

IN THE SUPREME COURT OF FLORIDA

KENNETH ELDON LOTT,

Appellant,

vs.

CASE NUMBER SC02-112

STATE OF FLORIDA,

Appellee.

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

**REPLY BRIEF OF APPELLANT**

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**PRELIMINARY STATEMENT**

As previously stated in the Appellant’s Initial Brief, this is an appeal from the summary denial of Kenneth Eldon Lott’s Motion for Post-Conviction Relief. This Reply Brief will address specific areas of Appellant's Answer Brief.

**SUMMARY OF ARGUMENTS IN REPLY BRIEF**

**REPLY ISSUE I**

**TRIAL COUNSEL WAS INEFFECTIVE  
SINGULARLY AND CUMULATIVELY  
DURING THE GUILT PHASE OF  
DEFENDANT'S TRIAL**

**REPLY ISSUE II**

**THE DEFENDANT WAS DENIED  
HIS RIGHT TO TESTIFY**

## **ARGUMENT I**

### **TRIAL COUNSEL WAS INEFFECTIVE DURING THE INVESTIGATORY AND GUILT PHASES OF THE DEFENDANT'S TRIAL AND THEREFORE AN EVIDENTIARY HEARING SHOULD HAVE BEEN GRANTED**

Appellant, Kenneth Eldon Lott, established sufficient evidence that trial counsel was ineffective in many areas and this cumulative effect had a chilling result ending in Appellant's conviction and sentence of death.

The State, in its Answer Brief, (p. 12), discusses the failure of trial counsel to call Robert Whitman's wife and relates to it as cumulative and therefore not admissible. When all of Lott's allegations are taken in total, this specific defect of failure to investigate and present Whitman's wife is very important and would have cast formidable doubt on Whitman's testimony. Lott presented, in his Motion for Post-Conviction Relief, that Whitman's wife was never questioned or deposed and had she been, as was discussed with her during the Post Conviction Investigation, she would have testified that Whitman knew specifics of the crime and about the crime itself, before he spoke to Lott. This would show that he, in fact, took part in the crime and would therefore cast such doubt on his testimony as to render it at best, suspect and at worst, totally unbelievable. This testimony would

have shown Whitman to be a liar and not capable of belief by the jury. It was Whitman who really established Lott as the murderer.

The State talks (p. 12) about Whitman's reputation for violence, but what was at stake was his reputation for truth and veracity. Mrs. Whitman's testimony, had she been spoken to before trial, would have and could have suggested and strongly suggested, that he, Whitman, had committed the crime. This was not a conclusory allegation. The fact is clear from the defendant's Motion for Post-Conviction Relief that Whitman's wife would have then, and will now, destroy Whitman's credibility. This lack of investigation cannot be seen as permissible.

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 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.

Appellant will also reply to the alibi issue as it relates to ineffectiveness under this argument. Again, as in this Initial Brief and in the record, it is clear that there is merit to this claim of ineffectiveness. The State knew there was merit and agreed to a hearing on this issue. The State claims now it was a tactical decision, yet it was a decision the State is bound by at this time. Just like the tactical decision of trial counsel are not reviewable in post-conviction proceedings, the State should now be held to its tactical decision.

When presenting an alibi, as any trial attorney knows, it must be looked at as an entire picture; the sum of its parts, not as different or single

broken out pieces. Ken Lott's alibi, had it been presented as a whole, would have consisted of Lott's own testimony, that of Elmer Jones and of the Sonny's Restaurant personnel. This is if it had been investigated at the time. Now, at an Evidentiary Hearing, it would consist of Kenneth Lott and Elmer Jones. Lott would have put himself traveling to the Lake Butler area of the State, hours from Orlando; spending hours there; speaking with Elmer Jones and buying items from his fruit stand. It would also show him traveling to St. Augustine, Florida where he ate dinner at a Sonny's Restaurant and eventually returning to Deland, Florida, putting him a considerable distance from the murder scene. Not only would this testimony been corroborated by Elmer Jones at the time of the trial, but also by Sonny's Restaurant personnel. Unfortunately for the defendant, since his attorney and investigator did not do their job then, he cannot present specific receipt evidence from Sonny's restaurant now. "The failure to investigate or call exculpatory witnesses presents a prima facie showing of entitlement of 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 11991), 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 not investigate 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. 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. (Initial Brief of Appellant 22/23).

## **REPLY ISSUE II**

### **DEFENDANT KENNETH ELDON LOTT WAS DENIED HIS RIGHT TO TESTIFY**

The court attempts to refute the defendant's allegations by citing (TT 1212-1213), but as the defendant points out, when the transcript is reviewed fully in this area (Initial Brief of Appellant 25/26), by the time the trial court realized that it had erred in not making a timely inquiry of the defendant on the record, before the jury was sent to deliberate, it tried to bootstrap an after-the-fact questioned of the defendant. Post conviction counsel has tried many cases with this trial judge. Her normal procedure is to make the inquiry she made here specifically about the defendant testifying before the defense rests its case. That is the way it would and must be done. To try and correct its error after the case is over is too late. United States of America v. Teague, 953 F2d 1525 (11<sup>th</sup> Cir 1992), Rock v. Arkansas, 483 US 44, 107 S.Ct. 2704, 97 L.Ed 2<sup>nd</sup> 37 (1987), Osorio v. State, 676 So2d 1363 (Fla. 1996).

Kenneth Eldon Lott's failure to testify prejudiced his case. He did not explain the presence of his fingerprints in specific areas of the victim's home; he did not present his alibi and he did not have an opportunity to deny his accusers in the form of Robert Whitman. His own attorney, Scott Richardson, was prepared to testify at an Evidentiary Hearing that it was on

numerous occasions, including the night before the last day of trial, that Lott had to testify and wanted to testify; it was essential to the defense.

The cases and argument in Appellant's Initial Brief, (TT31, p25), are controlling and will not be reiterated here at this time.

Kenneth Eldon Lott was entitled to an Evidentiary Hearing on this issue.

## **CONCLUSION**

Although the Appellant does not specifically argue each issue of his Initial Brief herein, he does not concede these points to the State, but states they were sufficiently argued in the Initial Brief. Further, Kenneth Eldon Lott respectfully submits that he is entitled to an Evidentiary Hearing on all issues in his Initial and Reply Briefs.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Robert Butterworth, Attorney General, Criminal Division, The Capital, Tallahassee, FL, 32399 this \_\_\_\_day of September, 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