No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANDRECO LOTT — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

PROOF OF SERVICE

I, Andreco Lott, do swear or declare that on this date, Oct 27., 2018, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General of the United States

Room 5616

Department of Justice

950 Pennsylvania Avenue, NW, Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Oct 27., 2018

(Signature)

APPENDIX D

Lott's §2255 Motion and Supplemental Pleadings

AO 243 (Rev. 5/85)

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District Northern District of Texas, Fort Worth Division	
Name of Movant Andreco Lott	Prisoner No. 27068-177	Case No. 4:01 CR 177 A(06)
Place of Confinement USP Pollock, P.O. Box 2099, Pollock LA, 71467		

UNITED STATES OF AMERICA V. Andreco Lott
(name under which convicted)

MOTION

1. Name and location of court which entered the judgment of conviction under attack
Northern District of Texas, Fort Worth Division

2. Date of judgment of conviction March 22, 2002

3 Length of sentence 1,111 months

4. Nature of offense involved (all counts)
Conspiring to Rob Bank 18 U.S.C. 2113 (Count 1, 2, 4); Use and Carry of a Firearm 18 U.S.C. 924(c)(1)(A)(i) and 2 (Count 3, 5, 17,19,21); Robbery 18 U.S.C. 1951(a)(b) and 2 (Count 16, 18,20)

5. What was your plea? (Check one)
(a) Not guilty ☒
(b) Guilty ☐
(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
(a) Jury ☒
(b) Judge only ☐

7. Did you testify at the trial?
Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court U.S. Court of Appeals, Fifth Circuit

(b) Result District Court decision affirmed

(c) Date of result April 8, 2003

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
Yes ☒ No ☐

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court United States Supreme Court

(2) Nature of proceeding *Certiorari for appeal of District Court decision*

(3) Grounds raised 1. Was there an abuse of discretion for the District Court to deny defendant a motion for continuance?

2. Was there error for the District Court to deny the defendant's Brady motion for a new trial?

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result Denial of Certiorari

(6) Date of result October 6, 2003

(b) As to any second petition, application or motion give the same information:

(1) Name of court

(2) Nature of proceeding

(3) Grounds raised

9. If you did appeal, answer the following:

(a) Name of court U.S. Court of Appeals, Fifth Circuit

(b) Result District Court decision affirmed

(c) Date of result April 8, 2003

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
Yes ☒ No ☐

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court United States Supreme Court

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2. Was there error for the District Court to deny the defendant's Brady motion for a new trial?

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result Denial of Certiorari

(6) Date of result October 6, 2003

(b) As to any second petition, application or motion give the same information:

(1) Name of court

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☒ No ☐
(2) Second petition, etc. Yes ☐ No ☐

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

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12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f)Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Trial Counsel Ineffective for Failing to Investigate and Interview Alibi Witnesses

Trial Counsel Ineffective for Failing to Investigate and Interview Alibi Witnesses

Supporting FACTS (state *briefly* without citing cases or law)

Defendant informed counsel of several witnesses who could testify as to his whereabouts at the time of ~~different charged crimes. Counsel never interviewed these witnesses nor investigated the alibis, nor spent~~ much time on the defense altogether. Counsel also did not make any effort to investigate the government ~~witnesses nor interview them.~~

B. Ground two: Trial Counsel Ineffective for Failing to Raise Issue in District Court and on Appeal that

In Court Identification Procedures were Impermissibly Suggestive

Supporting FACTS (state *briefly* without citing cases or law):

The government showed the same photo to different witnesses; identification came many months after the ~~crimes; the witnesses made vague identification of defendant or could not identify him at all. Counsel did~~ not raise this issue at trial or appeal.

C. Ground three: Trial Counsel Ineffective for Failing to File a Severance Motion

Supporting FACTS (state *briefly* without citing cases or law):

Defendant was prejudiced by the fact that co-defendant's crimes may have affected the jury's opinion of ~~defendant, that defendant was prevented from cross-examining certain witnesses; defendant and~~ co-defendant were not in the indictment or jury charges together. Counsel failed to file a motion for ~~severance.~~

D. Ground four: Trial Counsel Ineffective for Failing to Request Cautionary Instructions for Witnesses

Supporting FACTS (state *briefly* without citing cases or law):

Counsel should have requested cautionary instructions for accomplice/informant witnesses who had plea agreements and therefore reason to fabricate testimony.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them:

All grounds were not not presented due to either the issue being ineffective assistance of counsel at trial and appeal, and therefore appropriate for a motion under 28 U.S.C. 2255, or due to ineffective assistance of counsel in not raising the grounds heretofore.

**Attached are Grounds 5--17

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Ronald G. Couch, 1550 Norwood Drive, Suite 402, Hurst TX 76054

(b) At arraignment and plea Same

(c)At trial Same

(d) At sentencing Same

(e) On appeal Same

(f) In any post-conviction proceeding

(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

N/A
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

10-4-04 / October
(date)

Signature of Movant

Andreco Lott

5. **Due Process Violated when Prosecutor Vouched for Credibility of Witnesses, and Trial Counsel Ineffective for Failure to Object to Violation of Petitioner's Due Process Rights when Prosecution Vouched for Credibility of Witnesses, and to Ask for Curative Instructions and/or Mistrial.**

Prosecutor at trial improper suggested that the witnesses were telling the truth in the opening and closing statements. Counsel failed to object or ask for curative instructions, or in the alternative, a mistrial

6. **Counsel Ineffective for Failing to Object to Trial Court's Constructively Amending the Indictment for Counts 16, 18, and 20 During the Jury Charge.**

The court constructively amended the indictment when it instructed the jury that "the government is not required to prove" that the defendants knew their conduct would interfere or affect interstate commerce.

7. **Trial Counsel Ineffective for Failure to Object to "Serious Bodily Injury" and "Amount of Lost Money" in light of *Apprendi* and *Jones*.**

The factual determination as to whether "Serious Bodily Injury" resulted, and "Amount of Lost Money" should have been determined beyond a reasonable doubt rather than by a preponderance of the evidence, and by a jury. Trial counsel did not raise an objection to this determintion.

8. **Trial Counsel was Ineffective for Failing to Raise in the District Court and on Appeal that there was Insufficient Evidence to Support a Finding of Guilt on the Weapons Counts 3,5,21, 18 U.S.C. 924(c)(a)(A)(i) and § 2.**

The record is void of any evidence that the Petitioner at any time used or carried a firearm during and in relation to any crime as charged in counts 3,5,21, 18 U.S.C. §924(c)(1)(A)(i). Counsel did not raise this issue in court or on appeal.

9. **Trial Counsel was Ineffective for Failure to Raise on Direct Appeal that the Evidence was insufficient to Convict Petitioner of 1951(a)(b) on Count 18 and the 924(c) on Count 19.**

The government's evidence was insufficient to prove robbery as charged in the indictment. Counsel failed to raise this issue on appeal.

10. **Trial Counsel was Ineffective for Failing to Raise on Direct Appeal Fatal Variance that Violated the Petitioner's Fifth Amendment Right to only be Tried on the Indictment Returned by the Grand Jury for Count 18.**

For the robbery charged in the indictment as occurring the Greyhound Bus company, the actual victim was Armored Transport Systems. Counsel failed to raise this issue on appeal.

11. The Evidence was Insufficient to Support, and Counsel was Ineffective for Failing to Object to and Reserve for Appeal a Sufficiency Claim Regarding, Jury Verdicts for Counts 1,2, 4, 18 and 20.

These counts rested upon accomplice testimony which was insufficient to convict petitioner. Counsel failed to object to and preserve for appeal this issue.

12. Counsel Ineffective for Failing to Raise on Appeal that Government Failed to Prove Petitioner *was a part of any Conspiracy.*

The government failed to prove beyond a reasonable doubt that Petitioner was part of a conspiracy with alleged accomplices. Counsel failed to raise this issue on appeal.

13. The Evidence was Insufficient to Support a Conviction for Conspiracy to Rob First State Bank and Norwest Bank, and Counsel Inefficient for not Raising Issue on Appeal.

The Norwest Bank robbery and First State Bank robberies were not proven to be a part of the same act, plan or scheme. Counsel failed to raise this issue on appeal.

14. Trial Counsel Ineffective for Failing to Request Pretrial Motions for Discovery, Exculpatory *Jencks* Material under 18 U.S.C. § 3500 B, C, and D, Rule 16 and Impeachment Material, which would have Revealed Missing Documents, Letters, Police Reports, and 302's.

Petitioner avers that had counsel been given access to these materials he would have been able to use them in any number of ways such as 1) cross-examining of witnesses; 2) impeachment of witnesses; 3) disputing material misstatement of the facts.

15. Trial Counsel Ineffective for Failing to Raise *Batson* Issue During Trial or on Appeal.

Only 2 African-Americans were in the total jury pool. However, no African-American persons were included in the jury, and the persons in the pool were shuffled back to the end of the line. Counsel failed to raise this issue at trial or appeal.

16. Trial Counsel Ineffective for Failing to Raise *Batson* Issue During Trial or On Appeal.

17. Trial Counsel Ineffective for Failure to Allow Andreco Lott To Testify on His Own Behalf After Several Requests by Movant.

Certificate of Service

This is to certify that on the date below I did cause to be placed in the United States mails, First Class postage prepaid, one (1) copy of

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2255

, [timely filed in accordance with Houston v. Lack, 487 U.S. 266 (1988)] the same being addressed to:

Rose Romero, AUSA
Burnett Plaza Suite 1700,
801 Cherry Street, Unit #4,
Fort Worth, Texas 76102-6882

DATED: 12-8-04

Andreco Lott
Pro Se Petitioner
Reg. No. 27068-177
USP Pollock
P.O. Box 2099
Pollock LA 71467

AO 243 (Rev. 5/85)

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

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Place of Confinement USP Pollock, P.O. Box 2099, Pollock LA, 71467		

UNITED STATES OF AMERICA V. Andreco Lott
(name under which convicted)

MOTION

1. Name and location of court which entered the judgment of conviction under attack
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5. What was your plea? (Check one)
(a) Not guilty ☒
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(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
(a) Jury ☒
(b) Judge only ☐

7. Did you testify at the trial?
Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court U.S. Court of Appeals, Fifth Circuit

(b) Result District Court decision affirmed

(c) Date of result April 8, 2003

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
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2. Was there error for the District Court to deny the defendant's Brady motion for a new trial?

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result Denial of Certiorari

(6) Date of result October 6, 2003

(b) As to any second petition, application or motion give the same information:

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Yes ☐ No ☐

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(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
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(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Trial Counsel Ineffective for Failing to Investigate and Interview Alibi Witnesses

Trial Counsel Ineffective for Failing to Investigate and Interview Alibi Witnesses

Supporting FACTS (state *briefly* without citing cases or law)

Defendant informed counsel of several witnesses who could testify as to his whereabouts at the time of ~~different charged crimes. Counsel never interviewed these witnesses nor investigated the alibis, nor spent~~ much time on the defense altogether. Counsel also did not make any effort to investigate the government ~~witnesses nor interview them.~~

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In Court Identification Procedures were Impermissibly Suggestive

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The government showed the same photo to different witnesses; identification came many months after the ~~crimes; the witnesses made vague identification of defendant or could not identify him at all. Counsel did~~ not raise this issue at trial or appeal.

C. Ground three: Trial Counsel Ineffective for Failing to File a Severance Motion

Supporting FACTS (state *briefly* without citing cases or law):

Defendant was prejudiced by the fact that co-defendant's crimes may have affected the jury's opinion of ~~defendant, that defendant was prevented from cross-examining certain witnesses; defendant and~~ co-defendant were not in the indictment or jury charges together. Counsel failed to file a motion for ~~severance.~~

D. Ground four: Trial Counsel Ineffective for Failing to Request Cautionary Instructions for Witnesses

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Counsel should have requested cautionary instructions for accomplice/informant witnesses who had plea agreements and therefore reason to fabricate testimony.

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**Attached are Grounds 5--17

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Ronald G. Couch, 1550 Norwood Drive, Suite 402, Hurst TX 76054

(b) At arraignment and plea Same

(c) At trial Same

(d) At sentencing Same

(e) On appeal Same

(f) In any post-conviction proceeding

(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

N/A
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

10-4-04 / OCTOBER
(date)

Signature of Movant

Andreco Lott

5. **Due Process Violated when Prosecutor Vouched for Credibility of Witnesses, and Trial Counsel Ineffective for Failure to Object to Violation of Petitioner's Due Process Rights when Prosecution Vouched for Credibility of Witnesses, and to Ask for Curative Instructions and/or Mistrial.**

Prosecutor at trial improper suggested that the witnesses were telling the truth in the opening and closing statements. Counsel failed to object or ask for curative instructions, or in the alternative, a mistrial

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The factual determination as to whether "Serious Bodily Injury" resulted, and "Amount of Lost Money" should have been determined beyond a reasonable doubt rather than by a preponderance of the evidence, and by a jury. Trial counsel did not raise an objection to this determintion.

8. **Trial Counsel was Ineffective for Failing to Raise in the District Court and on Appeal that there was Insufficient Evidence to Support a Finding of Guilt on the Weapons Counts 3,5,21, 18 U.S.C. 924(c)(a)(A)(i) and § 2.**

The record is void of any evidence that the Petitioner at any time used or carried a firearm during and in relation to any crime as charged in counts 3,5,21, 18 U.S.C. §924(c)(1)(A)(i). Counsel did not raise this issue in court or on appeal.

9. **Trial Counsel was Ineffective for Failure to Raise on Direct Appeal that the Evidence was insufficient to Convict Petitioner of 1951(a)(b) on Count 18 and the 924(c) on Count 19.**

The government's evidence was insufficient to prove robbery as charged in the indictment. Counsel failed to raise this issue on appeal.

10. **Trial Counsel was Ineffective for Failing to Raise on Direct Appeal Fatal Variance that Violated the Petitioner's Fifth Amendment Right to only be Tried on the Indictment Returned by the Grand Jury for Count 18.**

For the robbery charged in the indictment as occurring the Greyhound Bus company, the actual victim was Armored Transport Systems. Counsel failed to raise this issue on appeal.

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These counts rested upon accomplice testimony which was insufficient to convict petitioner. Counsel failed to object to and preserve for appeal this issue.

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The Norwest Bank robbery and First State Bank robberies were not proven to be a part of the same act, plan or scheme. Counsel failed to raise this issue on appeal.

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Petitioner avers that had counsel been given access to these materials he would have been able to use them in any number of ways such as 1) cross-examining of witnesses; 2) impeachment of witnesses; 3) disputing material misstatement of the facts.

15. Trial Counsel Ineffective for Failing to Raise *Batson* Issue During Trial or on Appeal.

Only 2 African-Americans were in the total jury pool. However, no African-American persons were included in the jury, and the persons in the pool were shuffled back to the end of the line. Counsel failed to raise this issue at trial or appeal.

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17. Trial Counsel Ineffective for Failure to Allow Andreco Lott To Testify on His Own Behalf After Several Requests by Movant.

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PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2255

, [timely filed in accordance with Houston v. Lack, 487 U.S. 266 (1988)] the same being addressed to:

Rose Romero, AUSA
Burnett Plaza Suite 1700,
801 Cherry Street, Unit #4,
Fort Worth, Texas 76102-6882

DATED: 12-08-14

Andreco Lott
Pro Se Petitioner
Reg. No. 27068-177
USP Pollock
P.O. Box 2099
Pollock LA 71467

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS

ANDRECO LOTT, Movant, v. UNITED STATES OF AMERICA, Respondent.	In Support of a Motion to Set Aside, Vacate or Correct a Conviction or Sentence by a Prisoner in Federal Custody Pursuant to 28 U.S.C. § 2255 Case No. 4:01-CR-177-A(06)

SUPPORTING MEMORANDUM OF LAW

Comes now the Movant, "*pro se*", to file this Memorandum in support of his Title 28 U.S.C. §2255 Motion collaterally attacking his sentence as unlawful and incorrect.

TIMELINESS AND JURISDICTION

The Movant, sentenced in the District Court, Northern District of Texas, asserts that this Court has jurisdiction to review Movant's petition as supported by the record. Petition is *timely filed under* Clay v. U.S., 537 U.S. 522 (2003).

BACKGROUND

This case began when a series of bank, armored car and store robberies took place in the Dallas/Fort Worth area in 1999-2000. Various persons conspired with one another to commit the robberies. Authorities mistakenly believed that Movant Andreco Lott, (Hereinafter "Movant") had been brought into the conspiracy. On September 26, 2001, Movant was arrested and charged in a 27-count indictment in the Northern District of Texas, Fort Worth Division, with 6 other codefendants on October 17, 2001. Later, counts 8, 9, 12,13, 22, and 23 were dismissed against Movant only. On December 6, 2001, Movant was found guilty by a jury on

counts 1, 2, 3, 4, 5, 18, 19, 20, and 21 of the indictment, acquitted on counts 16 and 17 and sentenced to a total of 1,111 months. His appeal was timely filed and denied on April 8, 2002, Writ of Certiorari was timely filed and denied on October 6, 2003.

ISSUES PRESENTED

I. **Trial Counsel Ineffective for Failure to Interview and Investigate Alibi Witnesses and Failure to Allow Movant to Testify on his own Behalf;**

II. **Trial Counsel was Ineffective for Failing to Raise in the District Court and on Appeal that the Pretrial Identification Procedures were Impermissibly Suggestive, and Created a Substantial Likelihood of Misidentification such that the In-Court Identification was unduly Tainted.**

III. **Trial Counsel Ineffective for Failure to File a Severance Motion.**

IV. **Trial Counsel was Ineffective for not Requesting Cautionary Instructions of Accomplice Informants who may have had Good Reason to Lie.**

V. **Due Process Violated when Prosecutor Vouched for Credibility of Witnesses, and Trial Counsel Ineffective for Failure to Object to Violation of Movant's Due Process Rights when Prosecution Vouched for Credibility of Witnesses, and to Ask for Curative Instructions and/or Mistrial.**

VI. **Counsel Ineffective for Failing to Object to Trial Court's Constructively Amending the Indictment for Counts 16, 18, and 20 During the Jury Charge.**

VII. **Trial Counsel Ineffective for Failure to Object to "Serious Bodily Injury" and "Amount of Lost Money" in light of *Apprendi* and *Jones*.**

VIII. **Trial Counsel was Ineffective for Failing to Raise in the District Court and on Appeal that there was Insufficient Evidence to Support a Finding of Guilt on the Weapons Counts 3,5,21, 18 U.S.C. 924(c)(a)(A)(i) and § 2.**

IX. **Trial Counsel Ineffective for Failure to Raise on Direct Appeal that Evidence was insufficient to Convict Movant of 1951(a)(b) Count 18 and 924(c) Count 19.**

X. **Trial Counsel was Ineffective for Failing to Raise on Direct Appeal Fatal Variance that Violated the Movant's Fifth Amendment Right to only be Tried on the Indictment Returned by the Grand Jury for Count 18.**

XI. **The Evidence was Insufficient to Support, and Counsel was Ineffective for Failing to Object to and Reserve for Appeal a Sufficiency Claim Regarding, Jury Verdicts for Counts 1,2, 4, 18 and 20.**

XII. **Counsel Ineffective for Failing to Raise on Appeal that Government Failed to Prove Movant was a part of any Conspiracy.**

XIII. **The Evidence was Insufficient to Support a Conviction for Conspiracy to Rob First State Bank and Norwest Bank, and Counsel Inefficient for not Raising Issue on Appeal.**

XIV. **Trial Counsel Ineffective for Failing to Request Pretrial Motions for Discovery, Exculpatory *Jencks* Material under 18 U.S.C. § 3500 B, C, and D, Rule 16 and Impeachment Material, which would have Revealed Missing Documents, Letters, Police Reports, and 302's;**

XV. **Prosecutorial Misconduct for Failure to Turn Over Pretrial Motions for Discovery, Exculpatory *Jencks* Material under 18 U.S.C. § 3500 B, C, and D, Rule 16 and Impeachment Material, which would have Revealed Missing Documents, Letters, Police Reports, and 302's;**

XVI. **Trial Counsel Ineffective for Failing to Raise *Batson* Issue During Trial or on Appeal;**

XVII. **Trial Counsel Ineffective for Failure to Allow Andreco Lott To Testify on His Own Behalf After Several Requests By Movant.**

ARGUMENT

I. Trial Counsel Ineffective for Failure to Interview and Investigate Alibi Witnesses;

The Sixth Amendment guarantees a right to counsel in criminal proceedings. Johnson v. Zerbert, 304 U.S. 458, 463 (1938). "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy of our adversary process." Kimmelman v. Morrison, 477 U.S. 363 (1986). To ensure that defense counsel upholds the adversarial process established by the Sixth Amendment, the right to counsel is defined as the right to *effective* assistance of counsel. Strickland v. Washington, 446 U.S. 668, 686 (1986), citing McMann v. Richardson, 397 U.S. 759 (1970). When a criminal defendant does not receive the effective assistance of counsel during any critical stages of criminal proceedings, the adversarial process has been compromised, and a reviewing court should reverse the judgment.

Ineffective assistance has been rendered when 1) counsel's representation fell below an objective standard of reasonableness; and 2) there exists a reasonable probability that but for counsel's unprofessional errors, the outcome of the proceeding would have differed. *Strickland*, 466 U.S. at 694. *Kimmelman*, 477 U.S. at 375. Counsel's performance is deficient if it does not rise to the level of reasonably affective assistance. (*Id.* at 686). A court measures the reasonableness of counsel's performance against prevailing professional norms. U.S. v. Barbour, 813 F.2d 1232, 1234 (D.C. Cir. 1987). A satisfactory showing of prejudice need only rise to the level of a reasonable probability that the result of trial representation. *Strickland*, 466

U.S. at 694. On a scale of evidentiary burden, a reasonable probability is shown by less than preponderance of evidence. (*Id.* at 693-694).

Counsel must engage in reasonable amount of pretrial investigation and, minimum, interview potential witnesses and make independent investigation of relevant facts and circumstances. Failure to interview witnesses to the crime may strongly support a claim of ineffective assistance of counsel, and when alibi witnesses are involved, it is unreasonable for counsel to not even attempt to contact the witnesses and ascertain whether their testimony would aid defense. Bryant v. Scott, 28 F.3d 1411, 1415 (5th Cir. 1994), *citing* Gray v. Lucas, 677 F.2d 1086, 1093 (5th Cir. 1982) (noting that attorney's failure to investigate crucial witness may constitute inadequate performance).

Movant avers that counsel was ineffective for failing to investigate and interview Frankie Walton, Kevante Smith, Vernon Love, Delores Eggerson, Carla Smith, Ted Dunn, and David Johnson. Lee Eggerson, Brenda Mathis, Jacquline Greer Exhibits 1-9; 10

Movant contends that he told Counsel Ronald Couch to contact the witnesses to testify on his behalf, as well as investigate the government's witnesses Telesa and Adrium Clark, Jovon Holcomb, Brian Bishop, and Jerome Foster because each of them had denied knowledge of the crimes or exonerated Movant at some point.

Counsel abdicated his responsibility of investigating potential alibi witnesses and failed to "attempt to investigate and to argue on the record for the admission of the alibi witnesses testimony." Grooms v. Solem, 923 F.2d 88, 91 (8th Cir. 1991). Couch's failure to investigate potential alibi witnesses was not a "strategic choice" that precludes claims of ineffective counsel, in light of the fact that Movant was acquitted of the Home Depot robbery after alibi

witnesses testified that Movant could not have committed the crime. Nealy, 764 F.2d 1173, 1178 (5th Cir. 1985); Bryant v. Scott, 28 F.3d 1411, 1417 (5th Cir. 1995).

Movant avers that had counsel investigated and interviewed Vernon Love (the owner of V.T. and L. Real Estate Investment Trust Company), Love would have testified about Movant's excellent character. Love would have testified that Movant worked for V.T. and L. from mid February, 2000 until Movant's arrest. Love would have testified that it was part of Movant's job to go to banks, credit unions, mortgage companies and similar facilities to open accounts, and check for foreclosures on properties and to drop off and pick up deposits. This testimony would have established Movant's professional, non-criminal reason to have been present in any of the places alleged in the indictment. Love was present during trial and willing to testify but was never called. (See, Exhibit 11, 12 Notice of Alibi).

Ms. Kevante Smith is Movant's cousin who lived in Arlington, Texas. Ms. Smith would have testified that on January 19, 2000, she was with Movant at her home in Arlington alone with her husband (boyfriend at that time). From 10:00 am until at least 12:30 pm or later, Movant was at her home. (Exhibit 2, 9) Ms. Smith would have testified that she contacted Movant's mother (Delores Eggerson) after finding out Movant was in jail, and told Ms. Eggerson that she remembered Movant being in her house and very upset about a dent in his car from the night before, and that Movant stated his brother or his friend had wrecked the car. Ms. Smith would have also testified that she made this known a week or two before Movant's trial. In addition, Ms. Smith was present at trial to testify to such facts, but was not interviewed or called.

Even if counsel had first learned of the alibi witnesses on the first day of trial, he "nevertheless should have contacted the witnesses or subpoenaed them and made his record to

the trial court as to the significance of the alibi and the fact that it was newly discovered." Bryant v. Scott, 28 F.3d at 1417, citing Grooms, 923 F.2d at 91.

Frankie Walton was a customer of Movant's at the Sizzle-N-Styles Barber and Beauty Salon. Movant worked at Sizzle-N-Styles from January, 2000 until July 2000. Walton would have testified that on April 7, 2000, he was with Movant at the establishment from approximately 8:30 am until 12:30 or 12:45 PM, and that Movant never left the salon between those times. Walton would have testified that Movant cut his son's hair and attended to other customers. Walton was present at the trial and willing to testify but was not interviewed or called to testify. (See, Exhibit 1, 13, 14, 15).

Likewise, counsel's failure to interview the government's witnesses was deficient. Without investigating the witnesses, counsel was ill-equipped to assess their credibility or cross-examine them effectively, or obtain information relevant to Movant's defense through better pretrial investigation of the witnesses. Kemp v. Leggett, 635 F.2d 453, 454 (5th Cir. 1981); Gaines v. Hopper, 575 F.2d 1147, 1149 (5th Cir. 1978); Henderson v. Sargent, 926 F.2d 706, 711 (8th Cir. 1991) (counsel had duty to investigate all witnesses who possessed evidence of defendant's guilt or innocence).

Counsel failed to interview Delores Eggerson (Movant's mother) and Carla Smith (Movant's sister) to subpoena them as character witnesses. Ms. Eggerson would have testified that the accused crimes were not in Movant's nature. That Movant was an active minister in his community. That Movant worked in real estate and in the beauty salon, and worked extensively in youth groups, as well as modeling. Ms. Eggerson would have also testified that pertaining to the Greyhound robbery, her oldest son, Leon Dandredge, now deceased, made a request to come and testify on the day of the Greyhound robbery, Movant was over at Kevente Smith's house

trying to get a dent fixed in his car because Movant left from Dandredge's hotel room around 9:45 am in Arlington to get his car repaired. (See, Exhibit 4A-B and 15

Carla Smith would have testified that Movant was a good father to his children and loyal to people. That he always tried to help people and was not the type of person to commit these crimes. Ms. Smith would have testified that Movant was a gentleman at all times and that she knew Movant all his life, and this was not his character. (See, Exhibit 5).

Counsel did very little to prepare the defense. He visited Movant a total of 4 times between the arraignment and sentencing. He did not appear to use an investigator within a reasonable means as conscientious defense counsels routinely do to investigate alibis and witnesses. He did not subpoena witnesses nor interview government witnesses. Counsel claimed he lacked the funds for such investigation, but failed to submit any motions for financial Exhibit 4A-B & 7A, 10A-B, 39 and 40) assistance to the court. Failure to call or interview witnesses, and failure to subpoena witnesses at government expense for indigent client required an evidentiary hearing. Friedman v. U.S., 588 F.2d 1010 (5th Cir. 1979). Defense counsel is under an ethical obligation "to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and to a degree of guilt or penalty." U.S. v. Baynes, 622 F.2d 66 (C.A.Pa., 1980); U.S. v. Gray, 878 F.2d 702 (3rd Cir. 1989). Anderson v. Johnson, 338 F.3d 382 (5th Cir. 2003). Defendant was prejudiced by trial counsel's constitutionally deficient performance in failing to interview one of two eyewitnesses; in light of the relatively "weak" case, there was a reasonable probability that "but for" trial counsel's failure to interview and call eyewitness to testify, the result of the proceeding would have been different. Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir.1984) (finding ineffective assistance where counsel's "investigation of the case consisted of reviewing the investigative file of the prosecuting attorney" and holding that the

"investigation fell short of what a reasonably competent attorney would have done"). Failure to investigate a defense for interviewing witnesses and evidentiary inaccuracies is ineffective assistance. See, i.e, Kelley v. Secretary for Dept. of Corrections, 2004 WL 1637062 (11th Cir. 2004). ("[C]ounsel had the tools with which they could have shown the jury the inaccuracy. Without a reason, they simply failed to investigate and thus failed to develop or use the tools that they had [for example] Counsel failed to investigate and utilize the inconsistencies in the time periods on the evening of the murder...." At 25); See also, by analogy, Davis v. Del Papa, 84 Fed.Appx. 988 (9th Cir. 2004)."Remarkably, it appears as though defense counsel undertook *no investigation at all* into Davis' background, the victim's background, or the credibility of witnesses who could paint Davis in a sympathetic light. Had defense counsel undertaken an adequate investigation (or any investigation at all) into Davis's age, background, and other mitigating factors, it seems inconceivable that defense counsel would have advised Davis to accept a sentence of life without the possibility of parole." At 991). Moore v. United States, 432 F.2d 730, 735, 739 (3rd Cir. 1970) ("Adequate preparation for trial often may be a more important element in the effective assistance of counsel to which a defendant is entitled than the forensic skill exhibited in the courtroom. The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of which even the defendant is unaware and may suggest issues and tactics at trial which would otherwise not emerge. * * * The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance.") Wolfs v. Britton, 509 F.2d 304, 309 (8th Cir.1975) ("effective assistance refers not only to forensic skills but to painstaking investigation in preparation for trial"); Eldridge v. Atkins, 665 F.2d 228 (C.A.Mo. 1981). (Counsel has the duty to use

witnesses named by a defendant who may assist in the defense and to fulfill that duty counsel must make a reasonable attempt to investigate a material witness' knowledge; Movant was denied effective representation where counsel did not interview any prosecution witnesses and did not interview potential defense witnesses and, had a proper investigation been made, many inconsistencies in identification would have surfaced and proper investigation would have demonstrated strong evidence of mistaken identification and counsel did not investigate apparently because he had conclusorily decided that defendant was guilty; under circumstances, trial counsel owed a duty to investigate and interview all eyewitnesses to the robbery and to pursue substantial defense of mistaken identification and failure to do so was prejudicial.).

But for counsel's unprofessional errors, there exists a reasonable probability that the result of the proceedings would have differed in Movant's favor, sufficient to undermine confidence in the verdict. See, *Strickland*, supra.

II. Trial Counsel was Ineffective for Failing to Raise in the District Court and on Appeal that the Pretrial Identification Procedures were Impermissibly Suggestive, and Created a Substantial Likelihood of Misidentification such that the In-Court Identification was unduly Tainted.

The Due Process clauses of the 5th and 14th Amendment protects accused individuals from the use against them of evidence from unreliable identifications that result from impermissible suggestive procedures. Manson v. Brathwaite, 432 U.S. 98 (1977); U.S. v. Sanchez, 988 F.2d 1384, 1389 (5th Cir. 1993).

Admissibility of identification evidence is governed by a two-step analysis: 1) initially determination must be made as to whether identification from procedures was impermissibly suggestive; 2) the court must then determine whether, under the totality of the circumstances, suggestiveness leads to substantial likelihood of irreparable misidentification. Herrera v. Collins, 904 F.2d 944 (5th Cir.1990); Simmons v. U.S. 390 U.S. 377 (1968).

In Movant's case, Diana Ayala, Cornelius Lark, and J.W. Grandstaff all testified pertaining to the Greyhound Bus station Robbery. Angela Faires testified pertaining to the Norwest Bank (now Wells Fargo Bank). Ms. Ayala's identification (pretrial) was impermissible, in that the government showed the same photo to more than one of its witnesses (Ayala, T.T. pp. 447-48). Likewise, Movant was on trial for the Greyhound robbery, but Ms. Ayala identified Cedric Diggs, who was no on trial for the Greyhound robbery. Mr. Grandstaff's identification was impermissible because he testified he couldn't get a good look at the man who he saw running to a 'car' which he could not identify (Grandstaff, T.T. pp. 40-41). Mr. Grandstaff thought he got the license number of the car, but could not remember it. No evidence, such as a police report or notes, was presented to the jury. (Grandstaff, T.T. pp. 439-40). Mr. Grandstaff identified a man who was over six feet tall and over 200 pounds. Mr. Grandstaff testified that his initials were on the photo picture, but he didn't initial or sign that picture. Thus, the government withdrew his exhibit. (Grandstaff, T.T. pp. 441-42).

Mr. Lark made no pretrial identification, as his in-court identification consisted of two different clothing descriptions of the perpetrator, and two different descriptions of the perpetrator's skin complexion. (Lark, T.T. pp. 431-37). Also, Mr. Lark testified that he had only a glimpse of the perpetrator because he had been maced. (Lark, T.T. p. 432). More importantly, Ms. Romer told the trial court out of the jury's presence that Mr. Lark could not identify the robber because he was maced immediately. (T.T. pp. 509-410). Ms. Faires testified that she never completed a photo line-up because of the mace in her eyes, but later she was able to identify Cedrick Diggs. Ms. Faires also identified Mr. Diggs in court. (Faires, T.T. pp. 398-402).

In *Manson*, the Supreme Court indicated that "reliability is the linchpin" when examining the totality of the circumstances to determine the admissibility of identification testimony. Even an impermissibly suggestive identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability. The Supreme Court has set forth several factors to be considered when reviewing the reliability of a pretrial identification. These factors included: 1) the opportunity of the witness to view the criminal; 2) the witness's degree of attention; 3) the accuracy of the witness' prior description, 4) the witness' level of certainty; 5) the elapsed time between the crime and the identification. These factors are to be weighed against the corrupting effect of the suggestive identification. Neil v. Biggers, 490 U.S. 188 (1972); U.S. v. Atkins, 698 F.2d 711,713 (5th Cir. 1983); U.S. v. Rogers, 126 F.3d 655 (5th Cir. 1999). Ms. Ayala testified that she just saw the perpetrator mace the other guy, so she really couldn't see the alleged perpetrator. Also, she identified *Diggs* as the perpetrator. Mr. Lark made no pretrial identification and testified that he only glimpsed the perpetrator for 3 to 5 seconds because he couldn't see clearly after being maced. Also, Lark testified that the perpetrator was wearing black medium sized sunglasses and a baseball cap. Concepcion, 983 F.2d 369, 379 (2d Cir. 1992). In court identification is not admissible when witness had only a "quick look at defendant", defendant's face partially covered by a baseball cap, and the photo ID was six months after the crime.

Ms. Faires testified that she was on the phone, and as soon as she stood up to see what was going on she was maced. She also testified the robbers had on masks, hats and sunglasses, and the robbery only lasted a few minutes. (Ayala, T.T. pp. 446-47)(Lark, T.T. pp. 431-36) (Granstaff, T.T. pp. 441-42)(Faires, T.T. pp. 396-402).

Ms. Ayala testified that that robber came from behind Mr. Lark and maced him so she couldn't see him clearly. (Ayala, T.T. pp. 445-46). Mr. Lark testified that after being maced twice he couldn't see the perpetrator clearly; note the perpetrator came from behind Mr. Lark (Lark, T.T. p. 432, Ayala, T.T. p. 445). Ms. Faires testified that she was talking on the phone to a customer and working on the computer at the time the robbers came into her office. In addition, the robbers wore ski masks or hats and sunglasses. (Faires, T.T. pp. 397-98). Ms. Ayala's pretrial identification is unreliable because it came twenty months after the crime, and in the form of a photo that Ms. Ayala did not sign. The photo was signed and marked by the government and other witnesses. (Ayala, T.T. pp. 447-48). Mr. Lark made no pretrial identification, but gave two different clothing descriptions and two different skin descriptions to the grand jury. (Lark, T.T. 431-434). More importantly, Ms. Romero told the court that Mr. Lark could not identify the robber because he was maced immediately. (T.T. pp. 409-410). Mr. Grandstaff made no pretrial identification or in court identification, and someone signed his name on a photo without his approval. (Grandstaff, T.T. pp. 441-442). Ms. Faires made no pretrial identification which was different from her trial description. (See, Exhibit 17 Faires affidavit). Mr. Lark made an in court identification of Movant but only after he was questioned by the government attorney. U.S. v. Archibald, 734 F.2d 939, 941-43 (2d Cir. 1984); U.S. v. Rogers, 126 F.3d 655, 658 (5th Cir. 1997). Ms. Ayala identified Cedric Diggs as the perpetrator who robbed the armored car driver. (Ayala, T.T. p. 447); Ms. Faires identified Diggs as the man who maced her. (Faires, T.T. p. 399).

Ms. Faires alleged photo identification came some 12 months after the robber, although she testified it was 6 to 9 months later. (Faires, T.T. p. 402). This could not be true because Movant did not become a suspect until at least March of 2001 (See, Exhibit 16 criminal

complaint). Ms. Ayala's was almost 2 years and Mr. Lark's identification in court was 23 months after the robbery, a length which does not preclude identification bur raises concerns over the accuracy of the memory. *Roger*, 126 F.3d at 659; Mansden v. Moore, 849 F.2d 1536, 1546 (11th Cir. 1988) ("identification more than two years after crime weakened by delay"). The first photo line up was shown to Ms. Faires at least ten months after the alleged robbery because Movant did not become a suspect until March 2001. Trial counsel was ineffective for not objecting to or suppressing the pretrial identification as impermissibly suggestive, and the in-court identification as unreliable.

The Supreme Court in Brecht v. Abrahamson, 507 U.S. 619, 639 stated the Court must also assess whether the wrongly admitted evidence was emphasized in arguments to the jury. See, e.g., *Brecht* at 639; Chapman v. California, 386 U.S. 18, 25-26 (1967); Hynes v. Coughlin, supra, 79 F.3d at 291; U.S. v. Peterson, 808 F.2d 969, 976 (2d Cir. 1987). The more tangential the issue to which the wrongly admitted evidence pertains, the less likely it is that the evidence was a substantial factor in determining the jury's verdict. Similarly, where the wrongly admitted evidence was cumulative of other properly admitted evidence, it is less likely to have injuriously influenced the jury's verdict. The Court analyzes all of these issues in light of the record as a whole. See, *Brecht* supra; Kotteakos v. U.S., 328 U.S. 750, 764 -65 (1946); Dunnigan v. Keane, 137 F.3d 117, 130 (2d Cir. 1998). The Second Circuit reversed the district court's denial of habeas petition. The Court there found that the post-robbery show-up identification was unduly suggestive and its admission was not harmless, per the test of *Brecht*. The balance of the evidence implicating Petitioner was contradictory and suspect, and there was a lack of physical evidence to connect Petitioner to the crime. Wray v. Johnson, 202 F.3d 515 (2d Cir. 2000).

Due to counsel's failure to object and request an in-camera hearing to discuss the admissibility of the in-court identifications, this honorable Court was not called upon to rule on the identification. U.S. v Sutherland, 428 F.2d 1152 (5th Cir. 1970). The showing of a single photo is undisputedly impermissibly suggestive. Herrera v. Collins, 904 F.2d 944 (5th Cir. 1990); U.S. v. Shaw, 894 F.2d 689, 692 (5th Cir. 1990); *Rogers*, supra. Counsel should have objected and requested the trial judge to determine if the picture spread was impermissibly suggestive either in the photos used or the manner and number of times the photos were displayed. If the judge makes the determination, he should determine if the impermissibly suggestive picture spread gives rise to a "likelihood of irreparable misidentification." If both elements are found, *Simmons* prohibits the use of in-court identification.

Due to counsel's ineffectiveness, Movant was denied his due process rights to an in-cameral hearing, and his Sixth Amendment right to an impartial jury, and confrontation of his accusers with the unreliability of their prior identifications. The foregoing procedure will not only have the salutary effect of avoiding situations in which the trial court must solemnly instruct the jury to disregard vital unforgettable evidence, but will also save the defendant the *Hobson's* choice whether to attack the in-court identification by attacking a prior photographic identification that might wind up being upheld, thereby reinforcing the identification of the defendant. *Sutherland* at 1155 (citing Bruton v. U.S., 391 U.S. 123 (1968)). Further, counsel should have requested an identification instruction. Barber v. U.S., 412 F.2d 775 (5th Cir. 1969); (Pattern Jury Instructions, 2001 1.29).

But for counsel's unprofessional errors, there exists a reasonable probability the outcome of the proceeding would have differed in Movant's favor. See *Strickland*, supra.

III. Trial Counsel Ineffective for Failure to File a Severance Motion.

To prevail on this argument, "the defendant must show that: (1) the joint trial prejudiced

lead the jury to conclude that Movant was guilty. (4) Movant was prejudiced by the spillover of the evidence in the counts of Diggs, as well as, as all the counts being tried together; this was shown when the jury sent a note to trial count asking what evidence went to what count. (T.T. Vol. III. Pp. 652-54). See, U.S. v. Peterson, 867 F.2d 1110 (8th Cir. 1989), citing U.S. v. Merida, 765 F.2d 1205, 1219 (5th Cir. 1985) ("Severance is not required if the jury "could sort out the evidence reasonably and view each defendant and the evidence relating to that defendant separately.""). (5) In Movant's case, he was prejudiced even at the appeals level, when making its ruling that the appellate court was also confused, and put Movant in the count charging the Top Cats robbery, of which Movant was not alleged to be a part. (See, Exhibit 2 , Appeal from the U.S. District Court, Northern District of Texas, p. 4). Most importantly, Movant and Diggs are not named in any indictment or count together that went to the jury. (See, indictment). (See, T.T. Vol. III. pp. 643-44). The trial court made this fact clear when giving the jury charge.

Second, a severance should have been requested because the indictment charged separate crimes against separate defendants, improper under Rule 8, F.R.Crim.Pro.; U.S. v. Marianneaux, 514 F.2d 1244, 1248 (5th Cir. 1975). Whether joinder is proper is normally determined from the allegations in the indictment. U.S. v. Faulkner, 17 F.3d 745, 758 (5th Cir. 1994). The proprietary of Rule 8 joinder is determined by the initial allegations of the indictment which, barring arguments of prosecutorial misconduct are accepted as true. U.S. v. Kaufman, 858 F.2d 994, 1003 (5th Cir. 1988); U.S. v. Harrelson, 754 F.2d 1153, 1176 (5th Cir. 1985); U.S. v. Morris, 176 F.Supp.2d 668, 670-71 (NDTX 2001).

Movant contends that Foster and T. Clark were the only two common defendants to Movant and Diggs. Neither Foster or T. Clark testified that Movant and Diggs participated in any count of the indictment that went to the jury together with or without Foster and T. Clark

joined as co-defendants, the overlapping evidence of each separate counts would prejudicially influence the jury and subject Movant to the risk of conviction upon evidence wholly unrelated to the accusations against him. *Marioneaux*, supra.

To be joined as defendants in the same indictment under Rule 8(b), Movant and Diggs must be alleged to have participated (1) in the same act or transaction or (2) in the same series of acts or transactions constituting an offense or offenses.

Counts 1,2,3,4,5,16,17,18,19,20 and 21 charge Lott with criminal acts that do not include Diggs. Counts 10, 11,14,15,26 and 27 charge Diggs with criminal acts that do not include Movant. The indictment therefore does not allege that defendant participated in the "same act or transactions." See, Tifford v. Wainwright, 588 F.2d 954, 957 N.1 (5th Cir. 1979) ("The district court found that the joint trial was impermissible because the crimes with which Tifford was charged were substantially different from those that Bronstein faced.") citing *Marionneaux*, supra.

Finally, Movant contends that counsel was ineffective for not requesting counts 2, 4, 18, and 20 to be severed because of the difference in "Modus operandi". U.S. v. Chagrai, 754 1186, 1188 (5th Cir.) cert. denied, 474 U.S. 922 (1985); U.S. v Tubol, 191 F.3d 88, (2d Cir. 1999). Fed. Rules Crim. Proc. Rule 8(a) provides: "Two or more offenses may be charged in the same indictment or information...If the offenses charged...are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together constituting part of a common scheme or plan."

The court may also order that two or more indictments be tried together if the counts they contain could have been joined in a single indictment. Fed.R.Crim. Pro. 13. Even where the government properly joins offenses, the court may order severance "If it appears that a

defendant or the government is prejudiced." Fed. R. Crim. Pro. P.14. Movant offers *five* reasons for severance: (1) The robberies all occurred in different cities (Dallas, Arlington, Grand Prairie, and Fort Worth); (2) There were all different types of victims (banks, armored cars, and grocery stores); (3) The robberies were committed at different times (early morning, midday, and late evening); (4) The robberies were done with differing methods (cell phones/no cell phones, sunglasses and caps or none, mace or no mace, different number of persons, different actions); (5) The offenses did not qualify for joinder under Fed. R. Crim. Proc. Rule 8. *Tubal* at 95.

Thus, Movant contends that had his counts been severed, he would have been able to question T. Clark and J. Foster about their motives and bias for testifying against him, which he was prevented from doing in a joinder. (TT. Vol. II. p. 145)(Clark, T.T. Vol. II pp. 516-519) (Foster, T.T. Vol. II p.305). Evidence that Diggs robbed the Sack-N-Save, and threatened to kill witnesses in the Top Cats robbery, would have been inadmissible against Movant. Movant would also have been able to testify as to his whereabouts during the date and times of the Home Depot, Greyhound, and Norwest Bank Robberies.

Movant told counsel that he (Movant) wanted to testify about the Home Depot, etc., robberies, because each one of those robberies took place on dates and times when the Movant was elsewhere, i.e. moving, getting his car fixed, attending a funeral, working. Movant did not want to testify to the other robberies because the day and times of those robberies did not remind him of his whereabouts. He could only state he knew nothing of the robbers.

But for counsel's unprofessional errors in not requesting a severance pursuant to Fed. R.Crim.Pro. Rule 8(a)(b) and Rule 14, there exists a reasonable probability the results of the proceeding would have differed in Movant's favor, enough of a probability to undermine confidence in the verdict. See, *Strickland*, supra.

IV. Trial Counsel was Ineffective for not Requesting Cautionary Instructions of Accomplice Informants who may have had Good Reason to Lie.

Counsel failed to requested that Brian Bishop, Telasa Clark, Jerome Foster, and Jovan Holcomb's testimony must be consider with more caution than the testimony of other witnesses (See, Jury Instructions); U.S. v. Garcia, 528 F.2d 580 (5th Cir.) cert. denied, 429 U.S. 898 (1976); U.S. v. Bernal-Obeso, 989 F.2d 331 (9th Cur. 1993). U.S. v. Williams, 59 F.3d 1180 (11th Cir. 1995)(defendant is entitled to special jury instruction on the credibility of a government informer witness if the defendant requests it and the testimony implicating the accused is elicited solely from the informer; purpose behind such a policy is to ensure that no verdict based solely on the uncorroborated testimony of a witness who may have good reason to lie is too lightly reached; instruction must sufficiently focused to remind the jury of special credibility issue posed relate the instruction to the particular witness. See, U.S. v. Bernal, 814 F.2d 175 (5th Cir. 1987). See also, U.S. v. Partin, 493 F.2d 750 (5th Cir. 1974).

Counsel should have requested an accomplice-co-defendant plea agreement instruction at the time of each of the testifying alleged accomplice/informants' testimony. U.S. v. Pierce, 959 F.2d 1297 (5th Cir. 1992), cert. denied, 506 U.S. 1007 (1992), and, U.S. v. Abravaya, 616 F.2d 250 (5th Cir. 1980).

The jury did not benefit from customary, truth-promoting precautions that generally accompany the testimony of accomplice/informants. The Supreme Court has long recognized the "serious questions of credibility" informers pose. Lee v. U.S., 343 U.S. 747, 757 (1952). See also, Trott, Words of Warning for Prosecutors using Criminals as Witnesses, 47 Hasting L.J. 1381, 1385 (1996). Jurors suspect informant's motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable. We have therefore allowed defendant's "broad latitude to probe informer's

credibility by cross-examination "and have counseled submission of the credibility issue to the jury" with careful instructions" Lee, 343 U.S. 747, 757 (1952); accord Hoffa v. U.S., 385 U.S. 293, 311-312 (1996). See also, O'Malley, Grenig and Lee, Federal Jury Practice and Instructions. From the First, Fifth, Sixth, Seventh, Eighth, and Ninth, and Eleventh Circuits on special cautionary instructions appropriate in assessing informant testimony.

In Voyles v. Watkins, 489 F.Supp. 901, 911 (5th Cir. 1980), the court stated, "We find inexcusable the failure of counsel, who knew the critical importance of Mayo to the prosecution's case, to request an instruction that his testimony as an alleged accomplice should always be scrutinized carefully by the jury because of it inherent untrustworthiness." Jovan Holcomb, Jerome Foster, Brian Bishop and Telasa Clark were all alleged accomplices/informants in Movant's case. Accomplice/informant testimony should be particularly examined when the witness has manifested unreliability by making previous conflicting statements about the crime. Tillery v. U.S., 411 F.2d 644, 646-47 (5th Cir. 1969). (See, for example, Holcomb, T.T. pp. 366-68; Clark, T.T. pp. 516-518; Brian Bishop's upward departure hearing on 3/12/02, in which it was shown that Foster and Clark were not credible witnesses or informants; Bishop hearing, p. 57-58). Exhibit 21)

Importantly, the trial court while holding a hearing found that the 302's, statements and criminal complaint was full of false information of all kinds, also that the government knew of these facts both before Movant's trial and after. U.S. v. Bradfield, 103 F.3d 1207, 1218 (5th Cir. 1997) Note 16, 19. If, as here, the *court fails* to do so on its own and the defendant fails to request such an instruction, the government *must* request this instruction. As an officer of the court, the prosecutor should have fulfilled the government's obligation by inviting the district court to give the specific instruction on evaluation the credibility of the accomplice/informant

witnesses when the prosecution's hopes for a conviction hinges solely on the persuasiveness of the accomplice's testimony. McDonald v. Sheriff of Palm Beach County, 422 F.2d 839, 840 (5th Cir. 1970). In Movant's case, the alleged accomplice/informants' testimony was uncorroborated and contradicted by Ms. Ayala, Ms. Faires, Mr. Birdlong and Mr. Maddox. There was no evidence outside of the alleged accomplice informant's testimony to link Movant to any crimes. See, Williamson v. U.S., 332 F.2d 123, 127 (5th Cir. 1964).

Had counsel requested cautionary instructions regarding paid accomplice/informants who have good reason to lie, the jury would have likely discredited Bishop, Holcomb Foster, and Clark's testimony, and insofar as the testimony was uncorroborated, disregarded the testimony as evidence. See, Banks v. Dretke, 540 U.S. ___ (2004). U.S. v. Griffen, 382 F.2d 823, 827 (6th Cir. 1967). Counsel should have requested instruction at the time the accomplices gave their testimony, and again at the close of the trial in the jury's instruction. But for counsel's unprofessional errors, there exists a reasonable probability that the outcome of the proceeding would have differed in Movant's favor. See, *Strickland*, supra.

V. Due Process Violated when Prosecutor Vouched for Credibility of Witnesses, and Trial Counsel Ineffective for Failure to Object to Violation of Movant's Due Process Rights when Prosecution Vouched for Credibility of Witnesses, and to Ask for Curative Instructions and/or Mistrial.

As a general rule, the prosecutor may not bolster the credibility of its witnesses by personally attesting to their truthfulness, as "doing so may imply that the prosecutor has additional personal knowledge about the witness and facts that confirm such witness' testimony, or may add credence to such witness' testimony." U.S. v. Taylor, 210 F.3d 311, 318-19 (5th Cir. 2000).

During his opening statement, the prosecutor stated:

> The evidence—on the defendants that are sitting before you today, defendant Diggs and Movant, were part of this group of robbers; and the evidence that you're going to hear throughout this trial is this: on November 5th, 1999, defendant Diggs, Telasa Clark, and Jerome Foster robbed the Swinford's Bar-B-Que in North Fort Worth. You're going to know this because Telasa Clark and Jerome Foster have pled guilty to various robberies, have entered into a plea agreement with the government, and agreed to come and tell you exactly what happened there. (T.T. Vol. III p. 138).

This type of statement is reversible error. See, U.S. v. Austin, 786 F.2d 996, 991-92 (10th Cir. 1986) ("permitting Government in its opening statement and through the testimony of its chief witnesses and others, to inform jury that ten co-conspirators had been previously tried and convicted for their parts in the conspiracy with which defendants were charged, was reversible error.") See also, U.S. v Prawl, 168 F.3d 622 (1999) ("A co-defendant's guilty plea may not be used as substantive evidence of a defendant's guilt"); U.S. v. Baez, 703 F.2d 453, 455 (10th Cir. 1983) ("Due to the extreme and unfair prejudice suffered by defendants in similar situations, courts and prosecutions generally are forbidden from mentioning that a co-defendant has either pled guilty or been convicted."); U.S. v. Griffin, 778 F.2d 707, 710 (11th Cir. 1985).

During the prosecutor's direct examinations of Telasa Clark, Jerome Foster, Brian Bishop, and Jovon Holcomb, the prosecutor elicited testimony regarding their guilty pleas and plea agreements, without cautionary instructions. (Clark, T.T. pp. 500-02), (Foster, T.T. pp. 264-266); (Bishop, T.T. pp. 453-56, 461), (Holcomb, T.T. pp. 332-365). U.S. v. Austin, 786 F.2d 986, 992 (10th Cir. 1986); U.S. v. Hanson, 544 F.2d 778 (5th Cir. 1977); U.S. v. Francis, 170 F.3d 546, 550 (6th Cir. 1999).

During the prosecution's closing argument, he stated that, "The three or four other individuals that were involved in those robberies with the defendants, told you exactly what happened, *and they're telling the truth.*" (T.T. Vol. III p. 595-96). "Ladies and gentlemen, Jerome Foster is telling you the truth." (T.T. Vol. III. p. 597). "Foster and Telasa Clark also told

you about it. Those men are telling you the truth. (T.T. Vol. III. P. 598). See, U.S. v Garza, 608 F.2d 659, 663-64 (5th Cir. 1979); U.S. v. Krebs, 788 F.2d 1166, 1176-77 (6th Cir. 1986), cert. denied, 474 U.S. 930 (1986) ("In *Krebs*, the Sixth held these sort of statements to be inexcusable."); U.S. v. Carroll, 26 F.3d 1380, 1387 (6th Cir. 1994); U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992) (stating that improper vouching occurred when prosecutor asserted own belief in witnesses' credibility through comments including, "I think he [the witness] was candid. I think he is honest.").

Finally, during rebuttal, the prosecutor stated that, "These are their friends. They came up here and testified. Their testimony is uncontroverted. They did not lie to you. They told you the truth because they told you exactly the details of these robberies. *Garza*, supra. *Carroll*, supra; *Kerr*, supra; *Krebs*, supra; and U.S. v. Rudberg, 122 F.3d 1199, 1204 (9th Cir. 1997). In addition, while improper closing argument is made by prosecutor, trial judge has an obligation to intervene to assure protection of defendants rights to a fair trial. *Garza*, supra; Uiereck v. U.S., 318 U.S. 236 (1943). The trial Judge's comments during Brian Bishop's evidentiary hearing based on an upward departure confirms Movant's argument that the prosecutor vouched for witnesses credibility during trial. (See, Brian Bishop's Evidentiary Hearing, p. 8). Exhibit 21)

The testimony of the four "vouched witnesses credibility" was crucial to the government's case, opening and closing arguments. There was no indirect or direct evidence that linked Movant to the instant case, outside of the vouched witnesses' credibility.

Count 2: First State Bank; the only witness, Charlene Dunham, testified that person that was in the photo was Movant, and she made an in-court identification of Movant. But her testimony only shows that Movant was in the bank to open a checking account. Although she

testified Movant made a phone call, there's no testimony of who Movant called and what was said. (Charlene Dunham testimony, T.T. pp. 379-390).

Count 4: Norwest Bank; there were two witnesses to testify and both affirm Movant's argument that, "Movant was not involved in this crime." Angela Faires testified that she tried to complete a photo array some twelve (12) months or longer and was unable to complete it. (Faires, T.T. pp. 399-400) Even after Ms. Faires testified she picked Movant out of photo, she positively identified co-defendant "Cedric Diggs". (T.T. pp. 399,404) Isiaac Birdlong testified that "this person is the bank tape was not Long." (Birdlong, T.T. p. 588).

Count 18:Greyhound Bus Station; There were three witnesses to the crime. J.W. Grandstaff made no identification. (Grandstaff, T.T. pp. 441-442) Diana Ayala identified Cedrick Diggs as the perpetrator. (Ayala, T.T. p. 446-447, 449) As stated earlier Ms. Ayala's photo identification should been disregarded for the same reasons Mr. Grandstaff's identification was withdrawn. The prosecution forged her initials on the photo, and most important the photo shown to Ms. Ayala was marked by other witnesses. (T.T. pp. 442, 448) Cornelius Lark's in-court identification was perjured and impermissibly suggestive. Likewise, the prosecutor stated that, " Mr. Lark couldn't identify anyone because he was maced and couldn't see clearly.

Count 20: Winn-Dixie; Three (3) witnesses testified about this robbery. Bobbie Shroud, David Hamilton, and Mark Whenker. (T.T. Vol. II pp. 314-331) None of these witnesses testified that Movant was involved or present.

The government's entire case depended the vouched witnesses' credibility who

all received or hoped to receive sentence reductions in exchange for their testimony. Thus, the evidence was not overwhelming, and had a substantial and injurious effect on the jury's verdict. *Kerr*, Brecht, *Garza*, supra.

For the same reasons mentioned above, trial counsel's failure to object to prosecutorial misconduct during opening statement, direct examination and closing argument constitutes deficient performance. *Strickland*, supra.

Given the lack of a sufficient objection, the trial court issued no curative instruction leaving the jury free to consider this highly improper in determining guilt. Had counsel objected and prompted in curative instruction, the court may have given an appropriate cautionary instruction or granted a mistral. Washington v. Hofbauer, 228 F.3d 689, 708 (6th Cir. 2000); Burns v. Gammon, 260 F.3d 892, 896 (8th Cir. 2001).

The prosecution's arguments were constitutionally defective such that any reasonable counsel would have objected under the circumstances. One of defense counsel's most important role to ensure that the prosecutor does not transgress bounds of proper conduct. *Washington*, supra. *Strickland*, supra. But for counsel's unprofessional errors, there's a reasonable probability the outcome would have differed in favor of Movant. A reasonable probability is a probability to undermine confidence in the verdict. *Strickland*, supra.

VI. Counsel Ineffective for Failing to Object to Trial Court's Constructively Amending the Indictment for Counts 16, 18, and 20 During the Jury Charge.

The Court wrongly instructed the jury with regard to the charges regarding Home Depot, Greyhound, and Winn-Dixie by removing the elements of knowingly and willfully. Movant was acquitted of count 16, but contends that counsel should have objected to the trial court's constructive amendment as to counts 18 and 20. U.S. v. Zingaro, 858 F.2d 94 (2d Cir. 1988).

Movant was charged with "knowingly and willfully obstruct, delay and affect interstate commerce and did attempt...by robbery, to wit: the defendant did take and obtain property belonging to (count 18 Greyhound) (count 20 Winn-Dixie)" (See, Exhibit 1 Indictment).

Movant avers that the court constructively amended the indictment when it instructed the jury that "the government is not required to prove" that the defendants knew their conduct would interfere or affect interstate commerce (See, T.T. Vol. III p. 636), thereby removing the element of knowingly from the indictment and the jury's determination.

Next, the court instructed the jury that "It is not necessary for the government to show that the defendants actually intended or anticipated an effect on interstate commerce by their actions or that commerce was actually affected." (T.T. Vol. III p. 636), thereby removing the element of willfully or intent from the indictment and the jury's determination.

Movant contends that the Court committed reversible error during the jury charge, when the indictment was constructively amended by removing "knowingly and willfully" in the Court's instructions for counts 18 and 20.

The trial Court instructed the jury of three elements, but failed to charge knowledge and intent of Movant. "First: that the defendant under consideration, Movant, obtained or attempted to obtain money from another without that person's consent, that is, that other person's consent; Second: that the defendant...Movant did so by wrongful use of actual or threatened force, violence or fear; and Third: that such conduct of the defendant Movant interfered with or affected interstate commerce." (See, Jury Instructions).

Although not stated in the Hobbs Act itself, criminal intent of acting "knowingly or willfully" is an implied and necessary element that the government "must prove" for a Hobbs Act conviction. U.S. v. Soriano, 880 F.2d 192, 198 (9th Cir. 1989).

The Court explained away the government's burden of proof in its instruction to the jury. (T.T. Vol. III p. 636). The general rule of indictments is that indictments cannot be

amended in substance. "An amendment to an indictment occurs when the charging terms of an indictment are altered." U.S. v. Cancelliere, 69 F.3d 1116, 1121 (11th Cir. 1995). If the indictment could be changed by the court or by the prosecutor, then it would no longer be the indictment returned by the grand jury. In Russell v. U.S., 369 U.S. 749, 769 (1962), the Court pointed out that a consequence of amending the indictment is that the defendant "could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." "Thus, the Fifth Amendment forbids amendment of an indictment by the Court, whether actual or constructive." U.S. v. Wacker, 72 F.3d 1453, 1474 (10th Cir. 1995), *petition for cert. filed*, (Jun. 10, 1996)(No. 95-9284).

During the jury charge, the Court stated, "government is not required to prove that the defendants knew their conduct would interfere with or affect interstate commerce. It is not necessary for the government to show that the defendants actually intended or anticipated an effect on interstate commerce by their actions..." (T.T. Vol. III p. 636). This instruction allowed the jury to convict Movant without determining that he "knowingly and willfully" obstructed, delayed and affected interstate commerce, while the indictment charges that Movant knowingly and willfully did so.

The Court's failure to instruct the jury on the elements of intent impermissibly removed the government burden of proof of the elements beyond a reasonable doubt. This constitutes an amendment to the indictment, which was prejudicial to Movant, in violation of the Fifth Amendment to the Constitution. Thus, the indictment was no longer the indictment of the Grand Jury. See, Russell v. U.S., 369 U.S. 749 (1962) and Ex Parte Bain, 121 U.S. 1 (1887). The Court's amendment of the indictment is reversible error per se.

The Court's removing the "knowingly and willfully" elements of the charge violated Movant's constitutional right to be tried only on the elements of the indictment, which was given by the Grand Jury. Although "knowingly and willfully" are not a part of the statutory

language when the Grand Jury put "knowingly and willfully" in the indictment, the language of intent became elements that the government carried the burden to prove.

New [basis for conviction] may not be added without resubmitting the indictment to the Grand Jury. Nor can an indictment be changed or altered without resubmitting it to the Grand Jury, whether they are added literally, by a formal amendment to the indictment...or by instructions to the trial jury, which allows a conviction without the intent elements.

Pursuant to the opinions and rules of *Stirone* and *Bain* requires Movant's convictions under counts 18 and 20 to be reversed and remanded for a new trial. A jury instruction that constructively amends a Grand Jury indictment, constitutes per se reversible error, becomes such an instruction violates a defendant's constitutional right to be tried on only those charges presented in a Grand Jury indictment and thus creates the possibility that Movant may have been convicted on grounds not alleged in the indictment. U.S. v. Concelliere, 69 F.3d 1116 (11th Cir. 1995).

Thus, trial and appellate counsel was ineffective for failure to object during trial that the indictment had been constructively amended, and to request a new trial. In addition, counsel was ineffective for failure to raise on direct appeal that the indictment had been constructively amended.

But for counsel's unprofessional errors, as mentioned supra, there exists a reasonable probability that the outcome of the proceedings would have differed in favor of Movant. *Strickland*, supra.

VII. Trial Counsel Ineffective for Failure to Object to "Serious Bodily Injury" and "Amount of Lost Money" in light of *Apprendi* and *Jones*.

Movant was indicted for the Norwest Bank and Greyhound Bus Station Robberies without any reference made in the indictment as to any "Serious Bodily Injury" or "Bodily Injury" that enhanced his base offense by three and two points for each robbery. In addition, Movant was

indicted for a Home Depot, First State Bank and Winn-Dixie robbery without any reference to how much money was lost in any of these crimes.

The determination that Cornelius Lark, an armored car driver, was seriously injured, was clearly erroneous. The 1999 Supreme Court decision in Jones v. U.S., 526 U.S. 227 (1999), dictates that the factual determination as to whether "Serious Bodily Injury" resulted should have been determined beyond a reasonable doubt rather than by a preponderance of the evidence.

The two Supreme Court decisions of Castillo v. U.S., 530 U.S. 2090 (2000), and Apprendi v. New Jersey, 530 U.S. 466 (2000), both support Movant's contention. In *Jones*, the Court held that a factual determination such as whether a crime or some other factor caused "Serious Bodily Injury", which could increase the penalty for the crime, seriously implicated the Due Process Clause of the Fifth Amendment, and the Notice and jury trial guarantees of the Sixth Amendment. The Court noted that those constitutional provisions have historically suggested that "Any fact (other than prior conviction) that increased the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt." *Jones* at 243, *Apprendi* at 476. In fact, the Court warned in *Jones* of a set of circumstances similar to Movant's, when it stated, "in some cases, a jury finding of fact necessary for a maximum fifteen year sentence would merely open the door to a judicial finding sufficient for life imprisonment." *Jones* at 244.

The distinction between what was once called an "element" and what was called a "sentencing factor" is largely irrelevant after *Apprendi*. See, U.S. v. Matthews, 312 F.3d 652 (5th Cir. 2002), *cert. denied*, (2003).

In Counts 1 and 2, where Movant's base offense level was 20, his sentence was enhanced 2 levels because of a Financial Institution pursuant to U.S.S.G. § 2B3.1(b)(1), 3 levels because of alleged "Serious Bodily Injury" pursuant to U.S.S.G. § 2B3.1(b)(3)(0), and 1 level

for the Money Lost pursuant to U.S.S.G. § 2b3.1(b)(7)(B), for a total of a 6 level enhancement, changing Movant's sentence range from 41-51 months to 78-97 months.

In Count 1 and 4, Movant's sentence was enhanced 2 levels because of the Financial Institution enhancement, and 1 level because of the Money Lost enhancement. Movant's sentence was enhanced 3 levels, from 41-51 months to 57-71 months.

In Count 18, Movant's sentence was enhanced 2 levels because of "Serious Bodily Injury" and 1 level due to Money Lost. Movant's sentence was enhanced 3 levels, from 41-51 months to 57-71 months.

In Count 20, Movant's sentence was enhanced 1 level for Money Lost, changing the range from 41-51 months to 46-57 months.

Finally, because Movant allegedly committed 4 robberies, his maximum base offense level of 26 on Count 1 and 2 was increased by 4 units to a total base offense level 30, Criminal History III, 121-151 months.

The Fifth Circuit has held that counsel is not deficient for failure to raise every non-frivolous issue on appeal. U.S. v. Phillips, 210 F.3d 345, 348 (5th Cir. 2000), citing U.S. v. Williamson, 183 F.3d 458, 462 (5th Cir, 1999). To be deficient, the decision not to raise an issue must fall below an objective standard of reasonableness. *Strickland* at 688. The reasonableness standard requires counsel to "research relevant facts and laws, or make an informed decision that certain avenues will not prove fruitful. Solid meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention." *Williamson* at 462-63. Thus, to determine whether counsel was deficient in Movant's case, the consideration is whether a challenge to the "Serious Bodily Injury", "Bodily Injury", and "Money Lost" enhancements would have been sufficiently meritorious such that counsel should have objected during trial and sentencing, and raised the issues on direct appeal. (Movant submits that he

objected to the whole of his PSI at Sentencing. See, Sentencing Hearing, March 22, 2002 Transcript, p. 16). Exhibit 22

At the time of Movant's trial in 2001 and sentencing in 2002, and direct appeal in 2002, Supreme Court and Fifth Circuit precedent supported Movant's position that none of these enhancements were in his indictment or submitted to a jury proven beyond a reasonable doubt. Counsel failed to research and argue against any sentencing enhancements. *Jones*, supra; *Apprendi*, supra. Since "Serious Bodily Injury" and "Bodily Injury" and "Money Lost" all enhanced Movant's sentence beyond the statutory guideline maximum of 41-51 months, the enhancements should have been set forth in the indictment and proven beyond a reasonable doubt to a jury.

The recent case of Blakely v. Washington 2004 U.S. Lexis 4573 (June 24, 2004). affirmed *Apprendi* in that the maximum sentence a judge may impose is solely on the basis of the facts reflected in the jury verdict alone, or admitted by the defendant. The judge in Movant's case exceeded his proper authority when he imposed punishment that the jury's verdict alone did not permit. Consequently, the District Court's sentence violated Movant's Sixth Amendment right to trial by jury, as the facts supporting the above listed enhancements were neither admitted to by Movant nor submitted to the jury.

Had counsel not committed unprofessional errors, and had not failed to object to the Court's error in sentencing, and had not failed to raise the error on appeal, a reasonable probability exists that the outcome of Movant's case would have differed to his favor. See, *Strickland*, supra; Glover v. U.S., 531 U.S. ___(2004).

For enhancements to a robbery conviction, "if any victim sustained bodily injury", the sentencing court is to increase the offense level according to the seriousness of the injury." U.S.S.G. § 283.1(b)(3)(A)-(C). A 2-level increase is required for "Bodily Injury", greater increases are required for "Serious" and "Permanent or Life-Threatening" injuries. Of these

degrees of injury, the increase at issue is for "Bodily Injury", defined as "any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought;" and "Serious Bodily Injury", defined as injury involving extreme pain or the protracted impairment of a function of bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization or physical rehabilitation..." See, U.S.S.G. § 1B1.1 Comment n. 1 (b) and (i).

Very little was said regarding Movant's presentence report, "PSI", about the degree of injury cited to justify the enhancement recommendations. The PSI stated for the Norwest Bank on April 1, 2000, that victim Michael Pate was injured during the robbery. He was sprayed with mace, which caused intense burning and blistering near his eyes. He did not fully recover for two days. For the Greyhound Bus Station, which was actually the armored car transport, that Cornelius Lark was choked, and a semi-automatic pistol was placed to his side, and he was pulled to the ground. Lark reported that the robber then sprayed him with pepper spray as they fought on the ground.

While counsel objected to 16 different circumstances, none of the objections included "Bodily Injury" or "Serious Bodily Injury". Thus, at sentencing, the Judge did not address this issue, nor did the government present any information relevant to enhancing Movant's sentence for "Bodily Injury" or "Serious Bodily Injury".

The following cases hold, for obvious reasons, that the focus of the inquiry is not on the actions of the defendant, but rather on the injury sustained. U.S. v. Perkins, 89 F.3d 303, 308 (6th Cir. 1996) ("the basis for this enhancement is not the striking of the victim hear...rather, it is the fact that doing so causes physical injury"); U.S. v. Dodson, 109 F.3d 486, 489 (8th Cir. 1997) ("It is not the defendant's conduct, however, which determines whether a victim has sustained bodily injury, rather, the resultant physical injury is the determining factor")' U.S. v. Perkins, 132 F.3d 1324, 1326 (10th Cir. 1997); See also, U.S. v. Harris, 44 F.3d 1206, 1218 (3rd

Cir. 1995) (reversing "Bodily Injury" increase where witness testified that victims were sprayed with mace and later treated by medical personnel, but district court made findings with regard to whether victim suffered either pain or injury or why victims received medical treatment)' See also, U.S. v. Lancaster, 6 F.3d 208, 210 (4th Cir. 1993) (affirming finding that being sprayed with mace is [not] significant injury warranting bodily injury increase because burning sensation suffered by victim was "only momentary and the mace produced no lasting harm."). But see, Guerrero, 169 F.3d at 947 ("the Guidelines do not condition the increase on such treatment. The injury must be either 'painful and obvious' or 'of a type for which medical attention would ordinarily be sought.'") U.S.S.G. § 1B1.1 comment (n.1(b).

The district court's enhancements were not supported by the record because neither Michael Pate nor Cornelius Lark testified at Movant's sentence, nor did the district court make a finding with regard to whether victims suffered either pain and injury or why victims received medical treatment. Dodson, 109 F.3d at 488-89. Because Movant received a harsher sentence than prescribed by the Guidelines, he suffered ineffective assistance of counsel. *Glover*, id; U.S. v. Phillips, 210 F.3d 345 (5th Cir. 2000).

VIII. Trial Counsel was Ineffective for Failing to Raise in the District Court and on Appeal that there was Insufficient Evidence to Support a Finding of Guilt on the Weapons Counts 3,5,21, 18 U.S.C. 924(c)(a)(A)(i) and § 2.

The Supreme Court held in Bailey v. U.S., 516 U.S. 137 (1995). That use was more than mere possession "use" in §924(c)(1)(A)(i) required an active employment of the firearm by the defendant. In Muscarello v. U.S., 524 U.S. 125 (1998). The Supreme Court held that the "carry" prong under §924(c)(1)(A)(i) is not limited to carrying a firearm on one's person, rather it also applies to a person who knowingly possesses and conveys a firearm in a vehicle.

In Movant's case, the record is void of any evidence that the Movant at any time used or carried a firearm during and in relation to any crime as charged in counts 3,5,21, 18 U.S.C. §924(c)(1)(A)(i). (See, Testimony of Foster, Holcomb and T. Clark T.T. Vol. II.).

As to the charge of aiding and abetting counts 3, 5, 21, to attribute to the Movant the principal's use or carry of a firearm under §924(c)(1)(A)(i) the government must prove the following: 1) the principal used or carried a firearm; 2) the use or carrying of a firearm occurred during and in relation to the crime of violence as charged in counts 3,5, and 21; 3) and the Movant aided and abetted the principal's use or carrying of a firearm during and in relation to the crime of violence as charged in the indictment. It is the Movant's contention that the third element was not satisfied by the evidence presented. Since knowledge constitutes the requisite criminal intent of the principal's violation of §924(c)(1)(A)(i), knowledge must also be established as a part of the alleged aiding and abetting. The logic of this is that in order for the latter to merit the same level of punishment as the former, he must share the same level of culpability. No proof of knowledge was put forth. The government has failed to prove that the Movant *knew* and *aided and abetted* the principal's use of a firearm at any time during and in relation to a crime of violence as charged.

In Movant's case, no government witness testified that the Movant at any time gave, talked about, used, carried, aided and abetted or more importantly knew of their use or carrying of a firearm. U.S. v. Dinkane, 17 F.3d 1192 (9th Cir. 1994).

Movant is maintaining his innocence to all the crimes for which he stands convicted. For argument's sake, if a person knows of a crime to be committed and merely knows his actions will assist or influence the principal's commission of a crime, or who acts recklessly or negligently with respect to a risk that his action will do so, cannot be held liable as an accomplice. U.S. v. Medina, 32 F.2d 40, 46 (2d Cir. 1994)(reversing a conviction for aiding and abetting an armed robbery under §924(c)(1)(A)(i) and requiring specific facilitation of the firearm even though the defendant intentionally assisted in the predicate crime knowing a

firearm would be used). U.S. v. Hamblin, 911 F.2d 551, 558-59 (11th Cir. 1990) (rejecting the inference that an accomplice to an armed bank robbery must have known that the principal would use a gun because it would be hard to rob the bank without one). U.S. v. Spinney, 65 F.3d 231, 238 (1st Cir. 1995). The government must establish that the appellant knew "to a practical certainty that the principal would be using and carrying a firearm. The government must prove the appellant had actual knowledge that a firearm would be used."

In Movant's case, no alleged accomplice testified that the Movant "knew" of or "facilitated or encouraged the use or carrying of a firearm in any of the crimes. Appellant can't be convicted of aiding and abetting the use or carrying of a firearm without appellant having knowledge of a firearm. U.S. v. Sorrella, 145 F.3d 744, 753-54 (5th Cir. 1998). The defendant must act with the knowledge or specific intent of advancing the "use" of the firearm or in relation to the drug trafficking offense. Here, the charge is robbery. Since one might commit a robbery by some means other than a firearm, like with a knife, stick, bomb or note, ~~etc.~~ The appellant was charged for all unarmed robberies, counts 2, and 4, 18 U.S.C. 2113(a), bank robbery by "force and violence and intimidation", and counts 18 and 20, 18 U.S.C. 1951(a) and (b) by actual and threatened force, violence and fear. None of the counts, 2,4,18 or 20 charges any weapon as being used or carried in committing the crimes.

In count 3, the First State Bank robbery, the alleged accomplices T. Clark and Holcomb admitted they were the robbers and that A. Clark was the getaway driver. (T. Clark, T.T. p. 520; Holcomb, T.T. pp. 337-76). In count 20, the Winn-Dixie robbery, witnesses T. Clark, Foster and Holcomb admit that they were the robbers and that A. Clark was the getaway driver. (T. Clark, T.T. pp. 499-520; Foster, T.T. pp. 264-374; Holcomb, T.T. pp. 331-374). (See also, Bishop's hearing, 3/12/02 in which it was determined the guns came from Bishop). A conviction of

EX 21

aiding and abetting § 924(c) requires a much higher standard of knowledge than the knowledge of robbery.

In the Norwest Bank robbery, the Movant being one of the robberies was in contention. Witness Faires identified Diggs as the person that maced her in her office. (Faires, T.T. pp. 398-402). Also, in Faires' statement she described T. Clark as the one that maced her. (See, Exhibit 7 Faires' report). Witness Birdlong testified that the person shown in the bank photographs was not Movant. (Birdlong, T.T. pp. 587-88). Although the alleged accomplice witnesses testified that Movant was the person that robbed the bank, neither testified that Movant used or carried a firearm or knew of their use or carrying of a firearm. U.S. v. Nelson, 137 F.3d 1094, 1103-04 (9th Cir. 1998). ("There is no evidence that Edwards directly facilitated or encouraged the use of the firearm...as noted above, while she participated in the planning the robbery in general, she did not counsel or encourage the use of the gun in particular, while she participate in the robbery knowing a gun would be used, she took no action at the scene of the crime that encouraged or facilitated the use of the firearm...").

In the instant case, Holcomb testified that he and T. Clark talked about the Norwest robbery. Although Holcomb put Movant at the car wash. Holcomb never testifies that Movant take part in the planning or agreed to planned robbery. *Thomas*, supra. See, also, Torres-Maldonado, 14 F.3d 95,103 (1st Cir. 1994); U.S. v. Thomas, 987 F.2d 697m 701-02 (11th Cir. 1993); U.S. v. Williams, 985 F.2d 749, 756 (5th Cir. 1993) cert. denied, U.S. 114 (1993); U.S. v. Powell, 929 F.2d 724, 726-28 (DC Cir. 1991); *Medina*, 32 F.3d 40 (2d Cir. 1994); U.S. Bancalari, 110 F.3d 1425, 1429 (9th Cir. 1997).

Justice Learned Hand provided in U.S. v. Peoni, 100 F.2d 401,402 (2d Cir. 1938), what has become the definitive rule for accomplice liability under 18 U.S.C. § 2. *Peoni* declared that

the defendant must "associate himself" with the criminal venture of the principal and "participate in it as in something that he wishes to bring about. That he seeks by his action to make [it] succeed." In counts 3,5, and 21 the government has failed to prove the Movant used and /or carried a firearm or aided/abetted the use or carrying of a firearm.

Therefore, the Movant is actually innocent of the charges in counts 3,5, and 21; 18 U.S.C. §924(c)(1)(A)(i) and § 2 use and carry of a firearm during and in relation to a crime of violence and aiding and abetting. U.S. v. Bousley, 523 U.S. 614 (1998). This Movant has shown actual and legal innocence. There is no evidence that the Movant used or carried /or knew of his alleged accomplices' use or carrying of a firearm.

But for counsel's unprofessional errors in failing to raise this issue at trial or appeal, there exists a reasonable probability that the outcome of the proceedings would have differed in the Movant's favor. See, *Strickland,* supra.

IX. Trial Counsel was Ineffective for Failure to Raise on Direct Appeal that the Evidence was insufficient to Convict Movant of 1951(a)(b) on Count 18 and the 924(c) on Count 19.

Trial counsel raised a frivolous Rule 29 motion based on the government failing to provide sufficient evidence to prove that each of the alleged offenses occurred in the Northern District of Texas. (T.T. pp. 535-36). Even after the Movant wrote trial counsel showing him how to raise this issue right (See, Exhibit 13 , Letter to Ronald Couch). The Fifth Circuit held that the prosecution need only show by a preponderance of the evidence that the trial is in the same district as the criminal offense. U.S. v. Turner, 586 F.2d 395, 397 (5th Cir. 1978).

In the alternative, counsel failed to raise the *valid* Rule 29 motion that he raised during trial on direct appeal based upon the government's failure to prove that the Home Depot or Greyhound Bus Station was robbed as alleged in the indictment and submitted to the jury,

instead of the armored car. (T.T. p. 592). Cf. Holselew v. Smith, 822 F.2d 1041 (11th Cir. 1987); U.S. v. Williamson, 183 F.3d 458 (5th Cir. 1999).

Jerome Foster, alleged accomplice, testified that the armored car was the target, not the Home Depot. (Foster, T.T. p. 282). Mr. Lark testified that he went inside the Greyhound bus station and picked up cash and checks. The Greyhound employees sealed the envelopes into clear bag with their bag number and amount. (Lark, T.T. p. 430). Lark testified that before leaving the office, a gentleman attacked him after he got back into his armored car vehicle.

But for counsel's unprofessional errors in failing to raise this issue at trial or appeal, there exists a reasonable probability that the outcome of the proceedings would have differed in the Movant's favor. See, *Strickland,* supra.

X. Trial Counsel was Ineffective for Failing to Raise on Direct Appeal Fatal Variance that Violated the Movant's Fifth Amendment Right to only be Tried on the Indictment Returned by the Grand Jury for Count 18.

The Supreme Court held in Stirone v. U.S., 361 U.S. 212 (1960), that the manufacturer's dependence on shipments of sand from outside Pennsylvania to carry on his ready-mixed concrete business entitled him to the protection of the Hobbs Act against interruption or stoppage of his commerce in sand, but that, in the absence of a charge in the indictment, it was reversible error for the trial court to try defendant on a charge of interference with steel shipments. U.S. v. Figueoa, 666 F.2d 1375, 1379 (11th Cir. 1982). Variance has occurred if the evidence produced at trial differs from what is alleged in the indictment. U.S. v. Keller, 916 F.2d 628 (11th Cir. 1990); U.S. v. Doucet, 994 F.2d 169 (5th Cir. 1993).

In the instant case, the Movant was charged in count 18 of the indictment with knowingly and willfully obstructing, delaying and affecting interstate commerce by robbery of a Greyhound bus company, in violation of 18 U.S.C. § 1951 (a) and (b) and § 2. Movant avers

that Greyhound was not the victim of the robbery but the Armored Transport company was the victim. The trial records, along with the victim's loss statements proves these facts. Trial counsel made a Rule 29 motion based on the facts that Armored Transport System was the victim and not Greyhound as alleged in the indictment, which was overruled. (T.T. Vol. II. p. 536). Counsel failed to raise this important issue on direct appeal. Movant avers that had counsel raised this issue on appeal the outcome of the proceedings would have differed in Movant's favor. *Strickland*, supra.

Cornelius Lark, the driver/guard, testified that he was attacked after signing for the currency when he got back to his truck. (Lark, T.T. Vol. II. pp. 430-31). Although Movant is maintaining his innocence, 1) Greyhound no longer had possession of the currency but AT Systems did; 2) Greyhound was no longer responsible for the currency but AT Systems was; 3) most importantly, Greyhound was not robbed, but AT Systems was. Cf. U.S. v. Guerrero, 169 F.3d 933, 938 (5th Cir. 1999) (Government failed to prove funds were in control or custody of victim in indictment).

Trial counsel could have used the PSI addendum to show appellate court that the victim was not Greyhound, but AT Systems as stated in the declaration of victim loss statement by AT representative Frank McCoy. (See, PSI Addendum p. 13). (Exhibit 24-25)

But for counsel's unprofessional error, in failing to raise this variance on direct appeal, there exists a reasonable probability that the outcome of the proceedings would have differed in Movant's favor. *Strickland*, supra.

XI. The Evidence was Insufficient to Support, and Counsel was Ineffective for Failing to Object to and Reserve for Appeal a Sufficiency Claim Regarding, Jury Verdicts for Counts 1,2, 4, 18 and 20.

Review of the sufficiency of the evidence after conviction by a jury is narrow. The

appellate court must affirm if a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. U.S. v. Mergerson, 4 F.3d 337, 341 (5th Cir. 1993) cert. denied 510 U.S. 1198 (1994).

The court must consider the evidence in the light most favorable to the government including all reasonable inferences that can be drawn from the evidence. U.S. v. Pigrum, 922 F.2d 249, 253 (5th Cir. 1991) cert. denied, 500 U.S. 936 (1991). The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence.

In the instant case, after a 3 day trial the Movant was found guilty of counts 1,2,4, 18,20, namely, conspiracy, robbery of Norwest Bank, First State Bank, Greyhound Bus station, and Winn-Dixie market. Also, Movant was found guilty of the 924(c) counts that followed each robbery. Movant contends that the government's whole case rested on the reliability of the government's alleged accomplice/informant witnesses, who had reason to lie and fabricate their testimony and lie about their roles and others' roles in the robberies to gain favorable treatment and leniency from the prosecutor and this Honorable Court, as brought out in Brian Bishop's upward departure hearing. (See, Bishop Hearing, T.T. pp.. 10-11, 17, 57-58); (A. Clark, Sentencing pp. 19-20); T. Clark, Sentencing T.T. p. 40); (Bishop Sentencing T.T. p. 62); (Holcomb Sentencing T.T. p. 45). All were hoping for a downward departure for their testimony through a 5K1 motion and Rule 35. (T. Clark, T.T. Vol II. p. 516; Bishop, T.T. Vol. II. p. 455; J. Holcomb, T.T. Vol II. p. 365; J. Foster, T.T. Vol. II. P. 311) (Exhibit 21, 26 and 27)

Movant contends that absent the many errors that took place in Movant's proceeding, no reasonable jury would have found Movant guilty of the charges. Movant further avers that

absent the testimony of the alleged co-defendants and informants the governments case would have been weakened and properly instructed jury could not have found the Movant guilty.

But for counsel's unprofessional error, in failing to raise this issue at trial to reserve for direct appeal, there exists a reasonable probability that the outcome of the proceedings would have differed in Movant's favor. *Strickland*, supra.

XII. Counsel Ineffective for Failing to Raise on Appeal that Government Failed to Prove Movant was a part of any Conspiracy and insufficient evidence to support a conviction for robbery or aiding or abetting.

The government failed to prove beyond a reasonable doubt that Movant was part of a conspiracy. Holcomb testified that Movant used Holcomb's phone in the first store robbery, but Holcomb cell phone records were not entered into evidence. C. Clark's cell phone records only show calls going to and coming from Brian Bishop's phone. Neither phone was said to have been used. (Wolff, T.T. pp. 146-150)(See, Exhibit " " phone records).

Although Holcomb testified that Movant called A. Clark to say that "it looked good", there was no proof that Movant agreed to participate in or abet a robbery, or when or how the conspirators told Movant to case a bank. Holcomb's testimony was hearsay. Holcomb further testified that A. Clark just pulled up to the bank and they ran in. Holcomb failed to say that Movant knew and agreed that they would rob First State Bank. *Thomas*, supra. "The mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aim and interests, does not necessarily establish proof of the existence of the conspiracy." (Jury instruction, T.T. Vol. III, p. 631).

Since the government theory is that Movant called the co-defendants after he cased the First State Bank, the Movant avers that any act he was alleged to have done before the call was not part of any conspiracy. Because the gist of a conspiracy is an agreement, and such

agreement had not been formed. "A person who has no knowledge of a conspiracy but who happens to act in such as way which advances the purpose of the conspiracy, does not thereby become a conspirator." In this case, the alleged conspiracy would have formed after the alleged call of which there is no proof occurred, and no proof that Movant agreed to rob the bank with T. Clark and A. Clark. There was no proof Movant was with the co-defendants when they agreed to commit the robbery. Finally, some conspirator during the conspiracy must knowingly commit one of the overt acts to further the conspiracy in the indictment. Movant contends that he was not part of the conspiracy and cannot be held liable for the acts of others. Pinkerton v. U.S., 328 U.S. 640, 647 (1946); U.S. v. Ruiz, 860 F.2d 615, 619 (5th Cir. 1988). Thus, the government had insufficient evidence to support a finding of guilt for conspiracy as to count 1.

Movant avers that the evidence was insufficient to support a conviction for robbery or aiding/abetting. Absent the testimony of Holcomb and T. Clark, there exists no evidence to support a conviction. The evidence is insufficient event with their testimony.

Movant must be found guilty of committing the crime of § 2113(a) based upon the instructions given to the jury. (See, T.T. Vol. III, pp. 632-633, jury instructions). There are three elements that the government must prove. (1) that he intentionally took from the person described in the indictment money; (2) that he did so by means of intimidation; and (3) that the money was then in the possession of a Federally Insured bank.

Movant avers that the government failed to prove its case beyond a reasonable doubt, in that undisputedly T. Clark to the money in the robbery, and undisputedly T. Clark and Curtis Brown used intimidation. The record shows that Movant did not take any money and did not use intimidation.

Movant further avers that it is disputed that Movant was one of the robbers in this robbery. (See, Exhibit Walton affidavit);(See, Birdlong testimony);(See, Faires testimony). Movant avers that because the court failed to instruct on *Pinkerton*, he cannot be held liable for acts of others. Movant avers that the government may try to look for help under the aiding and abetting instruction which was insufficient for a finding of guilty to rest on, in that the aiding and abetting instruction only defined aiding and abetting, but failed to give the elements to the jury for which a finding of guilty could rest. (See, T.T. Vol. III, pp. 642-643). The government attempted to prove that Movant actually robbed the Norwest, a burden which was not met. The government's witness identified Diggs as the person that robbed and maced her. (See, Faires Testimony). Witness Birdlong said the person in the bank photo was not Movant. (See, Birdlong testimony). More importantly, Birdlong knew Movant's walk and appearance because Movant modeled for Birdlong's company. Both of these witnesses provided reasonable doubt of Movant's guilt.

To aid and abet, a defendant must share in the intent to commit the offense as well as play an active role in its commission. *Lombardi*, supra; citing U.S. v. Fishel, 686 F.2d 1082, 1087 (5th Cir. 1982). Movant also avers that anything or act the Movant was alleged to have done took place before any alleged conspiracy. The government failed to prove that Movant made an agreement with anyone. The gist of a conspiracy is the agreement and overt acts thereafter agreed to. Thus, the evidence was insufficient to prove robbery and aiding and abetting. Finally the government's case rested entirely on the testimony of Holcomb and T. Clark. Neither could testify that Movant had entered the bank with the intent to commit a crime because as Holcomb testified, neither he nor the Clarks had any knowledge of First State Bank prior to the robbery. (T.T. Vol. II pp. 347-48). 18 U.S.C. § 2. "The law recognizes that,

ordinarily, anything a person can do for himself may also be accomplished by that person...or by acting in concert with, or under the direction of another person or persons in a joint effort or enterprise." Movant's contention is that because none of the alleged bank robbers testified that they had knowledge of First State Bank prior to the robbery it cannot be said that the Movant was acting in concert or under the direction of any alleged co-defendant to case out the specific bank. In fact, Holcomb testified that they were on their way back to Adrium Clark's apartment: Holcomb, T. Clark, A. Clark, with no mention that Movant was to meet them nor how or when they told him to case the First State Bank. (T.T. Vol. II pp. 347). Thus the government failed to prove that the Movant 1) aided and abetted the intentional taking from Charlene Dunham, money; 2) aided and abetted the intimidation in the robbery; and 3) aided and abetted the taking of money from a federally insured bank as charged.

The evidence was insufficient to prove that Movant robbed the Greyhound Bus Station. Movant first avers that Greyhound was not the victim of the robbery, but Armored Transport (AT) Systems was the victim. (See Lark, T.T. Vol. II p. 431)(See, PSI p. 13.) Movant avers that absent Mr. Lark's impermissibly suggestive in-court identification, prosecution misconduct for vouching for the credibility of informants, court's failure to give a cautionary instruction regarding the testimony of co-defendants and informants, there is no evidence to sustain the conviction. U.S. v. Partin, 493 F.2d 750 (5th Cir. 1974).

Government witness Ayala testified that Diggs was the person that committed the robbery. (T.T. Vol. II. pp. 446-47). Brian Bishop's FBI 302 reports show that Bishop gave several inconsistent statements about his knowledge of the crimes. (See, Exhibit 302 reports). First, he had no knowledge of any crimes, then he read about them in the newspapers, next that A. Clark told him about the robberies, finally at trial to get a deal, Bishop testifies that

the Movant told him that Movant robbed the armored car. (T.T. Vol. II. p. 456). Counsel was also aware that Bishop had a pending murder charge. Bishop was the only person to implicate the Movant outside of Lark's impermissible in-court identification. (Exhibit 29)

Movant also avers that there was no evidence of any interference with or affect on interstate commerce by the alleged robbery. The government's two witnesses (Lark and Janna Willardson) failed to testify about an affect or interference with interstate commerce, because the government did not ask questions and show the interference with or affect upon interstate commerce.

The third element the government had to prove beyond a reasonable doubt was that such conduct of the defendant interfered with or affected interstate commerce. (T.T. Vol. III. p. 635). The government failed to prove that Greyhound's 1) assets were depleted; 2) customarily purchases goods from outside the state; 3) bought anything from anyone at anytime (past, present or future); 4) moved any merchandise; nor was it shown that the alleged robbery obstructed or delayed the movement of merchandise; 5) did business with any out-of-state businesses. In fact, at trial, it was not shown where AT Systems was located. U.S. v. Elders, 569 F.2d 1020 (7th Cir. 1978). Movant contends that because the government has failed to proved interference with or affect on interstate commerce the evidence is insufficient.

The evidence was insufficient to support the conviction for count 20 Winn-Dixie robbery, under either the robbery or aiding and abetting statute. Movant avers that because he was not charged with a conspiracy under the Hobbs Act, there was no conspiracy. Further, the Movant avers that if the government looks to rely on a conspiracy theory it would fail because the court did not give a *Pinkerton* instruction, but relied only on an aiding and abetting instruction. See, *Pinkerton*, supra; *Ruiz*, supra. (T.T. Vol. III. pp. 647-58).

There is no evidence that the Movant did anything to aid and abet the actual crime of robbery. Holcomb, Foster and T. Clark all testified that Movant allegedly made a call to someone, but it was not proven who received this call or the content of the call. See, Powers v. U.S., 168 F.3d 741, 746-47 (5th Cir. 1999) (telephone record without proof of who was making the calls and the substance of call was insufficient to establish an agreement). The records are void of any evidence that Movant played a role in the actual robbery. *Lambardi*, supra. Movant must aid and abet each material element of the crime, 18 U.S.C. 1951 (a)(b) of which there are 1) *knowingly and willfully obtained or attempted to obtain money from another without that* person's consent...2) did so by wrongful use of actual or threatened violence of fear; and 3) that such conduct interfered with or affected interstate commerce. *Lambardi*, supra.

The government failed to prove that the Movant aided and abetted any element of the crime. Also, the court removed from the jury the elements of knowingly and willfully. Finally, Movant avers that because the court failed to instruct on the necessary elements of aiding and abetting and only read to the jury the definition of aiding and abetting there was no crime for the jury to deliberate upon. (See, jury instructions T.T. Vol. III. pp. 642-43).

But for counsel's unprofessional errors, and failure to object and raise on appeal that the evidence was insufficient to support counts 1,2, 6, and 20, there exists a reasonable probability that the outcome of the proceedings would have differed in the Movant's favor. See, *Strickland*, supra.

XIII. The Evidence was Insufficient to Support a Conviction for Conspiracy to Rob First State Bank and Norwest Bank, and Counsel Inefficient for not Raising Issue on Appeal.

Movant avers that the government case shows two separate crimes and trial counsel should have requested severance of conspiracy counts. The Norwest Bank robbery and First

State Bank robberies were not proven to be a part of the same act, plan or scheme. Norwest was allegedly discussed about one month before its commission with no mention of any other place to be robbed. First State was found and robbed the dame day, with no planning or discussion. Although the institutions were both banks, the modus operandi was very different. Norwest was committed with people using guns and mace, and 4 robbers committing the robbery. While First State was done with 3 people using only guns, 2 robbers and 1 getaway driver. U.S. v. Patten, 226 U.S. 525 (1913). Movant avers that in Holcomb's testimony, Holcomb never testified that Movant agreed and heard their discussion about Norwest, only that Movant was at the car wash. (Holcomb, T.T. Vol. II. p. 354). This evidence is insufficient to prove that Movant was a part of the conspiracy and agreed to the robbery of Norwest. U.S. v. Thomas, 8 F.3d 1552 (11th Cir. 1993).

Movant avers that the First State robbery was not discussed by him with anyone else, and because A. Clark did not testify as to the content of the alleged phone call, if any, there is no proof that the Movant conspired with anyone, only that the Movant may have been present a the bank before a robbery.

If the hearsay evidence had been excluded, and but for counsel's unprofessional error, in failing to raise this issue at trial to reserve for direct appeal, there exists a reasonable probability that the outcome of the proceedings would have differed in Movant's favor. *Strickland*, supra.

XIV. Trial Counsel Ineffective for Failing to Request Pretrial Motions for Discovery, Exculpatory *Jencks* Material under 18 U.S.C. § 3500 B, C, and D, Rule 16 and Impeachment Material, which would have Revealed Missing Documents, Letters, Police Reports, and 302's.

Movant avers that counsel was ineffective in failing to submit motions for production of discovery, exculpatory, *Jencks* act, rule 16 and impeachment material. Nealson v. Hargett, 989 F.2d 847 (5th Cir. 1993). Movant contends that without any such material counsel was not

prepared to defend the Movant at the trial stage or at appeal (See, Exhibit 31-32). Counsel admitted he did not receive these materials as a part of the discovery from the government. Movant avers that had counsel been given access to these materials he would have been able to use them in any number of ways such as 1) cross-examining of witnesses; 2) impeachment of witnesses; 3) disputing material misstatement of the facts.

Movant was denied effective assistance of counsel, by counsel failure to make any pretrial motion that if made would had entitled the Movant to these materials. Had counsel had, for example, the letters written between the Clark brothers, he could have shown the jury that T. Clark was planning to hide his brother's role in the Norwest Bank, First State Bank, Winn-Dixie, and the Home Deport robberies. The material would have disbelieved T. Clark's testimony and acquitted Movant of charges. (See, Bishop Hearing).

Movant further avers that neither he nor this court can know what else the government withheld and the effect it would have had on the outcome of the jury's verdict. Movant contends that police reports and other impeachment and exculpatory material would have been used to put the government case in a whole different light in the eyes of the jury.

Movant avers that trial counsel was ineffective for failing to request material regarding Telasa Clark under 18 U.S.C. § 3500 B, C, and D (*Jencks* material) after Clark testified at trial. Had counsel made such a motion, the government would have been forced to turn over the letters between Clark brothers, showing Telasa Clark's protection of Adrian Clark to the extent of falsely implicating Movant in Clark's crimes, and to get a favorable deal on prison time. Withholding these letters violated Movant's 5th and 6th amendments and Due Process rights. Counsel could have used such 3500 material to cross-examine and impeach Telasa Clark to the jury, and the jury would have likely disbelieved Clark's contentions, his credibility undermined.

See, U.S. v. Harris, 542 F.2d 1283 (1976) cert. denied, 430 U.S. 934 (1976); Strand v. U.S., 780 F.2d 1497 (10th Cir. 1985); letters under Jencks act. Counsel's failure to request this material caused his representation to fall below a reasonable standard, and prejudiced Movant in that vital exculpatory evidence was not introduced. See, *Strickland*, supra.

Movant avers that trial counsel failed to request the notes, F.B.I. 302 material or any substantial verbatim recitation of oral or written statements of Jovon Holcomb after he testified. Movant was therefore denied due process right to confront and adequately cross-examine a witness against him. Movant contends that when counsel failed to cross-examine Holcomb, his failure prejudiced Movant before the court, in that Movant was deprived of an opportunity to challenge Holcomb on his testimony. See, *Strickland*, supra.

Even if the material regarding Clark and Holcomb was not considered *Brady* material, the material under the *Jencks* standard of 18 U.S.C. § 3500 B, C, and D went to the subject matter of the trial, and the material should have been given to counsel, had he asked. An evidentiary hearing needed to determine if the statements of Clark and Holcomb should be stricken.

Brian Bishop's lie detector test, and Bishop's FBI 302 reports contained statements by Bishop that he had no knowledge of any robberies other than that for which he had been arrested. Bishop proceeded to give conflicting accounts of his knowledge of the robberies. Had these documents been available to the defense, defense would have been able to impeach and discredit Bishop to the jury. (Exhibit 28 A-C ; 30)

Had Foster's rule 35 motion been made available to the defense, the defense would have been able to impeach and discredit Foster about his knowledge and lack of knowledge about the

rule 35 to the jury. The defense would also have been able to demonstrate his motive to testify for the government on cross-examination. (Exhibit 33 4 - D, 34)

Had the defense had access to the police reports he would have been able to demonstrate the inconsistency in the testimony of Mr. Lark, in which the government told the trial court out of the hearing of the jury that Lark could not identify the defendant in the Greyhound robber, and that Ms. Faires gave a different in-court identification than in the reports. Movant contends that this information, along with any other information the Movant has not seen at this time, would have undermined the case against him. Thus, Movant was denied his due process rights and the right to a fair trial, and suffered a miscarriage of justice. (Exhibit 28)

Failure to investigate documents such as these has been found to be ineffective assistance of counsel. Crandall v. Bunnell, 144 F.3d 1213 (9th Cir. 1998) (defense counsel's failure to confer with defendant, to seek investigation and interview witnesses, or to work substantially with defendant in capital case was incompetent representation. See also, Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980). Counsel's failure to read or review documents by government which contained potential exculpatory information was incompetent representation. U.S. v. Mayers, 892 F.2d 642 (7th Cir. 1990). Failure to call or interview witnesses, and failure to subpoena witnesses at government expense for indigent client required an evidentiary hearing. Friedman v. U.S., 588 F.2d 1010 (5th Cir. 1979).

XV. Trial Counsel Ineffective for Failing to Raise *Batson* Issue During Trial or on Appeal.

A jury selection process violates the Sixth Amendment's fair cross-section requirement if (1) the excluded group is distinctive in the community, (2) the representation of this group in the venires is not fair and reasonable in relation to the number of such persons in the community, and (3) this underrepresentation is due to "systematic exclusion of the group in the

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Discriminatory purpose may be proved as well by the absence of African-Americans on a particular grand jury combined with the failure of the jury commissions to be informed of the eligible African-Americans in the community. Rideau v.Whitley, 237 F.3d 472 (5th Cir. 2000). Since the beginning, the United States Supreme Court has reversed convictions and ordered indictments quashed in such cases without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage. Nor it is necessary to show that the intent in creating the system whereby grand jurors were chosen was discriminatory. Rather, the focus must be on whether the system has, in fact created a system that tends to exclude a class of citizens from participation. Wright v. City Council of City of Emporia, 407 U.S. 451 (1972).

Movant's petit jury panel had two African-American persons out of a likely panel of 36, equaling .056% of the panel, far below the average ratio of African-Americans in the overall district population. These persons were not utilized at all, but apparently shuffled to the end of the panel.

The number of jurors improperly excluded is not important. Indeed, a single juror who had been excluded from a trial jury was held sufficient in Witherspoon v. Illinois, 391 U.S. 510 (1968), a case in which a single juror had been excluded for cause simply because he voiced a general objection to the death penalty, or expressed conscientious or religious scruples against its application.

In Batson v. Kentucky, 476 U.S. 79, (1986), the Supreme Court held that the Federal Constitution requires courts to look beyond the face of a statute defining juror qualifications, and consider a challenged selection practice in order to afford protection against action of the Government in effecting prohibited racial discrimination in jury selection. There, the court held

CONCLUSION

Further, Movant prays this Honorable Court will liberally construe the pleadings of this *pro se* litigant and give his issues full and fair consideration, even though his inartful pleadings may not meet the exacting standards of counsel, and grant such relief as deemed appropriate in the premises. Haines v. Kerner, 404 U.S. 519 (1972) (*per curiam*).

Respectfully submitted,

This day of 2004,

Andreco Lott
Pro Se Movant
Reg. No. 27068-177
USP Pollock
P.O. Box 2099
Pollock LA 71467

APPENDIX E

Motion for Relief, Motion for Reconsideration, and Affidavit of Facts

Andreco Lott
Reg. #27068-177
FCC-Medium Forrest City
Post Office Box 3000
Forrest City, AR 72336

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORTH WORTH DIVISION

ANDRECO LOTT, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 4:04-cv-740-A **MOTION FOR RELIEF** (Fed. R. Civ. P. 60(b))

Relief Sought

Andreco Lott moves this court, pursuant to Rule 60(b)(4) and (6), for an order to set aside the judgment entered in this action on February 11, 2005 a copy of which is attached to this motion.

Grounds for Motion

Andreco Lott should be granted relief from the judgment in this matter because: The district court denied him due process by improperly failing to rule on the merits of 32 of his habeas claims.

I. FACTUAL AND PROCEDURAL HISTORY

A jury convicted Andreco Lott of conspiracy to commit bank robbery, two counts of bank robbery, two counts of conspiracy to obstruct interstate commerce by robbery, and four counts of using and carrying a firearm during a crime of violence. See United States v. Lott, 66 Fed. Appx. 523 (5th Cir. 2003). The district court sentenced Lott to a total aggegate term of imprisonment of 1,111 months, to be followed by concurrent terms of three and five years of supervised release. The district court ordered Lott to pay restitution in the amount of $87,359.85, jointly and severally with his codefendants, with payment to begin immediately. The district court also ordered Lott to pay special assessments of $900 immediately.

Lott filed a motion under 28 U.S.C. §2255 to vacate, set aside, or correct sentence. Motion under §2255 to vacate, set aside, or correct sentence was denied predicated upon Lott's failure to show that his counsel's performance fell below an objective standard of reasonableness; and his failure to explain how any identification procedures were suggestive. But Lott was denied due process by the district court improperly failing to rule on the merits of 32 of his habeas claims. However, the court's failure to make any ruling on a claim that was properly presented in habeas petition asserts defect in the integrity of the federal habeas proceeding.

ARGUMENT

In pertinent part, Rule 60(b) allows a party to obtain relief from a final judgment or order "for the following reasons: ... (4) judgment is void .. or (6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b).

In determining whether Rule 60(b) relief is appropriate, the district court considers the following factors:

> (1) That final judgment should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether - if the judgment was a default or a dismissal in which there was no consideration of the merits - the interest in deciding cases on the merits outweighs, in the particular case, the interest of finality of judgments, and there is merit in the movant's claim or defense... (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factor that is relevant to the justice of the judgment under attack, bearing always in mind that the principle of finality of judgments serves a most useful purpose for society, the courts, and the litigants....

Crutcher v. Aetna Life Ins. Co., 746 F.2d 1076, 1082 (5th Cir. 1998) (citing United States v. Goula, 301 F.2d 353, 355-56 (5th Cir. 1962) (quoting 7 MOORE'S FEDERAL PRACTICE P 60.19, at 237-39)).

In his Fed. R. Civ. P. 60(b) motion, Lott argues that the district court denied him due process by improperly failing to rule on the merits of 32 of his habeas claims.

The district court failed to consider whether counsel was ineffective for failing to make any effort to investigate the

government's witnesses or interview Telasa Clark, Brian Bishop and Jerome Foster; whether counsel was ineffective for failing to interview and call character witness; see Claim 1, whether Lott's due process rights under the Fifth and Fourteenth Amendments had been violated when the government used unreliable pretrial identification that resulted from impermissible suggestive photo line-up procedure; whether trial counsel was ineffective for not objecting to or suppressing the pretrial identification as impermissibly suggestive; whether counsel's failure to object and request an in-camera hearing to discuss the admissibility of the in-court identification of government witness C. Lark; whether counsel's failure to request an identification instruction was prejudice; whether Lott was denied his due process rights and his Sixth Amendment right to confrontation of his accusers with the unrelaibility of their prior identification; whether counsel was ineffective for failing to preserve and raise any of these claims on appeal; see Claim 2, whether counsel was ineffective for failing to request a severance, because the indictment charged separate crimes against separate defendants, when no count that went before the jury where Lott and Diggs both charged to be apart of together; whether counsel was ineffective for not requesting counts 2, 4, 18 and 20 to be severed because of the differences in "Modus Operandi;" see Claim 3, whether counsel was ineffective for not requesting cautionary instruction of accomplice informants who may have had good reason to lie; whether counsel was ineffective because he should have requested an accomplice-codefendant plea agreement instruction at the time of each of

car company (A.T. Systems) that was robbed outside of the Greyhound Bus Station in count 18; whether there was insufficient evidence that Lott actually was apart of the robbery of the Winn Dixie in count 20 or that he aided and abetted the actual robbery of the Winn Dixie because it was testified that Lott had left before the robbery took place; whether the trial court erred and violated Lott's due process rights when the cort failed to properly instruct the jury on the necessary elements of aiding and abetting and only read to the jury the definition of aiding and abetting without more; whether counsel was ineffective for failing to raise these issues at anytime during trial or on appeal in the form of a Rule 29(a); see Claim 12, whether counsel was ineffective for failing to request the letters written between the Clark brothers that detailed and suggested that Telasa Clark was planning and hoping to protect his brother Adrium Clark from being named as part of the robberies and falsely named other persons (codefendants); whether counsel was ineffective for failing to raise this claim on appeal; whether counsel was ineffective for failing to request material regarding Telasa Clark under 18 U.S.C. §3500(b), (c) and (d) after Clark testified at trial; whether Lott's Fifth and Sixth Amendments due process rights had been violated by the government withholding of the Clarks' letters; whether counsel was ineffective for failing to request the notes, FBI 302 material or any substantial verbation recitation of oral or written statements of Jovon Holcomb after he testified, Brian Bishop's lie detector test and Bishop's FBI 302's that show conflicting statements material different then his trial testimony, Jerome

Foster's Rule 35 motion for downward departure which would have shown that he committed perjury when Foster testified that he did not have such a motive or reason to testify falsely, the police reports from the Greyhound Bus Company robbery where A.T. Systems armor car driver C. Lark gave a material false and inconsistent in-court identification then that of the statement he gave in the police report; whether the government had denied his due process rights and the right to a fair trial and suffered a miscarriage of justice due to the government withholding key evidence; whether the court gave insufficient jury instructions concerning aiding and abetting the use and carriage of a firearm in violation of §924(c), back robbery in violation of §2113(a) and Hobbs Act robbery in violation of §1951(a) and (b); whether the government failed to prove that Lott aided and abetted any element of the crime; whether the court removed from the jury the elements of knowingly and willfully; whether the court failed to instruct on the necessary element of aiding and abetting and only read to the jury the definition of aiding and abetting; see Claim 14, and district court's failure to hold an evidentiary hearing on 32 affidavits with supporting documents and papers, none of which have been contradicted or refuted by the records and files in this case, represent a "true" Rule 60(b) claim because it assert a defect in the proceedings. The defect lies in the district court's failure to make any ruling on claims that were properly presented.

A Fed. R. Civ. P. 60(b) motion that challenges only the federal habeas court's ruling on procedural issues should be treated as a true 60(b) motion. See Spitznas v. Boone, 464 F.3d 1213, 1224 (10th Cir. 2006)("The court's failure to make any ruling on a claim that was properly presented in habeas petition asserts a defect in the integrity of the federal habeas proceeding.") See United States v. Biggs, 939 F.2d 322, 328 (5th Cir. 1991) ([W]here the allegations in the §2255 motion are not negated by the record, the district court must hold an evidentiary hearing to 'decide all of the unresolved factual allegations which, if true, might support defendant's constitutional claims In general the district court must grant a hearing, unless the files and record of the case show that the prisoner is not entitled to relief."

CONCLUSION

The Rule 60(b) motion should be granted, and upon reconsideration of the §2255 petition on trhe merits Lott's sentence and conviction should be vacated.

Dated: March , 2017.

Respectfully submitted,

Andreco Lott
Reg. #27068-177
FCC-Medium Forrest City
P.O. Box 3000
Forrest City, AR 72336

Andreco Lott
Reg. # 27068-177
FCC-Medium Forrest City
P.O. Box 3000
Forrest City, AR 72336

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ANDRECO LOTT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

No. 4:04-cv-740-A
(No. 4:01-cr-177-A)

MOTION FOR RECONSIDERATION AND OR HEARING EN BANC

Please Take Notice, that based on the annexed Memorandum of Law, undersigned hereby respectfully request reconsideration and or request a hearing en banc, of this court's March 6, 2018 order dismissing motion filed by Andreco Lott for a Certificate of Appealability from a final judgment pursuant to Rule 60(b)(4) and (6) of the Federal Rules of Civil Procedure.

PRO SE PLEADING STANDARDS

In Castro Romero v. Becken, **256 F.3d 347 n.2 (5th cir. 2001)** (noting the long standing rule that pro se pleadings must be construed liberally); **see** also **Estelle v. Gamble, 429 U.S 97,106; 50 L.Ed. 2d 251, 97 S.Ct 285 (1976). Haley v. Estelle, 632 F.2d at 1275 (citing Price v. Johnston, 334 U.S 266; 68 S.Ct 1049; 92 L.Ed 1356 (1948).** "The Supreme Court has stated that in a habeas corpus proceeding the "primary purpose" is to assure that no one is unjustly imprisoned. Therefore, if a prisoner is unaware of the legal significance of revelant facts, it would be unreasonable to prohibit his attempt for judicial relief."

Pro se litigants are entitled to liberal construction of their pleadings. **Haines v. Kerner, 404 U.S 519,520, 92 S.Ct.594,596, 30 L.Ed 2d 652 (1972).** Moreover, "[w]e have frequently instructed district courts to determine the true nature of a pleading by its substance, not its label." **Armstrong v. Capshaw,Goss & Bowers,LLP, 404 F.3d 933,936 (5th Cir. 2005);** see also **Edwards v. City of Houston, 78 F.3d 983,995 (5th Cir. 1996) (en banc)** ("[W]e have often stated that 'the relief sought, that to be granted, or within the power of the Court to grant, should be determined by substance, not a label'") **(quoting Bros. Inc. V. W.E. Grace Mfg.Co., 320 F. 2d 594,606 (5th Cir.1963)).**

MEMORANDUM OF LAW IN SUPPORT OF

PETITIONER'S MOTION FOR RECONSIDERATION

On March 6,2018, United States Circuit Judge Priscilla R. Owen denied Lott's request for Certificate of Appealability (COA).

Lott filed a motion for (COA) on August 15,2015, from the denial of his true Rule 60(b)(4) and (6) of the Federal Rules of Civil Procedure, Rule 59(e) motion for reconsideration and COA in the district court pursuant to Fed. Rule of Appellate Proc. 22 (b)(1).

On March 15, 2017, the motion was dismissed. The district court reasoned ...Lott's motion is without merit because the court addressed each of his claimes in the order they appeared in his motions. For the reasom explained below, Lott now request this court to reconsider it's March 6,2018, ruling in that the court states (1) Lott must establish that reasonable jurist could disagree with the decision to deny relief or that the issues he presents deserve encouragement to proceed further. (2) Lott must demonstrate that reasonable jurist could conclude that the district court abused it's discretion in denying him relief from the judgment. Lastly, Lott has not made the required showing.

Lott will explain and contend that his motion for COA should not have been denied and this court should reconsider it's prior decision, which failed to consider all the relevant law and facts of this case that when considered should alter the court's ruling to prevent and correct a clear or manifest error of law and facts or to prevent manifest injustice.

Statement of the case

Lott agrees with the statement of the case as outlined in earlier petitions.

Standards of Review

Genreally, the Fifth Circuit reviews a district court's Rule 60(b) ruling for abuse of discretion, **Jackson v. FIE Corp., 302 F.3d 515,521 (5th Cir.2002) (citing Bludworth Bond Shipyard, Inc. v.M/V Caribbean Wind, 841 F.2d 646 (5th Cir. 1988))**. Rule 60(b)(4) motions, however, "leave no margin for consideration of the district court's discretion as the judgments themselves are by definition either legal nullities or not." id. (citation and quotation ommited). For this reason the review of the issues and claims raised in this appeal is "effectively de novo."id.

A. Rule 59(e)

Lott's motion for reconsideration is a motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure apply to federal habeas petitions "only to the extent that [they are] not inconsistent with applicable federal statutes and rules." Rule 12, Rules Governing Section 2255 Proceedings for the United States District Courts (2016).

To prevail on a Rule 59(e) motion, the movant must show at least one of the following: (1) an intervening change in controlling law; (2) new evidence not previously available; or (3) the need to correct a clear or manifest error of law or

fact or to prevent manifest injustice. In re Benjamin Moore & Co., 318 F.3d 626, 629 (5th Cir. 2002). "A motion to alter or amend the judgment under Rule 59(e) 'must clearly establish either a manifest error of law or fact or must present newly discovered evidence' and 'cannot be used to raise arguments which could, and should, have been made before the judgment issued.'" Rosenzweig v. Azunx Corp., 332 F.3d 854, 863-64 (5th Cir. 2003)(quoting Simon v. United States, 891 F.2d 1154, 1159 (5th Cir. 1990).

B) Whether Lott was denied a Constitutional Right to be heard?

Basic notions of Due Process underpin this requirement. As the Supreme Court noted in **Mullane v Central Hanover Bank Trust,Co,** the fundametal requisite of due process of law is the opportunity to be heard" **"339 U.S 306,314, 70 S.Ct 652,657, 94 L.Ed 865 (1950)** (qouting **Grannis v. Ordean, 234 U.S 385,394, 34 S.Ct 779,783, 58 L.Ed 1363 (1934))** The right to be heard is of little value unless the party has some point of reference in establishing procedural rules to guide his continued participation in the proceedings, particularly when final judgment looms.

In this case § 2255 required a evidentiary hearing in which the district court did not conduct. Thus the court abused it's discretion when it denied Lott's 60(b)(4)(6) petition. see Also **Logan v. Zimmerman Brush Co., 71 L.Ed 2d 265, 455 U.S 422,433.**

The Due Process Clause of the Fourteenth Amendment grants a [P]arty the opportunity to present his case and have it's merits

fairly judged, so that some form of hearing is required before [he] is finally deprived of [his] liberty interest.

The district court in failing to address all claims raised in Lott's § 2255 has denied him the opportunity to be heard on constitutional claims, **Peach 468 F.3d at 1271, infra.**

Likewise, Rule 60(b)(4) allows district courts to "relieve a party ...from a final judgment" because the judgment is void. We typically review district court orders denying Rule 60(b) relief for abuse of discretion. **CJC Holdings, Inc. v. Wright & Lato, Inc.**, 979 F.2d 60,63 (5th Cir. 1992). "When, however, the motion is based on a void judgment under rule 60 (b)(4), the district court has no discretion-- the judgment is either void or it is not." **Recreational Prop. Inc. v. Southwest Mortgage Serv. Corp.**, 804 F.2d 311,313 (5th Cir. 1986); WRIGHT MILLER AND KANE, FEDERAL PRACTICE AND PROCEDURE §2862 (2d ed. 1995). "There is no time limit on an attack on a judgment as void.

In order to determine whether the judgment should be set aside, we must determine whether the judgment is void. "A judgment is not void merely because it is erroneous." WRIGHT,MILLER AND KANE,FEDERAL PRACTICE AND PROCEDURE § 2862 (2d ed. 1995) "A judgment 'is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.' "Williams v. New Orleans Public Serv., Inc., 728 F.2d 730,735 (5th Cir. 1984) (quoting WRIGHT, MILLER AND KANE, FEDERAL PRACTICE AND PROCEDURE § 2862 (1973)).

The district court had both subject matter and personal jurisdiction. Thus, the only inquiry is whether the district court acted in a manner inconsistent with due process as to render the judgment void.

"Ordinarily all that due process requires in a civil case is proper notice and service of process and a court of competent jurisdiction; procedural irregularities during the course of a civil case, even serious ones, will not subject the judgment to collateral attack." **Fehlhaber v. Fehlhaber**, 681 F.2d 1015,1027 (5th Cir. 1982), cert. denied, 464 U.S 818,78 L.Ed 2d 90,104 S.Ct 79 (1983).

Under our system of justice, the opportunity to be heard is the most fundamental requirement. **Mullane v. Central Hanover Bank & Trust Co.**, 339 U.S 306,314, 94 L.Ed 865, 70 S.Ct 652 (1950) ("**The fundamental requisite of due process of law is the opportunity to be heard.**"). Without notice Lott had no opportunity to be heard. Therefore, Lott was denied due process of law and the judgment against him is void. **Bass v. Hoagland**, 172 F.2d 205 (5th Cir.), cert denied, 338 U.S 816, 94 L.Ed. 494, 70 S.Ct 57 (1949). Because the judgment against him is void, the district court erred in refusing to vacate the judgment under Rule 60(b)(4).

When the district court failed to address 32 of Lott's due process claims, constitutional claims of ineffective counsel, prosecutor misconduct, or to grant any type of evidentiary hearing on the newly discovered evidence. The 33 affidavits that he submitted that refuted, and contradicted the affidavit of trial

counsel on material issue of facts. The judgment is void and this court should reconsider Lott's COA and review the district court's order denying Lott's 60(b)(4)(6) motion and debate whether or not the district court did in fact address all of Lott's claims. Since the district court has not pointed to anything in the record that shows it addressed any of the claims. If what Lott is requesting is correct, he should not be denied his day in court and should be granted just relief.

Lott's case should be remanded to the district court to address all claims or to show where it has addressed the claims and issues. As the court has stated.

C.1) The court premise that "Lott must establish that reasonable jurist could disagree with the decision to deny relief or that the issue he presented deserve encouragement to proceed further."

Lott contend and requests this court to reconsider it's ruling because he contended that the district court failed to and over looked 32 constitutional claims in his original § 2255 and the district court failed to hold an evidentiary hearing, and improperly denied the motion without holding an evidentiary hearing.

As it relates to the district court failing to and or neglecting to address all Lott's constitutional claims in his § 2255. Jurist of reason have said that this is a clear violation of due process when a court fails to address all constitutional claims raised in a petitioner's § 2255. United States v. Fertnandez, 98 F.3d 1338 (quoting : Peach v. United States, 468 F.3d 1269,1271 (10th Cir. 2006)

In the instant case, the district court reasoned that it had addressed all Lott's claims in his § 2255 in the order they appeared. see Courts March 15,2017 and April 18,2017 opinions.

Lott attest that a clear review of the record shows that the district court did not in fact address each of his constitutional claims at all. see February 11,2005 order (Att. 1)

Jurist of reason can and should disagree with the decision to deny relief and can debate that the issues Lott presented deserve encouragement to proceed further. see,. record of file for original request for COA that outline which claims Lott raised and the district courts opinion which totally fails to address any of the named claims ; see,. Also Clisby v. Jones, 960 F.2d 925,936 (11th Cir. 1992) (we vacate without prejudice and remand the case for consideration of all claims).

As it relates to the court's failure to hold a evidentiary hearing, since the court never addressed nor reached the merits of all claims raised, there was a defect in the integrity of the habeas proceeding. "The defect lies not in the district court's resolution of the merits of the claim(s), but in it's failure to hold a hearing and make any ruling on claims, that was properly presented in Lott's habeas petition. see,.Spitznas v. Boone, 464 F.3d 1213,1224 (10th Cir. 2006) **see (Att. 2 Affidavit of Lott)**

Lott avers that this court should consider the language in the district court's opinion as a important indicator of what the district court did and did not address. see , District court's February 11,2005 opinion--page 3, n.3; page 9, n.4; page 17, n. 6; and page 10 n.5.

All of these statements by the district court proves that it did not in fact address all claims. These are examples and not all the claims that the court failed to address. see, district court's February 11,2005 opinion. **(Att. 1)**

see Also, Fernandez, supra, 98 F.3d 1338. Lott's 60(b)(4)(6) was on point with Fernandez, in that, Lott is not attacking the merits of the court's resolution of his claim(s). Rather, he is attacking a defect in the proceeding. In Peach ,supra, the Tenth Circuit explained that the issue of whether the district court failed to consider one of the claims the petitioner had raised in his habeas petition "asserts a defect in the integrity of the federal habeas proceeding." **468 F.3d at 1271.**

The court found that "[t]he defect lies not in the district court's resolution of the merits of the ...claim(since it never reached those merits), but in it's failure to make any ruling on a claim that was properly presented in [the petitioner's] habeas petition."

In this case it is at least debatable if in fact the district court address all of Lott's properly raised claims in his § 2255, memorandum in support of his § 2255 and h is reply to the government's response to his § 2255.

Reasonable jurist could debate and disagree with the district court's decision to deny relief and or the issues Lott presented deserve encouragement to proceed further, in light of the length of time Lott has served, 16 plus years on a 92 year sentence, with 80 years being mandatory.

This courts decision to deny Lo tt a COA is in conflict with a decision of the United States Supreme Court or the Court to which the petitioner is addressed. see Gonzalez v. Crosby, 545 U.S 524,532 (2005), Fernandez, supra, and Hart v. United States 565 F.2d 360, infra, and consideration by the full court maybe necessary to secure and maintain uniformity of the court's decisions.

Further in this case, the district court did not point to any thing in the record that shows when and where it addressed any of the claims Lott's point out in his requeat for COA. The district court only used a catch-all statement that summarily denied Lott's claims and gave no basis for its decision. It only stated that "the court addressed each of his claims in the order they appeared in his motion."

Next, Lott states and avers that conflicting affidavits between he and his then trial counsel conflicted on key material points as to whether Lott agreed not to testify in his trial. Whether Lott agreed not to call his alibi, fact and character, witness, in light of the fact that the only alibi witness that was presented for Lott, he was found not guilty of that charge.

Whether counsel interviewed key alibi witnesses, government witnesses or investigated the governments case and case files. these are just some of the issues that Lott raised that if true would entitle Lo tt to relief or at the least a evidentiary hearing.

Lott has made the required showing for the court to reconsider his COA request and grant relief to reopen his § 2255 and allow the district court to address and to hold a evidentiary hearing on the facts and claims that are out side the record in the § 2255, as mandated by § 2255.

Saif v. United States, 2009 U.S Dist.Lexis 35757 citing U.S Hughes, 635 F.2d 449,451 (5th Cir. 1981)(Fact issues may not be decided on affidavits alone in a § 2255.)

The "[C]ourt abuses it's discretion when it (1) relies on clearly erroneous factual findings, (2) relies on erroneous conclusion of law, or (3) misapplies it's factual of legal conclusions." Cargill. Inc v. United States, 173 F.3d 323,341 (5th Cir. 1999) The court in its denial of Lott's 60(b)(4)(6) petition made no finding of facts, points to nothing in the record and like wise, made no conclusions of law. Hence, there is no way to determine what the court either relied on or applied. The court provided no specificity as to what, where, or how it ruled on any of the claims, Lott's 60(b)(4)(6) petition points out that the district court failed to or overlooked in his § 2255 motion. see (Att.3)

C (2) Further, the court premised "Lott must demonstrate that reasonable jurist could conclude that the district court abused it's discretion in denying him relief from the judgment."

Lott contends this premise should be reconsidered in light of Federal Rule 60(b)(4). Which is the nondiscretionary prong of Rule 60(b).

Lott raised his 60(b) motion under both (4) & (6), and the district court has no discretion in ruling on a 60(b)(4) motion. It is either void or it is not. Recreational Properties,Inc. v. Southwest Mortgage Service Corp., 804 F.2d 311,313-14 (5th Cir. 1986).

Unlike motions pursuant to other subsections of Rule 60(b), Rule 60(b)(4) motion leave no margin for consideration of the district court's discretion as the judgments themselves are by definition either legal nullities or not. The Seventh Circuit has explained that when the motion is pursuant to Rule 60(b)(4), however, the review is plenary and courts have little leeway as it is a per se abuse of discretion for a district court to deny a motion to vacate a void judgment. United States v. Indoor Cultivation equipment from High Tech Indoor Garden Supply, 55 F.3d 1311,1317 (7th Cir. 1995).

The Ninth Circuit's approach is also instrictive: "We review de novo ....a district court's ruling upon a Rule 60(b)(4) motion to set aside a judgment as void, because the question of validity of a judgment is a legal one." Export Group v. Reef Industries, Inc., 54 F.3d 1466,1469 (9th Cir. 1995)

The 5th Cir. has made clear and agrees with other circuits that in the review of a 60(b)(4) motion,the district court has no discretion.

Lott did what was required of him, making his claims for ineffective assistance of counsel in his original § 2255 and memorandum in support of his § 2255. The district court denied the motion without addressing all the constitutional and due process claims and failed to hold a hearing to address the conflicting affidavits, newly discovered evidence or to address the issues of counsels ineffectiveness.

Lott was and has been without the assistance of counsel to help him and could not have known about Rule 60(b) that would allow him to reopen his habeas petition on the grounds that the court failed to address specific claims.

Once Lott learned of the viable options, he has made his attempt to show that he is in fact actually innocent of the crimes and that the district court failed to address these claims that were raised pro-se in his § 2255. Along with 32 other constitutional and due process claims.

In Hart v. United States, 565 F.2d 360 (5th Cir. 1978), the court held that, "Unless the record conclusively shows that the petitioner is entitled to no relief, the district court must set out his findings of fact and conclusions of law when ruling on a § 2255 motion. id.at 362.

Such findings and conclusions are "plainly indispensable to appellate review."" id. see also Gray v. Lucas, 677 F.2d 1068,1099 (5th Cir. 1982); Thor v. United States, 574 F.2d 215,219 (5th Cir. 1978) This rule should and must apply to Rule 60(b) petitions also.

In his 60(b)(4)(6), Lott alleged that he was denied procedural due process when the court failed to rule and address all his claims in his §2255 and failed to hold an evidentiary hearing to address material disputes of facts and conflicting affidavits.

And newly discovered evidence among other claims and issues of fact. see COA that outlines the 32 issues that the district court did not address nor mention in it's opinion that denied relief.

The Supreme Court has made clear in United Student Aid Funds Inc., v. Espinosa, 176 L.Ed 2d 158, 559 U.S 260. "That Rule 60 (b)(4) applies (when) ...[a] violation of due process that deprives a party of notice or the opportunity to be heard." Also, the Fifth Circuit has "recognized two circumstances in which a judgment may be set aside under rule 60(b)(4)..."[2] if the district court acted in a manner inconsistent with due process of law." Callon Patroleum Co. v. Frontier Ins.Co., 351 F.3d 204,208 (5th Cir. 2003)

The district court in this case has acted in a manner inconsistent with due process of law when it failed to or overlooked the 32 constitutional claims raised in his(Lott's) § 2255 and failed to hold an evidentiary hearing to address the material conflicts and disputes in the affidavits of counsel, and Lott. As well as counsel and the affidavits of Lott's alibi witnesses, character witnesses and other fact witnesses which if true would entitle Lott to relief.

The proceeding involves one or more questions of exceptional importance. Lott asserts that there is a issue with regards to which this courts decision conflicts with the authoritative decisions of other courts of appeals that have addresses this issue. That the district court failed to address all the claims raised in Lott's §2255.

And this courts dicision to deny Lott a COA is also in conflict with the Supreme Court's ruling on this same matter in other cases. And other circuits and the Fifth Circuits precedent.

The court in denying Lott's request for COA, it states that Lott must make "a substantial showing of the denial of a constitutional right."

The Supreme Court states in Buck v. Davis, 137 S.Ct 759 (2017) that the Fifth Circuit exceeded the limited scope of the COA analysis. The COA statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and, if so, an appeal in the normal course. 28 U.S.C § 2253.

The queation that Lott raised is whether the district court in fact, addressed all of his constitutional and due process claims raised in his § 2255 petition and supporting memorandum of law. And whether the district court failed to hold an evidentiary hearing in violation of due process and 2255 (e).

The court phrased it's determination in proper terms. But it reached it's conclusion after faulting Lott for having failed to demonstrate that reasonable jurist could conclude that the district court abused its discretion in denying him relief from the judgment.

The question for the court of appeals was not whether reasonable jurist could conclude that the district court abused its discretion, but whether jurist of reason could debate whether the court's failure to hold a hearing violated Lott's due process rights when it didn't address the newly discovered evidence, the 32 affidavits Lott submitted and other material fact disputes and whether or not the district court addressed all claims raised.

Lott has demonstrated that the district court failed to address all claims raised in his § 2255. **see** COA submitted August 15,2017, and attached exhibits namely the district courts opinion February 11,2005. The district court's opinion does not address any of the newly discovered evidence nor the 32 affidavits submitted with the § 2255. Nor the 32 claims Lott raised.

A "claim for relief" is defined as "any allegation of a constitutional violation. Ineffective assistance of counsel constitutes a violation of a defendant's Sixth Amendment Rights and is thus a claim of a constitutional violations. See Strickland v. Washington, 466 U.S 668,687-696, 104 S.Ct 2052, 80 L.Ed. 2d 674 (1984)

In Re Chinese-Manufactured Drywall Prods.Liab.Lit.,742 F.3d 576,593 (5th Cir. 2014). "[b]ecause of the seriousness of a default judgment, and although the standard of review is abuse of discretion, even a slight abuse of discretion may justify reversal."id at 594 (quoting Lacy V. S.Tel Corp., 227 F.3d 290, 292 (5th Cir. 2000)). "Any factual determinations underlying [the denial] are review for clear error."

D. REQUEST FOR HEARING EN BANC

Lott expresses a belief, based on a reasoned and studied judgment, that the court's decision, (**see attached**) is contrary to the following decision(s) of the Supreme Court of the United States and or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court.

In Gonzalez v. Crosby, 545 U.S 524,532, 125 S.Ct 2641, 162 L.Ed. 2d 480 (2005) The court set out that a Rule 60(b) petition is the correct vehicle to correct a defect in the integrity of a habeas proceeding when a court fails to address all claims raised in a habeas petition: and when a court fails to reopen a petition it is a **per se** abuse of discretion. But see Rule 60 (b)(4) that states a court has no discretion. A petition is either void or it is not.

Also, in Buck v. Davis, 137 S.Ct 759,773 (2017), the court held that the Fifth Circuit exceeded the limited scope of the COA analysis when if faulted Buck for having failed to demonstrate extraordinary circumstances. The only question was whether jurist of reason could debate that issue.

In this case the only questions are: 1) whether jurist of reason could debate the district courts statement that it had addressed all of Lott's claims in the § 2255 or does Lott's issues deserve encouragement to proceed further? 2) Whether jurist of reason could debate whether the district court should have held an evidentiary hearing? 3) Whether jurist of reason could debate whether the district court abused it's discretion when denying Lott's 60(b)(4)(6) and Rule 59(e) motion? These are questions that have not been answered. Along with the questions in Lott's request for COA, in both the district court and Fifth Circuit.

To have Lott show that jurist would disagree with the courts decision, or that jurist could conclude that the court abused its discretion, is in conflict with the Supreme Court, and Fifth Circuit and other circuit courts precedents. see also Fernandez (5th Cir.) supra Peach (10th Cir.), supra, Buck v. Davis supra.

Lott also express belief, based on a reasonable and studied judgment, that this appeal involves one or more question of exceptional important. Does the courts decision set up a needless conflict with the Supreme Court and all other circuits that have ruled on the issue(s) of void judgment under Rule 60(b) when a court fails to address all claims raised in a § 2255 and failing to hold an evidentiary hearing when a petition present conflicting

affidavits, alibi witness affidavits, newly discovered evidence, and other issues and claims of material fact disputes? Taking a position contrary to authoritative opinions of the Second,Ninth, Eleventh circuits and the Supreme Court of the United States.

APPOINTMENT OF COUNSEL

Lott also request appointment of counsel to assist with any legal form or issue that was faised and not clear to the court and to assist in any paper drafting of this same motion do to its pro-se nature and any errors in drafting and submitting on behalf of petitioner.

Conclusion

Petitioner request this Honorable Court to grant him a COA after reconsidering the facts and content of this petition.

Andreco Lott
REG.No. 27068-177
FCC-Medium Forrest City
P.O. Box 3000
Forrest City, AR 72336

CERTIFICATE OF SERVICE

I hereby certify that a copy of Motion for Reconsideration has been served via U.S Mail, with the appropriate amount of postage affixed, on opposing counsel, addressed as follows:

Angie L. Henson
Assistant United States Attorney
801 Cherry Street, Suite 1700
ForthWorth, Texass76102

Dated: April___, 2018

Andreco Lott
Reg. No. 27068-177
FCC-Medium Forrest City
P.O. Box 3000
Forrest City, AR 72336

Andreco Lott
27068-177
FCC Forrest City-Med
P.O. Box 3000
Forrest City,AR 72336

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ANDRECO LOTT, PETITIONER, V. UNITED STATES OF AMERICA, RESPONDENT.	NO. 17-10581

AFFIDAVIT OF FACT

I am Andreco Lott, Reg # 27068-177, being held at FCC Forrest City Medium Prison, in Forrest City, Arkansas 72336 P.O. Box 3000, being the mailing address. Do swear and attest that I am over 18 years old and give this Affidavit of my own free will.

Swear and attest under the penalty of perjury that the foregoing is true and accurate to the best of my knowledge and memory. I am willing and able to testify to the facts herein after in any court and or hearing.

1) I submitted 32 Affidavits with the § 2255 taht has never been refuted, disputed or contradicted, of alibi witnesses, charachter witnesses and fact witnesses.

2) I submitted newly discovered police reports from the court involving the GRay Hound robbery, that could prove my actual innocense. And that the eye witness gave a knowingly false identification at my trial when he gave totally inconsistent physical and clothing description than what was in his police statement.

3) I submitted newly discovered FBI 302's that prove the government allowed knowingly false or misleading testimony to be presented to the jury. From T.Clark, Brian Bishop, and Foster that was totally inconsistent with their trial testimony.

4) I submitted 32 constitutional and due process claims that have never been addressed or mentioned at any time during these proceedings. In my 60(b)(4)(6) petition I stated what claims were not addressed by the District Court and at what pages in my § 2255 and memorandum I raised each claim of constitutional and due process violations.

5) The District Court has at no time shown where, when or how it addressed each claims Lott raised in his § 2255.

6) I am willing to testify to the facts in this affidavit. And will submit to a lie detector test to prove the facts in this affidavit and any questions out side the four corners of this affidavit.

7) The Court's Memorandum Opinion signed February 11, 2005, did not address each of my claims and the allegations are with merit in my 60(b) motion, I argued that the court denied me due process by improperly failing to rule on the merits of 32 claims listed below.

Lott raised in Claim 1 that trial counsel was ineffective for failing to interview and investigate alibi witnesses, and within that claim he asserted counsel was ineffective for failing to interview the government's witneses, codefendants, that it has been proven that Telesa Clark, Adrium Clark, Brian Bishop, and Jerome Foster had given false and incorrect information and or tried to protect each other by falsely implicating others. Had counsel investigated and interviewed any of these government witnesses this could have been discovered and used to impeach or discredit their testimony. See Lott's Memo. at 4,6,7 and 9, and §2255 at 5.

Lott raised in Claims 2 that trial counsel ineffective for failing to raise issue in district court and on appeal that in court identification procedures impermissibly suggestive. Within this claim he asserted fhe following claims that (1) his due process rights under the 5th and 14th amendment had been violated when the government used unrelaible pretrial identification that resulted from impermissible suggestive photo line up procedure. Memo. at 9, §2255; (2) trial counsel was ineffective for not objecting to or suppressing the pretrial identification as impermissibly suggestive, Memo. at 13, §2255; (3) counsel's failure to object and request an in-camera hearing to discuss the admissibility of the in-court identification of government's witness C. Lark, Memo. at 14, §2255; (4) counsel's failure to request an identifaction instruction, Memo. at 14, §2255, and (5) whether "Lott] movant was denied his due process rights and his Sixth Amendment right to confrontation of his accusers with the unreliability of their prior identificationa, Memo. at 14.

The court's analysis failed to discuss, mention or consider (1) whether Lott's due process rights under the 5th and 14th Amendment had been violated when the government used unreliable pretrial identification that resulted from impermissible suggestive photo line up procedure, Memo. at 9; (2) whether trial counsel was ineffective for not objecting to or suppressing the pretrial identification as impermissibly suggestive, Memo. at 13; (3) whether counsel's failure to object and request an in-camera hearing to discuss the admissibility of the in-court identification of government witness C. Lark, Memo. at 14; (4) whether counsel's failure to request an identification instruction was prejudice, Memo. at 14; (5) whether Lott was denied his due process rights and his Sixth Amendment right to confrontation of his accusers with the unrelaibility of their prior identification, Memo. at 14; and (6) whether counsel was ineffective for failing to preserve and raise any of these claims on appeal, Memo. at 14, §2255.

The district court failed to address the due process claims of the 5th amendment that trial counsel was ineffective for failing to raise in the district court and on appeal that the pretrial identification procedures were impermisibly suggestive, and created a substantial likelihood of misidentification such that the in-court identification was unduly tainted, see §2255 motion at 5, Memo. at 9-14.

Lott raised in Claim 3 that trial counsel ineffective for failing to file a severance motion. See $2255 at 5 and Memo. at 14-18. Within this claim Lott raised three distinct claims of constitutional violations due to his 6th amendment right to

effective assistance of counsel. The court addressed two of the claims but failed to address the 3rd claim raised on page 17-18 of Lott's Memo. of his $2255 motion.

The court failed to consider £1· whether counsel was ineffective for failing to request a severance, because the indictment charged separate crimes against separate defendants, because no count that went before the jury where Lott and Diggs both charged to be a part of together, under Rule 8 Fed. R. Crim. P.; £2· whether counsel was ineffective for not requesting counts 2,4,18 and 20 to be severed because of the differences in "Modus Operandi", Memo. at 17-18.

Lott raised in Claim 4 that trial counsel was ineffective for failing to request cautionary instruction witnesses. He also asserted in Memorandum of Law that £1· counsel was ineffective for not requesting cautionary instruction of accomplice informants who may have had good reason to lie, Memo. at 19; £2· counsel was ineffective because counsel should have requested an accomplice-codefendant plea agreement instruction at the time of each of the testifying alleged accomplice-informants testimony, Memo. at 19, 21.

Lott raised in Claim 5 that due process violated when prosecutor vouched for credibility of witnesses, and trial counsel ineffective for failing to object to violation of movant's due process rights when prosecution vouched for credibility of witnesses, and to ask for curative instructions and/or mistrial. Within this claim he asserted four distinct claims of constitutional violations (1) prosecution violated Lott's due process right when the prosecution used and informed

the jury that codefendants were truthful because they pled guilty to same crime Lott was on trial for, at 22, §2255; (2) trial counsel's ineffectiveness for failing to object to violation of Lott's due process rights when the prosecution vouched for the credibility of witnesses, at 2, §2255; and (3) counsel ineffective for failing to request and/or prompted a curative instruction for witnesses plea agreements and vouched for government witnesses, at 25, §2255.

The court failed to address Lott's claim that (1) the prosecution violated his due process right when they vouched for its witnesses during opening arguments, at 21-22, §2255 Memo, when stating that the jury would know that Lott was a part of the group of robbers... and the Telesa Clark and Jerome Foster were truthful and could be believed because they have pled guilty to various robberies, have entered into a plea agreement with the government, and agreed to come and tell you exactly what happened there; (2) whether counsel was ineffective for failing to object to violation of Lott's due process rights when the prosecution vouched for the credibility of witnesses (codefendants), at 21, 25, §2255 Memo; and (4) whether the prosecution violated Lott's due process rights when they used and informed the jury that the codefendants were truthful because they had pled guilty to same crimes Lott was on trial for, at 22, §2255 Memo.

Lott raised in Claim 8 that trial counsel was ineffective for failing to raise in the district court and on appeal that there was insufficient evidence to support a finding of guilt on counts 3, 5, 21. Within this claim he raised that (1) the

record is void of any evidence that the movant at anytime used or carried a firearm during and in relation to any crime charged in counts 3, 5, 21, at 33, §2255; (2) the government has failed to prove that the movant knew and aided and abetted the principals (codefendants) use of firearm at anytime during and in relation toa crime of violence as charged, at 34, §2255; (3) Lott asserted an actual innocent claim due to insufficent evidence and ineffective counsel pursuant to Bousley, at 37, §2255; and (4) Lott raised but for counsel's unprofessional errors in failing to raise these issues at trial or appeal. There exist a reasonable probability that the outcome of the proceeding would have differed in the movant's favor, at 37, §2255.

The court failed to address whether there was sufficient evidence that Lott used or carried a firearm in counts 5 and 21, at 33, §2255.

The court failed to address whether there was sufficient evidence that Lott aided and abetted the use or carriage of a firearm in counts 3, 5, and 21, at 34, §2255.

The court did not address Lott's actual innocent claim raised pursuant to Bousley, due to ineffective counsel, at 37, §2255.

The court failed to address whether Lott suffered ineffective assistance of counsel for counsel's failure to raise these claims in the district court and on appeal.

The court failed to address if counsel was ineffective for failing to raise a 29(a) motion even after the court assumed that that was what Lott was trying to assert.

Lott raised in Claim 12 that counsel ineffective for

failing to raise on appeal that government failed to prove movant was a part of any conspiracy and insufficient evidence to support a conviction for robbery or aiding or abetting. Within this claim he asserted several subclaims of constitutional violations on the part of the government and the trial court that (1) that there was insufficient evidence that there was any interference with or effect on interstate commerce during the robbery of the armored car (A.T. Systems) outside the Greyhound bus station in count 18, at 45, §2255 Memo; (2) that there was insufficient evidence that Lott, himself actually robbed the Winn Dixie in count 20 or that he aided and abetted the actual robbery of the Winn Dixie in count 20, at 45, §2255 Memo; (3) that the trial court erred in violation of due process when it failed to properly instruct the jury on the necessary elements of aiding and abetting and only read to the jury the definition of aiding and abetting without more, at 46, §2255 Memo; and (4) that counsel was ineffective for failing to raise any of the above at anytime during trial or on appeal, at 46, §2255 Memo.

The court failed to address distinct claims of ineffective assistance of counsel raised in Issue 14 of §2255 which was titled Trial counsel ineffective for failing to request pretrial motions for discovery, exculpatory Jencks material under 18 U.S.C. §3500B, C, and D, Rule 16 and impeachment material which would have revealed missing documents, letters, police reports and 302's, at 47-50, §2255.

Andreco Lott pro-se
April 19, 2018