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## **STATEMENT OF THE CASE**

This is an appeal from the summary denial of the defendant Ken Eldon Lott's Motion to Vacate Judgment and Sentence pursuant to Florida Rule of Criminal Procedure 3.850.

The defendant filed his Amended Motion to Vacate Judgment and Sentence on February 26, 2001 in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida. The State of Florida filed its response on March 27, 2001.

In the defendant's Motion to Vacate (R81-103), he raised several claims for relief, the primary claims being for ineffectiveness of counsel as argued in claims one through seven, Part A and his claim that the state presented false and misleading evidence to the jury in claim two. The defendant's claim one is separated into three subsections (A, B, C) (R82-90).

The trial court substantially ruled in its Order that the defendant had failed to state or establish sufficient facts in the court's opinion, to justify a hearing on the Motion to Vacate Judgment and Sentence (R183-199). The defendant moved for a re-hearing (R200-207) after which the State of Florida, in its response to Motion for Rehearing (R208-209), stipulated to an evidentiary hearing on the issue of ineffectiveness of counsel during the guilt phase of the trial with respect to the failure of trial counsel to call the defendant as a witness

in his own behalf and the failure of defense counsel to call witnesses to establish the defendant's alibi defense. Additionally, the state stipulated to an evidentiary hearing as to the defendant's claim of ineffectiveness during the penalty phase of the trial as to all issues raised (R208-209).

The trial court ruled that the Motion for Rehearing contained no additional facts (R210) and summarily denied the Motion for Rehearing.

On December 19, 2001, the defendant filed his timely Notice of Appeal and this court accepted jurisdiction.

## **STATEMENT OF THE FACTS**

The original matter on appeal, Ken Eldon Lott v. State of Florida, 695 So2d 1239 (Fla. 1997) contains the overall recitation of the facts upon which this court affirmed the defendant's Judgment and Sentence.

The facts, which the defendant brought out in his verified motion and are undisputed in the record herein or the original record on appeal, are as follows herein:

During the preliminary stages of the original proceedings, Mr. Lott advised his attorney that he had an alibi, which would have placed him in a combination of locations. He was in North and Northeast Florida at or in the time frames when the victim was murdered. The defendant provided to counsel, Mr. Spector, and his investigator, Ed Bartles, the locations and descriptions of people in Lake Butler, Florida and St. Augustine, Florida who he believed would place him in these locations during the 24 hour period when the murder took place in Orlando. In his motion, the defendant verified specifically an Elmer Jones of Lake Butler who, when shown photographs of the defendant and his truck remembered the defendant having been at his fruit stand in Lake Butler some five (5) years earlier (the time of the murder). Further, the defendant asserts that he identified persons at a Sonny's B-B-Q in St. Augustine, Florida who could verify that he had eaten there in the 24 hour

period surrounding the murder (R82-83). Additionally, the defendant himself could have and would have testified to these facts had he been called as a witness. The defendant's investigation in preparation for the filing of his Motion for Post-Conviction Relief established these facts and they are not rebutted by the State or the original record on appeal. In the original trial, defendant's counsel did not raise an alibi defense whatsoever. Black's Law Dictionary defines alibi as "at the commission of the crime charged in the indictment the defendant was at a difference place so remote or distant or under such circumstances that he could not have committed the offense."

There are no facts in the record to rebut the defendant's alibi defenses, yet the trial court says he was not given sufficient facts to support this defense.

In his Motion for Post-Conviction Relief, the defendant states under Claim 1A, 8 other instances in the investigatory stages of the original case where counsel failed to investigate and/or call witnesses to rebut the state's case in chief (R83-85).

At the trial of this case, in the guilt and penalty phases, as well as the sentencing and in this court's original opinion, the torture of the victim to get her personal identification number for her credit card was addressed and argued. The defendant contends, in this motion, that factually, had his attorney investigated this aspect of the case regarding the PIN number, he could have

called the bank/credit card company to testify as to how credit cards and PIN numbers are sent to customers thereby rebutting the argument of the prosecutor as to the likely torture of the victim (R98), and nullifying the heinous, atrocious and cruel aggravator.

The record (R84) establishes that defense counsel also failed to investigate and call witnesses favorable to the defendant in the form of Robert Whitman's wife. It is verified in defendant's Motion for Post-Conviction Relief that Whitman's wife is and was able to testify that Robert Whitman was untruthful, further, that within days of the murder, Whitman told her facts about the murder and discussed the murder before being contacted by Lott. Whitman did not go to the police for two months after the murder as stated in this court's opinion affirming the conviction and sentence. Whitman's wife, factually, is another exculpatory witness who could have totally undermined Robert Whitman, the state's key witness. Without Robert Whitman, there was only very little circumstantial evidence.

Mr. Lott alleged, in his Motion for Post-Conviction Relief, that he wished to testify and that co-counsel, Scott Richardson, would testify that the defense discussed that the only avenue open to Lott to attempt to rebut the state's evidence was for Lott to testify. This testimony would establish his alibi, give reasons for his fingerprints at the scene in various parts of the house, and

explain his dealings with Whitman. The Record (OR 1098) shows that Mr. Spector, after an evening recess, announced he had no more witnesses. It is at this point, and contemporaneously, an inquiry should have been made about the defendant testifying. The trial court in its order says the record rebuts this contention. What the record reveals (OR 1212-1213) is that after the jury left to deliberate, the court inquired if Lott was satisfied with what his attorneys had done for him and that it was a joint choice not to testify. But this was after the trial was over, Spector had rested and closing arguments were given and the jury had retired to decide his fate. The time for making this inquiry was at the time his attorney rested or, realistically, before he rested, not when the trial was over, except for deliberation by the jury.

The evidence is unrefuted that Mr. Spector never defended a capital case and neither had Mr. Richardson. The trial court (R191) says the defendant hired Spector therefore, he can't complain about any deficiency in his representation. The record in the original appeal, is clear that Mr. Richardson, the second chair, made the closing argument, not the lead attorney, Mr. Spector, and the defendant alleges in his motion that Spector thrust the duties of closing argument on his second chair without notice or preparation. This establishes Mr. Spector's ineptitude, and lack of concern for his client.

The facts, as established in the original record and set out the in the defendant's Motion for Post-Conviction Relief, when taken as a whole, show a series of defects which give rise to a presumption that an Evidentiary hearing be held.

## **SUMMARY OF THE ARGUMENTS**

The Appellant/Defendant maintains that his representation at the trial level was ineffective and that this ineffective representation in numerous areas prejudiced the outcome of his trial and resulted in his conviction.

Prior to the trial, defense counsel did not investigate nor secure witnesses to testify as to the defendant's alibi. The defendant had told counsel that he had been in various areas of the State of Florida, including Lake Butler, St. Augustine and DeLand, Florida over the period of time the murder took place. Defense counsel and his investigator never acted on those leads and witnesses and did not present the defendant's alibi defense. The defendant had named witnesses who were named in his motion for post-conviction relief as well as a statement as to their testimony and they were not called and never contacted. The defendant was prejudiced in this failure to call alibi witnesses as he could not establish and did not establish any defense at all.

Defense counsel also failed to investigate this case and develop the meager defense he did put on. Trial counsel, through several witnesses, tried to place the blame on Robert Whitman. Robert Whitman's wife was prepared to testify at the evidentiary hearing that he, Whitman, told her details of the murder before Lott supposedly advised Whitman of the facts. She would have also testified as to his lack of credibility and truthfulness. The record on this

issue does not conclusively establish that the defendant is entitled to no relief, and therefore, an evidentiary hearing should have been held.

There are many instances of ineffectiveness demonstrated in the defendant's motion for post-conviction relief that are not conclusively rebutted by the record. The State has stipulated to an evidentiary hearing on the issues of failure to present the alibi witnesses and the failure of the defendant to testify in his own behalf as well as on issues regarding presentation of mitigation in the penalty phase of the trial.

The trial court constantly says, in its order summarily denying relief, that the defendant fails to state sufficient facts to establish an entitlement to relief. Yet this is not the standard. The defendant must show facts, but only a brief statement of facts is necessary, not every fact the defendant will rely on. The actions, or inactions, of defense counsel and the facts in the defendant's motion for post-conviction relief are sufficient to establish grounds to conduct a hearing.

The defendant claims that he wanted to testify at his trial and was denied that right by counsel. The trial court points to the record to dispute this. But the record the trial court uses arose after the trial was over and the jury was deliberating. An inquiry should have been made contemporaneously with that

point in the trial where the defendant would have testified, NOT when it was over. The state stipulates that this issue is worthy of an evidentiary hearing.

Kenn Lott was and is entitled to an evidentiary hearing on his motion for post-conviction relief.

## **ARGUMENTS**

Appellant discusses below the reasons, which, he respectfully submits, compel the reversal of the trial court's summary denial of an evidentiary hearing. Each issue is predicated on the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, and 22 of the Florida Constitution and such other authority as set forth.

### **POINT 1**

#### **THE TRIAL COURT ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING ON DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF UNDER THE STANDARDS FOR REVIEW ESTABLISHED BY THIS COURT.**

“A defendant is entitled to an Evidentiary hearing on a Motion for Post-Conviction Relief unless 1) the motion, files and records in the case conclusively show that the Petitioner is entitled to no relief; or 2) the motion or particular claims are legally insufficient Moharaj v. State, 684 So2d 726 (Fla. 1996); Anderson v. State, 627 So2d 1170 (Fla. 1993); Holiana v. State, 503 So2d 1250 (Fla. 1987). The defendant in a post-conviction proceeding bears the burden, however, of establishing a prima facie case based on a legally valid claim. Patton v. State, 784 So2d 380 (Fla. 2000), Kennedy v. State, 547 So2d 912 (Fla. 1989).

The records in this case do not conclusively show that defendant Lott is entitled to no relief and by raising the facts and issues in his Motion for Post-Conviction Relief as he does, he establishes a prima facie case to be entitled to an evidentiary hearing.

Under Rule 3.850, a post-conviction defendant is entitled to an Evidentiary Hearing unless the motion and record **conclusively** show that the defendant is entitled to no relief. Florida Rules of Criminal Procedure 3.850 (d); Peede v. State, 748 So2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So2d 509, 516 (Fla. 1999). A movant is entitled to an Evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific facts which are not **conclusively** rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant. Gaskin v. State, 737 So2d at 516, See also Mendyk v. State, 592 So2d 1076 (Fla. 1992) Kennedy v. State, 547 So2d 912, 913 (Fla. 1989). Upon review of a trial court's summary denial of post-conviction relief without an evidentiary hearing, this court must accept a defendant's factual allegations as true to the extent they are not refuted by the record Freeman v. State, 761 So2d 1055 (Fla. 2000); Occhicone v. State, 768 So2d 1037, 1041 (Fla. 2000); Gaskin v. State, 737 So2d at 516; Lightbourne v. Duggar, 549 So2d 1364, 1365 (Fla. 1989). This court has strongly urged trial courts to err on the side of granting evidentiary hearings in cases involving initial

claims for ineffective assistance of counsel in capital cases. Gaskin v. State, 737 So2d at 516 n. 17; See also Mordenti v. State, 711 So2d 30, 33 (Fla. 1998) advocating mandatory evidentiary hearings for all initial 3.850 motions asserting ineffective assistance of counsel, Brady and other newly discovered evidence claims in capital cases.

Further, although not dispositive on the issue of whether an evidentiary hearing is granted OR not, the state herein has stipulated to an evidentiary hearing on certain issues. Peede v. State, 748 So2d 253 (Fla. 1999). In its response (R208) to defendant's Motion for Rehearing (R200), the state agrees to an evidentiary hearing on defendant's claims of failure to call alibi witnesses known to defense counsel and failure to call the defendant to testify in his own behalf, as well as all issues raised as to ineffective assistance of counsel during the penalty phase of the trial proceedings. Obviously the state believes that an evidentiary hearing should be granted or it would not have stipulated to such a hearing.

Florida Rules of Criminal Procedure 3.850 merely require the defendant's motion to state the judgment and sentence under attack...and a BRIEF STATEMENT OF THE FACTS relied upon in support of the motion. It does not require naming the witnesses, nor affidavits from the witnesses nor the

nature of their testimony OR availability to testify. Gaskin v. State, 737 So2d 509 (Fla. 1999).

The trial court cites Cherry v. State, 609 So2d 1069 (Fla. 1995) for the proposition that the defendant must demonstrate (in his motion) exactly how counsel's errors prejudiced him (R192, 193). This is not what Cherry stands for. In Cherry, this court stated "to prove that counsel was ineffective the defendant must establish that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense..." How much more of a deficiency must be established than to show the defendant had an alibi, name the alibi witness who advised where the defendant was at the time and then have counsel not call that witness or even look for him? Cherry also states "...to demonstrate that counsel's performance was deficient, the defendant must establish that counsel made errors so serious that counsel was not functioning as counsel; and the defendant must establish that counsel's errors were so serious as to deprive the defendant of a fair trial whose result was reliable." Lott has done this in his motion for post-conviction relief.

The trial court has failed to properly adhere to this court's decisions with regard to the basis for summary denial of a post-conviction relief motions under the Florida Rules of Criminal Procedure 3.850. The trial court was requiring

specific facts, not a brief statement of the facts relied upon, as stated in Rule 3.850.

Therefore, the defendant respectfully requests that this court reverse the trial court and remand this matter for an evidentiary hearing on the issues of ineffective assistance of counsel or in the alternative, to grant an evidentiary hearing at the very least on the stipulated issues stated by the State of Florida.

## **POINT II**

### **THE TRIAL COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING AS TO DEFENDANT'S CLAIM IN HIS MOTION TO VACATE JUDGMENT AND SENTENCE, THAT COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE OF HIS TRIAL IN THE INVESTIGATION AND PREPARATION OF HIS CASE FOR TRIAL**

In the defendant's Motion for post-conviction relief (R81-85), Section A, the defendant delineated ten (10) separate instances where his trial attorney failed to investigate and/or call witnesses in his defense. The first two of those areas or sub-claims deal with the failure to investigate or call exculpatory witnesses primarily in the form of alibi witnesses. These two claims have been separated out herein and will be discussed in detail in Point IV on appeal.

The remainder of the ineffectiveness of counsel claims by the defendant show a deficiency on the part of counsel which, when taken as a whole, cast doubt on the reliability of the verdict. Further, had the witnesses been called, they would have cast doubt on the state's key witness, Robert Whitman.

The state argued at trial that the victim received her credit card and PIN number in the same mailing and that this is why she was tortured to get the PIN number. This type of evidence could have been rebutted if properly investigated. Exhibit "A" to the defendant's motion (R98) shows that bank personnel could have testified that these items are mailed separately, not together, as the state put forth in its evidence. Is this act alone enough to meet the test of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984). No, it is not.

This court in its affirmance of Lott's conviction and sentence discussed, at length, the fingerprint, shoe print and fiber evidence as establishing Lott's present at the scene. The defendant raises the issue in his motion of the reliability of the shoe print evidence with regard to the failure to investigate by counsel. The evidence presented by the state only showed the shoe print was

similar to a shoe owned by Lott, not that it was Lott's shoe print. This was a very common shoe, by calling a witness to testify as to the shoe print evidence, it could easily have been shown to be unreliable; but it was not done.

In its affirmance, this court placed great weight on the testimony of Robert Whitman, as can be seen from the discussion of his testimony. In his motion, the defendant attacks the credibility of Robert Whitman in a different context. The defendant establishes that Whitman's own wife could have and would have testified as to his lack of credibility and his reputation for violence and untruthfulness had she been interviewed, deposed or otherwise contacted by the defense. But, more importantly, she would testify that Robert Whitman told her of details of the murder of Rose Connors within days of the crime and certainly before Lott approached Whitman about the jewelry stolen from the victim after Easter, which was on April 3, 1994. This evidence may actually be raised and probably should have been raised as newly discovered evidence, but either way, it cast considerable doubt on the testimony of Whitman and would have more likely than not, led to a different result, as it clearly bolstered Lott's defense that Whitman had set him up and would have shifted the focus to Whitman. A claim of ineffectiveness of counsel based on counsel's failure to investigate witnesses must include: 1) the identification of the witness or witnesses; 2) the substance of their testimony; and 3) a description of the prejudice suffered due to the omission of the witnesses testimony at trial Odom v. State, 770 So2d 195, 197 (Fla. 2<sup>nd</sup> DCA 2000), Tyler v. State, 793 So2d 137 (Fla. 2<sup>nd</sup> DCA 2001). Absolute certainty regarding potential testimony is not required in order to state a factually sufficient claim. Further, the failure to call this witness given what she has said as to Whitman's knowledge of details of the crime long before he went to the police with the facts of the murder, clearly establishes the prejudice of not calling this witness. Under Strickland, this claim alone establishes grounds for an evidentiary hearing.

The trial court (R197) apparently accepts each of Mr. Lott's allegations as true but says there are not sufficient facts to establish prejudice, but under the reasoning of Tyler, above, and the cases cited therein, absolute certainty is not necessary and prejudice is inherent, therefore the trial court erred in not granting an evidentiary hearing on the issues of ineffectiveness for failure to investigate and call witnesses especially when viewed as to their cumulative effect on the reliability of the circumstantial evidence herein.

### **POINT III**

#### **THE TRIAL COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING AS TO DEFENDANT'S CLAIM OF INEFFECTIVENESS OF COUNSEL FOR HIS FAILURE TO CALL EXCULPATORY WITNESSES WHO WERE KNOWN TO DEFENDANT'S COUNSEL AND/OR OFFER WITNESSES TO ESTABLISH THE DEFENDANT'S ALIBI DEFENSE**

The record herein (R82, 85-86) establishes that Mr. Lott advised his attorney of an alibi defense. He advised the attorney that he had been in North Florida in the Lake Butler area and St. Augustine, Florida the “day of the murder”. His mother put him in DeLand, Florida on Sunday, March 27, 1994 (R112, OR 1042). This murder, according to the testimony of the medical examiner, occurred between 2:00PM Saturday, March 26, 1994 and 5:00PM on Sunday, March 27, 1994. The state could not and did not narrow the time of death down any further than a twenty-six (26) hour period. The defendant, in his motion (R82, 85-86), alleges he told attorney Spector about a fruit stand he visited, presumably on Saturday, March 26<sup>th</sup>. His mother put him in DeLand, Florida with his wife on March 27<sup>th</sup>. The defendant gave attorney Spector the general location, but not the specific name of the person he spoke with. It is the defendant's allegation that attorney Spector did nothing with this information. Attorney Spector also did nothing with the information provided that from Lake Butler he went to St. Augustine and had dinner at a Sonny's B-B-Q restaurant

there. In his pre-post-conviction relief investigation, it was determined that the fruit stand existed and when Elmer Jones saw a picture of the defendant and his custom truck five years later, he remembered the defendant as being at his fruit stand in Lake Butler. Also, this investigation attempted to show a paper trail into St. Augustine, but the people at the Sonny's restaurant advised had they been subpoenaed or had someone come there up to six months after the murder, they would have had paperwork to establish the sale and personnel who possibly could have identified the defendant. Since this was five years later, they no longer had the paperwork and the waitress, most likely, was gone. Lott's claim is had this been investigated back in 1994, there was information and witnesses, some who still exist, to testify and substantiate his claim of alibi. Unfortunately for Mr. Lott, attorney Spector never investigated these leads and failed to speak with Elmer Jones. "The failure to investigate or call exculpatory witnesses presents a prima facie showing of entitlement to relief, subject to rebuttal evidence from the record or testimony at an evidentiary hearing". Prieto v. State, 573 So2d 298, 399 (Fla. 2<sup>nd</sup> DCA 1991), Honors v. State, 752 So2d 234, 1235-36 (Fla. 4<sup>th</sup> DCA 2000), Cohens v. State, 785 So2d 336 (Fla. 2<sup>nd</sup> DCA 2000), Carter v. State, 687 So2d 1321 (Fla. 4<sup>th</sup> DCA 1997), Zonecol v. State, 740 So2d 55 (Fla. 3<sup>rd</sup> DCA 1999) Barnes v. State, 787 So2d 1217 (Fla.

4<sup>th</sup> DCA 2000), Ash v. State, 767 So2d 1260 (Fla. 1<sup>st</sup> DCA 2000) and Mallory v. State, 577 So2d 987 So2d 1321 (Fla. 4<sup>th</sup> DCA 1991).

This case was a circumstantial evidence case as far as placing the defendant at the victim's home sometime within a twenty-six (26) hour period surrounding her death. For a large part, if not all of that time, the defendant had an alibi and his attorney did no investigation or it can at least be determined from the record that he did no investigation as no witnesses were called, not even the defendant. By not investigating and calling alibi witnesses, the defendant was prejudiced. How can it be said that not to call a witness who can say you could not have been there cannot be prejudicial? Further, it clearly would have had an effect on the outcome of the trial, as the defendant only needs to raise reasonable doubt in the mind of one person. Nothing in the Florida Rules of Criminal Procedure 3.850 states that the movant must allege the identity of the witness (Lott has done this), or their availability (Lott has done this) or the nature of their testimony (Lott has done this). It is during the evidentiary hearing that (Lott) must come forward with witnesses to substantiate the allegations raised in the post-conviction relief motion. Gaskin v. State, (737 So2d 509 (Fla. 1999).

In this area, it is clear from defendant's motion that he also would have been a witness as to his alibi and would have stated the alibi, which would have

been reinforced by the other witnesses. The issue of Lott testifying will be discussed further in this brief.

It must also be noted the issue of sufficiently factually stating the alibi defense is noted in the state's response to Motion for Rehearing and Stipulation to Evidentiary Hearing (R208-209). The state agrees that an evidentiary hearing on this issue should have been granted, and it should be granted.

#### POINT IV

### **THE TRIAL COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING AS TO THE DEFENDANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR DENYING HIM HIS RIGHT TO TESTIFY AT HIS TRIAL**

The trial court (R188) states this claim is refuted by the record and cites the trial transcript, pages 1212-1213. The problem with the trial court's reasoning is that the colloquia referred to took place after both parties rested and the jury had been instructed and sent out for deliberation.

The Original transcript (Vol. VIII, p1068) shows that on April 27, 1995, the court recessed for the evening, the jury was excused and a discussion was held about additional defense witnesses. Attorney Spector responded to the court's question as to the defendant testifying by saying "At this point, I would say I'm not going to put him on". It is the defendant's contention that after this time, and before the trial resumed, that discussions were held with the defendant. Both trial counsels had previously agreed that the defendant had to testify and that Lott wanted to testify in his own behalf. The defendant states, in his motion, that "the defendant, during the proceedings both at the pre-trial stages and trial, advised counsel of his desire to testify on his own behalf. It was understood by counsel and co-counsel that the only means to explain or rebut specific state's evidence, including the defendant's fingerprints at the

victim's home, was for the defendant to testify. Additionally, defendant's co-counsel, Scott Richardson who would testify at an Evidentiary Hearing, advised counsel, that it was agreed upon that the defendant had to testify, and that both the defendant and Mr. Richardson were shocked when Spector rested. (R86).

The original trial transcript (Vol. IX, p 1090) shows that on April 28, 1995 that the case reconvened and the court asked if the defense was calling Mrs. Coleman, not the defendant, back to the stand and attorney Spector answered "no". At page 1101 Spector, after discussion about jury instructions, advised the court he was resting. At page 1103, the jury was returned at 10:20AM and the defense formally rested without calling the defendant. Again, there was no inquiry, during the hours preceding the return of the jury, with the defendant about him testifying or waiving his right to testify. This was not held until after the jury was charged and left to deliberate.

This court in Osorio v. State, 676 So3d 1363 (Fla. 1996) sets the standard for determining this issue. The defendant, claiming ineffectiveness of counsel, must satisfy both prongs of Strickland v. Washington, 466 U.S. 668 104 S.Ct. 2052, 80 L. Ed 2d 674 (1984) stating that counsel's interference with his right to testify must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. Osorio points to United States of America v. Teague, 953 F2d 1525 (11<sup>th</sup> Cir. 1992).

The court, in Teague stated “The defendant’s right to testify on his own behalf cannot be waived by defense counsel; further that a criminal defendant’s fundamental right to testify in his own behalf at trial is personal to the defendant and cannot be waived either by the trial court or by defense counsel.” The difference in Lott and Teague is that Teague’s counsel filed a motion for new trial on which an evidentiary hearing was held. Lott’s trial counsel did not file a motion for new trial. Teague’s counsel, in her motion, essentially advised the court of what may have been an error on her part and asked that other counsel be appointed for purposes of the evidentiary hearing. The court still denied her motion, but only after an evidentiary hearing on the issue. The trial court herein should have granted an evidentiary hearing, which was stipulated to by the state on this issue. In its analysis of a defendant’s right to testify, the Teague court first looked at Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L. Ed. 2<sup>nd</sup> 37 (1987) which first cited “The due process clause of the Fourteenth Amendment” stating “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.” Further, “The Court found support in the compulsory process clause of the Sixth Amendment, stating that logically included in the accused’s right to call witnesses whose testimony is material and favorable to the defense, is a right to

testify himself, should he decide it is in his favor to do so.” The right to testify is a fundamental right held by the defendant alone. “To deny the defendant control over this decision could be tantamount to denying the defendant a trial.

The American Bar Association’s Standards for Criminal Justice provide:

- a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are for defense counsel. The decisions which are made by the accused after full consultation with counsel are:
  - (i) what plea to enter;
  - (ii) whether to waive jury trial; and
  - (iii) whether to testify in his or her own behalf.

Standards for Criminal Justice, Standard 4-5.2(a) (2<sup>nd</sup> Ed. 1980)

In his separate opinion, Senior Circuit Judge Clark states, “That a criminal defendant has a **fundamental** right to testify on his own behalf and that this right is **personal** to the defendant and cannot be waived by his counsel. In analyzing claims involving 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 trial record should reflect that the defendant’s waiver of his right to testify was knowing and intelligent and timely.” We have no such waiver here and what we do have is a waiver after the

conclusion of the trial when it is too late to re-open any part of the case and this makes Lott's "waiver" a nullity. It is over except for the return of the verdict. The U.S. Supreme Court has mandated that trial courts establish, on the record, the valid waiver of those constitutional rights that are fundamental and personal to the defendant Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Lott submits that the waiver should not only be on the record, but made simultaneously with and at a point in the trial where the defendant would have testified.

In the case of Hill v. State, 771 So2d 9 (Fla. 2<sup>nd</sup> DCA 2000), the appellate court decided, citing Osorio, that the defendant was entitled to an evidentiary hearing on his post-conviction relief motion where the record did not contain the petitioner's waiver of his right to testify and he establishes his failure to testify prejudiced his case. In Hill, the defendant planned to testify that he acted in self-defense and without this testimony, he could not get a self-defense jury instruction. There, after a break for the day, the trial resumed and defense counsel rested without calling the defendant. This is much the same fact pattern as Lott. Mr. Lott was prejudiced because he had no rebuttal for the very damaging fingerprint evidence in the victim's bathroom and had he testified, he would have established and solidified his alibi defense. Surely, this establishes prejudice and that the outcome of the trial may have been different, thereby

entitling Lott to relief and an evidentiary hearing. Further, Lott claims, in his motion, that it was discussed and understood that he had to testify and this is re-affirmed by attorney Richardson who was willing to testify as to these conversations as well as the necessity of Lott's own testimony.

The trial courts of this circuit routinely and specifically ask a defendant, on the record, before closing arguments, whether he or she will be taking the stand in his or her defense. The waiver, if there is one, is on the record, before the jury is charged and before closing arguments. The trial judge, it appears, was caught up in trying to push this case and get it finished by the end of the trial week, Friday, April 28, 2001. Kenn Lott should have been afforded an evidentiary hearing on this claim. The state saw this fact and was cognizant of the law when it stipulated (R208) to an evidentiary hearing on this specific issue.

The record does not establish a knowing and intelligent waiver of the fundamental right to testify at that point in the trial where the defendant would have exercised that right. Therefore, he is entitled to an evidentiary hearing.

## POINT V

### **THE TRIAL COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING AS TO THE DEFENDANT'S CLAIMS OF INEFFECTIVENESS OF COUNSEL DURING THE PENALTY PHASE OF THE TRIAL**

Kenn Lott did not have a stellar background. But there was evidence, which could have been presented, and preparation done to at least give him a fighting chance during the penalty phase of the trial proceedings. Trial counsel again failed to investigate and present evidence and witnesses on Mr. Lott's behalf.

The state, in its response to the defendant's motion for rehearing, admits, by stipulation, that trial counsel was ineffective in this stage of the proceedings at least on the face of the defendant's motions, (R208-209) and that an evidentiary hearing should be held.

The guilt phase of this trial ended late in the afternoon of Friday, April 28, 1995. The penalty phase of the trial began June 8, 1995, approximately six weeks later. During those six weeks, trial counsel did nothing other than retain Dr. Henry Dee to assist the defendant at this crucial stage of the proceedings. Normally, penalty phase preparation goes hand in hand with the guilt phase

preparation of a capital murder defense. Some of the same witnesses are even used, such as family members, friends, and expert witnesses. As can be seen from the trial record, attorney Spector called few witnesses and those few were obviously not at all persuasive. The record (R102) shows how woefully little information was provided to Dr. Dee, a noted neuropsychologist. He was given copies of the state's case (discovery materials and the depositions of Tammy Lott and Randy Nelis). This is not evidence on which to base a mitigation investigation. Dr. Dee needed materials such as those provided in the investigatory stages of the preparation of the defendant's motion for post-conviction relief. Materials such as interviews with the defendant and biographical materials of the defendant and his family background as well as medical background that was not provided to him before. Additionally, counseling records, Department of Correction records dating back to age seventeen (17), as well as school records. Attorney Spector made none of these available to the doctor even though they were easily obtained, nor did he attempt to secure this information.

During the penalty phase, Dr. Dee's opinions were totally discredited by a seasoned homicide prosecutor who did not have to call his own expert. When Mr. Ashton said, in closing, "The defense presented no evidence for mitigation" he was right. 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 definite opinion and one not subject to destruction by the state.

“An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant’s background, for possible mitigating evidence”, Porter v. Singletary, 14 F. 3rd 554, 557 (11<sup>th</sup> Circuit 1994). The failure to do so may render counsel’s assistance ineffective. Bolender v. Singletary, 16 F.3<sup>rd</sup> 1547 (11<sup>th</sup> Circuit 1994); Rose v. State, 675 So2d 567 (Fla. 1996). In Rose, the trial court initially denied an evidentiary hearing on defendant’s post-conviction relief motion without a hearing. This court reversed and Ordered an evidentiary hearing be held, after which the trial court again denied relief. This court then 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 and obtain school records, hospital, prison and other records and material outlining mental problems. This is very similar to the fate of Kenn Lott. In his motion, Lott contends, and the neuropsychologist confirms, that many, many records were not provided to him, nor were witnesses and statements who could have assisted him in his evaluation and testimony provided. From the original trial record, it is apparent that counsel never attempted to meaningfully investigate mitigation and hence he violated the duty of counsel to conduct a reasonable

investigation, including an investigation of the defendant's background for possible mitigation, Baxter v. Thomas, 45 F. 3<sup>rd</sup> 1501 (11<sup>th</sup> Circuit 1995).

“A defendant is entitled to an evidentiary hearing on an ineffective assistance of counsel claim unless the claim is legally insufficient or the record conclusively refutes the factual allegations”, Freeman v. State, 761 So2d 1055 (Fla. 2000). In Freeman, as here, the defendant's motion for post-conviction relief was summarily denied. He alleged, as here, that counsel was ineffective for failing to provide his only expert witness with his background, his school records and the insight of numerous family members and friends into his childhood. He further claimed that his expert witness was critically impeached because he did not have substantial background information. These are the same claims Lott makes in his motion and which this court found to be ineffective assistance of counsel in the penalty phase in Freeman.

Lott claims a history of abuse and drug dependency as well as a brain injury. No expert was called to testify as to these aspects of mitigation. In Freeman, supra, the same allegations were made and, as here, his attorney called only one expert, a neuropsychologist not qualified to give an expert opinion on the effects of drug and (alcohol) abuse. Mr. Spector failed to investigate and present this type of mitigation evidence. This court found in Freeman that “There is a reasonable doubt as to the effect such a witness might have had on

the jury's recommendation. Therefore, the court should have held an evidentiary hearing". Upon review of a trial court's summary denial of post-conviction relief without an evidentiary hearing, this court must accept a defendant's factual allegations as true to the extent they are not refuted by the record. Floyd v. State, 808 So2d 175 (Fla. 2002). Further, allegations about an attorney's failure to adequately investigate the defendant's family history and mental health stated a claim of ineffective assistance of counsel at the penalty phase of a capital murder prosecution and entitled the defendant to an evidentiary hearing on his post-conviction claim where the record did not conclusively refute the allegations. Cook v. State, 792 So2d 1197 (Fla. 2001).

It is clear from the trial record that Lott's trial attorney, who had never defended a capital murder case, did not know how to investigate and present mitigation evidence at a penalty phase. The one expert called at trial stated in his letter that he did not have the materials necessary to perform a proper evaluation. In his original testimony of the penalty phase (penalty phase Vol. II, p.300) he admitted that he never spoke to any family members about the defendant. Critical material was not provided to the one expert called. Had Dr. Dee been provided the additional materials noted in his letter, he would have been able to strengthen and bolster his testimony and his original findings, but

he was left out to be impaled on those original findings by a lack of background materials and assistance from attorney Spector.

## CONCLUSION

Florida Rules of Criminal Procedure 3.850 (d) establish that a post-conviction relief defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief, Gaskin v. State, 737 So2d 509 (Fla. 1999); Rivera v. State, 717 So2d 497 (Fla. 1998). Further, the movant is entitled to an evidentiary hearing on a claim of ineffectiveness of counsel if he alleges specific facts which are not conclusively rebutted by the record and which demonstrates a deficiency in performance that prejudiced the defendant.

Kenn Lott pled a sufficient, factual basis for the trial court to grant an evidentiary hearing. The trial court says the defendant had not provided a sufficient factual basis to be entitled to an evidentiary hearing. Yet Lott advised the court of specific exculpatory witnesses by name and the essence of their testimony and that they were available to testify. He went beyond the dictates of Gaskin in showing that there was evidence to present to establish an alibi. The record is devoid of any specific alibi witnesses being called on behalf of the defendant and no notice of alibi was filed by trial counsel. There is no basis, from the record, to state the defendant is conclusively not entitled to a

hearing. Rule 3.850 was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion. To the contrary, the Rule was promulgated to establish an effective procedure in the courts, as they are the best equipped to adjudicate the rights of those originally tried in those courts. Gaskin; Roy v. Wainwright, 151 So2d 825 (Fla. 1963). The trial court has, in its fervor to not have its rulings attacked, lost sight of the rights of the accused. He has a right to competent counsel who is knowledgeable in death penalty cases. Had the new amendments to the criminal rules, which provide specific qualifications for death penalty case attorneys, both public and private, been in effect at the time of this case, we may not be here today. Lott's attorneys were not death qualified in any sense of the term. But that is not a specific issue before this court.

The record in this case does not conclusively rebut any of Lott's allegations. The closest the record comes to establishing a rebuttal to any claim is in the area of the defendant not testifying. But again, it was not a knowing and intelligent waiver at a time contemporaneous with that time in a trial where a defendant would testify; it was after the fact, after the jury was sent out to deliberate. An inquiry should have been made when the trial court commented about Mr. Goodman being part of the trial team and talking to Lott prior to the defense resting.

The record is replete with specific acts of ineffectiveness that placed the jury's verdict in doubt and therefore, prejudiced the defendant. The trial court should have granted an evidentiary hearing on the issues of ineffectiveness in both the guilt and penalty phases of the trial.

Therefore, the defendant respectfully prays that this court reverse the trial court and remand for a full evidentiary hearing on the issues raised in his motion for post-conviction relief.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Robert Butterworth, Attorney General, Criminal Division, The Capital, Tallahassee, FL, 32399 this \_\_\_\_day of May, 2002.

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FRANK J. BANKOWITZ

**CERTIFICATE OF FONT**

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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FRANK J. BANKOWITZ

