IN THE SUPREME COURT OF FLORIDA

DAVID GORHAM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 70,428

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee was the prosecution and Appellant the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

The following symbols will be used:

"M"	Record of Appellant's Motion for Post-Conviction Relief and attached affidavits
"T"	Record of the trial
"SR"	Supplemental Record of the trial

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts, to the extent that it is nonargumentative, as a generally accurate account of the proceeding below with such additions and exceptions that are set forth below and in the argument portion of this brief.

Wendy Parker, a clerk at J.C. Penny in Pompano Beach, testified that on October 31, 1982, the Appellant sought to use a Master Card credit card when purchasing two Seiko watches and a gold chain. Because Appellant's signature did not match the one on the card Ms. Parker asked him for additional identification (T.397). Appellant showed her a Visa card with the name Carl Peterson, the victim, on the card. Ms. Parker called a supervisor to come down (T.397). However, Appellant only stayed a moment, turned, walked away and left the store (T.398).

Sigmund Rothstein, Milton Siegel, and Ruby Hoo also testified concerning credit card sales (T.405-408, 413-415, 417-423). Of the other store clerks Ruby Hoo was able to identify Appellant (T.421).

Mose Jordan testified he knew Calvin Gorham as well as Appellant and that a phone number used on one of the sales slips, 943-6396, used to be his telephone number (T.423-426).

Clyde Mitchell testified that Appellant asked him to drive him (Appellant) around. Appellant paid for gas and Mitchell drove him around to various stores, including Pompano

Fashion Square. Appellant came back with packages and bags and Mitchell received two pairs of jeans and a brown pullover for his services (T.427-434).

Barbara Slocumbe, who lived in the neighborhood where the victim was shot, testified that she heard a shot at approximately 6:25 p.m. (T.434-436).

Charles Slocumbe, who knew the victim, testified that he identified the victim's body that night and that he called the victim's wife to the scene (T.439-441).

Detective Hill testified that he assisted evidence technician Osborn with the technical processing of the crime scene (T.441-445).

Kenneth Gardner testified that on October 30, 1981 he was heading towards the Pompano Restitution Center when he saw two persons talking and subsequently heard a shot (T.453-457). The shot sounded so close that Gardner started running and as he crossed a railroad track he slipped and hurt his ankle at which time he heard two more shots (T.457). Gardner turned and saw an individual running but he could not tell who he was or whether the person was white or black. Gardner went to the Restitution Center and told people there (T.458). Gardner later accompanied police officers to the scene where the victim's body was found (T.458-460).

In the course of rambling on Gardner blurted out:

> I came home about 1:30, close to 2, back to the Restitution Center and I even much

took a lie detector test.

The prosecutor immediately sought to restrict the witness's rambling by saying: "Just answer the questions." (T.464). Defense counsel moved for a mistrial however, he specifically rejected a curative instruction (T.465). Though Gardner in cross-examination intimated that the prosecutor sought to improperly influence him by promising to write a letter to Tallahassee concerning a pardon (Gardner was serving a prison sentence at the time), the prosecutor merely showed Gardner his prior statement (one in which he had not identified a particular individual) (T.466-467,478). Pompano Beach Detective Fowler testified as to the chain of custody on various pieces of evidence (T.480-481).

Dennis Grey, of the Broward Sheriff's Office Crime Laboratory (whose qualifications as an expert on ballistics were stipulated to) (T.493) testified he examined two bullets (T.493-494). Grey testified that the bullets were fired from the same weapon, a revolver chambered .38 special (T.495). The bullets were 158 grain Remington Peters, lead round nose .38 special bullets - not a jacketed bullet - all lead (T.495). Remington Peters is a particular manufacturer of ammunition, of which there are approximately twelve (T.497-500).

Patricia Peterson, the victim's wife, testified that she did the books for the victim's business (T.512). Mrs. Peterson testified that the victim used a ledger and checkbook

form of accounting (T.512). With regard to day to day affairs of his business the victim paid a lot of bills through petty cash checks. He would take between $400 and $600 in cash and he would pay his men in cash or he would pay for materials in cash (T.513). The victim regularly kept $500 on his person as part of his normal business affairs (T.513-514). The victim also had Visa, Master Charge, and Sears charge cards (T.514). The victim carried these cards in his wallet (T.514-515).

If the victim paid cash he would take the bill home and Mrs. Peterson would reimburse him (T.516-517). The victim usually kept these bills in his shirt pocket (T.517).

Ada Johnson testified at trial that she knew Appellant as "Cisco" or "Greg Richardson" (T.524). Johnson saw Appellant on October 30, 1981, a Friday, at approximately 2:00 p.m. at her apartment on Fifth Street in Pompano (T.526). Appellant came there looking for an apartment (T.526). Johnson offered to rent an apartment with furniture; she wanted the security deposit and rent (T.526). Appellant replied he did not have the money then but he pulled out a gun and said he could get the money and that he would be back (T.527). Appellant said he would be back at 6:00 p.m. and that he would bring $600 or $700 (T.527).

Johnson offered to give Appllant a ride becaue she knew that he did not have a car (T.528). Appellant replied he was going to walk and to just hang out (T.528). Johnson then left Appellant and went to pick up her boy at 2:15 p.m. (T.528).

Later that afternoon Johnson saw Appellant on the street approximately two streets over (T.529). That evening, while taking out the trash, someone heard a gunshot (T.530). Johnson looked up the street and she thought she saw Appellant because he had the same outfit on (T.530). Johnson described the outfit as short jeans to the knee, which were faded; a yellow T-shirt with blue stripes and Converse high-top sneakers with knee socks (T.530-531).

Johnson described the gun which Appellant showed her as a blue steel .32 or snubnose .38 caliber gun (T.534). A Pompano Beach jailor described the procedure for taking fingerprints from persons arrested (T.548-549A). Detective Murray testified that Appellant's fingerprints were taken on March 15, 1982 (T.552, State Exhibit 38). It was stipulated that State Exhibit No. 39 were the prints of Kenneth Gardner (T.544,556).

Fingerprint specialist John Massey, of the Federal Bureau of Investigation, in Washington, D.C., testified that a latent fingerprint on a Pompano Mercantile Co., Inc. receipt was Appellant's (T.584).

Cara Kubicek and Deborah Edwards testified as to sales charged to the decedent's credit cards in a gas station and a clothing store respectively (T.596-599, 600-607).

Pompano Beach Police Detective Blair testified he arrested Appellant on November 7, 1981 (T.610). On that date Blair went to the apartment of Diane Walker due to information

concerning Appellant (T.610). Ms. Walker, the lease holder on the apartment, granted Detective Blair permission to search the apartment for Appellant (T.610-611). In so doing Detective Blair seized various items bought with the stolen credit cards of the decedent; jackets, shoes, sweaters, (State Exhibit 49,50,51). Detective Blair also observed a partially used box of .38 caliber ammunition - Remington 158 grain, round nose bullets (T.614,615). The bullets were found on the floor of a closet, a closet where some of the clothing items were also found (T.614). The bullets were placed in evidence as State Exhibit 52 (T.616).

Detective Murray testified at trial that he investigated the homicide of Carl Peterson (T.618). Murray questioned Appellant on November 7, 1981 (T.619). Appellant was advised of his rights and he signed a form and initialed each response (T.619-622). Appellant admitted to the use of the credit cards (T.624). Appellant claimed he received the cards out in Collier City on 27th Avenue (T.625). Appellant said he received the cards from a white male named Sid, who was accompanied by a black man in a Monte Carlo. In his taped statement Appellant described the Monte Carlo, the persons from whom he received the credit cards, and the transaction itself in elaborate detail. When asked if he had been in the area where the homicide occurred Appellant claimed he had not been in the area for a couple of weeks (T.630-631). In a second statement on

November 7, 1981 Appellant admitted having a .38 caliber gun the previous week (SR-35-36). Appellant claims he pawned the gun and that he did not know to whom (SR.36-37). Detective Murray also spoke to Appellant on November 12, 1871 and November 13, 1981 (T.636). On each occasion a rights form was signed by Appellant (T.636, State Exhibit 59,60).

Pursuant to information received from the FBI, Detective Murray told Appellant that new information linking him to the homicide of Carl Peterson had been found (T.640). Appellant was told that his fingerprints were found at the scene of the crime (T.640). Though at first he laughed, Appellant changed his tune and told Detective Murray that he was going to tell him the truth (T.640-641). Appellant said that approximately 8:00 p.m. he was coming from Jerry and Ada Johnson's apartment when he heard one shot and then two more. He looked down the street and saw two or three guys. They ran into an unidentified car and fled west and then north (T.641). Appellant said he was walking by this area when he saw a wallet. He walked over, picked up the wallet, took the credit cards and threw the wallet down (T.641). Appellant said he did not go into the warehouse at all (T.641). Appellant said he did not see anyone else in the area and that is how his prints got found at the scene (T.642). Detective Muray told Appellant that he had a problem because his fingerprints were found inside the warehouse (T.642). Appellant angered shouted "Your a crook.

Your a crook. Your crooks." (T.642). He then stormed out of the interview room (T.642).

In his closing argument the prosecutor argued that he had proven both felony murder with the underlying felony of robbery or attempted robbery and premeditated first degree murder (T.718,719).

SUMMARY OF THE ARGUMENT

Appellant's Motion for Post-Conviction Relief did not state any legally sufficient claim. Appellant's Brady allegations are refuted by the motion itself and attached affidavits. The record, as a whole, refutes Appellant's allegations as to ineffective assistance of trial counsel. An evidentiary hearing on either of Appellant's claims would be an exercise in futility because, even if taken at face value, Appellant's allegations testimony would not have affected the outcome of his trial.

ARGUMENT

POINT I

APPELLANT'S MOTION FOR POST-CONVICTION RELIEF WAS LEGALLY INSUFFICIENT ON ITS FACE.

Appellant argues that the trial court erred by failing to hold an evidentiary hearing and by failing to attach portions of the record to show that Appellant is not entitled to post-conviction relief. However, Fla.R.Crim.P., Rule. 3.850 reads in part:

> If the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. In those instances when such denial is not predicated upon the legal insufficiency of the motion on its face, a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief shall be attached to the order.
> (emphasis added)

Appellee submits that, in the case at bar, Appellant's motion was insufficient on its face and thus there was no need to attach portions of the record to show why he was not entitled to relief. Gulley v. State, 436 So.2d 1042 (Fla. 1st DCA 1983); Watkins v. State, 413 So.2d 1275 (Fla. 1st DCA 1982).

The law is also clear that under 3.850 procedure, a movant is entitled to an evidentiary hearing unless the records conclusively show that the movant is entitled to no relief. O'Callahan v. State, 461 So.2d 1354, 1355 (Fla. 1985); Meeks v. State,382 So.2d 673, 676 (Fla. 1980). Since sub judice, no

portions of the record were attached to the trial court's order, the presumption must be that the lower court's ruling was based on the face of the pleading. Thames v. State, 454 So.2d 1061, 1066 (Fla. 1st DCA 1984). Because Appellant's motion, when viewed in light of the entire record at bar, clearly shows that the movant is entitled to no relief, the trial court correctly denied relief without an evidentiary hearing. Middleton v. State, 465 So.2d 1218, 1221 (Fla. 1985); Mann v. State, 482 So.2d 1360, 1361 (Fla. 1986); Porter v. State, 478 So.2d 33 (Fla. 1985); Harich v. State, 484 So.2d 1239 (Fla. 1986); Delap v. State, 505 So.2d 1321 (Fla. 1987). Appellee will proceed to illustrate how the instant record conclusively showed that no legally sufficient point has been raised by Appellant.

A. APPELLANT'S MOTION FOR POST-CONVICTION RELIEF DID NOT STATE ANY LEGALLY SUFFICIENT GROUNDS TO BASE A BRADY VIOLATION CLAIM ON.

In the Motion for Post-Conviction Relief, Appellant alleged that the State did not disclose several matters, and that the failure to disclose constituted Brady violations. This claim was legally insufficient on the face of the motion and the attached exhibits, which conclusively show that Appellant was not entitled to relief.

1. THE TESTIMONY OF LORETTA FOREHAND

Appellant's claim that the State committed a Brady violation by not disclosing the testimony of Loretta Forehand was

based on a deposition of Forehand taken on December 13, 1984. Since this deposition was attached as Exhibit "E" to Appellant's motion for post-conviction relief, Appellee submits that the trial court could properly rule on the sufficiency of this claim on the basis of the record, without conducting an evidentiary hearing. See Fla.R.Crim.P. 3.850. In addition to the deposition, the praecipe for witness of Appellant's trial counsel which showed that the trial counsel was aware of Loretta Forehand, was attached to Appellant's motion as Exhibit "D." Also attached as Exhibit "F" to Appellant's motion was an affidavit of Appellant's trial attorney, Michael D. Gelety, in which he swears that Loretta Forehand denied any knowledge of the murder and robbery (M.171) From these exhibits, the trial court could determine that Appellant's Brady claim, as to the alleged testimony of Forehand, was legally insufficient on its face.

In the deposition, Ms. Forehand alleged that she told police officers that she saw two men running immediately after the shooting (M.97). Appellant bases his Brady claim on this unsubstantiated allegation. The fact that Ms. Forehand's name appears on the praecipe of witnesses of, Appellant's trial counsel negates the implication that the State suppressed information provided by Ms. Forehand. (M.81). Moreover, as previously noted, Appellant's trial counsel even stated in a sworn affidavit, which Appellant attached to his motion, that Ms. Forehand denied knowledge of the case during the trial

(M.171). Thus, the trial court could conclude from the record and files attached to Appellant's motion that the state did not suppress any favorable knowledge that Ms. Forehand may have possessed in regard to the murder and robbery. In the absence of actual suppression of evidence favorable to an accused, the state does not violate due process in denying discovery. Delap v. State, supra; relying on James v. State, 453 So.2d 786, 790 (Fla. 1984), cert denied 469 U.S. 1098 (1984); Antone v. State, 410 So.2d 157 (Fla. 1982); United States v. Luis-Gonzalez, 719 F.2d 1539 (11th Cir. 1983).

As the deposition to perpetrate testimony reveals and as the state pointed out in its response to Appellant's motion, Ms. Forehand was an eighty-two year old witness who had trouble remembering the details of what she allegedly observed. In regard to the two men she allegedly saw immediately after the shooting, Ms. Forehand could only remember that one was tall and the other was short (PR.109). She could not comprehend an aerial view of the crime vicinity (PR.125). Since the only basis for Appellant's Brady claim was Ms. Forehand's unsubstantiated allegation in the deposition, the trial court could determine that the claim was legally insufficient on the basis of Ms. Forehand's deposition and the sworn affidavit of Appellant's trial counsel that Ms. Forehand denied knowledge of the incident during the trial. Thus, there were no factual issues requiring an evidentiary hearing, and because the claim was insufficient on

the face of the motion and attached affidavit, there was no requirement for the trial court to attach the portion of the record showing that Appellant was not entitled to relief. Fla.R.Crim.P. 3.850; Delap v. State, supra.

2. THE ALLEGED PROMISE TO ADA JOHNSON

Appellant contends that the State committed a Brady violation when it allegedly failed to disclose to the defense that Ada Johnson had received lenient treatment in return for her testimony. However, in the motion and its attached affidavit, Appellant did not present any factual basis for this claim, other than Ada Johnson's Motion for Mitigation and Reduction of Sentence in a completely unrelated case (M.244-245).

However, in the Motion for Mitigation, Johnson did not even assert that she received a recommendation of leniency for her testimony in Appellant's case (M.245). Even if Ada Johnson's representations in the motion to mitigate were true, Appellant did not present any facts in the Motions to show that the leniency recommendations of Mr. Kern and Sergeant Murray were given in exchange for Johnson's testmony in Appellant's case. However, Appellant provided no extrinsic evidence of a deal between Johnson and the State, other than Johnson's unverified statement in her pro se motion to mitigate. Moreover, as Sergeant Murray pointed out in his affidavit (M.253), the fact that Johnson was imprisoned for the probation violation and grand

theft was proof that Johnson was not given a lenient deal in exchange for her testimony in Appellant's case. Appellant's claim that Johnson received a deal for lenient treatement was further negated by the fact that the trial court denied Johnson's motion to mitigate.

Johnson's Motion to Mitigate, which was the only basis for Appellant's Brady claim, was insufficient on its face as a matter of law to show that the State offered Johnson a lenient deal in exchange for her testimony in Appellant's case. Thus, the court properly declined to grant an evidentiary hearing on the claim. Delap v. State, supra. Since Appellant's claim was not based on the record and was legally insufficient as a matter of law, the trial court was not required to attach the portion of the record showing Appellant's nonentitlement to relief.

The present case is distinguishable from Giglio v. United States, 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1971), a case in which Appellant asserts as controlling. In Giglio, the Government filed an affidavit that confirmed the Petitioner's claim that a promise had been made to a witness that if the witness testified before the grand jury, the witness would not be prosecuted. Id, 31 L.Ed.2d at 107. However, in the present case, Appellant did not present any facts in the Motion establishing that Ada Johnson was promised lenient treatment in exchange for her testimony in Appellant's case. In addition to distinguishing Giglio from the present case, the absence of facts

in Appellant's Motion establishing a deal between the State and Johnson also distinguishes the present case from the other cases relied upon by Appellant.

3. THE BLOODY FOOTPRINT

As with Appellant's other Brady claims, Appellant's claim that the State committed a Brady violation for its alleged failure to disclose a bloody footprint was legally insufficient as a matter of law. The alleged "bloody footprint" which Appellant alludes to in the motion was contained in a photograph which defense counsel had access to, as evidenced by Appellant's attachment of the footprint to the motion as Exhibit "P" (M.271). In the affidavit of Mr. Gelety, Appellant's trial counsel, Mr. Gelety admitted that he viewed many photographs made available to him (M.169). The fact that Appellant attached a photograph of the footprint to the motion reveals that the photograph was made available to Appellant's trial counsel. In the motion, Appellant did not allege or show that he came into possession of the photograph after trial. Although Mr. Gelety states in his carefully-worded affidavit that, to the best of his knowledge, the State did not advise him of a bloody footprint, Mr. Gelety does not say that the State did not make available to him a photograph of the footprint (M.169).

Moreover, Appellant did not allege facts in the motion that showed that the State had suppressed favorable evidence.

Delap v. State, supra; James v. State, supra. Appellant's assertion in the motion that the footprint and plaster cast "might have proven that a bystander or even a Pompano Beach police officer brought the wallet to the body of Carl Peterson after the murder" is sheer speculation, which does not satisfy the materiality requirement for a Brady violation. United States v. Bagley, 473 U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 474 (1985); Stone v. State, 481 So.2d 478 (Fla. 1986).

Appellant's Brady claim as to the footprint was reputed by appendixs to the motion, as were his other Brady claims. Therefore, the claim was insufficient as a matter of law. Accordingly, the trial court's summary denial of the claim was proper. Fla.R.Crim.P. 3.850.

B. APPELLANT'S MOTION FOR POST-CONVICTION RELIEF DID NOT STATE ANY LEGALLY SUFFICIENT GROUNDS TO BASE AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON.

A defendant alleging ineffective representation must meet a two-prong standard before his conviction could be reversed. First, a defendant alleging ineffective representation must show counsel's representation fell below an objective standard of reasonableness. Knight v. State, 394 So.2d 997 (Fla. 1981); Strickland v. Washington, ___U.S.___, 80 L.Ed.2d 674,693 (1984); McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1980). There exists a strong presumption that an

attorney's performance was reasonable. Strickland v. Washington, supra, at 694; Michel v. Louisiana, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed.2d 83 (1984). The second prong of the standard is that the defendant must show that the attorney's deficient performance prejudiced the outcome of the case. Strickland v. Washington, supra; Knight v, State, supra; Burger v. Kemp, 735 F.2d 936 (11th Cir. 1985); United States v. Dimatteo, 759 F.2d 831 (11th Cir. 1985). The defendant alleging ineffective representation also must identify the acts or omissions that serve as the basis for the claim. Strickland v. Washington, supra at 695.

In the present case, when viewed in light of the entire trial record, the omissions which Appellant cites to support his claim of ineffective assistance of counsel were legally insufficient as a matter of law. As in Agan v. State, 503 So.2d 1254 (Fla. 1987), the trial judge who entered the order on Appellant's motion to vacate was the same judge who presided at Appellant's trial, and thus, could reasonably and properly determine that the record and files of the case conclusively showed that Appellant was not entitled to relief. See also Bush v. State, 505 So.2d 409. Now Appellee will show that the omissions alleged by Appellant in the motion were legally insufficient as a matter of law.

The first three omissions alleged by Appellant are the same claims that Appellant raised as Brady violations. In regard to Ms. Forehand's statement that she told a police officer that

she saw two men running after the shooting, Appellant asserts that his counsel was ineffective for not discovering this information. However, as previously noted, Appellant's trial counsel, Mr. Gelety, stated in an affidavit attached to the motion that he contacted Ms. Forehand, and Ms. Forehand denied any knowledge of this incident (M.171). Thus, the Motion and exhibits conclusively showed that Appellant was not entitled to relief on the basis of this alleged omission. By contacting Ms. Forehand, Mr. Gelety did all that a competent counsel could do.

Appellant's second claim, the alleged failure of Mr. Gelety to discover an alleged deal between Ada Johnson and the State, was legally insufficient on the face of the motion and its attached affidavits. As previously noted, Appellant did not present any extrinsic evidence of a deal in the motion. The only basis for Appellant's allegation that a deal existed was the unsubstantiated statement of Ada Johnson, in a prose motion to mitigate filed in an unrelated case, that Assistant State Attorney Kern and Detective Murray had promised a lenient recommentation (M.244-245). Johnson did not state in the motion that the lenient recommendation was made in exchange for her testimony in Appellant's case. Thus, where Appellant's motion did not provide any evidence that Johnson's testimony was elicited through a leniency deal, Appellant's claim that his trial counsel was ineffective for not discovering such a leniency deal was legally insufficient on the face of the motion.

Appellant's third claim, the alleged failure of his trial counsel to find other suspects, was also legally insufficient as a matter of law. As a basis for this claim, Appellant asserted that he told his trial counsel that Tim Carlo was one of the two men fleeing the crime scene (M.32). However, other than Appellant's self-interest and unsubstantiated assertion, Appellant did not present any independent evidence in the motion revealing that Appellant informed his trial counsel of Tim Carlo. In the affidavit of his trial counsel which was attached to the motion, Appellant's trial counsel did not mention that Appellant had informed him of a possible suspect (M.171). Moreover, even if it was conceded that Appellant told his trial counsel of Tim Carlo, Appellant did not cite any facts in the motion that supported the claim that his counsel failed to investigate Tim Carlo. Whether or not to call Tim Carlo as a witness was a tactical decision of Appellant's trial counsel, and his trial counsel cannot be held to be incompetent for making the tactical decision. See Lighbourne v. State, 471 So.2d 27,28 (Fla. 1985); Armstrong v. State, 429 So.2d 287 (Fla. 1983).

Appellant did not provide any facts in the motion showing that his trial attorney failed to investigate Tim Carlo, or any other potential suspect. Thus, Appellant's motion was legally insufficient as a matter of law to satisfy the performance prong of Strickland, supra. Moreover, the motion also was legally insufficient as a matter of law to satisfy the

prejudice prong of Strickland. Appellant did not state in the motion how his trial counsel's investigation of other suspects would have changed the outcome of the trial. Armstrong v. State, supra. The jury was made aware of the two possible suspects through Appellant's reference to them in his oral confession, which was played to the jury at trial (T.641). Thus, because the record revealed that the jury was aware of the two possible suspects, Appellant was not prejudiced as a matter of law by the alleged failure of his trial attorney to investigate other suspects.

In regard to the fourth alleged omission of trial counsel, the failure to present mitigating evidence during the sentencing phase, Appellant's claim as raised in the motion did not satisfy either the performance or prejudice prong of Strickland as a matter of law. Contrary to Appellant's representations, Appellant's trial counsel did all that could be required of a competent attorney to bring mitigating evidence before the court. Appellant's trial counsel subpoened witnesses to testify in mitigation (T.781). When these witnesses did not show up for the sentencing phase, Appellant's trial counsel moved the court for a continuance (T.781,784). As in Jent v. State, 408 So.2d 1024,1028 (Fla. 1981), Appellant's counsel diligently pursued a continuance, and his suffering an adverse ruling does not rise to the level of ineffective assistance of counsel.

Appellant contends that his trial counsel was

responsible for failing to protect the record in regard to the denial of the motion for continuance where the motion allegedly was procedurally defective. However, Appellant is completely wrong on this point. First, Appellant did not cite any authority in the motion that precluded an appeal of the denial of the motion for continuance. In the cases relied upon by Appellant, the courts relied on Fla.R.Crim.P. 3.190 to hold as procedurally defective a motion for continuance which is not in writing and which does not show the expected testimony. See Perczynski v. State, 366 So.2d 863 (Fla. 3rd DCA 1979); Duncan v. State, 350 So.2d 825 (Fla. 3rd DCA 1977); Lyles v. State, 312 So.2d 495 (Fla. 1st DCA 1973). However, Rule 3.190 only applies to pre-trial motions. Where, as in the present case, the basis for a continuance arises during the trial or at sentencing, it is unrealistic to require a written motion for continuance. Moreover, Appellant's counsel apprised the trial court of the subject matter of the expected testimony; Appellant's counsel informed the court that the testimony would be offered as mitigation evidence (T.781).

The claim raised by Appellant in his motion concerning the failure of his counsel to procure a continuance was legally insufficient as a matter of law to satisfy the performance prong of Strickland v. Washington, supra. The claim also was legally insufficient as a matter of law to satisfy the prejudice prong. Since the jury recommended life imprisonment, Appellant obviously

did not suffer any prejudice in the hands of the jury for the alleged failure of his trial counsel to present mitigating evidence. As to the trial court who sentenced Appellant, the trial court had for its review at sentencing a presentence investigation report, which would have familarized the trial court with any potential applicable mitigating circumstances. See Williams v. State, 438 So.2d 787,786 (Fla. 1983).

Although Appellee acknowledges that this Court held to be invalid two of the trial court's aggravating circumstances, this Court held that the trial court was correct in finding as aggravating circumstances that Appellant was under sentence of imprisonment when the murder was committed and that the murder was committed during the commission of a felony. See Gorham v.State, 454 So.2d 556 (Fla. 1984). In view of these two valid aggravating factors, Appellant's claim in the motion that the witnesses on the praecipe submitted by his trial counsel would have presented substantial evidence as to change the outcome of the sentence was pure speculation, and was legally insufficient as a matter of law to satisfy the prejudice prong of Strickland.

Appellant's contention in the motion that his trial counsel was ineffective for failing to object to allegedly unconstitutionally deficient instructions also was legally insufficient as a matter of law. The instructions that Appellant claimed to be deficient were the standard instructions on first-degree murder under the premeditated and felony-murder theories

(T.741-744). Appellant's assertion that the trial court should have instructed the jury that they had to reach a unanimous verdict on whether the defendant was guilty under a premeditation or felony murder theory is both novel and meritless. Appellant did not cite any legal authority in the motion for this assertion. The trial court instructed the jury that their verdict had to be unanimous (T.763). For the trial court to further instruct the jury that their verdict had to be unanimous under either the premeditated or felony-murder theories of first-degree murder would have been confusing, and beyond the requirements of the law. Moreover, Appellant's trial counsel could hardly be considered incompetent for failing to object to standard instructions. Thus, the performance prong of Strickland was not satisfied as to this claim, and since any prejudice resulting from the alleged omission was purely speculative, the prejudice prong of Strickland also was not satisfied. Accordingly, summary dismissal of this claim was appropriate.

Appellant's claim that his trial counsel was ineffective for failing to object to the trial court's instruction on the aiding and abetting/felony murder theory also was legally insufficient as a matter of law. Appellant contends that the trial court should have instructed the jury that, in order for it to find Appellant guilty of first-degree under this theory, the State must prove that Appellant intended to kill the victim. However, under the first-degree felony murder

theory, the State does not have to prove that a defendant had the specific intent to kill, but must prove that the defendant entertained the mental element required to convict on the underlying felony. Gurganus v. State, 451 So.2d 817 (Fla. 1984); Deloach v. State, 388 So.2d 31 (Fla. 3rd DCA 1980); Adams v. State, 341 So.2d 765 (Fla. 1976). Thus, Appellant's claim that his trial counsel was ineffective for failing to object to an entirely proper instruction was legally insufficient as a matter of law, and the trial court's summary dismissal of the claim was proper. As to this claim, Appellant in his motion did not satisfy the performance prong of Strickland, and his suggestion of prejudice was purely speculative.

Howard v. State, 489 So.2d 875 (Fla. 4th DCA 1986) and Majewski v. State, 487 So.2d 32 (Fla. 1st DCA 1986), relied upon by Appellant, are distinguishable from the present case. In both Howard and Majewski, the ineffective representation claims were legally sufficient and thus, an evidentiary hearing was required. However, as Appellee has shown, the allegations of ineffective representation raised in Appellant's motion were legally insufficient as a matter of law. From the face of the motion itself and the record and files in the case, the trial court could determine that Appellant's allegations did not satisfy either the performance and prejudice prong of Strickland. Accordingly, summary dismissal was appropriate.

CONCLUSION

WHEREFORE based upon the foregoing argument and the authorities cited therein, Appellee respectfully requests this Honorable Court to affirm the trial court's summary dismissal of Appellant's Motion for Post-Conviction Relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished by U.S. to, THOMAS KENWOOD EQUELS, ESQUIRE, Holtzman, Krinzman & Equels, P.A., 8585 Sunset Drive, Miami, Florida 33143, this 30th day of July, 1987.

OF COUNSEL