IN THE SUPREME COURT OF FLORIDA

KEN ELDON LOTT,	)	
	)	
Appellant,	)	
	)	CASE NO: SC04-1814
vs.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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DESIGNATIONS IN BRIEF

"R"	Record on Appeal
"TR"	Trial Record
"EHT"	Evidentiary Hearing Transcript

APPELLANT'S STATEMENT OF PROCEDURAL HISTORY

This case originally came before this Court as Lott v. State of Florida, 695 So2d 1239 (Fla. 1997) wherein this Court affirmed the conviction of Ken Eldon Lott as well as the death sentence imposed by the trial court. Mr. Lott appealed this decision to the United States Supreme Court and certiorari was denied at 118 S.Ct. 452 (1997).

The defendant/appellant filed his original motion for post conviction relief with leave to amend. The defendant/appellant then filed his final amended motion to vacate judgment and sentence on February 26, 2001 (R 581). The State of Florida filed its response to the defendant's final amended motion to vacate judgment and sentence on March 17, 2001. The trial court summarily denied the defendant's motion for post conviction relief and an appeal was taken to this court, and without opinion, the case was remanded back to the trial court for a full evidentiary hearing, Lott v. State of Florida, 839 So2d 698 (Fla. 2003).

Between the dates of July 26, 27 and 28, 2004, an evidentiary hearing was held before the Honorable C. Alan Lawson, Circuit Judge. On August 4, 2004, the trial court entered its order again denying the

defendant/appellant's motion for post-conviction relief (R 814-832). The defendant now appeals the denial of his motion for post-conviction relief.

DEFENDANT'S STATEMENT OF FACTS

The facts of the original trial are as follows as well as the facts as presented at the evidentiary hearing.

On Monday, March 28th, Ann Ferguson arrived at the victim Rose Connors' home at approximately 11:15AM as planned. She entered the house and called Rose's name. Ferguson went towards the bedroom and then saw Rose Connors lying on the bed. (TR 329) Ferguson ran to the kitchen to telephone the police. (TR 332)

Orange County Deputy Sheriff Timothy Gillespie was dispatched to the Connors' house in the Sweetwater West area of Orange County, Florida. (TR 338) The deputy subsequently entered the house and saw Ferguson on the phone in the kitchen. Ferguson began screaming and pointing to the bedroom area. (TR 340-341) The deputy then observed the naked victim lying face down on the bed in a pool of blood. The deputy observed no sign of life from Rose Connors, and found no other victim or suspects in the house. (TR 341-344) Deputy Gillespie contacted his supervisor, took a statement from Ferguson, and secured the crime scene. (TR 343-344)

Orange County Deputy Sheriff Dana Griffis of the Crime Scene Unit responded to the crime scene at about noon. (TR 355-356) Deputy Griffis

fingerprinted Ann Ferguson and collected a pair of shoes from her. (TR 360, 355) Deputy Griffis then assisted Deputy Corriveau in taking measurements of the house. (TR 361) Deputy Griffis also recovered some duct tape from the dumpster outside the residence. (TR 362) The following day, Deputy Griffis collected latent fingerprints from the master bedroom and took prints from the vacuum cleaner with black powder. (TR 368-369) The deputy also administered a chemical, Nynhydrin, to the walls of the hallway, door and the bathroom furthest from the crime scene and to the walls around the other bedroom. (TR 372-375)

On March 30th, Deputy Griffis returned to the crime scene for further processing. From March 30 through April 11, Deputy Griffis processed numerous areas of the house including a pack of cigarettes and all the exterior doors and windows except the front door. (TR 377-380) The deputy photographed several latent fingerprint areas on the hallway walls. (TR 380) The deputy also photographed a footwear impression located in the dirt outside of the house, (TR 381) swept the master bathroom, shower stall and bathtub, and photographed latent fingerprints. (TR 382-383) The deputy also photographed more latent fingerprints taken from the coffee maker and walls (TR 384-386) then processed the master bedroom bathroom with black powder and a latent fingerprint was found on the sink and on the

shower stall (TR 387-389). Deputy Griffis also collected a piece of gray duct tape and an empty duct tape roll from the closet in the first bedroom (TR 390). He processed all the water and sink traps, collected hair samples, and processed the kitchen cabinet doors, drinking glasses and a toaster (TR 392). He also collected a pair of pliers and a plastic bag from underneath the desk in the first bedroom (TR 392-394); the deputy also photographed latent fingerprints processed with physical developer in the hallway and cut off a red stain from the back of the sofa in the living room; the deputy also processed two latent fingerprints areas on the south edge of the north front door and a latent fingerprint area on the exterior glass of the door; (TR 396-398) and he processed the interior doors, took a picture of a purse that was found open and put it into evidence. (TR 465) On April 21st, Deputy Griffis went to appellant's home in Deltona, Florida and took a v-neck shirt into evidence. (TR 467) Fibers found during the sweep of the victim's home were consistent with fibers found in a tee shirt found at the appellant's home. (TR 504)

Dr. William R. Anderson, Deputy Chief Medical Examiner for Orange and Osceola counties, testified. (TR 507) When the medical examiner arrived at the crime scene, he observed the victim lying face down, unclothed with a towel-like item over the bottom of her buttocks area. (TR

511) A large quantity of blood was found around the body and a stab wound to the right shoulder. (TR 511) The medical examiner also observed no secondary path of blood from the shoulder, meaning there was no body movement after the bleeding started. (TR 512) A significant amount of blood soaked into the mattress and came down the side of the bed. (TR 512) The medical examiner then observed areas on the victim's arms where the blood must have come in contact with, but was spared getting on the skin because something was there to prevent it from going onto the skin until it dried. This indicated that the arms were actually in a different position and had been moved after the blood dried. (TR 513-514) The medical examiner also found some gray, linear, sticky material that looked like the edges of tape. According to the medical examiner, this indicates that duct tape was on the wrists and that the body was moved and duct tape removed after death, giving the blood a period of time to dry (TR 514-518). There were no blood marks on the feet, showing the victim did not walk in the blood. (TR 515)

Based upon the collection of blood, the medical examiner concluded the wounds were inflicted while the victim was on the bed. (TR516) Fecal matter was found on the victim's foot, in her underwear and smeared in various areas in the house. According to the medical examiner, it's not

unusual for someone who is being assaulted and injured to have some defecation as well as urination. (TR516) There was sticky tape substance on the victim's cheek indicating that duct tape was put over her mouth. (TR 517-518) The victim's larynx was fractured, however, the medical examiner did not observe petechial hemorrhages (very small hemorrhage in the skin and membranes of the eyes) that is often seen in strangulation. The lack of hemorrhaging suggests that there was not sufficient compression around the neck to cut off the venous flow of blood. (TR 518) The victim also had a knife wound on the neck that partially cut the jugular vein, causing significant loss of blood. (TR 520)

A pair of pliers, which matched the size of some of the wounds, was found at the scene. These wounds were consistent with the contusion and abrasion caused by pliers being applied to the skin in a pinching type manner. (TR 523) The thumb of the right hand was cut. The cut was consistent with the hand possibly trying to grab the weapon or defend against the weapon. This was really the only defensive wound found on the body. (TR 524) A fingernail was broken; this could have been the result of a struggle. (TR 525) There was also significant bruising in the area of the thigh. The victim had injuries to the temporal area indicating some significant amount of blunt force injury prior to death. (TR 527) The blow

to the head combined with the pressure to the neck rendered the victim unconscious. Once the bleeding started, there was very little motion of the body. (TR 528)

The cause of death was bleeding due to the incision wound to the neck that cut the jugular vein. (TR 529) The blow to the head was inflicted minutes (up to a half hour) before the neck was cut. (TR531-532) The time of death was determined to be in the general neighborhood of between 5:00PM on March 26 (Saturday) and 5:00PM on March 27 (Sunday). (TR 533-534) There was no evidence that the victim was beaten (TR 535-536). Also there was no evidence of any disinfectant used at the crime scene in an effort to clean up the scene or the blood. There was no evidence of sexual battery found by the medical examiner. (TR 537-538)

Sergeant Robert Corriveau of the Orange County Sheriff's Office was the initial lead crime scene investigator of this homicide. (TR 581) Corriveau also did a perimeter check of the outside of the house. He found the front door unlocked, the back door locked and the windows secure. (TR 586) The homes' security system did not appear to be tampered with. (TR 587) There were no pry marks or other signs of forced entry. (TR588) While processing the crime scene, Corriveau found a wallet on top of the drop ceiling in the kitchen. (TR 591) He also found duct tape in a dumpster

on Lot 65, adjacent to the crime scene. (TR 593) Fecal matter was found on the floor in the foyer. (TR 594) Corriveau found a pair of panties underneath a bed that were torn and had fecal matter on them. (TR 596)

Robert Lindsay, a representative of Capital Warrant, presented records from his credit card company of certain credit card transactions from a credit account issued to Rose Connors. (TR 647-648). John Levinson, manager of electronic banking for Sun Trust Service Corporation, authenticated business records of ATM transactions that occurred at Sun Trust ATM locations (TR 650-653). Through Levinson, the State also introduced photographs made at the ATM machine at the Douglas Drive ATM, in Longwood, Florida near Interstate 4 that corresponds with the transaction at the ATM (TR 654).

David Pratt borrowed Lott's truck in April, 1994, and Lott offered to sell Pratt a gold ring and a tennis bracelet (TR 674-676). Lott wanted $600 for the jewelry (TR 676). The jewelry was taken to a pawn shop where the diamonds on the gold ring were determined not to be real (TR 678). Lott told Pratt that he did something for somebody in Ocala, and they gave him the jewelry in lieu of money. That may have been the reason Pratt did not buy it, because other people might have stolen it (TR 687).

Robert Whitman had known appellant since he was ten years told (TR 722). According to Whitman, sometime after Easter, 1994, appellant, Lott,

came to Whitman's house and stated that he had some jewelry he had to get rid of that had come from a robbery and murder in Jacksonville (TR 723-724). A week later, appellant returned to Whitman's house and told Whitman that Lott and a friend, Ray Fuller, had gone to this lady in Sweetwater to rob her and ended up killing her (TR 725-726). Appellant told Whitman that he used to work for the victim doing landscaping and he knew she was pretty well off (TR 725-726).

Appellant further told Whitman that his and Fuller's plan was for Ray to get the lady inside and tie her up and gag her. Somehow the lady got loose and ran out the front door screaming. He said he ran out there and grabbed her and took her back into the house (TR 727). The victim did not have any cash, just gold and jewelry (TR 731). The lady begged Lott not to kill her, saying that she would take him to the bank and get them money and sign her car over to them. Lott said he could not take the chance because she knew him and she would send him to prison (TR 731-732).

Appellant further admitted, according to Whitman, that he beat the lady because she was frightening him. "He beat her worse than he beat on men before and could not knock her out." Appellant admitted killing the victim, to Whitman, with a boning knife and cut her throat with a filet knife, saying he had to kill her because the lady knew him. Appellant also

admitted to Whitman that he returned to the house the same night and poured disinfectant on the victim and cleaned up the scene (TR 730). When appellant returned to the victim's house to clean up, he took his stepson's bicycle and left his truck about a mile or two away (TR 747).

A couple of weeks after appellant confessed to Whitman, Whitman contacted Lieutenant Ben Johnson of the Volusia County Sheriff's Department. Whitman met with Lieutenant Johnson on a Saturday. Johnson asked that Whitman meet with other law enforcement officers at another date, and requested that he try to get some of the jewelry from Lott (TR 733). The next day, Lott showed up and Whitman got three rings from him (TR 733). The following day, Whitman gave the three rings to Detective DeRidder of the Orange County Sheriff's Office (TR 734-735). Whitman stated that a tennis bracelet that Lott showed him sort of looked like the bracelet in State Exhibit #39 (TR 737).

The detectives asked Whitman for permission to tape record a telephone conversation with Lott wherein Whitman would solicit admissions from the appellant (T 737):

> WHITMAN: Oh, no. Well, maybe I can help ya' on them rings, man.
>
> LOTT: Yeah.
>
> WHITMAN: What, uh, is your lowest – the guy's offering

six hundred. That one's zucranium.

LOTT: That's what I told 'em it looked too damn big, you know?

WHITMAN: Yeah, it's not worth much. But the other one they said it may go six hundred.

LOTT: Try six fifty.

WHITMAN: Try what?

LOTT: Try six fifty.

WHITMAN: Six fifty?

LOTT: Yeah, I give you fifty of it. That all right?

WHITMAN: okay

LOTT: You know, I –

WHITMAN: I didn't, weren't really looking for nothin' but I know you're in a bind (SR 4-5).

The police then made arrangements with Whitman to give money to Lott for the rings. The police bugged Whitman's house where the transaction was to take place (TR 740).

Lott showed up early while the police were still at Whitman's house planting electronic devices. Lott spotted the police van with an Orange County tag. Whitman said it was a TV repairman from Sanford and to come back in two hours and he would have the money (TR 741). Subsequently, Lott returned to Whitman's house and came in the trailer real spooky. He

went back looking around and wouldn't come out to the living room. Whitman invited Lott to talk with him in the living room, where the bug was, but Lott refused and went outside (TR 742). Whitman went to the breakfast nook and from the window said, "Well if you won't come here, here's your money and you can leave." Whitman then passed $600 to Lott through the window (TR 743). Lott got in his truck and left. Whitman then hollered over the bug that Lott was leaving the back way toward Grand Avenue (TR 744).

Whitman stated that he had been convicted of three or four felonies, the last one was in 1983 or 1984 (TR 746). According to Whitman, Lott "snitched" on Whitman and he went to jail for a week and received probation (TR 748). Whitman and Lott had no association with each other for nearly twenty years. (TR 749). Then one day Whitman saw Lott and his wife riding horses. They saw each other a couple more times and a relationship developed (TR 751). Whitman had purchased a horse from appellant (TR 752). Whitman admitted supplying marijuana to appellant. On the day he came to the trailer to get the $600, Lott also discussed purchasing or picking up some marijuana.

After Lott was arrested, Whitman wrote a letter to Lott's wife stating that he would always be there for her (TR 763). Whitman admitted to

making efforts to establish an alibi because he felt Lott would try to implicate him in the murder. He contacted people that were with him to show there was no way he could have been involved (TR 772). Whitman told his friends that they may be called as witnesses, and they were, to testify that he was in a garage putting an engine in a truck (TR 773). Whitman denied ever knowing appellant's alleged accomplice, Ray Fuller. However in an April 22nd or 23rd phone call with Lott's wife, Whitman stated, "Oh you know him" when Lott's wife denied knowing Ray Fuller (TR 783-786). When Whitman testified, he held a calendar that had information on it pertaining to his alibi (TR 787). Whitman prepared his alibi when law enforcement told him that Lott was implicating him in the murder (TR 789).

Volusia County Deputy Sheriff Laurence Josepa was involved in the surveillance and apprehension of the appellant (TR 801). After appellant was stopped, there was a request to search appellant's vehicle and Lott cooperated fully (TR 802). The deputy obtained the shoes that the appellant wore and gave them to Detective DeRidder (TR 803). Volusia County Deputy Phillip Delgado also participated in the arrest of Lott (TR 810). When Deputy Delgado approached Lott's vehicle, he observed cash bills underneath the appellant's vehicle on the driver's side. He turned the bills over to the Orange County law enforcement officers (TR 811-812). Orange

County Sheriff Investigator Stuart DeRidder became the lead investigator that investigated the murder of Connors (TR 813). After recording the serial numbers from some bills, DeRidder gave money to Whitman who was to give it to Lott. Lott was arrested shortly thereafter and the same money was found under his car (TR 819-820). DeRidder admitted that he did not have first-hand knowledge of the jewelry ever being in Lott's hands, just the statements of Whitman (TR 832). During the taped phone call, Whitman talked about perhaps he could keep one of the rings for his part (TR 833). Despite the fact that appellant was arrested in April, 1994, the State gathered evidence in December, 1994 on Royce Pipkin, the victim's boyfriend (fingerprints, shoes, and interviews) (TR 842-843).

Debra Fischer, an FDLE analyst testified as an expert in the area of latent print comparison identification (TR 863-866). Fischer stated that three latent palm prints found in the house were identified as appellant's (TR 885). One palm print was found on the left door jam of the second bedroom (TR 887). Two other palm prints were found on the exterior glass of the front door, and on the front edge of the west sink in the master bedroom (TR 890). Three of the shoe impressions found at the crime scene matched the footwear impression of appellant's shoes (TR 899). Fischer could not make a positive identification of the shoe because there were individual

characteristics missing or cuts left by wear (TR 903). Two footwear impressions were recovered from the kitchen tile floor area (TR 909). Whitman could not be eliminated as a suspect from the palm prints found because the palm print provided by law enforcement officers was inadequate. Fischer advised the law enforcement officers of this in her March 13, 1995 report, however, there had been no response from them (TR 917-920).

Juan Briones was painting a house next to the victim's house on Sunday morning, March 27th, 1994 (TR 1006). Briones testified he heard five or six screams from a woman's voice between 9:30 and 10:30AM. Briones identified the victim's house where he heard the screams coming from (TR 1009).

Hortense "Libby" Coleman, the appellant's mother, overheard Whitman state that he had been trying to get even with him (Lott).

At the evidentiary hearing, the defendant/appellant called Elmer Jones of Starke, Florida (EHT 12), Ken Eldon Lott, the appellant (EHT 29-170); Henry L. Dee, PH.D. (EHT 194-225); Hortense Coleman (EHT 246-283); L. Michelle DeLoach (EHT 290-3119) and Scott Lee Richardson (EHT 319-398)

Elmer Jones testified that he owned and operated a fruit and peanut stand on Highway 16 in Starke, Florida in 1994 and 1995 and identified a photograph of that stand taken at that time in 1994 (EHT 13-14). Mr. Jones testified that he operated the stand only on weekends, Saturday and Sunday, and was open from 8:00AM to approximately 6:00PM. During his testimony, Mr. Jones advised that he remembered the defendant as having come to his stand, ten (10) years previously, and identified a photograph of the defendant dated March 26, 1994 and identified him in open court ten years after their initial meeting. Mr. Jones also recollected the conversation the he and the defendant/appellant had when they discussed fishing and Lake Okeechobee. Mr. Jones also identified the appellant's truck from a photo (EHT 19). Although he could not be date specific, ten years later he did remember the appellant and their conversation. He also advised that had anyone spoken to him back in 1994, his memory would have been much better (EHT 16) than it was ten years later, at the time of the hearing, as well as at the time he first spoke to appellant's post conviction investigator.

Ken Lott then testified. The appellant advised that his mother hired attorney Joel Spector to represent him in this case (EHT 57) and that Spector told him he had handled a bunch of murder cases (EHT 58). Mr. Lott also testified that he had a hard youth due to abuse by his step-father consisting

of hitting him constantly (EHT 30-31). Further, that he had had a head injury when he was eighteen months old as it was related to him by his mother (EHT 31-32). Lott related his drug use and abuse over a period of years (EHT 39-42). He advised that he had a lawn service business in the Rosemont area of Orange County, where the victim's home was located, with a commercial account and several residential customers including the victim (EHT 42-43). Lott also did other work for the victim such as repairs at her home, landscaping and changing out plants approximately every ninety (90) days (EHT 45-46) and also moved furniture. He stated that a short time before the murder, he met the victim, accidentally, at a barbeque restaurant near her home and went to her home to get jumper cables to start her car that she could not get started at the restaurant (EHT 47-50). He related that he had gone into her bathroom adjacent to her master bedroom to look at a garden area outside of the bathtub (EHT 52) and that he leaned on the sink/counter area while they discussed improving this garden area. He advised that Robert Whitman had been at her home with him on at least one occasion.

Ken Lott testified that he had an alibi for his location at the time of the murder. He had advised his attorney of that when he first interviewed with Spector. He told Spector that on Saturday, March 26th; he spent time with

his mother at her home (EHT 62-63) and had a photograph taken with his mother and some puppies and that his mother's testimony would prove this fact. He gave his attorney the names of Roger Duggins, Bill Snodderly and of course, his mother (EHT 66) as people he had contact with all during Saturday and Sunday, March 26th and 27th. These also included his wife and the fruit stand man. He advised Mr. Spector that he left the Deltona area on Sunday morning, March 27th, after speaking with his mother about 9:00AM (EHT 70) and drove to Starke, Florida and then on to St. Augustine, eventually returning to Deltona in the late afternoon/early evening of the 27th of March, Sunday. He told attorney Spector, the investigator and attorney Scott Richardson about a fruit stand he visited in Starke on Highway 16 (EHT 82) at about 1:00PM on Sunday. This time frame is very important to the alibi since the State's witness Briones heard screams from the victim's home on Sunday between 9:30AM and 10:00AM (TR 1009). He advised his defense team that after going to the fruit stand, he went to St. Augustine, had lunch at Sonny's Barbeque, checked on his mother, who was there at a camp ground, and returned to Deltona. At no time, until six months after Mr. Spector was hired (EHT 465), did he even attempt to investigate this alibi. He then sent the investigator to Starke during the week to find someone who only was there on weekends. He made no other attempts to go back, if he

went at all. Other than a billing from the investigator, Spector had no evidence the investigator went to these locations. This was the alibi that Spector determined to be Lott's number one defense (EHT 462). Ten years later, Elmer Jones still recognized the defendant, recognized his truck, and remembered their conversation.

Lott advised that he met Robert Whitman that night, Sunday, and took him to Longwood, near the victim's home to pick up his truck that was broken down. At that time, Whitman showed him the bank paperwork and credit card of the victim (EHT 92). Lott advised Spector of this (EHT 96) yet Spector said he had never heard about it, and never investigated the bank records (EHT 473-76). Lott advised that Whitman was the last person he would confide in or confess to about anything he did (EHT 107) because he knew Whitman wanted to get even with him, because he had sent Whitman to jail years before.

Lott, according to Scott Richardson, always wanted to testify in his own defense (EHT 334). In fact, Lott needed to testify, according to Richardson, as to his alibi and to deflect or explain the fingerprint evidence in the victim's home (EHT 333). Lott did not testify because his attorney, Spector and a friend of his, Raymond Goodman, on the last day of trial, browbeat him (EHT 371) into acquiescence to their opinion that he should

not testify. Richardson told the Court that Lott was always consistent in his recitation of the facts surrounding his alibi (EHT 384). Lott wanted to testify. Lott had to testify. The official record (TR 1212-1213) establishes that the defendant did not indicate his satisfaction with his attorneys and what they did in his case, until after the jury went out to deliberate. No questions were asked of Lott as to his choice to testify or remain silent at any time. Ken Lott wanted to testify but eventually relented after being brow beaten by counsel. (EHT 161) At no time on the record, did he give up his right to testify.

Scott Richardson was co-counsel on this case at trial. He admitted that neither he nor Spector had death penalty experience, none at all. Richardson was well aware of the alibi, the locations and what needed to be done. But as he testified, Joel Spector was not enthusiastic about the alibi, did not want to put the defendant on the stand and made no real effort to track down witnesses, which is obvious when Spector testified (EHT 326). He says Spector outwardly appeared to care about the case, but his actions dictated otherwise (EHT 327). As far as preparations for trial, Richardson advised it was very loose (EHT 329). There were no long running planning sessions and there was no division of responsibility (EHT 379); such as "you take guilt and I'll take penalty and mitigation". There was no defense

strategy or plan one month before trial or even during trial (EHT 331). Scott Richardson admitted, as co-counsel, that Ken Lott did not get effective representation (EHT 336).

Richardson was also very adamant about the lack of preparation for the penalty phase and mitigation in this case – there was none. Mitigation was not even discussed before the guilty verdict (EHT 336)

Mrs. Coleman testified, at the evidentiary hearing, that the defendant came to her home between 5:00PM and 6:00PM on March 26th to pick up puppies (EHT 256) and she took a photograph that was entered into evidence. She also called him at his home at about 10:30PM (EHT 251) and he called her back at 11:00PM and discussed Roger Duggins coming back to her home to finish fixing her recreational vehicle so she could travel to St. Augustine the next morning (EHT 251).

Also testifying was the defendant's post-conviction investigator, L. Michelle DeLoach. Ms. DeLoach testified as to how she started on the defendant's case with the Capital Collateral Regional Office in Tampa (EHT 291). She testified that she attempted to locate early medical records on the defendant without success, specifically those dealing with his head injury at eighteen months old. She told of how she tracked down Elmer Jones years after the crime. She had gone to the Starke area and could not find the stand,

however, unlike Spector's investigator, Bartles, she did not give up at that point. She went with the same pictures Bartles had and asked other stands in the area if they knew the stand in the pictures. This led her to the Florida Department of Agriculture office in that geographical area. The person at the agriculture office recognized Mr. Jones's stand and provided her with an address and telephone number. Mr. Jones was contacted, interviewed and remembered the defendant, his truck and discussing fishing ten years later after the event.

Lott then put on Henry Dee, Ph.D. Dr. Dee is a well-known neuropsychologist who testifies both for the State and defense in death penalty cases. Dr. Dee was retained by Spector to test the defendant back in late 1994 approximately three to four months prior to trial. At that time, Dr. Dee was given a "biosheet" on Ken Lott and two transcripts of depositions taken during discovery. This was the extent of all background information (EHT 205) he was given other than a history taken from the defendant. He advised (EHT 200) that these materials did not help him at all. He was provided more information on the defendant by the state in the form of his criminal history at a deposition right before the penalty phase of the case. No other records were provided,

Dr. Dee was provided many more records in the post-conviction proceedings that were "quite important" to his diagnosis and testimony and, although it did not necessarily change his diagnosis, it bolstered it and he found that Lott had actual brain damage as opposed to an anti-social personality disorder (EHT 211).

The last witness to testify was Joel Spector, lead counsel. (EHT 404-518). Mr. Spector made many statements on the stand such as "I don't know" and "I don't recall". Mr. Spector knew very little about Ray Fuller (EHT 443-444). He thinks they parceled out what each of the attorney's would do at trial, but was not unequivocal (EHT 452). He did not know how to handle the issues about the testimony of the defendant being in possession of the victim's jewelry (EHT 449). He stated that at some point we decided that Scott would do the closing (EHT 354). He did not recall the photograph of the puppies (EHT 453) or its significance. He stated he listed witnesses as defense witnesses but did not know why or who he listed (EHT 476). He has no written reports from his investigator and no evidence the investigator did anything except billing records. He claims the alibi defense was the number one priority in the case (EHT 462); yet he did not investigate the alibi until six months into the case (EHT 463). He said the alibi fell apart when Tammy Lott refused to testify; but he also said she never told him the

alibi was a lie (EHT 455). He subpoenaed Bill Snodderly yet did not know why or what he would testify to (EHT 409). He was part of the defendant's alibi and Spector did not even know it. Yet he believed he was doing everything possible for Lott in furtherance of his defense, which is what he testified to at the hearing.

SUMMARY OF ARGUMENT

Points on appeal are as follows:

Point One: The conviction for First Degree Murder of Ken Eldon Lott is unreliable due to the ineffectiveness of counsel by failing to investigate, locate and present witnesses and evidence at trial.

Point Two: Whether trial counsel and/or the trial court deprived the defendant/appellant Ken Lott of his right to testify on his own behalf.

Point Three: The cumulative effect of all the trial counsel's errors and omissions establish that counsel was ineffective and a new trial should be ordered.

Point Four: The trial court improperly denied defendant's motion for post-conviction DNA analysis and testing.

POINT I

THE CONVICTION FOR FIRST DEGREE MURDER OF KEN ELDON LOTT IS UNRELIABLE DUE TO THE INEFFECTIVENESS OF COUNSEL BY FAILING TO INVESTIGATE, LOCATE AND PRESENT WITNESSES AND EVIDENCE AT TRIAL

Lead counsel for the defendant was retained by the defendant's mother after the defendant was indicted for First Degree Murder on May 20, 1994. On June 2, 1994, attorney Joel Spector entered his Notice of Appearance. Mr. Spector had never handled a capital case before (EHT 456). He was not and to this day is not qualified under any standards to defend a capital murder case.

When Mr. Spector first started to represent Mr. Lott, one of the first things he was told by the defendant was that he had an alibi (EHT 463); this was in early June, or possibly in May since Mr. Spector met with the defendant before entering his actual Notice of Appearance. It was not until November of 1994, six months later, that Spector sent his investigator to look for witnesses (EHT 463) pertaining to the alibi. To sustain the alibi defense, the defendant and his mother presented specific evidence to locate witnesses including a photograph of the fruit stand where he was on the day of the murder in Starke, Florida and a photo of the defendant with his mother and some puppies in DeLand on March 26, 1994. Spector was told by the

defendant's mother that the stand was only open on weekends, yet the investigator went only once to look for it on Friday, November 4, 1994 according to Spector's records, a weekday (EHT 464). This Court only has to look at Spector's testimony at the evidentiary hearing (EHT 465), to appreciate the extent of his ineffectiveness when examining as to sending out the investigator to support the alibi defense.

> Q: "Why didn't you push him out the door and send him up there…this is important. This is our number one focus."
>
> A: "…I really don't know, I don't remember this, I don't know."

The defendant's post-conviction investigator went out to locate the fruit stand years later (EHT 297). She acted like an investigator and did not just drive around as Mr. Bartles, Spector's investigator, did. When she could not find the stand the first time, she checked other stands in the area and eventually went to the State Department of Agriculture. She found the owner of the stand (EHT 298) still living in Starke, Florida. The photograph given to attorney Spector by the defendant's mother identified him, Elmer Jones, and the stand, to the Department of Agriculture people. She made the simple, extra effort and Spector and his investigator did not. By Spector's own records, his investigator went looking only one time and gave up. They gave up on what Spector called the number one focus of the defense.

Defendant's post conviction investigator also went to St. Augustine to the Sonny's restaurant the defendant spoke of but all of their records had been destroyed prior to the year 2000.

The actions of Spector and his investigator show and establish that no actual investigation was done on behalf of Ken Lott. One drive through an area, with no written reports of what was done, is not sufficient to establish that counsel, or his investigator, was effective. There is no actual evidence that Investigator Bartles ever went to Starke or St. Augustine to locate potential witnesses/witness who, ten years ago, were essential to Lott's defense, specifically his alibi.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1986), the court stated that ineffective assistance of counsel claims fall into two categories. The first involves claims that the government violated the defendant's right to effective counsel by impermissibly interfering with counsel's ability to make important decisions about how to conduct the defense. The second category are claims that the defendant was deprived of his right to the effective assistance of counsel because his counsel, whether appointed or retained, simply failed to provide adequate legal assistance. Claims in the second category are actual ineffectiveness claims. Strickland at 2063, 2064. Lot raises this second type of claim.

Under the Strickland guidelines for reviewing attorney performance, the defendant must identify specific acts or omissions that were not the result of reasonable professional judgment on the part of his attorney. The court must decide whether, in light of all the circumstances facing trial counsel, his conduct fell outside the wide range of professionally competent assistance Strickland at 690, 104 S.Ct at 2066. The court, in Strickland did not outline specific requirements for effective assistance of counsel stating only "the proper measure of attorney performance remains simply reasonableness under prevailing norms. Strickland, 466 U.S. at 688. To apply this standard "the court must inquire into the actual performance of defense counsel and determine whether representation was reasonably effective based on the totality of the circumstances in the entire record" Washington v. Watkins, 655 F.2d 1346 (5th Cir 1981), Goodwin v. Balkcom, 648 F.2d 794 (11th Cir 1982). Spector's actual performance was poor, at best, and this lack of performance casts serious doubt on the veracity of the verdict.

The U.S. District Court for the Middle District of Florida has decided a case very similar to the claim of Lott in the case of Miller v. Singletary, 958 F.Supp.572 (MDFL 1997). On petition for habeas corpus, Miller claimed his attorney was ineffective for his failure to locate a key witness. Lott claims herein that Spector was ineffective for his failure to locate Elmer

Jones, the key alibi witness. In Miller, defense counsel made no attempts to serve a key witness beyond one single attempt and the court found that was not reasonable performance. The Miller court stated "failure of defense counsel to make reasonable efforts to find a witness that could have been critical to the defense was sufficient to undermine the confidence in the outcome." The wording specifies efforts, not just a casual pass through an area which Investigator Bartles apparently did and nothing else.

Another aspect of Spector's lack of investigation was his failure to investigate and prepare any mitigation. Now the appellant is aware the trial court found two mental health mitigations and Dr. Henry Dee's opinion remained the same although it was bolstered and further explained by additional information provided in the post conviction investigation but his overall lack of preparation by Spector casts doubt on the reliability of the penalty phase.

Co-counsel Scott Richardson demonstrated that there was no mitigation investigation by his testimony that mitigation was never even discussed before the guilt stage verdict (EHT 336). Although it is clear that Dr. Henry Dee was retained approximately three months before the guilt phase of the trial, he was given nothing in terms of guidance and direction by Spector. He received a "biosheet" from Investigator Bartles and two

depositions (EHT 205) and these items did not help him at all (EHT 200). He was provided more information at a deposition before the actual penalty phase by the prosecution rather than the defense. Trial counsel did little or nothing in preparation for the penalty phase. He did not subpoena any records of the defendant at all. He is not sure, other than Dr. Dee's deposition, whether he even met with him before he testified or not. Spector conducted no background investigation and presented his expert no family background including of the names and addresses of family members of the defendant to obtain a family history. It was a result of information provided in the investigation leading up to the filing of the motion for post conviction relief he was provided the records he needed to establish a formal basis for his opinions. During the penalty phase Dr. Dee's opinions were totally discredited by an experienced homicide prosecutor who did not even have to call an expert to rebut the defense. In closing, Mr. Ashton said, "The defense presented no evidence for mitigation"; he was correct and not because it did not exist, but because it was not investigated and the proper materials were not provided to the expert so that he could form a conclusive opinion.

At the evidentiary hearing, Dr. Dee was asked, "Was there anything in those materials (provided in the post-conviction relieve investigation) that

may have changed or altered in any way your opinions you gave in the original trial?" (EHT 207) His answer at the same page was "I don't know that it changed my diagnosis or opinion, but it bolstered it. I did learn information that I did not have before that seemed to me quite important." He went on to say, paraphrasing, that it was information about a car accident when the defendant was eighteen months old and he developed an infection in the head and had tubes put into his head. He had no information about that before. (EHT 207) The only information he had about head injury was from the original interview with the defendant when he was told that Lott was in a motorcycle accident at age sixteen and lost consciousness. Dr. Dee was reminded of questioning by Ashton at trial asking about "what if this accident happened before he was sixteen" and the doctor said "He was making the point that there was antisocial conduct before age sixteen and…I didn't have any other information than that, of course." (EHT 209) Had Dr. Dee had this information as well as that provided by post-conviction counsel "…that would have changed the opinion the following way. That the act, the criminal behavior, the impulsivity, specifically, that he showed after age sixteen was a continuation of the kind of impulsivity and scrapes he was getting into before age sixteen and I think that would have been more clearly based on this injury at a very young age. This sort of ties things together

much better. Mr. Ashton made a great deal of that in the original penalty phase…" "…there certainly would have been questions remaining in the mind of the trier of fact because the accident occurred at sixteen…so one is kind of left wondering…". Dr. Dee's post conviction testing showed actual brain damage as opposed to anti-social personality disorder argued at trial. (EHT 211)

"An attorney has a duty to conduct a reasonable investigation including an investigation of the defendant's background, for possible mitigation", Porter v. Singletary, 14 F.3rd 554, 557 (11th Circuit 1994). The failure to do so may render counsel's assistance ineffective. Bolender v. Singletary, 16 F3d 1547 (11th Circuit, 1994), Rose v. State, 675 So2d 567 (Fla 1996). This court in Rose found counsel ineffective for failure to investigate and present mitigation evidence and ordered a new sentencing hearing. Rose's counsel failed to investigate the defendant's background, as did Spector on behalf of Lott, obtain school records, hospital records, prison record(s) and others that outlined his mental problems. Dr. Dee confirms in his testimony, that many records were not provided to him, nor were witnesses and statements that could have assisted him in his evaluation and testimony. Spector's own testimony during the evidentiary hearing and before that he was not concerned with Department of Corrections records

that were important to Dr. Dee and this inactivity establishes that counsel never attempted to meaningfully investigate mitigation and hence, he violated that duty to perform a meaningful investigation, Baxter v. Thomas, 45 F3d 1501 (11th Circuit 1995). In the case of Freeman v. State, 761 So2d 1055 (Fla 2000), Freeman claims counsel was ineffective for failing to provide substantial background information to the defense expert such as his background, his school records and the insight of numerous family members and friends into his childhood. He further claimed that his expert was critically impeached because he did not have substantial background information. These are the same claims of ineffectiveness that Lott makes and which this court found to be ineffective assistance of counsel as to the penalty phase in Freeman.

Further, attorney Spector also never investigated Lott's information alleged to have come from Whitman that the victim's credit card and personal identification number came in separate mailings. This would have rebutted the allegation of the State that they came together which is why, as the State theorized, the victim was tortured into giving her PIN number. This torture led to the Heinous, Atrocious and Cruel aggravator being given by the court.

Further, 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.

The totality of attorney Spector's lack of investigation casts much doubt on the reliability of the verdict and sentence in this case. The federal courts, in almost identical situations, have found that this was ineffectiveness, citing Miller, and when applying the Strickland standards to a claim of ineffectiveness.

II

WHETHER TRIAL COUNSEL AND/OR THE TRIAL COURT DEPRIVEDTHE DEFENDANT/ APPELLANT KEN ELDON LOTT OF HIS RIGHT TO TESTIFY ON HIS OWN BEHALF

In determining this issue on appeal, the totality of the circumstances must be examined. The testimony was consistent throughout the evidentiary hearing from all witnesses, Lott (EHT 111), Joel Spector and Scott Richardson (EHT 334) and Lott's mother, that Mr. Lott wanted to testify on his own behalf; that he needed to testify to establish his alibi and to rebut how his fingerprints were found in the victim's home. This aspect of the case significantly changed on the last day of trial (EHT 115-116). The record establishes that after a recess and before court was to start, Spector and another lawyer, not working on the case, came over to the defendant who was seated in the jury box and started to talk him out of getting on the witness stand in his own defense (EHT 116). The defendant testified, "I kept looking for Scott (it was Spector and Raymond Goodman who talked to him in the jury box)…I didn't know what to do. I was really getting confused as to what was going on and (what) Spector seemed to be so scared about…he was sweating bullets for some reason." (EHT 116). He was asked why he told the court he was pleased with his representation and why he would do that if he wanted to testify (EHT 116-117). Lott's answer was,

"Why would I do that? 'Cause I was frustrated…I tried to get rid of this guy…and I know I gave up when (Judge) Russell gave that remark in the hallway, 'You'd better get used to small spots, 'cause that's where you are going…' plus every time I tried to get Spector to do something during the trial, he told me 'shh, shh, hang on…', but it wasn't happening…plus I was so nervous, you know, I didn't know what was going on up there." Co-counsel Scott Richardson testified that Lott had always expressed that he wanted to testify (EHT 321) and that his recollection of the elements and facts of the alibi were always consistent and unwaivering. Further, Richardson stated that attorney Raymond Goodman was there to talk Lott out of testifying (EHT 332). Also that Spector and Goodman were browbeating Lott to get him not to testify and before the conversation was complete, the trial judge cut them off to start the trial (EHT 321). Richardson believed that the defendant needed to testify as that was the only way to get his alibi into evidence and to defray or deflect the fingerprint evidence of the defendant in the victim's house (EHT 333). This fingerprint evidence was relied on heavily by the State and this court in its original opinion. The recent, prior to the murder placement of Lott in the victim's bathroom where his palm print was found on the counter, was essential rebuttal to the fingerprint evidence. It was essential.

The trial record (R1090) shows that on April 28, 1995, the last day of trial, the case re-convened and the court asked if the defendant was recalling Mrs. Coleman, not the defendant, back to the stand and Mr. Spector replied no. After a discussion about jury instructions, Mr. Spector advised the court he was resting (R 1101). The jury was returned at 10:20AM and the defense formally rested without calling any other witnesses including the defendant (R1103). There was no inquiry, by the court, preceding the return of the jury, with the defendant about him testifying or whether he was waiving his right to testify. Nothing was discussed until after closing arguments and the jury was charged and excused to deliberate when the trial judge asked the defendant if he was satisfied with his representation and if everything that was done was what he expected. He answered "yes". At no time did the court ask Lott if he wanted to testify in his own defense or whether he waived that right.

A criminal defendant has a fundamental constitutional right to testify in his or her own behalf at trial and this right is personal to the defendant and cannot be waived, either by the trial court or by defense counsel, United States v. Teague, 953 F.2d 1525 (11th Cir 1992). The defendant must establish that the defendant's will was overborne by his counsel. Teague, supra. In Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed. 2d 37

(1987), the Supreme Court first cited the due process clause of the Fourteenth Amendment stating that "the right to be heard, which is so essential to due process in an adversary system of adjudication, can be vindicated only by affording a defendant an opportunity to testify before the fact finder." The court in Rock also cited to Justice Clark's concurring opinion in Ferguson v. Georgia, 365 U.S. 510,81 S.Ct. 756, 5 L.Ed. 2d 783 (1961) for the proposition that the Fourteenth Amendment secures the right of a criminal defendant to choose between silence and testifying in his own behalf. Lott was not given a choice by the trial court or his attorney, and he was browbeaten by two attorneys, one not even working on the case, to get him not to testify. That decision not to testify was no decision at all; it was not based on a willful and voluntary surrendering of this most important right. In Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed. 2d 987 (1983), the Supreme Court stated that the accused has the ultimate authority to make certain fundamental decisions regarding the case as to whether to plead guilty, waive a jury, testify in his or her own behalf or take an appeal. Lott had the ultimate decision and should have been allowed to make it himself, but he was not given the chance to make that decision.

The Supreme Court in Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971) stated every criminal defendant is privileged to

testify in his own defense, or to refuse to do so. A criminal defendant clearly cannot be compelled to testify by defense counsel who, in that case, believed it would be in the defendant's best interest to take the stand. It is only logical that the reverse is true; a criminal defendant cannot be compelled to remain silent by defense counsel. Lott was browbeaten; he was compelled not to testify.

The American Bar Association Standards for Criminal Justice provide:

a) certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:

i) what plea to enter;

ii) whether to waive a jury trial;

iii) whether to testify in his or her own defense

Because of the fundamental nature of these three decisions, so crucial to the defendant's fate, the accused must make the decision. Further, Rule 1.2(a) of The American Bar Association Model Rules of Professional Conduct states that:

> a) a lawyer shall abide by a client's decisions concerning the objectives of representation…and shall consult with the client as to the means by which they are to be pursued…In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

In Teague, Senior Justice Clark eloquently stated that a criminal defendant has a fundamental constitutional right to testify on his or her own behalf and that his right is personal to the defendant and cannot be waived by his or her counsel…in analyzing claims including those constitutional rights that are fundamental and personal, courts have consistently employed the procedural safeguard of an on-the-record waiver (not an after-the-fact waiver). The right to testify should be treated no differently. Accordingly when a criminal defendant has not testified, the trial record should reflect that the defendant's waiver of his or her right to testify was knowing and intelligent." There was no on-the-record, timely made, waiver of Lott's right to testify, nor can it be shown to have been a knowing, intelligent and voluntary waiver.

Now the appellant is well-aware of this court's rulings in Monlyn v. State, 2004 WL 2797191 (Fla 2005); Lawrence v. State, 831 So2d 121 (Fla 2002) and Torres-Arboledo v. State, 524 So2d 403 (Fla 1988) all of which stand for the proposition that the defendant's waiver of his right to testify, at the guilt and penalty phases of a capital murder trial, did not have to be on the record. All of these cases can be distinguished from the facts herein.

In Monlyn, The defendant did testify at the guilt phase of his trial and asserted that he did not intend to kill the victim and felt bad about it. At the evidentiary hearing, he stated he was just in the wrong place at the wrong time. He did not testify during the penalty phase and that is what he complained about. This court held in relation to Strickland, that to prevail in an ineffectiveness claim that trial counsel interfered with defendant's right to testify, the defendant must meet both prongs of Strickland, and that Monlyn failed to do that based on trial counsel's unswerving testimony that counsel always advised clients of this right and that he did so in this case. In Lott, Spector said he discussed with Lott his testifying and recommended against doing so. Yet the evidence is clear that he brought in an outside attorney to talk to Lott to talk him out of testifying. Further, Scott Richardson testified that the two attorneys browbeat the defendant and that the discussion they were having with the defendant was cut off by the trial judge. There was no

final agreement. No one, including Spector, said Lott agreed not to testify, it was more as if he acquiesced to their will or opinion. This is totally different than Monlyn. Defense counsel bears the primary responsibility for advising a defendant of his right to testify or not, and the strategic implications of each choice, and that choice is ultimately for the defendant to decide. U.S.C.A Constitutional Amendments 5,6 14.

In Lawrence, this court specifically stated that an on-the-record waiver is not necessary to satisfy due process, but a reading of this case shows how different it is from Lott. Lawrence specifically told his attorney he was not going to testify, according to his attorney; and that the attorney tried to get him to testify at the penalty phase and he again refused. Lott wanted to testify from the outset of the case. He wanted to present his alibi; he wanted to express his side of the case. Now Spector claims it was trial strategy not to have Lott testify because it would open him up to Assistant State Attorney Jeffrey Ashton's tenacity and cross-examination and it would be like "poking a dog in a cage with a stick". Additionally, that Lott's memory deficits made him a liability on the stand. Yet Scott Richardson testified that Lott was always consistent in his recall of the alibi and all circumstances surrounding the people involved in the alibi; also it should be noted that it was Richardson who was hired to interface with the client in jail

(EHT 330) not Spector. Every time Spector went to see Lott, they argued and Lott at one point before trial, fired Spector. Spector, by his own records, had very little contact with Lott from the beginning right up to the trial. Also, Dr. Dee testified that although Lott suffered from some memory deficit, he would remember consistently noteworthy events in his life. We submit an alibi is noteworthy when indicted for murder.

In Torres-Arboledo, this court found that although the trial court does not have an affirmative duty to make inquiry concerning the defendant's waiver of his right to testify, **it would be advisable for the trial court, immediately prior to the close of the defense case, to make record inquiry as to whether the defendant understands he has a right to testify and that it is his personal decision, after consultation, not to take the stand; such inquiry would, in many cases, avoid post-conviction claims of ineffective counsel**. Under the facts of this case where counsel brought in the reserves to browbeat the client and confuse the client, a different approach needs to be taken. An approach that Lott did not knowingly, intelligently and voluntarily waive his right to testify. He was coerced into not testifying, this is clear. Further, trial judges throughout this state follow the better reasoning in Torres-Arboledo and make an on-the-record inquiry.

If the court does not do it, the attorney should ask for it to be done by the court.

As the trial court noted, at the evidentiary hearing, Lott's testifying is inextricably intertwined with his waiver of his right to testify, Lott wanted to testify, if he didn't, then why bring in another attorney to convince him not to testify? It would not have been necessary if he voluntarily waived his right to testify then the alibi also falls by the wayside. But he did not voluntarily waive his right. Lott sets the stage in the evidentiary hearing (EHT 116) when he states that Spector is sweating, brings Goodman in and he, Lott, is confused. He looked to each person, especially Richardson, for help and Judge Russell cut off the conversation. Spector then rested.

It is hard for the appellant to see the reasoning or to accept the premise that this right has not been considered so fundamental as to require the same procedural safeguards employed to ensure that a waiver of the right to counsel is knowingly and intelligently made. The appellant's situation is so different than the cases cited above. His alibi was the number one focal point of the defense, how could he not testify? His counsel, Mr. Richardson, agreed that Lott had to testify and that Lott wanted all along to tell his story. To deprive him of this right was ineffective in light of the rulings in Harris v. New York, 410 US 222, 91 S.Ct 6031, 28 L.Ed 2d 1 (1971), Farretta v.

California, 422 US 806, 95 S.Ct 2525, 45 L.Ed 2d 562 (1975), Brooks v. Tennessee, 406 US 605, 96 S.Ct 1991, 32 L.Ed 2d 358 (1972) and Justice Burger's concurrent opinion in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977).

The appellant would submit that it is because of this court's recommendation in Torres-Arboledo that an on-the-record waiver of the defendant's right to testify be made, that trial courts throughout the state and the trial judge in Lott's case normally do put that waiver on the record.

What we are looking at is counsel's interference with the right to testify. Spector and Goodman interfered with that right. They coerced Lott into not testifying. Like a coerced plea that is not voluntarily made a tacit waiver like Lott's cannot and should not stand. Although death is a certainty to everyone, it should not come early to Lott because of the conduct of his attorneys.

III

THE CUMULATIVE EFFECT OF ALL THE TRIAL COUNSEL'S ERRORS AND OMISSIONS ESTABLISH THAT COUNSEL WAS INEFFECTIVE AND A NEW TRIAL SHOULD BE ORDERED

The defendant is very cognizant of the law from this court regarding cumulative effect State v. Duncan, 2004 WL 2699063 (Fla 2005), Griffin v. State, 860 So2d 1 (Fla 2003). In the event that all of Lott's claims are without merit, then obviously his cumulative effect claim must also fail. Lott would argue that his claims are not procedurally barred nor are they without merit.

Lott's first claim of failure to investigate, locate, subpoena and present witnesses as well as his counsel's failure to investigate mitigation are well-taken and support his request for relief. Trial counsel's failure to make reasonable efforts to find witnesses that were critical (such as alibi witnesses) is sufficient to undermine any confidence in the outcome of the trial and establishes the prejudice required to support a claim of ineffective assistance of counsel, Miller v. Singletary, 958 F. Supp 572 (Middle Dist. FL 1997). Further, trial counsel's failure to call alibi witnesses constitutes a prima facie showing of entitlement to relief. Young v. State, 511 So2d 735 (Fla 2nd DCA 1987).

Lott has established that counsel's entire preparation was deficient. Counsel's conduct rises to the per se ineffectiveness enunciated in United States v. Cronic, 460 U.S. 648, 103 S.Ct. 2039, 80 L.Ed. 2d 657 (1984). Mr. Spector failed entirely to subject the prosecution case to any meaningful testing and that established a violation or denial of Lott's Sixth Amendment rights. No strategy can be found in Spector's failure to investigate the supposed focus of his defense case until six months into the case, especially with the fluidity of how today's population moves around and changes locations and addresses. He did nothing for six months! Although Spector did not actually admit Lott's guilt, he, in actuality, did so by not presenting the alibi and merely taking potshots at the state's witnesses.

The lack of investigation is the lynchpin of this case. Had the investigation been properly conducted, Lott could have testified, Elmer Jones would have testified and records from the restaurant and the waitress would have been available. Spector would not have had to rely solely on Tammy Lott's testimony as he obviously did. This inaction caused his entire case to fold like a house of cards within weeks of the start of the trial.

The glaring lack of preparation and investigation coupled with interfering with Lott's right to be heard in his own defense, when taken as a whole or cumulatively, establish that Spector did not meet the

reasonableness standard of Strickland. This totally and completely prejudiced Lott's case because it left him with no defense or as Scott Richardson testified, not even a defense strategy.

IV

THE TRIAL COURT IMPROPERLY DENIED DEFENDANT'S MOTION FOR POST-CONVICTION DNA ANALYSIS AND TESTING

The trial court restates the prevailing law in post-conviction DNA requests when it says (R 798) "The court must determine whether there is a reasonable probability that the defendant would have been acquitted or if he would have received a lesser sentence if the evidence had been admitted at trial." The trial court goes on to state, in denying the motion, (R 799) "At trial the prosecutor clearly conceded that another person might have been involved in the murder…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 spermatozoa 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 Heinous, Atrocious and Cruel aggravator". The trial court does not attack the defendant's motion (R 662) as procedurally defective.

Breaking down these findings of the trial court, one by one, it is arguably reasonable that the defendant should have been permitted to do the requested testing.

The State, at the trial, argued that Ray Fuller did not exist, yet this is the person the State also points to as a co-perpetrator as suggested by Robert Whitman in his testimony. Attorney Spector had the evidence to rebut this assertion of the non-existence of Fuller since his investigator interviewed Fuller (EHT 443-444). The DNA testing would show Whitman was a participant in the murder as suggested by the defendant. Had Whitman's' DNA been identified, either by the mitochondrial examinations of the hair or testing of the material under the victim's broken fingernail, it would have cast great doubt on the testimony of Whitman probably led to his prosecution and possibly the recanting of his testimony against Lott. The evidence and testing this court found in its original review of this case to be compelling, could be nullified by casting doubt on the credibility of Whitman and without him, a large amount of the State's circumstantial case comes crashing down. It casts doubt on all of Whitman's assertions such as the defendant's supposed confession to him; the issue of who had the victim's jewelry first – Lott or Whitman? If Lott's DNA was not identified and Whitman's was, it would put Whitman as a perpetrator and not Ken

Lott. This is exactly what Lott testified to at the evidentiary hearing. The testing of these items would lead to actual innocence. Additionally, the finding of DNA other than that of the defendant would enable the defendant to make a proportionality argument. That argument being that the defendant did not do the actual torturing or killing and therefore, he should not receive death for his limited involvement in Rose Connors' death.

In all death penalty cases, the establishment of the Heinous, Atrocious and Cruel (H.A.C.) aggravator, by the prosecutor, leads ultimately to the death sentence. This case, and Lott's sentence of death, was the result of the Heinous, Atrocious and Cruel aggravator. The State argued Rose Connors was tortured by Ken Lott to get the credit card and PIN number. Assistant State Attorney Ashton argued, convincingly, that she was tortured with pliers, the pliers found at the scene. One medical examiner linked the injuries on the victim's breasts and other parts of her body to the pliers and the marks they left on the skin. This type of testimony was compelling enough to get the Heinous, Atrocious and Cruel aggravator to the jury. The testing of the pliers found at the scene could establish that the victim's skin cells were not present on them and therefore, she was not tortured in the manner argued by the State. Nothing in the record suggests any other type of torture other than with the pliers. Therefore, the trial court's denial on the

basis of “the victim was tortured in some way” is not supported by the trial record.

DNA testing in this case has and would have the result of exoneration of Ken Lott and further, if not exonerating him, would give rise to a lesser sentence by removing the Heinous, Atrocious and Cruel aggravator as well as establishing a proportionality argument on his behalf.

CONCLUSION

The facts surrounding Ken Lott's Motion for Post Conviction Relief are relatively simple and straight forward and are un-rebutted by the record or testimony. When Ken Lott's family hired Joel Spector and paid him twenty five thousand dollars, they did not know what they were getting. He was not qualified, to defend a capital murder prosecution. He had never, before this case, handled a capital case and has not since. He misled Lott and his family by saying he had handled a lot of murder cases. Spector tried to have the court appoint counsel to assist him who was "death qualified", but this was denied by the trial court, at which time Spector obtained more money from Lott's family and hired Scott Richardson to second chair the case.

From the onset of the case, Lott proclaimed his innocence and claimed to have an alibi. He provided Spector with a number of names; Bill Snodderly, Roger Duggin, Lott's mother (Hortense "Libby" Coleman), his wife and most importantly, a fruit stand operator in Starke, Florida. Although he had no name for the fruit stand man, he had a picture of the stand and it was given to Spector. For six months, Spector did nothing about the alibi. He never, for the first six months, even sent his investigator out to try to find the stand. When he did go, one time, he went on a weekday and

found no one. This, of course, is after Spector was told the stand was only open on weekends therefore this witness, essential to the alibi defense, was not fully investigated or located by Spector. This lack of investigation coupled with the failure to obtain any records on the defendant for mitigation purposes, clearly establish that Lott had ineffective counsel. One attempt to locate a critical witness is just not enough, it is not adequate investigation. Couple that with the fact he subpoenaed Bill Snodderly and never called him because he did not know why he was subpoenaed, shows that counsel did not prepare this case and did not know the facts of the defense case. Spector failed to attack the state's case in any material way. He was not adequate, he was not competent and it cost Ken Lott a death sentence. As Scott Richardson said at the evidentiary hearing, there was no defense plan, no strategy; what there was, according to Richardson, was ineffectiveness of counsel. The defendant/appellant would argue that this lack of investigation meets the test of Strickland, and is on all fours with Miller v. Singletary from the Middle District of Florida.

Defense counsel also interfered with the defendant/appellant's right to testify. Moreover, he interfered with his ability to make a well-reasoned, voluntary decision not to testify. The defendant was being browbeaten by his attorney and an outside lawyer into not testifying. They succeeded. Yet

Richardson states he knew Lott wanted and needed to testify. Richardson knew Lott was consistent in every detail of his alibi that he could and should have taken the stand in his own defense. To put a defendant in the witness chair to say he did not do it, that he could not have done it, speaks volumes to a jury. Lott had memory deficits due to his brain damage, yet he was always, always consistent in his recollection of his alibi, times, places, and people. They always remained the same.

Dr. Dee told us that although Lott had memory impairment, but it was not of the type or nature that he would not remember or confuse significant times and events of his life. They stayed with him. Lott knew he wanted to testify as did everyone on the defense side. Not only that he wanted to testify, but that he needed to testify to rebut the fingerprint evidence at the victim's home. There was no argument to rebut or explain away that evidence without Lott testifying and its not evidence that's likely glossed over by a jury or court as this court viewed it on direct appeal, by placing the tag of "overwhelming" onto it. It was overwhelming evidence when taken in the light that nothing was done to rebut it from Lott's side of the case.

Further, there was never any DNA testing done in this case. Lott's motion, procedurally sufficient, should have been granted. It is the defense argument that the subjecting of the state's physical evidence to DNA

scrutiny would have exonerated him or at the very least, given him a proportionality argument.

Lastly, the cumulative effect of counsel's errors make the reliability of the verdict and sentence questionable by not investigating the defendant's alibi and not reasonably trying to locate witnesses counsel was ineffective and the defendant was prejudiced. By not conducting a reasonable investigation into mitigation and preparing mitigation, counsel was deficient.

No defendant in the criminal justice system is guaranteed a perfect or error free defense. But he or she is guaranteed a reasonable and effective defense. Ken Lott did not get that reasonable and effective defense as stated by co-counsel, Scott Richardson. Therefore, this case should be remanded to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Scott Browne, Attorney General's Office, Concourse Center 4, 3507 E. Frontage Road, #200, Tampa, FL, 33607 this ____ day of April, 2005.

_____

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CERTIFICATE OF COMPLIANCE

I HEREBY CERITFY that the foregoing complies with the font requirements, Times New Roman, Pitch 14, of Florida Rule of Appellate Procedure 9.210(a) (2).

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