

IN THE SUPREME COURT OF FLORIDA

KENNETH E. LOTT,

Appellant,

vs.

CASE NO. SC02-112

STATE OF FLORIDA,

Appellee.

_____ /

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Reference to the record on direct appeal will be referred to as "R" followed by the appropriate page number. Reference to the transcript on direct appeal will be cited as "TR." Citation to the penalty phase on direct appeal will be referred to as "PP." Reference to the post-conviction record on appeal will be referred to as "PCR" followed by the appropriate volume and page numbers.

STATEMENT OF THE CASE AND FACTS

The State generally accepts appellant's statement of the case but cannot accept the statement of facts. The statement of facts provided by the appellant impermissibly contains argument.

Appellant was indicted for one count of first degree murder on May 20, 1994. (R. 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. (R. 202). The guilt phase of appellant's trial began on April 24, 1995. (TR. 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. (TR. 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. (TR. 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 Connors 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 Connors' 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 Connors' card at the ATM, but he contended that he got the card and the PIN number from Whitman and did not notice that Rose Connors' 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.

SUMMARY OF THE ARGUMENT

ISSUES I, II--Appellant's guilt phase ineffective assistance of counsel claims were refuted by the record. Moreover, appellant failed to sufficiently allege prejudice emanating from the claimed deficiencies.

ISSUE III--Appellant's factual allegations did not suggest a viable alibi defense existed. Consequently, this claim was properly denied without a hearing.

ISSUE IV--The record refutes any assertion that appellant was denied his right to testify or that his attorneys interfered with his right to testify.

ISSUE V--The trial court properly denied appellant's penalty phase ineffective assistance of counsel claims without a hearing. Trial counsel presented sufficiently persuasive expert testimony to establish both statutory mental mitigators. The expert's opinion would not change with the benefit of additional time and background materials. Appellant completely failed to articulate any basis for finding prejudice where the asserted deficiencies of counsel were minimal and the State presented a massive case in aggravation. Appellant's allegations, even if true, provide no basis for finding a reasonable possibility of a different result.

ARGUMENT

PRELIMINARY STATEMENT ON APPLICABLE LEGAL STANDARDS

I) Standard of Review on the Summary Denial of Post-Conviction Relief

In Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993), cert. denied, 502 U.S. 834 (1994), this Court observed that “[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion. However, an evidentiary hearing is not a matter of right, a defendant must present “‘apparently substantial meritorious claims’” in order to warrant a hearing. State v. Barber, 301 So. 2d 7, 10 (Fla.), rehearing denied, 701 So. 2d 10 (Fla. 1974)(quoting State v. Weeks, 166 So. 2d 892 (Fla. 1960)). The motion must assert specific facts which, if proven, would warrant relief. Fla.R.Crim.P. 3.850(c)(6). II) Ineffective Assistance of Counsel

To properly raise an allegations of ineffective assistance, a defendant must allege specific facts that, when considering the totality of circumstances, are not conclusively rebutted by the record, and demonstrate that counsel’s performance was so deficient that but for the deficiency, the outcome of the trial would have been different. Kennedy v. State, 547 So. 2d 912,

913-14 (Fla. 1989). Courts evaluating ineffective assistance claims do not grade lawyers' performances. Trial lawyers, always, could have done something more or something different. The issue is not what is prudent or appropriate, but what is constitutionally compelled. Burger v. Kemp, 483 U.S. 776 (1987); Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000).

Both the state and federal courts have not hesitated in approving the summary denial of post-conviction relief where the pleadings and record demonstrate that a hearing is unnecessary. See, e.g., Provenzano v. Singletary, 148 F. 3d 1327 (11th Cir. 1998); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Provenzano v. State, 616 So. 2d 428 (Fla. 1993); Atkins v. Singletary, 965 F. 2d 952 (11th Cir. 1992); Atkins v. Dugger, 541 So. 2d 1165 (Fla. 1989); Kennedy v. Dugger, 933 F. 2d 905 (11th Cir. 1991); Harich v. Dugger, 844 F. 2d 1464 (11th Cir. 1988); Puiatti v. Dugger, 589 So. 2d 231 (Fla. 1991).

The seminal decision addressing ineffective assistance of counsel, Strickland v. Washington, 466 U.S. 668 (1984), explained the deleterious cost to society of the automatic grant of intrusive post-conviction inquiry:

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of

ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Strickland, 466 U.S. at 690.

ISSUES I¹, II

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PREPARE HIS CASE FOR TRIAL? (STATED BY APPELLEE).

Appellant claims the trial court erred in summarily denying his allegation that counsel was ineffective during the guilt phase for failing to investigate and prepare his case for trial. The State disagrees.

A. MAILING METHOD OF THE PIN NUMBER AND CREDIT CARD

Appellant first contends that trial counsel was ineffective for failing to counter the State's argument that the victim received her credit card and personal identification number in the same mailing. The trial court summarily denied this claim,

¹Appellant's first issue presents no specific claim other than attempting to delineate a *per se* rule in favor of evidentiary hearings. As the claim does not make any specific allegations, the State sees no need to respond.

stating:

Mr. Lott alleges counsel failed to object [when] the State argued the victim was tortured for the personal identification number (PIN) to her credit card and that this number came directly with the credit card upon issuance of the card. He alleges that by contacting the credit card company, counsel could have presented rebuttal evidence to show that the State's theory regarding the PIN was wrong. However, the rebuttal would have consisted only of the letter indicating that PINS are generally mailed separately from credit cards, which would not have rebutted the theory that the victim was tortured for her PIN. Evidence showing separate mailings would not have made a difference in the outcome of the trial.

(PCR-3, 190).

Appellant failed to explain how this evidence tended to exonerate him, much less establish a reasonable probability of a different result had such evidence been presented. Indeed, the fact of separate mailings indicates that appellant could not have simply stolen them from the mail, and that torture or coercion was indeed the method he used to secure the PIN number. It must be remembered that a man closely resembling the appellant and driving a truck closely resembling the appellant's was caught on camera using the victim's credit card.² As

²Indeed, during the Spencer hearing, appellant admitted that it was indeed him caught on camera using the victim's card to withdraw cash. He claimed, for the first time however, that he got the card and PIN number from Whitman. (R. 140). As the State noted in its response, it is clear that the appellant did not obtain the PIN number by simply stealing it from the mailbox. "The gruesome plier marks on Rose Conner's body and the lack of disorder in the crime scene, coupled with the

evidence showing that the card and PIN number were separately mailed does not in any way exonerate the appellant, the trial court properly denied this claim without an evidentiary hearing.

B. SHOE PRINT EVIDENCE

Appellant next contends that counsel was ineffective for failing to present expert evidence to counter evidence that a shoe print in the victim's house was of the same size and of a similar nature to a pair of shoes worn by the appellant. (Appellant's Brief at 18). The trial court denied this claim below, stating, as follows:

Mr. Lott alleges counsel failed to investigate footprint evidence in order to rebut the State's evidence of footprints similar to those on his shoes. He further alleges the investigation would have established that the prints came from a very common shoe and that this type of evidence was inherently unreliable. However, he fails to explain how the absence of this rebuttal prejudiced him. Furthermore, the State's expert witness testified the print came from a common shoe size and contained no individual characteristics within the print which could link it to Mr. Lott's shoes. See trial transcript, pages 902-903 and 923-924. In addition, since Mr. Lott had worked for the victim, the existence of his shoe print in her house would not have provided strong evidence

immediate use of her PIN number and ATM card to withdraw funds, bespeak a perpetrator who needed to gain access to Rose Connor's bank account by terror and torture. It is clear from this evidence that the perpetrator did not obtain the PIN number or the ATM card out of the mail box. If he had done so there would have been no reason to confront and torture Connor." (PCR-3, 108).

of his guilt, so additional rebuttal evidence would not have made a difference in the outcome of the proceedings.

(PCR-3, 186). The trial court's stated rationale for denying this claim has support in the record. As such, summary denial of this claim should be affirmed on appeal.

The State also provided a cogent analysis of this issue in its response to appellant's motion. The State offered, in part, the following:

...the record indicates that expert Deb Fischer testified that there were no individual characteristics from the latent footprint taken from the scene which could be linked to the shoes later taken from the Defendant. (Tr. 903). She also stated that size nine was a common shoe size, and that she could not say how many shoes might have come from the Spalding Company mold which produced the shoe. (Tr. 924). This testimony made the point that the print may well have come from someone else's shoe. Even if the point had been made in a more persuasive manner by introducing evidence to show exactly how many shoes came from that particular mold, there is still no reasonable probability that the outcome of the trial would have been different. It is clear from the record that Defendant had worked for Rose Connors, and might have left prints inside her home during the period of [his] employment. (Tr. 1134, lines 5-14). The shoe print came from the kitchen (Tr. 909). This is an area where a yard man might well have been invited in on a hot day for a glace of ice tea. In short, better refutation that the shoe print in Connor's kitchen came from Defendant's shoes would not have made a difference in the outcome of the trial because that print alone was not strong inculpatory evidence. The damning inculpatory evidence was Defendant's unexplained possession of the victim's jewelry and ATM card soon after her murder, and his palm print in the master bath, a private room which could only be entered through Connor's master bedroom.

(TR. 1115).

(PCR-3, 111).

Appellant's trial counsel established that the shoe print was not compelling evidence of appellant's guilt. Further, the shoe print evidence pales in comparison to the much more damaging evidence of appellant's guilt, including his possession and use of the victim's ATM card, possession of her jewelry, his fingerprints in private areas of the victim's home, and, his confession of guilt to his friend Whitman. Thus, it cannot be said that appellant's allegations, even if true, cast any doubt upon the outcome of his trial. In other words, even if his allegation suggests a deficiency on the part of counsel, his allegation completely fails to establish any prejudice.

C. FAILURE TO CALL WHITMAN'S WIFE AS A WITNESS

Appellant next asserts that counsel was ineffective for failing to call Whitman's wife to testify about his character for lack of truthfulness and to establish that Whitman told her about the crime prior to going to the police. Appellant raised this issue below under the guise of ineffective assistance (PCR-3, 84), but asserts on appeal that it might be more appropriately classified as newly discovered evidence. Appellant cannot proceed under a different theory on appeal than he presented below to the trial court. Nevertheless, regardless

of the theory, this claim was properly denied without an evidentiary hearing.

The trial court denied this claim below, stating:

...Mr. Lott fails to show how the absence of impeachment prejudiced him. Further, Mrs. Whitman's testimony that her husband was a liar would have been cumulative to that of Hortense Coleman, who testified that Mr. Whitman had a reputation for not telling the truth. See trial transcript, page 1028-1032.

In addition to the rationale offered by the trial court below, the State notes appellant failed to show that Whitman's reputation for violence would even be admissible. There was no credible evidence to suggest that Whitman committed the crime in question at the time of trial and appellant failed to allege any such evidence in his motion for post-conviction relief.³

³As noted in the State's Answer Brief on direct appeal, the physical evidence matched the admissions made by Lott and were otherwise corroborated by powerful circumstantial evidence:

...The man and truck in the ATM transaction photos resembled both Lott and his vehicle, also consistent with Lott's statement to Whitman that the victim had begged him not to kill her and offered to take him to the bank and get money. Lott also tried to sell the gold ring and tennis bracelet to David Pratt. Lott's wife was seen wearing the tennis bracelet by others. Lott gave Whitman three rings to sell and a transaction over the phone concerning such details was recorded. Police gave Whitman money to give to Lott for the rings. When Lott went to Whitman's residence to get the money he was spooked by the police van outside and refused to enter the living room. When arrested the same bills were found under Lott's car. The theory that Whitman gave Lott the ATM card and jewelry hardly constitutes a reasonable hypothesis of innocence. Such a claim was not even fashioned until the Spencer hearing. If Whitman had given the card and jewelry to Lott there would be no reason

It is not as if trial counsel failed to investigate the possibility of presenting witnesses as to Whitman's reputation for truthfulness. Trial counsel attempted to present Whitman's brother, James, as a witness, but was unable to qualify him. James Whitman did not have a broad or community based view of his brother's reputation. Lott, 695 So.2d at 1242. And, as the trial court found, defense counsel did present one witness, Hortense Coleman, who testified that Whitman's reputation in the community for truthfulness was poor. See also Van Poyck v. Moore, 15 Fla. L. Weekly Fed. C555, C557 (11th Cir., May 9, 2002)(observing that ineffective assistance is not established

for Whitman to be in possession of the jewelry to sell on Lott's behalf then turn the proceeds of the sale over to Lott. Furthermore Lott's wife would not relinquish the tennis bracelet to Whitman, which would be somewhat audacious, had Whitman given it to Lott in the first place, especially since Lott represented its worth to be more than five thousand dollars. Moreover, since Lott's statements matched the details of the crime scene, there would be no way Whitman would know all such details to frame Lott unless he had been there, of which there was no evidence, especially since Whitman had an alibi, or the police had taken Whitman to the scene or briefed him on the same. There was absolutely no evidence of that. The hypothesized motive for Whitman to frame Lott is more than a little attenuated: The fact that Lott snitched on Whitman twenty years earlier, when they were juveniles, for which Whitman, a three or four time convicted felon, received the onerous punishment of probation...

(State's Answer Brief on Direct Appeal, dated July 15, 1996).

"simply by pointing to additional evidence that could have been presented.")(citation omitted).

As for Whitman allegedly telling his wife murder details within days after it occurred, appellant failed to explain how this would contradict Whitman's trial testimony. See Kennedy v. State, 547 So. 2d at 913 ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing."). The murder occurred sometime before March 28th, when Rose's body was found. Whitman testified that Lott told him about committing a murder at the end of March or just after Easter. (TR. 722). Thus, he was aware of the murder within days. He testified that he did not go to the police for a couple of weeks. He sought out a police lieutenant who he knew and trusted and told him that Lott admitted committing a murder and robbery. (TR. 732).

Appellant failed to assert that the details provided by Whitman to his wife differed in any respect from the statement he provided to the police. If anything, it would appear to support Whitman's testimony that he thought about the situation before volunteering the information Lott provided to him about the victim's murder. It is also important to note that Whitman's testimony was well corroborated in this case.

Whitman cooperated with the police, allowing them to listen in on his conversations with Lott. Whitman arranged to give Lott money in exchange for some of the victim's jewelry. The physical evidence found at the crime scene was generally consistent with the confession given to Whitman by Lott. Appellant and his wife possessed jewelry belonging to the victim, appellant used the victim's ATM card to withdraw money, and his fingerprints were found in an area of the house which was highly incriminating.⁴ Further, Whitman was not a jailhouse 'snitch' who was attempting to curry favor with the prosecution in exchange for his testimony. Although he had three or four prior felony convictions, he sought out the police and gained nothing for his cooperation. Whitman was worried that Lott might kill again and was concerned that he could get in trouble for failing to provide information about the murder. (TR. 732).

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

⁴As the State noted during the Huff hearing, appellant's fingerprint was found in the master bathroom:

In the master bathroom where there is no other way in except through her private bedroom. So that is extremely damaging evidence. (PCR-Supp. 47).

that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693. This is particularly true in a case such as this where appellant fired his court appointed lawyer and utilized counsel of his own choice. As appellant's allegations below completely failed to allege any prejudice under the established facts of this case, his claim was subject to summary denial. See Hays v. State of Alabama, 85 F. 3d 1492, 1496 (11th Cir. 1996)(ineffective assistance claim properly denied where defendant failed to show how better preparation would have changed the outcome of the trial).

ISSUE III.

WHETHER APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT AN ALIBI DEFENSE WAS PROPERLY DENIED WITHOUT A HEARING BELOW?

As appellant points out, the State conceded in response to appellant's motion for rehearing that, in an abundance of caution, it would stipulate to an evidentiary hearing on this issue. That concession was borne out of an extremely cautious tactical decision and should not be taken as the State's recognition of any merit to appellant's claim. To the contrary, the state maintains that the trial court's order denying a hearing on this issue is supported by the record and should be affirmed by this Court on appeal.

The trial court rejected this claim below, stating:

Mr. Lott alleges Elmer Jones remembers that he visited the fruit stand Jones owned in Lake Butler, Florida. However, he offers no additional facts, such as the date he visited the stand, how long he was there, or exactly what Jones would have said about the matter. It is completely unclear how Jones' testimony would have supported a viable alibi defense.

Mr. Lott alleges he was at a Sonny's restaurant in St. Augustine, Florida at or near the time of the offense. He further alleges that restaurant personnel have said that if an investigator had come to the restaurant within six months of the incident, there would have been a written record of the transaction. However, he offers no additional facts, such as whether he paid by cash or credit card, so he fails to identify the nature of the written record or to explain how it could have helped him or how its absence prejudiced him. Furthermore, counsel conceded at the *Huff* hearing that it was probably a cash transaction, and it is unclear how such a record could have tied Mr. Lott to that particular location.

(PCR-3, 184-85).

Although appellant asks "[h]ow can it be said that not to call a witness who can say you could not have been there cannot be prejudicial?[,]" he identified no such witness below. Post-conviction counsel's point below was that he was prejudiced in establishing evidence to support appellant's alibi because memories fade and records of transactions are no longer available. As for Elmer Jones, counsel stated that he "remembered Mr. Lott as having been there a long time ago in the Lake Butler area purchasing items from him and talking to him at his stand." (PCR-Supp. 34). However, when asked if Mr. Jones knew the exact date or that it was during the period the murder

could have been committed, post-conviction counsel stated: "Not specifically." (PCR-Supp. 34).

Post-conviction counsel essentially conceded at the Huff hearing that he could not establish any actual prejudice. That is, post-conviction counsel could not present admissible evidence to show how trial counsel's alleged failure to investigate prejudiced appellant. As the most appellant could offer is some speculative potential for prejudice, he utterly failed to provide the trial court with some plausible basis for relief. The Assistant State Attorney made this point well below:

So you don't have ineffective assistance floating in the air by an act. It has to be tied down to a showing. All they have alleged, and all he's said today -- and Mr. Bankowitz is in this position. He can't do anymore than Mr. Jones can. And he's admitted to this Court on the record, Mr. Jones can't say when Mr. Lott came up there. So he can't even provide a partial alibi. And they can't prove that, therefore, that a reasonable suspicion, a reasonable suspicion or reasonable probability that this would have made a different outcome in trial. So their claim by the case law fails at that point because they have made an insufficient allegation.

(PCR-Supp. 40-41).

As for counsel's alleged failure to investigate a meal appellant may have eaten at Sonny's Barbeque in support of an alibi defense, post-conviction counsel asserted that Lott paid cash for his meal. The manager of the Sonny's evidently

advised post-conviction counsel that the restaurant kept receipts for transactions for six months. (PCR-Supp. 42). Appellant never stated that he uncovered evidence from Sonny's either in the form of a witness or a transaction record that would support an alibi defense. Indeed, counsel stated that he attempted to locate a waitress to assist in appellant's defense but that he was unsuccessful. (PCR-Supp, 42). See LeCroy v. Dugger, 727 So. 2d 236, 240-241 (Fla. 1998) (noting summary denial was proper where motion failed to allege what unspecified evidence should have been developed or should have been used). It is apparent that appellant has no evidence to present on this issue which requires further development during an evidentiary hearing.

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 Columbia 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, 136

L.Ed. 2d 340 (1996)(quoting Sullivan v. Fairman, 819 F. 2d 1382, 1392 (7th Cir. 1987)).

In conclusion, appellant failed to allege any facts which would entitle him to an evidentiary hearing. The most appellant could offer is speculation about what counsel might have uncovered had he investigated the possibility of raising an alibi defense at the time of trial. Where appellant's motion and argument falls short is that even now appellant can offer little if any evidence to support an alibi defense. Since appellant's motion fails to suggest a viable alibi defense exists, no hearing on this issue is warranted.

ISSUE IV.

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT HE WAS DENIED THE RIGHT TO TESTIFY AT TRIAL?

Appellant next asserts that he was denied his right to testify at trial. The State disagrees. The record clearly refutes this claim.

The lower court denied this claim based upon the colloquy which appears in the record between the trial court and appellant. The trial court stated:

Mr. Lott alleges counsel deprived him of the right to testify in his own behalf, although he had indicated he wished to do so and it was understood that this was the only way to explain or rebut the evidence such as the presence of fingerprints in the victim's home. However, this claim is refuted by the record, because

at the conclusion of the trial, Mr. Lott told the Court counsel had done everything he anticipated counsel would do. He further stated the decision not to testify was a joint decision made by him and his attorneys and expressed satisfaction with their services. See trial transcript, pages 1212-1213.

Mr. Lott alleges the record shows that counsel had another attorney, Raymond Goodman, try to talk him out of testifying. He further alleges that co-counsel Scott Richardson would testify it was absolutely necessary for Mr. Lott to testify because it was the only way to rebut the circumstantial evidence against him. Again, however, his claim that he wished to testify but was not allowed to do so is refuted by the record, as set forth in the previous paragraph.

(PCR-3, 188-89).

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.”).

Appellant’s reliance upon Hill v. State, 771 So. 2d 9 (Fla. 2d DCA 2000), is misplaced. In Hill the defendant asserted in his post-conviction motion that his counsel was ineffective for interfering with or depriving him of the right to testify. The trial court summarily denied the claim, attaching a portion of the record to refute the claim. In reversing the trial court, the Second District observed:

In support of [its] conclusion, the trial court attached a portion of the trial transcript in which the court advised Hill that the decision whether or not to testify was his alone to make. In response, Hill stated that he wished to discuss the matter with his attorney before making a final decision. The court then recessed for the day. When trial resumed the next day, the issue was not addressed. Defense counsel simply rested.

Hill, 771 So. 2d at 9. The record did not support the trial court’s summary denial. While the matter was mentioned, the

defendant claimed that he wanted to discuss the matter with his attorney. No additional inquiry was made as to whether or not appellant and his attorney had in fact discussed the matter and came to an agreement.

Although the defendant testifying issue came up in Hill, the defendant never stated he agreed with or otherwise acquiesced in the decision not to testify. In contrast to Hill, here appellant affirmatively stated that he agreed with the decision to rest without taking the stand to testify on his own behalf. He further stated that he was happy with his attorneys and agreed with how they were handling his case. (TR. 1212-1213).

This record reflects that at the time of trial appellant made an informed and voluntary decision not to testify on his own behalf. See generally Blackledge v. Allison, 431 U.S. 63, 74, 97 (1977)(While responses during a plea colloquy are subject to challenges under limited circumstances, they "constitute a formidable barrier in any subsequent collateral proceedings."). That appellant has apparently changed his mind after an adverse verdict is of no consequence. The record clearly supports the trial court's denial of this claim without a hearing.

ISSUE V.

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT HIS COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF HIS TRIAL?

Appellant asserts that the State admitted "by stipulation, that trial counsel was ineffective in this stage of the proceedings at least on the face of the defendant's motions..." (Appellant's Brief at 32). However, again, the State never conceded even a facially sufficient motion; rather, the State made an extremely cautious tactical decision to not oppose a hearing. Such a concession should not be taken, as appellant posits, as a comment on the validity of appellant's claims. An examination of the record in this case support denial of this claim without an evidentiary hearing.

In denying this claim without a hearing, the trial court stated:

Mr. Lott alleges counsel retained Dr. Henry Dee, a mitigation expert, but failed to provide him with medical or mental health records or the names of more than two family members, so he did not have enough information to investigate. He further alleges counsel did not give Dr. Dee enough time to conduct his investigation. As a result, he argues Dr. Dee's opinions were torn apart by the prosecution. However, the record demonstrates that the State actually agreed with Dr. Dee that Mr. Lott suffers from a psychopathic personality disorder. See sentencing transcript, pages 390-392. Furthermore, the Court found that the defense established both mental health mitigators and gave them considerable weight. See sentencing order. Finally, Mr. Lott fails to explain what additional investigation Dr. Dee

could have done had he been provided more information or whether it would have established additional mitigation. Therefore, he fails to show that there would have been a different outcome.

Mr. Lott alleges he had a history of abuse, but he fails to state who abused him, when it occurred, or exactly how he was abused. Furthermore, counsel called a number of friends and family members to testify about Mr. Lott's background and none of them mentioned child abuse. Mr. Lott also alleges he had a history of drug abuse and dependency, but he fails to state what kind of drugs he used, when he used them, or how they affected him. He also alleges he had a brain injury which could have been used in mitigation if an expert neuropharmacologist had been secured, but he fails to state the extent of the injury, how and when it occurred, and how it affected him. Again, he offers no facts to support his conclusory allegations, so he fails to show why there would have been a different outcome had this information been presented.

Mr. Lott alleges the defense presented essentially no mitigation because Dr. Dee was hamstrung by the lack of information he received and no other experts were called. He argues it is common practice to employ a social investigation expert/social worker to do an evaluation. He further argues it was incumbent on counsel to humanize him to the jury, since he had already been convicted of murder and the jury needed to be convinced he did not deserve death. However, he fails to explain what information a social worker could have used and developed, or what that person would have discovered in an evaluation, which would have had a reasonable probability of "humanizing him" to the jury or convincing the jury to recommend a life sentence. Counsel did call witnesses to testify about Mr. Lott's background. See sentencing transcript, index (pages 118-207). Again, the Court gave considerable weight to the mental health mitigating factors as a result of Dr. Dee's testimony, and Mr. Lott's allegations are too conclusory and speculative to establish the existence of any additional mitigating factors.

(PCR-2, 192-193).

The trial court's denial of this claim is supported by the record and should be affirmed by this Court. Appellant's motion failed to specify exactly how Dr. Krop's opinion would be strengthened against cross-examination. Nor did he state that Dr. Krop's opinion would change with additional background evidence. See e.g. Engle v. Dugger, 576 So. 2d 696, 701 (Fla. 1991)("Counsel had Engle examined by three mental health experts, and their reports were submitted into evidence. There is no indication that counsel failed to furnish them with any vital information concerning Engle **which would have affected their opinions.**")(emphasis added). The State's Response made this point well below:

...Moreover, Dr. Dee's February 23, 2001 letter, attached as an exhibit to Defendant's motion, did not indicate that he would have found any different diagnosis, but only that the support for them would have been enhanced. Given the record, which indicates that those diagnosis were considered and given considerable weight already, there is no reasonable probability that the sentence would have been different, even if Dr. Dee had been provided with the additional material he mentions in his letter. If Dr. Dee's conclusions are the same after reviewing the omitted collateral background material, as the conclusions he testified to at trial, there is no basis for an ineffectiveness claim. See Brown v. State, 755 So. 2d 616, 636 (Fla. 2000). The sub-claim regarding Dr. Dee should therefore be summarily denied.

(PCR-2, 118-119).

Appellant asserts that no expert was called to testify about

his history of abuse, drug dependency and brain injury. (Appellant's Brief at 35). Even a cursory review of the record refutes appellant's claim. 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 judgments regarding his behavior. (PP. 279-293). Dr. Dee evidently had conducted enough testing and reviewed sufficient background materials⁵ 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.

Appellant simply failed to assert a basis for finding counsel's performance constitutionally deficient. Expert witnesses such as Dr. Dee, like lawyers, could always improve upon their performance given additional time, materials, and experience. What is interesting in this case is that appellant has not alleged that Dr. Dee's opinions would change at all with the benefit of additional time, background materials, and the

⁵Appellant mentions that among the materials Dr. Dee did not have access to were the DOC records. (Appellant's Brief at 33). However, Dr. Dee admitted he reviewed DOC records prior to testifying and this formed the basis for corroborating appellant's claim of physical and psychological abuse by his step father. (PP. 292). Thus, appellant's allegation is clearly refuted by the record.

exercise of such "20-20" hindsight.⁶ Moreover, Dr. Dee was apparently persuasive in his testimony below, providing the basis for the trial court to find both statutory mental mitigators. (R. 580-81). This claim was properly denied without a hearing.

Appellant's allegation that counsel was ineffective for failing to retain a social worker in order to humanize the appellant provides no basis for finding counsel's performance deficient.⁷ As the trial court observed, appellant failed to

⁶It appears Dr. Dee had ample background information on the appellant. While appellant only admitted to one prior armed robbery, Dr. Dee was aware that appellant's history included three such robberies. (PP. 298-299). Moreover, Dr. Dee was aware that appellant grossly underestimated the number of crimes he had committed, telling Dr. Dee it was five when it was in fact, much more than that. (PP. 302-303). In fact, Dr. Dee was even aware of appellant's juvenile record, which reflected his penchant for vandalizing churches. (PP. 305).

Dr. Dee did have evidence to corroborate appellant's claimed drug use (PP. 281-282, 308), but was unsuccessful in obtaining hospital records to document appellant's claimed head injury at the age of 16. (PP. 289). Dr. Dee was told that the hospital records had been destroyed and therefore were no longer available to him. (PP. 313-314). Dr. Dee testified that his test results were consistent with such a head injury. (PP. 289-290). Of course, the testing conducted by Dr. Dee was consistent with appellant being classified a psychopath. (PP. 320).

⁷Evidence of abuse presented at trial consisted of Dr. Dee testifying that appellant told him he was physically and psychologically abused by his step-father. (PP. 292). However, on cross, Dr. Dee admitted that it was quite possible that the 'abuse' consisted of the step-father being rough on appellant in an attempt to discipline him for misbehavior. (PP. 304-305).

allege what this social worker would have found and what could have been presented to the jury. See LeCroy, 727 So. 2d at 240-241 (noting summary denial was proper where motion failed to allege what unspecified evidence should have been developed or should have been used). Appellant failed to allege any specific favorable evidence that a social worker would have uncovered. See Berry, 814 F.2d at 1409 (a defendant must show what the witnesses would have testified to and how it would have changed the outcome.). Thus, this claim provides no basis for post-conviction relief.

Even assuming appellant's penalty phase claims suggest some deficiency on the part of counsel, he has entirely failed to satisfy the prejudice prong of Strickland. Appellant "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, 122 S.Ct. 179 (2001) (quoting Strickland, 466 U.S. at 695). Appellant made no such demonstration here.

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. (R. 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. (R. 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 Connors, 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.

(R. 579)(emphasis in original).

Given the massive case in aggravation presented by the State, the twelve to zero vote for death, and the largely cumulative nature of the additional evidence in mitigation mentioned in appellant's motion, the motion failed to allege any plausible basis for finding prejudice. Consequently, this issue was properly denied without a hearing below. See Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992), receded from on other grounds, Hoffman v. State, 613 So. 2d 405 (Fla. 1992)(asserted failure to investigate and present evidence of mental deficiencies, intoxication at time of offense, history of substance abuse, deprived childhood, and lack of significant prior criminal history "simply does not constitute the quantum capable of persuading us that it would have made a difference in this case," given three strong aggravators and did not even warrant a post-conviction ~~CONVICTION~~ hearing.).

Based on the foregoing arguments and authorities, the lower court's ruling denying appellant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

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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, Esquire, 126 E. Jefferson Street, Orlando, Florida 32801, ____ day of August 2002.

COUNSEL FOR STATE OF FLORIDA

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

COUNSEL FOR STATE OF FLORIDA