “10:30, o’clock, maybe a little later.” (V-2, 131). He claimed he got back with Tammy from their trip earlier in the afternoon, about 5:30 or 6:00. (V-2, 131). He knew that the card Whitman gave him belonged to Rose Conners from the name on the card and the accompanying paperwork. (V-2, 132). On cross-examination, Lott was confronted with the fact that during the Spencer hearing, he claimed he was not aware of who’s name was on the card he was using until a week later. (V-2, 134). Lott claimed that “[w]ell, I didn’t really see it at first, you know. I just said that I found out it was Rose’s Conner’s card.” (V-2, 135). Lott admitted Rose was a long time customer of his but that he did not have reason to believe Rose was in danger. (V-2, 151). Lott claimed to hear about Rose’s murder from his cousin, Randy, a few days after the murder. (V-2, 152). And, Lott admitted that at this point he knew Whitman had a card with Rose Conners’ name in it and that Lott used it to withdraw money from her account. (V-2, 152). Lott did not tell the police about it, though, because his cousin had “scared” him. (V-2, 152). At some point Lott did admit, yes, he “started putting two and two together.” [Whitman had her card, was in possession of

jewelry.] (V-2, 154). But, Lott would not go to the police, stating "I'm not a snitching person like that." (V-2, 154).

Even though Lott claimed not to be a trusting person, and, was suspicious of Whitman after the murder, Lott continued to talk to Whitman about jewelry. (V-2, 155). He had a pretty good idea the jewelry came from Rose at that point. (V-2, 155). Lott testified that he did not know or suspect the phone might be tapped when he was talking with Whitman: "I don't know." (V-2, 155). However, Lott claimed not to be thinking clearly: "…Like I said, it was a long time ago; I can't remember what I was thinking. And, like I say, I do a lot of drugs. I don't know what state of mind I's (sic) in, I can't even remember back to when that was, you know?" (V-2, 155).

Lott was confronted again with his testimony from the Spencer hearing, where Lott claimed he was told by Whitman that Mexican drug dealers would be listening to their conversation and that he, Lott, was to act like he owned the jewelry. (V-2, 156). At the Spencer hearing, Lott claimed he didn't "know nothing about the jewelry. He is in the drug business." So, at the Spencer hearing, Lott claimed he was going to hold money for a drug deal going down at his house and that he explained the phone conversation with an explanation about "drug dealers listening in on" his conversation with Whitman. (V-2, 157).

Lott claimed that it "coulda (sic) been" that way now that the prosecutor "refreshed" his "memory." (V-2, 157).

Lott claimed that he did not know his wife was wearing [Rose's] jewelry and learned that from Spector or some detective. Lott claimed his wife had a lot of jewelry. (V-2, 137). Lott was again confronted with his Spencer hearing testimony where he testified Whitman owed him money on the horse business and he tried to give his wife some jewelry to pay off part of the debt: "…you know, work it out with him on the horse deal." (V-2, 138-39). According to his Spencer hearing testimony, the plan was for Tammy to show off the jewelry in order to possibly find someone to buy the jewelry. (V-2, 140). Lott claimed: "I don't recall it going like that." (V-2, 140).

In another apparent contradiction, Lott claimed not to know why he got $600 from Whitman, it was either in payment for the horse or that he was "holding it for him because of grass." (V-2, 141). Lott admitted that he went to the ATM machine to draw out money with someone else's card, with someone he did not trust, Whitman. (V-2, 145). He wasn't really thinking about it because he was "doing cocaine." (V-2, 145). Lott also admitted that he was purchasing drugs from Whitman to "resell." (V-2, 146). He was constantly having financial transactions with him. (V-2, 146).

At the Spencer hearing Lott claimed he met Rose at Cousin's Bar-B-Q instead of Jimbo's. (V-2, 149). Lott claimed not to remember the name of it. (V-2, 149). Also, in the Spencer hearing, Lott claimed he met Rose there in February, not seven to ten days prior to the murder as he claimed in the evidentiary hearing. (V-2, 150). While Lott claimed he was in the area to conduct an affair with Kim Godlove, Lott claimed her husband found out about the affair and that she "wouldn't do nothing" [like testify on his behalf]. (V-2, 150).

Whitman was five or six years younger than Lott and they were friends. (V-2, 102). They had a falling out though when they were teenagers over the theft of a go cart. They broke into a place and took a racing go cart. (V-2, 102). When Lott was caught, he told them about Whitman's participation in the crime. (V-2, 102). Lott was seventeen at the time and went to prison for "two years" for breaking and entering. (V-2, 102-03). Whitman, however, only got something like 60 or 30 days at the "county farm." (V-2, 103). They did not stay in touch and Lott did not see him again until 1991. From 1991 to 1994 Whitman was Lott's drug connection. (V-2, 103). Lott claimed that Whitman's reputation in the community was as a drug dealer and liar. (V-2, 105). Lott said that he would not tell Whitman about committing a murder because he knew that Whitman held a

grudge against him for telling on him "when I was a kid." (V-2, 106-07). In fact, Lott said that "if I'd done something like that [commit murder], I wouldn't tell anybody, really. I'm not a very trusting person." (V-2, 107).

Lott claimed he tried to fire Spector several months prior to trial. Lott testified: "I told the man, just, you know, 'You got to go; you ain't doing shit here,' you know." (V-2, 97). Lott testified that he only met with investigator Bartle twice with Spector and then "three or four times by hisself (sic)." (V-2, 98).

Lott claimed his wife Tammy was with him during the two day period. She was not called, according to Lott, because they had a little heated problem while he was in County jail. (V-2, 118). According to Lott, he found that that "she had Whitman's truck in her name underneath my insurance police and so forth." (V-2, 118). He questioned her about it and they got in a serious fight over that and the fact Lott would not sign over the deed to their house to her father. (V-2, 119).

Lott acknowledged that he, Spector, and Richardson, talked about whether or not Lott should testify at trial. (V-2, 111). He wanted to testify and thought that Richardson agreed that there was no other way to explain his fingerprints. Richardson said Lott had to testify to explain this "cause there's no

witness that can prove otherwise, you know; that, you know - - that, you know, that I go in the house and stuff, that see me going in the house; …" (V-2, 114). Lott said he tried to bring this up again during trial but that Spector seemed "scared" but he didn't want him to stir up "no problems." (V-2, 115). Lott claimed they discussed the issue of him testifying again when the jury was out on a recess. (V-2, 115). At that point, Spector and another lawyer Ray Goodman, came over and tried to talk him out of taking the stand. (V-2, 116). Lott did not recall the judge asking him about taking the stand after the jury left to deliberate. (V-2, 116). "There might have been some discussion, but I can't remember what it was about or nothing like that." (V-2, 116). When confronted with the transcript, wherein Lott expressed satisfaction with the services of his lawyers in a colloquy with the judge, Lott testified he was in shock. "I had a big load on me there, as you well know." (V-2, 161). The transcript reflects Lott was questioned by the court and admitted it was a joint choice by all three of them that he not testify at trial. (V-2, 160). Lott also stated that his attorneys did everything he anticipated that they would do. (V-2, 160).[4]

[4] When the State introduced a letter Lott didn't like, he said: "You done gave me an attitude. That's what you done did." (V-2, 169).

Lott admitted that he had some six felony convictions prior to being charged with Rose's murder. However, Lott claimed not to know if Spector was concerned about this prior record being revealed if he testified. (V-2, 120-21). Lott did admit that Spector was concerned about him taking the stand because "I'm a hot tempered person." (V-2, 120-21). While Lott denied showing anger or hostility toward Judge Russell, he did admit to losing his temper with "the bailiffs." (V-2, 121). And, he did acknowledge losing his temper under questioning by prosecutor Ashton during the Spencer hearing: "He kept asking the same question over and over, and I asked him what part he didn't understand. And then that's when I told the judge, 'I'm not going to keep answering the same question.'" (V-2, 121).

Lott claimed that when the police caught him fleeing from Whitman's place with money and drugs, he tried to hide the drugs because they were illegal. (V-2, 123-24). Lott, however, denied that when he got out of the truck he threw the money under the truck. (V-2, 125). He did try to hide the money because he thought it was a more serious crime, "trafficking" and did not want to suffer the consequences of a more serious offense. (V-2, 125). Lott was still using cocaine and marijuana at the time but claimed he had given up using crystal meth in 1979. (V-2, 126).

Hortense Coleman, Lott's mother, testified that she lived near him in 1994. (V-3, 246). And, in 1994 or 1995 she actually testified at Lott's trial during the penalty phase. (V-3, 247). Coleman testified about Lott's hospitalization for a head injury sustained in a car crash when he was a child. (V-3, 247). Also, he had an accident on a motorcycle at the age of 16. (V-3, 247). According to Coleman, Lott was "very obedient" as a child. He couldn't be out late and had chores to do. (V-3, 248). He got into trouble with the law at the age of 17 or somewhere around that time. (V-3, 248).

Coleman testified that she provided the money to hire Joel Spector, but, that Tammy, Lott's wife, actually retained him. (V-3, 248). She paid $25,000 for Spector and later gave $3,000 to Richardson. (V-3, 249). Coleman testified that she spoke with Spector at his office at least seven times. (V-3, 260).

Lott came over Saturday March 26th and helped pump up the tires before she and her husband left for St. Augustine. (V-3, 252). Lott must have arrived at her home before twelve o'clock. (V-3, 253). They had a problem with the motor home and Ken Duggins came out to disconnect a switch or replace it. Duggins arrived around two o'clock in the afternoon. (V-3, 254). She spoke to Lott on the phone before he came back to the house to get the puppies. (V-3, 256). This was before dark because they

were leaving town. (V-3, 256). Coleman also spoke to Lott later on that night at his home in Deltona, around 10:30 or so. (V-3, 257). She called because Duggins had not yet come back out to finish up working on the motor home. (V-3, 257).

Coleman and her husband left for St. Augustine at 10:00 and woke up at around 8:00 in the morning. Coleman claimed she spoke to Lott before leaving at his home in Deltona. (V-3, 258). Coleman testified that she drove to the fruit stand in Starke and that it took two and a half hours, there and back. (V-3, 262-63).

At one point, Lott told her he was angry with Spector and fired him. (V-3, 264). Coleman told Lott she didn't have money to hire another lawyer and that was it. (V-3, 264). She did not know anything about his trial experience when she hired him, nor did Spector relate his experience in criminal trials to her. (V-3, 265).

On Saturday, Coleman testified that she was with her son from noon until five o'clock. (V-3, 266). Coleman testified that she did not see Lott again for two or three weeks. (V-3, 268). She had no idea where Lott was between five o'clock and 10:30 when she called Lott at home. (V-3, 269). When Lott hung up the phone at 10:35 or so, she had no idea where he was after that. (V-3, 271). Coleman admitted she was aware that an aunt

who turned Lott in to the law was subsequently murdered. (V-3, 274-75). However, she believed that her sister was murdered when Lott was in prison. (V-3, 282). She was murdered in 1988. (V-3, 288).

Coleman testified that she and Lott were familiar with the fruit stand in Starke. Coleman testified that she went up there and bought peanuts once or twice. (V-3, 278). She did not know if Lott was with her when she and her husband went to the stand. (V-3, 278). But, she added, he used to drive a semi truck and "knows where the place is at." "And that he used to go up there to get the relish the man made. I think it was Vidalia relish he made also and --" (V-3, 278). Lott was getting the relish at "all times" "whenever he had a chance to go get it." (V-3, 279). This was before Lott was arrested. (V-3, 279). "[H]e mentioned it to me one time because we were having some great northern beans, and he said it was good on it and we tried it and it was good. But we liked the pepper relish also." (V-3, 279). Coleman identified the stand and did not believe it was another stand in Green Cove where Lott got the relish. (V-3, 281). Coleman recalled only testifying once during Lott's trial, but, would let the record speak for itself. (V-3, 284). Her recollection was refreshed by the trial transcript and she agreed that she testified during the guilt phase. (V-3, 287).

Lott was recalled to the stand to explain the contradiction between his testimony about the fruit stand and that of his mother. Lott said that his mom was "70 years old, and she's a little confused there." (V-5, 398). Lott explained she must be confused because the stand where he bought the relish was in a different location, near Titusville. (V-5, 398).

Stuart DeRidder testified that he was employed in the Orange County Homicide unit in 1994. (V-2, 176). Robert Whitman approached him with some leads in the Conners homicide. (V-2, 178). Whitman was referred to him by Ben Johnson, a Lieutenant with the Volusia Sheriff's Department. (V-2, 188). Whitman was working as an informant for him. Id. Lieutenant Johnson told DeRidder that Whitman had been a reliable informant in the past. (V-2, 188-89).

Whitman implicated Lott in the murder. (V-2, 178). DeRidder checked to see if Whitman was involved, and, looked into what Whitman was doing during the time frame of the murder. (V-2, 179). Whitman said that he was installing an engine in his truck and provided the names of individuals who were with him. Detective DeRidder obtained interviews from those individuals and verified the alibi, including the fact that an engine was obtained and apparently installed in his truck. (V-2, 180-81).

Whitman agreed to cooperate in the investigation of Lott, and, agreed to purchase stolen property from him. (V-2, 182). Whitman also agreed to a phone tap and was also wired for sound when the transaction was supposed to take place. (V-2, 182). Whitman expressed no reluctance in signing a waiver and having his trailer wired for sound. Phone calls were in fact taped between Lott and Whitman. (V-2, 183). He identified phone transcripts as accurate which reflected those conversations. (V-2, 183). The conversations in the trailer, however, were largely inaudible because the trailer was metal. (V-2, 184).

After Lott arrived in the trailer, Whitman turned over some jewelry he obtained from Lott. (V-2, 186). And, Lott had the money with him when he was pulled over. (V-2, 186-87). The $600 in Lott's possession had been photocopied and was the same money given to Whitman to make the transaction for the jewelry. (V-2, 187).

Loretta Michele Deloach AKA Michel Harbor testified that she used to work for the regional capital collateral office in Tampa. (V-3, 290-91). She worked on Lott's case and did the prison intake interview with Lott. She met with him more than once when she worked for CCRC. (V-3, 291-92). She was subsequently retained by appointed collateral counsel to work on Lott's case. Lott mentioned the phone call from his mother but

Deloach was not able to find any record to document the call. (V-3, 295). She was able to obtain some medical records from an accident in Volusia County. (V-3, 295). Deloach did find a produce stand in Starke. (V-3, 297). She also obtained a photograph of Lott and puppies taken the same weekend this "transpired." (V-3, 297).

She found Elmer Jones, the owner of a fruit stand in Starke. (V-3, 299). Jones was shown a photograph of Lott and said he looked familiar. (V-3, 301). She also went to a Sonny's Barbeque in St. Augustine that Lott had described. (V-3, 302). But, Deloach did not find any records or anyone who recognized Lott. (V-3, 303). Deloach also obtained some school records on Lott and DOC records to develop mitigation. (V-3, 304).[5] She turned those records over to Dr. Dee. (V-3, 305).

On cross-examination, Deloach admitted that she developed a romantic relationship with Lott. (V-3, 306). She admitted that under the cover of "legal mail" she sent Lott romantic letters in prison. (V-3, 307). And, she sent appealing or physical pictures of herself to Lott and called herself his girlfriend. (V-3, 307). She was aware that sending letters of this type and with that content under the cover of legal mail was against

[5] She had trouble obtaining the school records; at first they told her they had no record of Lott going to school there. However she was persistent and they did come up with the records. (V-3, 305).

prison rules. (V-3, 308). And, that having physical contact with Lott was also against the rules. In fact, her visiting privileges were revoked because guards observed her sitting in Lott's lap during an official visit. (V-3, 308-09). However, Deloach stated that it was a lie and attempted to explain they observed her bending down for some sort of computer equipment. (V-3, 309).

Any additional facts necessary for disposition of the issues presently before this Court will be discussed in the argument, *infra*.

SUMMARY OF THE ARGUMENT

ISSUE I: Trial defense counsel was not deficient in failing to investigate or present Lott's alibi. Counsel conducted a reasonable investigation and simply could not find witnesses to corroborate his claimed alibi. Even now, Lott has failed to present any witnesses to show that a viable alibi defense is available. Consequently, he has failed to establish any resulting prejudice under Strickland. The remaining allegations of ineffectiveness were properly denied after the evidentiary hearing below.

ISSUE II: Trial defense counsel provided sound tactical advice regarding whether appellant should testify on his own behalf at trial. Lott ultimately agreed to heed his attorney's advice and voluntarily chose not to testify.

ISSUE III: Appellant failed to show his attorney made individual errors in representing him during trial, much less establish multiple errors or omissions to support his claim of "cumulative error."

ISSUE IV: This issue is not cognizable in this appeal because Lott did not appeal the court's ruling on DNA testing.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT HIS DEFENSE ATTORNEYS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT AND PENALTY PHASES OF HIS TRIAL? (STATED BY APPELLEE).

Appellant first claims that he was denied the right to effective assistance of counsel during the guilt phase because his attorneys failed to investigate and present an alibi defense and question the State's forensic evidence. He also asserts that his defense attorneys failed to adequately prepare or present mitigating evidence during the penalty phase. The State disagrees. The trial court properly rejected these claims after an evidentiary hearing below.

A. Standard Of Review

This Court summarized the appropriate standard of review in State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000):[6]

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See Rose v. State, 675 So.2d 567, 571 (Fla. 1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

[6] This standard applies to all issues of ineffectiveness addressed in this brief.

This Court has stated that "[w]e recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001). Consequently, this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court." Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)(citing Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955)).

B. Preliminary Statement On Applicable Legal Standards For Ineffective Assistance Of Counsel Claims

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 668 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight.

Id. at 696. "The Supreme Court has recognized that because representation is an art and not a science, '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" Waters v. Thomas, 46 F.3d 1506 (11th Cir.) (*en banc*), cert. denied, 516 U.S. 856 (1995)(citing Strickland, 466 U.S. at 689).

The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364 (1993). The defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

C. The Trial Court Properly Rejected Appellant's Ineffective Assistance Claims After The Hearing Below

(i) Alleged Failure To Prepare And Present An Alibi Defense

The trial court found that the defense failed to establish either deficient performance or prejudice from counsel's alleged failure to investigate or present an alibi defense. The trial court stated:

In Subclaims Al-A4, the defense alleged that Mr. Lott's trial counsel was ineffective for failing to adequately investigate certain matters prior to trial. With respect to each of these subclaims, the Court finds that the Defendant has proven neither deficient performance nor prejudice.

With respect to Subclaim Al, Mr. Lott seeks relief based on his allegation that his counsel should have located witness Elmer Jones, a fruit stand operator who was located by the investigator hired by postconviction counsel. All that the defense has proven is that the investigator for postconviction counsel located Mr. Jones when Mr. Spector's investigator did not. However, given the efforts testified to by Mr. Spector, the Court does not find that his performance was defective in this regard. Moreover, all that Mr. Jones could say was that he believes that he remembered Defendant stopping by his stand on either a Saturday or a Sunday. However, the witness could not even narrow the date down to the year in which he believed this possible encounter took place. The witness could in no way place Mr. Lott in North Florida at the time of the murder. Therefore, the Court finds no reasonable argument by which the defense could establish any prejudice. FN9

FN9 The Court would also note that Defendant's mother contradicted Mr. Lott's testimony that he only visited Mr. Jones' fruit stand one time — on March 27, 1994. According to Ms. Coleman, Mr. Lott frequently stopped at Mr. Jones' stand to buy a certain relish that Mr. Jones sold. On redirect, Mr. Lott testified that his mother was confused and mistaken.

The Court's findings are similar with respect to Subclaim A2. With respect to this issue, postconviction counsel's investigator was not able to locate any documents or witnesses at the Sonny's B-B-Q restaurant to corroborate Defendant's alibi. Therefore, there was no evidence available from which the Court could find prejudice, even if a deficiency was found in Mr. Spector's performance. And, again, the Court finds that Mr. Spector's efforts to investigate the existence of corroborating witnesses was reasonable and did not violate the Strickland standard.

> In Subclaim A3, the defense argues that Mr. Spector was ineffective for failing to secure telephone records from Defendant's mother that would support Mr. Lott's alibi defense. This claim is clearly refuted by the record. Although Ms. Coleman had telephone billing records available, her bills only showed long distance phone calls. Because Mr. Lott's house was a local call from her home, the calls that she made to his home were not reflected on her statement. This was the testimony given at the original trial when Mr. Spector did introduce Ms. Coleman's telephone records as evidence. Ms. Coleman testified that she called Mr. Lott immediately before calling her aunt in Lakeland, Florida (long distance) on Sunday morning, March 27, 1994. Ms. Coleman's bill showed the call to Lakeland at 8:55 a.m., in order to pinpoint the time of her previous call to Mr. Lott at 8:45 a.m. *See* Trial Transcript at pp. 1042 and 1056. The defense has failed to prove that any additional records were available from Defendant's mother. And, from the testimony given at trial, it is clear that they were not.

(V-7, 823-25).

Appellant initially contends that Spector, the attorney hired by Lott's mother, was not qualified to handle a death case. However, he cites no evidence introduced below during the hearing to support this statement. And, although Spector had not handled a capital case at the time he represented Lott, he had represented four defendants charged with murder and possessed more than twenty years experience as a criminal defense attorney. (V-5, 404-05).

As found by the trial court below, Spector did in fact conduct an investigation into appellant's alibi defense. He had investigator Bartle track down leads relating to appellant's potential alibi defense. This included attempts to find someone

from a fruit stand in Starke and attempting to find someone who might have recognized Lott from a Sonny's Barbeque Restaurant in St. Augustine. (V-5, 411-16). It was not counsel's fault that these efforts did not prove successful.

Interestingly enough, while collateral counsel criticizes trial counsel for failing to uncover and present evidence to support Lott's alibi defense, collateral counsel, with the benefit of time and hindsight, presented no evidence aside from Lott to support such a defense. Appellant did call Elmer Jones and his mother to testify during the evidentiary hearing; however, neither witness provided evidentiary support for Lott's claimed alibi.

Elmer Jones, the owner of the fruit stand, simply testified that Lott looked familiar and that he believed he stopped at his stand. He thought, but couldn't swear to it, that they talked about fishing. However, Elmer Jones could not even give a year in which he talked with Lott, much less a specific date which might support Lott's alibi.[7] (V-1, 18, 21). According to Jones it could have been any time from the early eighties up until 1996. (V-1, 21). Similarly, Lott's mother provided no support

[7] Jones testified: "When you talk to 50 or 100 people a day, you know, it's been so long ago, it's hard to say, but I do remember this fellow." (V-1, 16).

for his alibi because he was out of her presence during most of the relevant time period. (V-3, 266).

In an attempt to overcome the rather obvious lack of evidentiary support for appellant's claimed alibi, collateral counsel contends that had defense counsel conducted a diligent investigation at the time of trial, such witnesses might have been uncovered. However, this assertion is highly speculative and cannot form the basis for finding reversible error under the facts of this case. See Spencer v. State, 842 So. 2d 52 (Fla. 2003)(this court noted that reversible error cannot be predicated on "conjecture" in rejecting an ineffectiveness claim where collateral counsel failed to call an allegedly impeaching witness during the evidentiary hearing)(citing Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1074)). In U.S. v. Berry, 814 F.2d 1406, 1409 (9th Cir. 1987) the Ninth Circuit observed that an allegation of inadequate investigation must show what the witnesses would have testified to and how it would have changed the outcome. As observed by the District of Colombia United States Court of Appeals:

> ...a defendant basing an inadequate assistance claim on his or her counsel's failure to investigate 'must make a comprehensive showing as to what the investigation would have produced. The focus on the inquiry must be on what information would have been obtained from such an investigation and whether such information, assuming its admissibility in court, would have produced a different result.'

U.S v. Askew, 88 F.3d 1065 (D.C. Cir. 1996), cert. denied, 519 U.S. 986 (1996)(quoting Sullivan v. Fairman, 819 F.2d 1382, 1392 (7th Cir. 1987)).

Appellant has completely failed in his evidentiary burden of showing that counsel was deficient in failing to uncover or present an alibi defense. Even now after the evidentiary hearing, appellant has failed to present witnesses to suggest, much less establish, that he had a viable alibi defense. Accordingly, appellant has neither established deficient performance nor prejudice under Strickland. See Gordon v. State, 863 So. 2d 1215 (Fla. 2003)(counsel's decision not to present alibi defense was a reasonable tactical decision where he used an investigator to follow up on defendant's claims and the investigation and did not produce beneficial evidence to support the defense); Reed v. State, 875 So. 2d 415, 429-30 (Fla. 2004)(trial counsel's decision not to present an alibi defense was a reasonable tactical decision where available witnesses would have provided only an "incomplete" alibi and counsel was concerned about presenting potentially "perjurious" testimony).

(ii) Failure To Prepare And Present Mental Health Mitigation

Appellant next maintains that defense counsel was ineffective for failing to adequately prepare for and present mental health testimony through Dr. Dee. However, during closing argument below, collateral counsel conceded that this claim was not viable and abandoned it. (V-5, 541-42).

The following colloquy took place below:

> THE COURT: Okay. Are you going to address the penalty phase at all?
>
> MR. BANKOWITZ: Judge, it appears that I still don't think a competent, sufficient evaluation was done. But Judge Russell did consider the mental health mitigators, and gave them great weight or substantial weight, I believe is what the wording of the order was, so I'm not going to argue that.

(V-5, 541-42). And, when the assistant state attorney mentioned Dr. Dee in closing, the trial court interrupted and indicated it was no longer an issue in these proceedings. (V-5, 570). Collateral counsel confirmed that it was no longer an issue based upon "the fact that the court accepted his testimony and found what it did with regard to the penalty phase, no." (V-5, 570). Relying upon counsel's statement in open court, the trial court's order on this issue states:

> Claims Alleging Penalty Phase Deficiencies
>
> At oral argument after the hearing, postconviction counsel agreed that the evidence presented at the hearing failed to support the

> requested relief as to the subclaims alleging ineffective assistance of counsel during the penalty phase of the trial. Therefore, for the reasons set forth and conceded by postconviction counsel on the record, these claims must be denied.

(V-7, 829).

Amazingly, collateral counsel ignores his concession below and argues the penalty phase ineffective assistance of counsel claim. The respondent questions the propriety of abandoning a claim below, only to resurrect it on appeal. The trial court's order denying relief was made in reliance upon defense counsel's concession in open court. As an officer of the court, collateral counsel should not be able to concede an issue below, then ignore his concession, and, pursue the same claim on appeal. See generally Vining v. State, 827 So. 2d 201, 212-13 (Fla. 2002)(a defendant may not raise claims piecemeal, refining his claims "to include additional factual allegations after the postconviction court concludes that no evidentiary hearing is required."). In any case, it is clear that based upon this record, Lott's claim lacks any merit and his concession below was well taken.

Collateral counsel's assertion that Dr. Dee received no background information or completely inadequate material is refuted by the record. Collateral counsel repeats the testimony of co-counsel Scott Richardson, who mistakenly testified below,

that no penalty phase investigation occurred until after the guilt phase.[8] On cross-examination, Richardson admitted that he either forgot or was unaware that Dr. Dee had been retained months prior to the trial.[9] (V-4, 354-56). The record demonstrates that Dr. Dee received background material from and met with defense investigator Bartle prior to the guilt phase of trial. (V-3, 205-06). He received at least two depositions, a family history memo from the investigator, and, conducted a standard battery of neuropsychological testing. (V-3, 204-06; 216-19). During the penalty phase, Dr. Dee testified to Lott's brain injury, memory impairment, and increased impulsivity at the time of trial.[10] (V-3, 214-15).

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[8] On direct examination, Richardson testified unequivocally that the penalty phase was not even discussed prior to the guilt phase verdict. (V-4, 336-37). He also stated he was not aware of any effort to hire a mental health expert prior to the guilt phase verdict. (V-4, 337). However, on cross-examination he was confronted with documents showing that Dr. Dee had been appointed and began work on the case months prior to the guilt phase. Richardson acknowledged his earlier statement had been incorrect. (V-4, 354-56). Nonetheless, Richardson's apparently unequivocal statement to the contrary on direct examination casts great doubt upon other issues concerning his 'recollection' of what occurred at the time of trial. In fact, on cross-examination, Richardson acknowledged that "[t]here may have been a great deal of things going on that I was not aware of or that I might have forgotten." (V-4, 359).

[9] Dr. Dee was asked by Spector to conduct a neuropsychological evaluation of Lott and produce mitigating evidence if Lott should be found guilty. (V-3, 197).

[10] Dr. Dee testified extensively regarding appellant's claimed drug use, his history of brain trauma, and testified that frontal lobe damage rendered him less able to make calculated

While Dr. Dee claimed that new information in the form of a transcript of Lott's mother's penalty phase testimony regarding an earlier auto accident in which Lott was injured would have "bolstered" his opinion, Dr. Dee was forced to acknowledge that the memo provided to him by the defense investigator at the time of trial referenced this earlier auto accident. (V-3, 217). During the evidentiary hearing, Dr. Dee read from this report which stated Lott "was involved in an auto accident at the age of two or three and was treated at MacDill Air Force Base." (V-3, 217). The report indicated that the defense was in the process of obtaining the records from this accident which were allegedly archived in St. Louis. (V-3, 217). However, even at the time of the evidentiary hearing Dr. Dee did not have these records, which he was told, could not be obtained. (V-3, 235).

Even if trial counsel did not provide sufficient background material to Dr. Dee, there is no resulting prejudice. Dr. Dee testified that his opinions did not change with the benefit of the additional information. See e.g. Carroll v. State, 815 So. 2d 601, 611 (Fla. 2002)(Even "assuming trial counsel was

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judgments regarding his behavior. (T. 279-293)[penalty phase]. Dr. Dee evidently had conducted enough testing and reviewed sufficient background materials to determine that both statutory mental mitigators applied in this case. He rendered this opinion notwithstanding the facts of this offense, which clearly suggest a coldly calculated and planned murder for financial gain.

deficient for failing to provide the additional background information" defendant failed to demonstrate prejudice under Strickland where the experts would not have changed their opinions with the benefit of such material); Brown v. State, 755 So. 2d 616, 636 (Fla. 2000) (trial counsel's performance was not deficient for failing to provide mental health expert additional background information because the expert testified at the evidentiary hearing that the collateral data would not have changed his testimony). The fact that additional material might have "bolstered" his opinion, does not provide any basis for finding trial counsel deficient. Particularly in this case, where Dr. Dee testified below that both statutory mental health mitigators applied and the trial court in fact, found those mitigators based upon his testimony. (V-3, 236, 239).

Finally, even assuming, *arguendo*, appellant established some deficiency based upon defense counsel's penalty phase preparation or presentation, he has failed to show any resulting prejudice. With regard to the penalty phase, this Court observed that a defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000),

cert. denied, 534 U.S. 878 (2001)(quoting Strickland, 466 U.S. at 695). The Defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

Dr. Dee's testimony was entirely cumulative to the testimony he already provided during the penalty phase below. See Brown v. State, 894 So. 2d 137 (Fla. 2004)(even if there was some deficiency on the part of counsel, "there is no prejudice because the additional testimony presented at the evidentiary hearing contributes virtually no new information and is merely cumulative to the testimony presented at trial.")(citations omitted); Downs v. State, 740 So. 2d 506, 516 (Fla. 1999) (affirming trial court's denial of ineffectiveness claim for failing to present mitigating evidence where the additional evidence was cumulative to that presented during sentencing); See Glock v. Moore, 195 F.3d 625, 636 (11th Cir. 1999) (concluding that the petitioner could not show prejudice because much of the new evidence is merely repetitive and cumulative to that which was presented at trial). Moreover, the State presented a massive case in aggravation with six aggravating factors, including some of the most weighty, such as HAC, CCP,

and prior violent felonies. See e.g. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999)(noting that "heinous, atrocious, or cruel" and cold, calculated and premeditated aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme..."). Appellant's prior violent felonies consisted of three robberies and an attempted escape. One of the robberies involved appellant placing a butcher knife next to the throat of a female Shop and Go cashier, threatening to kill her unless she gave him money from the cash register. Appellant received a twenty year sentence for his criminal misconduct. (T. 574-75). In addition, the State presented appellant's conviction for attempted escape in Volusia County, a conviction which involved violence to a corrections officer. (T. 575).

Probably the most damaging aggravator was the heinous, atrocious, and cruel manner in which appellant murdered Rose Conners. As the trial court found below:

> Based on the evidence, this crime occurred over a period of time. From the minute the Defendant entered the home until the victim was choked into unconsciousness (hopefully), she suffered unspeakable humiliation, terror, and pain. She was so afraid that she defecated on herself, her panties with feces on them were removed in one bedroom, she was completely nude and died in the master bedroom. Her mouth, wrists, and ankles were taped making her totally defenseless. Plier marks were on her arm. The State suggest the pliers were used to get her to tell her attacker(s) her ATM number. That is a reasonable possibility and perhaps the **least** onerous. There is no way of knowing how long this tortuous assault

> lasted, but common sense dictates it could not have been brief. Once the Defendant got everything he needed from Rose Conners, he deliberately slashed her throat, and to be sure she was dead, he stabbed her in the back. These acts were definitely conscienceless, pitiless, and unnecessarily torturous.

(T. 579)(emphasis in original).

Given the massive case in aggravation presented by the State, the twelve to zero vote for death, and the entirely cumulative nature of Dr. Dee's testimony, appellant failed to show a reasonable probability of a different outcome. See Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997)(no reasonable probability of different outcome had mental health expert testified, in light of strong aggravating factors); Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989) (postconviction evidence of abused childhood and drug addiction would not have changed outcome in light of three aggravating factors of HAC, during a felony, and prior violent convictions).

(iii) The Credit Card And PIN Number

Appellant's next claims that his counsel was ineffective for failing to investigate whether the PIN number and credit cards were sent in separate mailings to Rose Conners. However, appellant never explained how this information might prove beneficial to him at trial. The trial court recognized this fact, below in denying this claim:

> Finally, with respect to Subclaim A4, the Court simply does not see how it would tend to prove or disprove any material fact at trial had the defense proven that the victim's PIN number was mailed to her in an envelope separate from her credit card, which Mr. Lott used to withdraw money following the murder. The defense's theory appears to be that this information could have been used to argue that the PIN number was stolen from Conners' mail box. However, that would still not explain the theft of the card — and Mr. Lott clearly had both the card and the PIN. Moreover, if theft from the mailbox were the theory, it would appear much more likely that someone could steal a single envelope with both the card and the PIN number than that someone would have separately stolen both in two distinct thefts. Because the defense has failed to show how a separately-mailed PIN number would have tended to establish Mr. Lott's innocence, the Court finds that: (1) Mr. Spector was in no way ineffective for failing to investigate the bank's mailing procedures; and (2) no prejudice has been shown from his failure to do so.

(V-7, 825). Appellant's argument on appeal does not make any more sense than it did below. The trial court's order denying relief must be affirmed.

The PIN number and credit card did not form the basis for finding HAC in this case. It was the frightening, lengthy, and painful attack Lott inflicted upon Rose Conners which caused the trial court to find this aggravator.

(iv) Shoe and Fiber Evidence

Appellant's entire argument on this issue is, as follows: "[f]urther, although Spector was able, to a slight degree, to discredit or question the shoe and fiber evidence, it also was not investigated or conclusively rebutted." (Appellant's Brief

at 36). Perhaps appellant's argument on this matter is so cryptic because no evidence was presented to support this claim below. Collateral counsel presented no evidence to question the shoe or fiber evidence during the evidentiary hearing.

The trial court denied this claim, stating:

> In Subclaim B4, the defense alleges ineffective assistance of counsel for failing to object to or rebut the State's shoe print and fiber evidence. At trial, a State witness testified to fibers found at the scene that matched the fibers from a shirt found at Mr. Lott's house – and to the shoe print "match" to the shoes that Mr. Lott was wearing at the time of this arrest. Defense counsel attacked the evidence on cross-examination by eliciting admissions that: (1) the fibers would match any Haynes brand T-shirt; and (2) the shoe print was not unique to Mr. Lott's shoe and would match any same-sized Spalding tennis shoe manufactured using the same mold. The witness also admitted that size nine was not an uncommon size; that there would be a number of shoes that would match the print (since she found no unique characteristics); that she had no idea how many other shoes were in circulation that would leave the same print; and, that Robert Whitman's shoes were not submitted to her for comparison to any of the shoe prints taken from the murder scene. At the hearing, the defense did not demonstrate anything else that trial counsel could or should have done to cast doubt on the relevance of the fiber and shoe print evidence. Therefore, the Court finds that the defense has failed to demonstrate either deficient performance by counsel or prejudice with respect to this Subclaim.

(V-7, 827). Appellant has offered nothing on appeal to suggest the trial court's erred in denying this claim below.

ISSUE II

WHETHER TRIAL DEFENSE COUNSEL DEPRIVED APPELLANT OF HIS RIGHT TO TESTIFY ON HIS OWN BEHALF? (STATED BY APPELLEE).

The trial court denied Lott's claim below after a hearing below. The trial court noted that at least initially, Spector thought that Lott would testify as part of his trial strategy. However, the court noted that during the course of investigation, no corroboration could be obtained for Lott's alibi and the defense strategy changed. The Court found, as follows:

> Mr. Spector testified that, relying on his investigator, the trial team had "followed up every possible lead that we had in every direction" and had investigated "every witness offered up" as a potential witness. However, these efforts proved useless. The investigator could not locate anyone other than Tammy to corroborate Mr. Lott's alibi story.
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> Then, shortly before trial, Tammy Lott contacted Mr. Spector and told him that she "was not going to lie for Ken anymore," and would not testify at trial. This left Mr. Spector with no one except Ken Lott to testify to his North Florida trip on Sunday, March 27, 2004. Mr. Spector believed strongly that the risks of putting Mr. Lott on the witness stand far outweighed the benefits of placing an uncorroborated alibi before the Jury. First, Mr. Lott had multiple prior felony convictions. Second, Mr. Lott had a "hair trigger" temper. In addition to Mr. Spector's own experience with Mr. Lott, Mr. Spector had retained a potential penalty phase expert in clinical neuropsychology, Dr. Henry Dee, early in the case. By the time of trial, Dr. Dee had reported to Mr. Spector that Mr. Lott had brain damage to his frontal lobe from an accident

> years prior that affected Mr. Lott's ability to control his own behavior. Dr. Dee confirmed that Mr. Lott was an impulsive person who would be prone to "outbursts." Finally, Dr. Dee had reported that Mr. Lott's brain injury had caused significant memory impairment — meaning that Mr. Lott would have difficulty remembering details of an event, and that he would have difficulty remembering what he had testified to, for example, earlier in the day.
>
> Mr. Spector discussed these risks of testifying with Mr. Lott. Ultimately, Mr. Lott agreed.

(V-7, 820-21). And, the court concluded:

> Subclaim B 1 states that counsel was ineffective for depriving Defendant of his right to testify on his own behalf at trial. With respect to this claim, the Court finds that Defendant initially wanted to testify in the case. However, he ultimately followed the advice of counsel and decided not to testify. This was Mr. Lott's voluntary decision, and a joint decision between counsel and Mr. Lott. Therefore, this claim is denied.

(V-7, 825-26).

Although initially Lott wanted to testify on his own behalf, he ultimately listened to the advice of counsel and decided not to take the stand. Defense counsels' recommendation was a reasonable one based upon the considerable risks posed by Lott testifying.[11] See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000)("Counsel's strategic decisions will not be second guessed on collateral attack."). Lott's temper was a factor to consider and the last thing Spector wanted was to show the jury

[11] Some of these dangers were realized when Lott testified during the Spencer hearing and lost his temper with the prosecutor.

a temper or propensity for violence. (V-5, 422). Also important was the fact Lott's alibi defense fell apart. He did not have Tammy's support and didn't have the support of anyone in North Florida who could say they observed Lott during the relevant time frame. (V-5, 423). In addition to his demeanor, Lott's criminal history was significant and "certainly didn't want any of that to get out." (V-5, 423-24). Also, the potential that the nature of his prior record could be revealed was a significant risk, it would "have been very damaging to his defense." (V-5, 424). Finally, the prosecutor, Jeff Ashton, was a "sharp guy" and incisive. "He's just too sharp to mess around with, you know?" (V-5, 451). "And the idea of him not testifying, I think if I had to do it all over again I would do it the same way." (V-5, 511).

Regardless of these tactical considerations, Spector agreed that it was Lott's decision to make on whether or not to testify. Lott ultimately agreed with the decision not to testify. (V-5, 426). "I guarantee that if he insisted after that that he wanted to testify, then I would have put him on… That's his decision after my best advice, then, okay" (V-5, 426-27). Even co-counsel Richardson testified below that Lott ultimately agreed with the decision not to testify. (V-4, 368-69).

Supporting the denial of relief in this case is the fact the court made an inquiry at trial into whether Lott was voluntarily waiving his right to testify. Collateral counsel's assertion that "[a]t no time did the court ask Lott if he wanted to testify in his own defense or whether he waived that right" (Appellant's Brief at 39) is simply incorrect. Prior to a verdict being rendered, the trial court inquired as to appellant's decision not to testify and appellant's satisfaction with his attorneys. (T. 1212). Appellant told the trial court it was a joint decision made by him and his attorneys not to testify. He also expressed satisfaction with his attorneys' services and indicated that they did not do anything that he didn't want them to do. (T. 1212-1213).

Appellant maintains that the inquiry by the trial court does not resolve this issue because it did not occur prior to the defense resting. However, the inquiry occurred prior to the verdict, immediately after the jury was charged. If appellant was unhappy with his decision not to testify he had an opportunity to express it in open court. Instead, he chose to gamble on a favorable verdict and now wants a second bite at the apple. Under the circumstances of this case, not only does the record refute appellant's claim in that he affirmatively stated it was a joint decision not to testify, but he should be

equitably estopped from making such a claim. If appellant disagreed with the decision not to testify he had an obligation to tell the trial court upon the court's inquiry. See generally United States v. Morris, 977 F.2d 677, 685 (1st Cir. 1992)("[A] defendant cannot learn of juror misconduct during trial, gamble on a favorable verdict by remaining silent, and then complain in a post-verdict motion that the verdict was influenced by the misconduct.")(citing United States v. Bolinger, 837 F.2d 436 (11th Cir. 1988)); Rooney v. Hannon, 732 So. 2d 408, 411 (Fla. 4th DCA 1999)(rejecting an allegation of juror misconduct, the court stated: "...it is simply unfair to allow a party to hold back an objection like a trump card, ready to be played in the event of an unfavorable verdict.").

In sum, the record reflects that counsel recommended Lott not take the stand to testify and that Lott accepted his attorneys' recommendation. Spector did not interfere with or deny Lott his right to testify. The trial court's inquiry confirmed that Lott agreed with this decision at the time of trial. The trial court's order denying any relief on this claim should be affirmed.[12]

[12] Appellant certainly failed to show any prejudice as his testimony concerning an aimless journey to North Florida and improbable testimony concerning his fingerprints would not have resulted in a different outcome at trial. See Monlyn v. State, 894 So. 2d 832, 837-38 (Fla. 2004).

ISSUE III

WHETHER THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S ALLEGED ERRORS AND OMISSIONS REQUIRE A NEW TRIAL? (STATED BY APPELLEE).

Appellant next asserts that the cumulative nature of defense counsel's errors or omissions deprived him of the effective assistance of counsel. However, as noted above, none of the allegations demonstrate any error on the part of counsel, individually or collectively. See Bryan v. State, 748 So. 2d 1003, 1008 (Fla. 1999)("where allegations of individual error are found without merit, a cumulative-error argument based thereon must also fail."); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998)(where claims were either meritless or procedurally barred, there was no cumulative effect to consider).

Appellant's reliance upon United States v. Cronic, 466 U.S. 648 (1984) is misplaced. In Cronic the Court recognized that some extremely limited factual scenarios may obviate the need for a defendant to demonstrate prejudice for ineffective assistance of counsel. However, despite the fact that the trial court in Cronic had appointed an inexperienced real estate lawyer who was given only a limited time to prepare the case against fraud charges, the Court declined to find such a situation per se ineffective. Instead, the Court found in

Cronic that the defendant must plead and prove deficient performance and resulting prejudice. Cronic provides no support for appellant's claims for post-conviction relief. See Fennie v. State, 855 So. 2d 597, 602 (Fla. 2003)(declining to apply Cronic on assertion that counsel was essentially absent during voir dire by failing to effectively question jurors on racial tension); Woodard v. Collins, 898 F.2d 1027, 1028 (5th Cir. 1990)(prejudice prong required even where counsel advised defendant to plead guilty to a charge that counsel had not investigated); United States v. Reiter, 897 F.2d 639, 644-645 (2d Cir 1990), cert. denied, 498 U.S. 990 (1990)(applying both prongs of Strickland despite defendant's claim that counsel's errors were so serious that it amounted "no counsel at all."). In this case, none of appellant's allegations suggest that his attorney, with over twenty years experience as a criminal defense attorney, was either incapable of representing him or effectively abandoned his cause.[13]

[13] Appellant did briefly reference the cumulative effect of counsel's alleged errors in his Amended Motion for Post-Conviction Relief, arguably preserving the issue for appeal. (V-6, 589).

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DNA TESTING UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.853?

Appellant contends that the trial court erred in denying his motion for DNA testing below. The appellee, state of Florida, had filed a separate Motion to Strike Issue IV from appellant's brief. The Appellee argued that the DNA issue was not raised in appellant's motion for postconviction relief and that the order denying DNA testing was separately appealable under Florida Rule of Criminal Procedure 3.853(f) and Florida Rule of Appellate Procedure 9.110(b). Consequently, the State argued that it was improperly joined to appellant's separate action for postconviction relief and that any appeal of the trial court's order denying the requested DNA testing would be untimely.

On September 27, 2005, this Court denied the Appellee's motion to strike issue IV from appellant's initial brief. The State does not abandon its argument that this issue is barred from the present appeal as an untimely separately appealable order which has been improperly merged with appellant's postconviction appeal. In any case, even assuming the issue is not barred, appellant is not entitled to DNA testing in this case.

On December 4, 2003, the trial court issued an order denying the requested DNA testing. The court, stated in part:

> Mr. Lott identifies numerous items recovered from the crime scene, and he argues that testing of these items would exonerate him. For example, he submits that if DNA testing excludes him as the source of hair found at the scene, and if another person's DNA was found under the victim's fingernails, this would demonstrate that another person committed the crime. He also argues that although original testing did not detect the presence of spermatazoa, methods have evolved and he believes new testing would produce exculpatory evidence. Finally, he argues that testing of the pliers allegedly used to torture the victim would show if the tool actually came into contact with the victim, and if her skin cells and blood were not found, the State would not be entitled to the H.A.C. aggravator.
>
> However, this Court finds the State's arguments to be more persuasive. At trial, the prosecutor clearly conceded that another person might have been involved in the murder, and never relied on the assertion that Mr. Lott alone was responsible. The victim had a boyfriend who was an overnight visitor in her home; therefore, one would expect his hair to be found at the scene and his spermatazoa to be found in the swabs. If a second person participated in the murder, that person's DNA material could have been found under the victim's fingernails or swabs. The lack of DNA material on the pliers would not make a difference either, as the evidence was clear that the victim was tortured in some way, supporting the H.A.C. aggravator.
>
> Even if another person participated in the murder in this case, there was strong evidence that Mr. Lott participated as well, and benefitted from the crime. He was in possession of the victim's jewelry, and he used her bank card and personal identification number to obtain money soon after she was murdered. Under these factual circumstances, this Court concludes that there is no reasonable probability that any of the results Mr. Lott believes DNA testing would produce would tend to exonerate him or mitigate his sentence.

> Based on the foregoing, it is ORDERED that Defendant's Motion for Postconviction DNA Testing is DENIED.

(V-7, 799).

The State can add little to the well reasoned order of the trial court. The trial court's order is supported by competent, substantial evidence, and should not be disturbed on appeal. Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997); Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998). The circuit court, having familiarized itself with the record in this case, found that appellant failed to show a reasonable probability of acquittal on retrial or that he would receive a lesser sentence. A review of the record in this case supports the trial court's decision.

On appeal, appellant asserts that physical evidence might somehow link Whitman to the crime. However, he failed to make this argument in the trial court below. While appellant did argue that testing of hairs, and, examination of the fingernails might lead to physical evidence of another perpetrator, he never mentioned Whitman in connection with his DNA motion. (V-6, 664-72). Since this argument was not presented to the trial court below, it is not preserved for appeal. Archer v. State, 613 So. 2d 446, 448 (Fla. 1993)("For an issue to be preserved for appeal, however, it 'must be presented to the lower court and

the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.'" (quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)).[14]

The Hairs

Appellant offered no plausible theory wherein testing of hairs found "in the sink trap" or on the bed would lead to an alternate suspect. There is simply no reason to believe the hairs, which are frequently shed and easily transferred, were connected in any way to the victim's murder. The hairs were not found clutched in the victim's hand or covered in blood. Nor did the State offer a forensic analyst at trial. Even if the hairs belonged to someone other than the appellant, such evidence would not exonerate appellant or lead to a lesser sentence. Indeed, as the state pointed out in its response, the victim had a boyfriend who would stay over at the victim's house on weekends at the time of her murder. It would be expected that his hairs might be found in her house, on the bed, or in the trap of the victim's sink. (V-6, 685-86).

[14] Appellant's brief fails to argue DNA testing of the vaginal swabs. In his motion, appellant acknowledges that "[p]revious lab tests did not show the presence of spermatozoa on the items listed[.]" (V-6, 667). Obviously, appellant has failed to make a preliminary showing that any genetic material suitable for testing is present.

The Pliers

Appellant's asserts that testing of the pliers would undermine the heinous, atrocious, and cruel finding below. However, he fails to show that there is any genetic material on the pliers to test. The pliers were dusted for fingerprints, but, none were found. There was no mention of blood, skin, or other genetic material on the pliers. (TR. 633). Thus, appellant did not make a preliminary showing that any genetic material exists from which DNA testing could be conducted. Indeed, it appears that appellant seeks testing to show that there was not any genetic material from the victim on the pliers. However, even if testing showed that no DNA was present, this did not mean that the pliers were not used. They might have been cleaned off by Lott as the lack of fingerprints would tend to suggest. Finally, regardless of whether DNA testing can be conducted on the pliers, the victim was horribly attacked and murdered in her own home, supporting the finding of the heinous, atrocious, and cruel aggravator.

Bruises on the victim's body show that some injuries were inflicted consistent with pliers found on the home. (TR. 522-23). Moreover, the victim struggled to save herself, but, was overcome by the appellant. Torn panties with fecal matter on them suggest they were forcibly removed from the victim during

the struggle. Fecal matter on the panties as well as on the bed, floor, and foyer, indicate that Rose was terrorized by appellant's attack. As the medical examiner explained below: "It's not unusual for someone who's being assaulted and injured to have some defecation as well as urination and we see that a lot of times in situations where somebody is being injured, frightened and so forth, under a lot of stress, life fight type of situation." (V-4, 516).

Rose Conner was bound, naked, on her own bed with duct tape around her legs, arms, and mouth. (TR. 514-15; 526). According to Lott's statement to Whitman, the victim begged for her life. She also defecated upon herself, had her panties torn, and her legs were bruised in manner suggestive of being forced apart, in a sexual overture. (TR. 526-27, 537). As she lay bound and helpless, she was stabbed repeatedly, resulting in her death. Rose did not die a quick and painless death, regardless of whether the appellant used pliers to torture her. Thus, DNA testing on the pliers would not undermine the trial court's finding that the victim's murder was heinous, atrocious, and cruel.

The Victim's Fingernails

As for the victim's fingernails, appellant failed to show that any genetic material exists which can be tested.[15] He did not allege that skin was found underneath her fingernails. Indeed, the record reflects that the fingernails were in fact scraped and sent off for analysis.[16] (TR. 445). Moreover, a photograph shows that one of the victim's nails was broken off during the attack. However, this fingernail was associated with an incised or defensive wound, which cut her finger as well as taking the nail off. (TR. 442-43). A nail that is sheared off by a knife is unlikely to yield any DNA evidence relating to the attacker.

Finally, even **if** we assume some genetic material suitable for testing is available from the victim's fingernails, such test results would not exonerate the appellant. As noted by the State below and in the trial court's order, appellant's own confession to Whitman asserted that he committed the murder with another individual, Ray Fuller. (V-6, 683-85). Moreover, the evidence against Lott is compelling, and, includes his own statements, his possession of the victim's property immediately

[15] Rule 3.853 (b)(2) requires a defendant to state in his motion the results of any prior testing.

[16] The fact that no reference to the results of that analysis appears in the record strongly suggests that no material suitable for analysis was found.

after her murder, his possession and use of the victim's ATM card at the time of her murder, his taped statements showing his attempts to sell the victim's jewelry, and, his fingerprints in the victim's master bathroom, an area of unlikely access to a member of the public or former lawn maintenance worker such as Lott.[17]

This Court recently affirmed the denial of postconviction DNA testing under similar circumstances in Hitchcock v. State, 866 So. 2d 23 (Fla. 2004). Hitchcock sought DNA testing pursuant to Florida Rule of Criminal Procedure 3.853. Pursuant to the rule, Hitchcock asserted that the requested DNA testing would establish his innocence. Hitchcock admitted to having sex with his 13-year-old niece [corroborated by DNA testing], but asserted the true murderer was his brother, a position that he took at trial when he testified. Hitchcock requested DNA analysis which he asserted would show that hair analysis conducted at trial improperly included him as the source of the hair, and, improperly excluded his brother, Richard. Hitchcock also asserted that DNA testing on the hair "may" show that Hitchcock's brother strangled the victim and that his hair or

[17] Interestingly enough, the victim's friend, Ann Ferguson, in a deposition attached to the State's response, noted that according to her information, Lott attempted to gain entry into the victim's home by asking to use the telephone when he worked for the victim. (V-6, 708). Ann also testified that the victim had fired Lott. (V-6, 708).

blood was at the scene of the murder. Hitchcock then went on to list 24 items that he sought to be tested by an independent lab for DNA. 866 So. 2d at 27-28.

The trial court denied the motion, stating the allegation that DNA testing may exonerate the defendant was too "speculative" to grant postconviction DNA testing. The court noted that the defendant confessed to having sexual intercourse with the victim and that he failed to establish a reasonable probability that DNA testing would exonerate him of the victim's subsequent murder. The court noted that the presence of physical evidence linked to his brother Richard (who lived in the house with the victim), would not establish that Defendant was not at the scene or that he did not commit the murder.

This Court affirmed the trial court's denial of DNA testing under Rule 3.853, noting the defendant has the burden of meeting the requirements of the rule:

> The clear requirement of these provisions is that a movant, in pleading the requirements of *rule 3.853*, must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case.

Hitchcock, at 27. This Court noted that Rule 3.853 does not authorize a speculative "fishing expedition" stating that "[i]t

was Hitchcock's burden to explain, with reference to specific facts about the crime and the items he wished to have tested, 'how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or . . . will mitigate the sentence received by the movant for that crime.'" Hitchcock, 866 So. 2d at 28. (quoting Rule 3.853) (emphasis in original).

In this case, appellant has clearly failed to meet his burden of showing that the DNA testing would somehow exonerate him or lead to a lesser sentence. Appellant has simply embarked upon a "fishing expedition" of the type this Court condemned in Hitchcock. See also Sireci v. State, 908 So. 2d 321 (Fla. 2005) (affirming trial court's denial of DNA testing under Rule 3.853 where such testing did not carry a reasonable probability of a different result). Consequently, the trial court's order should be affirmed on appeal.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State asks this Honorable Court to affirm the denial of postconviction relief in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Frank J. Bankowitz, Esq., 126 E. Jefferson Street, Orlando, Florida 32801, this 19th day of December, 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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