IN THE SUPREME COURT

OF FLORIDA

Case No. 70,428

DAVID GORHAM,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in summarily dismissing DAVID GORHAM's Rule 3.850 Motion, without explanation, citation to the record or benefit of an evidentiary hearing, where GORHAM's motion alleged colorable factual claims of ineffective assistance of trial counsel and of Brady and Giglio violations at trial which were bolstered by specific evidence.

2. Whether the trial court erred in denying DAVID GORHAM an evidentiary hearing where GORHAM's 3.850 Motion alleged colorable factual claims, bolstered by specific evidence, and uncontradicted by the record.

STATEMENT OF THE CASE

DAVID GORHAM was convicted after a trial by jury of first degree murder and sentenced to death on October 26, 1982. The conviction and sentence were affirmed by this Court in Gorham v. State, 454 So.2d 556 (Fla. 1984) (per curiam). GORHAM subsequently obtained new counsel who conducted an extensive post-trial investigation.

On January 16, 1986, relying in large part upon information discovered through counsel's post-trial investigation, GORHAM filed a motion to vacate his conviction and sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, raising substantial constitutional issues. GORHAM argued that his conviction and death sentence were unconstitutional because, among other grounds: the State had suppressed

exculpatory evidence; the State had permitted a critical state witness to commit perjury; and GORHAM's trial attorney did not provide effective assistance of counsel.

On March 24, 1986, the trial judge ruled that Scott v. State obligated GORHAM to sign the Rule 3.987 form oath and dismissed the petition. GORHAM appealed that dismissal in Gorham v. State, Case No. 68,664 and, while this Court affirmed, in its ruling, it clarified the requirement of personal knowledge for purposes of Scott v. State, 464 So.2d 1171 (Fla. 1985). On remand, appellant amended his Rule 3.850 petition to meet the requirements of Scott, the State responded and the trial court denied the petition without granting an evidentiary hearing. This appeal follows.

As described in GORHAM's Rule 3.850 motion, the pertinent facts begin with the date of October 30, 1981, when the body of Carl Peterson, a middle-aged white male, was found by officers of the Pompano Beach Police Department. The body was near a bathroom inside a warehouse building with a large open baydoor which was being utilized as an excavation contracting center and truck repair shop. M. at 5 citing Tr. 359-60.[1/] Peterson had been shot twice in the back. Id. citing Tr. 325. Various papers, as well as Peterson's wallet, were found near the body.

[1/] Throughout this brief, "M." refers to the 3.850 motion which is part of the record on this appeal and "Tr." refers to the trial transcript.

Id. citing Tr. 367, 371. Although Peterson's credit cards were missing, the wallet still contained two hundred dollars in cash. Id. citing Tr. 388.

The officers were accompanied by Kenneth Gardner, an inmate at the nearby Pompano Detention Facility. Gardner had returned to the facility from work release with an injured leg. After he was questioned regarding the injury, he told the police that he had heard a shooting and fell while he was running from the shots. Gardner went with police to the crime scene and he directed police to look in Mr. Peterson's garage. Id. citing Tr. 458-459.

The day after the killing, Peterson's credit cards were used at various stores in the Pompano area. GORHAM, a young black male, was identified by store clerks from a police photograph as the individual using the stolen credit cards. Id. citing Tr. 421. Further investigation also showed that GORHAM's fingerprint was found on a paper receipt located near the crime scene. Id. citing Tr. 584.

The investigation by the Pompano Beach Police Department also led the detectives to an apartment rented by Diane Walker and Louise Owens. Louise Owens was GORHAM's lady friend and GORHAM frequently stayed at this apartment. Upon searching the apartment, police found some of the purchases charged to Peterson's credit cards. M. at 6 citing Tr. 611-14. They also found a box of Remington & Peters .38 caliber lead nose bullets.

Id. citing Tr. 614. Shortly thereafter, the police located and arrested GORHAM.

After GORHAM's arrest, he allegedly made several statements to police without the presence of an attorney. In his statements, GORHAM admitted the fraudulent use of the credit cards. He initially denied being in the vicinity of the homicide, claiming that he bought the credit cards from two men. Id. citing Tr. 625, 631. GORHAM then told the police that he found the credit cards on the road in a wallet a few feet outside the garage.

GORHAM stated that he was walking along 5th Street and heard shots. He looked down the street and saw two or three men running.[2/] They jumped into a car and fled west on 5th Street. GORHAM continued walking and about five to seven feet outside the warehouse, he noticed a wallet. He picked it up, pulled out the credit cards and then threw the wallet down. Id. citing Tr. 641. In all his statements to police, however, GORHAM steadfastly denied participating in the robbery or the murder of Carl Peterson.

2/ GORHAM informed his attorney, Mr. Gelety, that one of these men was Tim Carlo, a local hoodlum with a reputation as an armed robber. This lead was never pursued by trial counsel. Undersigned counsel have attempted to locate Carlo, however, efforts to locate Carlo have been hindered by Judge Seay's discovery decision not to allow with regard to the 3.850 Motion.

At trial, only one of the State's witnesses gave any testimony linking GORHAM to the crime; the other prosecution witnesses did not. Barbara Jean Slocumbe lived near Peterson's garage and testified that the night Peterson was killed, she heard gunshots at about 6:25 p.m. Id. citing Tr. 436. She testified, however, that when she looked outside, she did not see anything. Id. citing Tr. 436.

The State also called Kenneth Gardner, the work release inmate who reported the crime to the police. Despite pressure from the prosecution, Gardner's testimony tended to confirm GORHAM's innocence. Gardner testified that he saw two men outside Peterson's garage just before the shooting. He kept walking and heard a shot that seemed very close. Gardner started to run but slipped on the railroad tracks, hurting his ankle. Gardner then heard two more shots. He turned around and saw someone running. Although the individual fleeing appeared to have on white socks and a white shirt, Gardner was not certain what the man was wearing. However, Gardner was able to state unequivocally that GORHAM was not the man that he saw. Indeed, Gardner further testified that he was positive that he had never seen GORHAM before in his life. M. at 7 citing Tr. 457-468.

On cross-examination, Gardner stated that prior to trial, the prosecutor offered to reinstate his probation if he would change his testimony and identify GORHAM as being the person who ran from the crime scene. Gardner testified that he

would not lie about such an important matter and refused to falsely implicate GORHAM in the murder of Carl Peterson. Id. citing Tr. 466-67.

The key witness for the State was Ada Johnson. She testified that on the morning of the murder, GORHAM had attempted to rent an apartment from her and promised to get approximately $600.00 which he would need for the rent and the deposit. She also stated that GORHAM had a pistol of unidentified caliber with him and indicated that he would use the gun to get the money he needed. Id. citing Tr. 526-27. Ada Johnson then testified that she was approximately one block away from the crime scene a few minutes after the shots were fired. Although she could only see the back of one man running, Johnson testified that she thought the man was GORHAM, because he was wearing clothing similar to what GORHAM had worn earlier in the day.

GORHAM's trial counsel, Michael Gelety, rested immediately after the State's case was completed. No alternative theory of the case was given to the jury. The defense attorney took the position that the State had failed to prove that GORHAM was guilty beyond a reasonable doubt. M. at 8 citing Tr. 692-695.

The Court then instructed the jury that they could convict GORHAM of first degree murder under either a premeditation theory or a felony-murder theory based on the robbery. The Court, however, did not require the jury to reach a unanimous verdict on one or the other theory. After one and one-half hours

deliberation, the jury found GORHAM guilty of first degree murder and attempted robbery.

The Sentencing Phase

Trial counsel presented no evidence, mitigating or otherwise, on behalf of GORHAM during the October 26, 1984 sentencing hearing and instead moved ore tenus for a brief adjournment to compel the attendance of the seven witnesses he had allegedly subpoenaed for the hearing. M. at 8 citing Tr. 780, 784. The Court denied the continuance motion and after the State presented its evidence of aggravating circumstances, trial counsel immediately rested. Id. citing Tr. 796.

The jury recommended that GORHAM receive a life sentence. Trial counsel then requested that the Court postpone its sentencing for two weeks so that trial counsel would have an opportunity to bring in witnesses in mitigation. The Court granted this request, but on the reset date for sentencing, trial counsel represented to the Court that he was unable to bring in "available" witnesses. He did not request a further continuance or proffer what these witnesses would have said. M. at 9 citing Tr. 821. The Court overruled the jury's recommendation and imposed a sentence of death on DAVID GORHAM. Id. citing Tr. 839-845.

GORHAM's court-appointed trial counsel, Mr. Gelety, was reappointed to represent GORHAM in the direct appeal to the Supreme Court of Florida. None of the points raised as to guilt were considered meritorious by the Court.

The Supreme Court of Florida did, however, find that the trial court's sentencing analysis was partly erroneous. The Court found that the murder could not be considered especially heinous, atrocious or cruel and that there was insufficient evidence that the murder was premeditated. The Court, nevertheless, affirmed the death sentence. The Court stated that the trial court properly found that the crime was committed while the defendant was under an existing sentence and that the murder was committed during the commission of a felony.

The Post-Trial Investigation

After DAVID GORHAM's direct appeal to the Supreme Court of Florida was lost, new counsel was appointed as clemency counsel. After reviewing the record, counsel conducted an extensive independent investigation of the case leading to significant findings.

Loretta Forehand

The most significant discovery of this post-trial investigation was the discovery of another witness, Loretta Forehand, who was at the scene of the shooting of Carl Peterson. Pursuant to Rule 3.190(j), Florida Rules of Criminal Procedure, Ms. Forehand's deposition was not only transcribed but also video taped. M. at Exhibit E.

Ms. Forehand is an eighty-two year old life-long resident of South Florida. Id. She worked as a Christian volun-

teer and was in the vicinity of the shooting, along with seventeen year old Haralene Spence, attempting to collect money for her Church. Id.

Ms. Forehand was standing and talking to Miss Spence about how much money they had collected so far that evening, when Forehand heard two loud shouts and saw the muzzle flashes from the guns inside Peterson's garage. Id. The garage door was half open. Forehand could see in from outside. Id. After no more than three or four minutes, she saw two men running past a car from the direction of the garage and past her. Id. Because they were running at a furious pace, Ms. Forehand did not see their faces, but one of the running men was tall and one was short. Id. She did not know if they dropped anything. Id.

As they ran by, she saw GORHAM walking toward her from a direction opposite from Peterson's garage. Id. He was about twenty feet away when she first noticed him coming. Id. She knew both GORHAM and his girlfriend, Louise Owens, from her church work in the neighborhood, although they were not her friends, because they were not practicing Christians. Id.

As GORHAM was walking, she saw him stoop down, pick something up from the ground and quickly put it in his pocket, as if he did not want her to see what it was. Id. She thought it might be money and wanted it for her church. Id. GORHAM kept walking past her and just told her he was on his way home.

As she was leaving the scene, two police officers stopped and questioned her. She told them: "I seen some shooting in there or backfire . . . I saw two men running that way." Id. She did not tell them about seeing GORHAM, because he was on the other side away from where the shooting occurred. Id. The officers took her name and address but they did not take a written statement from her. Id.

Prior to trial, no one, neither the State nor trial counsel, asked her about what she saw. Nor did trial counsel call her on the telephone to interview her even though Louise Owens had given counsel Ms. Forehand's name, address and phone number. Ms. Forehand also was never served with a supboena to testify at the sentencing hearing. Id.

Ada Johnson's Lenient Treatment

Counsel also discovered that the State withheld from the defense several other items of exculpatory evidence, none of which was disclosed to trial counsel.

Prior to trial, Mr. Gelety requested the State to produce any material information within the State's possession which would impeach the credibility of, or challenge the competency of, any State witnesses. M. at Exhibit H. Although the Pompano Beach Police and the State Attorney's Office were in possession of significant impeachment evidence regarding a key State witness, Ada Johnson, it was not produced. M. at Exhibit F.

On December 18, 1981, Ada Johnson gave a sworn statement to the police which varied dramatically from her later trial testimony. Nowhere in this statement did she say that she saw GORHAM at the time of the shooting. Rather, she stated merely that she had seen GORHAM earlier that day with a gun and that he had promised to bring her $700 that evening as a security deposit for an apartment he wanted to rent. She also recounted that she had been questioned by the police the night of the shooting and she had told them that she had not seen or heard anything. M. at Exhibit I.

Ten days after her statement was given, Ada Johnson and her husband were caught stealing merchandise. Johnson was arrested by the Pompano Beach Police and charged with nine counts of criminal misconduct, including grand theft, resisting arrest, and evading arrest. Although arrested along with Ada Johnson, Jim Oscar Smith, Johnson's husband, was arrested but never charged with these offenses. His probation stemming from a separate armed robbery conviction was revoked as a result of this arrest, but the probation was reinstated on January 29, 1982 with the recommendation of the State.

On this same date, January 29, 1982, Johnson pled guilty to grand theft and fleeing a police officer and was sentenced to three years imprisonment to be served concurrently with a sentence she received for violating her probation. On May 13, 1982, Johnson filed a pro se motion pursuant to Rule 3.800(b) of

the Florida Rules of Criminal Procedure requesting that her sentence be reduced. M. at Exhibit K. In this sworn motion, Johnson stated that she has been given a "mitigation recommendation" by State Attorney Thomas Kern, who was the assistant state attorney who prosecuted the DAVID GORHAM case. Johnson also stated in her motion that she has been given a "recommendation" by Detective Sergeant Dan Murray. Id. Detective Murray was the detective in charge of the GORHAM investigation.[3/] This evidence of lenient treatment for Ada Johnson and her husband was not disclosed to the defense prior to trial. Id.

With her secret deal with the State in hand, Ada Johnson changed her story at trial so that she became the key witness who directly implicated GORHAM in the robbery and murder of Carl Peterson. Thus, she testified not only that she had seen GORHAM with a gun early on the day of the murder, but also that she had seen him flee from Carl Peterson's garage shortly after

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3/ Johnson's Motion for Reduction of Sentence was denied on May 26, 1982, because the Court found that it was without jurisdiction. This denial of the Motion, however, is of no real consequence to the question of whether Johnson had something to gain from her cooperation or was led to believe that she would be helped. First, Johnson had already testified during GORHAM's first trial in April - before her Motion was denied - that she had seen GORHAM flee the scene of the murder. Obviously, she would face perjury charges if she backed off from this testimony during the October trial. Moreover, the "recommendations" by Kern and Murray for mitigation of Johnson's sentence could very well have been utilized by Johnson before the parole commission. Thus, Johnson still had something to gain by cooperating with the State.

the shots were fired. Moreover, defense counsel asked Ada Johnson point-blank, "Were you offered any kind of deals?" She replied: "No." M. at 14 citing Tr. 540. Defense counsel then asked, "Did Mr. Kern make any kind of deals toward you or tell you he would write a letter to the parole board or anything like that?" She again responded: "No." Id.

The prosecutor made no attempt to correct this lie. On the contrary, the prosecutor exploited it as much as possible. The final words he stated to the jury were: "I submit that the testimony of Ada Johnson is credible testimony, believable, forthright. She testified she had nothing to gain at this point." Id. citing Tr. 721.

Evidence of Other Suspects

The State also had in its possession evidence that others may have murdered Peterson. Undersigned counsel uncovered a Pompano Police Memorandum regarding two black male suspects with a history of harassing and robbing Mr. Peterson. Furthermore, the Pompano Police learned of a fight between Peterson and his tenant on the day of the shooting. M. at Exhibits L, M and N. This evidence was never revealed to defense counsel, even though the State's own witness, Ken Gardner, testified to seeing two unidentified males at the murder scene and Philip Portman gave a statement to police that he heard two or more black males run from the crime scene. M. at Exhibits F and O. Moreover, this evidence of other suspects was well within Mr. Gelety's pre-trial discovery demand. M. at Exhibit H.

The Bloody Footprint

Prior to trial, defense counsel Michael Gelety filed a specific request for "comparison evidence." Id. The State did not produce evidence of a bloody footprint found under Carl Peterson's body by the Pompano Beach Police sometime during the investigation. The State failed to preserve the footprint and failed to disclose its existence to defense counsel, despite his specific request for comparative evidence. M. at Exhibit F. The footprint is now memorialized only by photograph. M. at Exhibit P.

In sum, there is overwhelming evidence supporting GORHAM's Rule 3.850 Motion. The trial court apparently failed to consider this evidence when it summarily dismissed GORHAM's motion without a hearing.

SUMMARY OF ARGUMENT

DAVID GORHAM's Rule 3.850 Motion raised three serious constitutional issues: (1) perjury by a State witness; (2) failure of the State to disclose exculpatory information; and (3) ineffective assistance of trial counsel; each issue being fully supported by allegations under oath, depositions, affidavits of third party witnesses and public records under seal. The trial court summarily dismissed DAVID GORHAM's Rule 3.850 Motion without an evidentiary hearing or an opinion by the Court attaching that portion of the record which conclusively shows that GORHAM was entitled to no relief. This summary dismissal is reversible error.

The Rule 3.850 Motion contains irrefutable proof that Ada Johnson perjured herself at trial, that the prosecutor knew of this perjury and that the prosecutor exploited this perjury in his argument to the jury. The Motion contains irrefutable proof that the State failed to produce critical exculpatory evidence, evidence specifically requested by trial counsel. Finally, if the Court should find that the State's misconduct is excusable because the defense counsel failed to exercise due diligence, there is a strong argument presented in GORHAM's motion for a finding of ineffectiveness of counsel.

DAVID GORHAM's Rule 3.850 Motion was prepared with exhaustive reference to applicable legal authority and overwhelming supporting evidence. The depositions, affidavits, and public records under seal which are attached as appendices to the Rule 3.850 Motion constitute clear and convincing proof of constitutional violations which rendered GORHAM's trial unfair. The trial court ignored this overwhelming evidence as well as the Florida Supreme Court's mandate in Meeks v. State, 382 So.2d 673, 676 (Fla. 1980) and O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1984). This Court should, therefore, order the trial court to conduct a fair and impartial hearing on GORHAM's Rule 3.850 Motion.

ARGUMENT

I. THE SUBSTANTIAL AND SERIOUS ISSUES RAISED IN GORHAM'S MOTION REQUIRED EVIDENTIARY PROCEEDINGS AND SHOULD NOT HAVE BEEN DENIED WITHOUT HEARING.

Under Florida Rule of Criminal Procedure 3.850, a petitioner seeking post-conviction relief who raises an appropriate factual issue "is entitled to an evidentiary hearing unless the motion and the files and records in the case conclusively show that he is entitled to no relief." Meeks, 382 So.2d at 676; O'Callaghan, 461 So.2d at 1355. Not only did the lower court err on the merits by denying the motion, it erred procedurally by entering a summary denial without explaining the grounds for decision. According to this Court, "the trial judge reviewing the [3.850] motion must either attach that portion of the case file or record which conclusively shows that the prisoner is entitled to no relief or grant an evidentiary hearing." Meeks, 382 So.2d at 676 (emphasis added). Thus, on both grounds, the trial judge committed reversible error.

In his 3.850 motion, GORHAM raised three separate and compelling factual contentions about the unconstitutional manner in which his trial was conducted. The three distinct factual issues are set forth with particularity below. With regard to each issue raised in his 3.850 motion, GORHAM stated the necessary elements to raise a claim for relief and bolstered the claims with specific factual allegations sufficient to establish

the claims and evidence by way of depositions, affidavits and public records in support of his claims. The trial judge ignored his duty under Rule 3.850 and under this Court's mandate with regard to each issue by decreeing a summary dismissal without written explanation, citation to the record or a formal evidentiary hearing. See Order of Dismissal at Exhibit "A".

A. The State Failed To Disclose Critical Exculpatory Evidence Despite Specific Requests For Such Evidence By Defense Counsel And Allowed A State Witness To Present Perjured Testimony To The Jury And Exploited Said Testimony In Final Argument.

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that the "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." Brady violations are properly raised by way of collateral attack pursuant to Florida Rule of Criminal Procedure 3.850. See Dougherty v. Wainwright, 491 F. Supp. 1317 (M.D. Fla. 1980) (applying Florida law). Following a motion for post-conviction relief, a motion like GORHAM's raising such issues requires an evidentiary hearing. Meeks, 382 So.2d 673. As a result, the trial court clearly erred when it refused to hear evidence on the Brady issue.

The sufficiency of GORHAM's allegations for Brady purposes is manifest. The Brady rule applies irrespective of the

good or bad faith of the prosecution, United States v. Agurs, 427 U.S. 97, 107 (1976); United States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978), cert denied, 440 U.S. 947 (1979); and it encompasses evidence the trial prosecutor in fact knew or merely should have known. The scope of this obligation reached the evidence alleged in GORHAM's motion irrespective of whether the prosecutor personally knew all of the suppressed facts. As the Supreme Court emphasized in Giglio v. United States, 405 U.S. 150, 154 (1972), "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government."[4/] The Pompano Police Department, and thus the State, was aware of all of the information discussed above.

Not only was the suppressed evidence within the ambit of the State's Brady obligation, it also falls within the meaning of exculpatory, because, at a minimum, such facts might lead to the discovery of favorable evidence, or may be used to impeach or

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4/ The duty of disclosure under Brady binds the individual prosecutor, the prosecutor's office and all persons working as part of the prosecution team or connected to the State's case. See Fulfor v. Maggio, 692 F.2d 354, 358 n. 2 (5th Cir. 1982) (if information "were held by the New Orleans Police Department we would be compelled to conclude that, constructively, the State's attorney had both access to and control over" the information); Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964); United States v. Morell, 524 F.2d 550, 555 (2d Cir. 1975); and United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973).

discredit State witnesses. United States v. Bagley, 105 S. Ct. 3375 (1985).[5/]

Equally clear is the State's failure to produce relevant evidence. Prior to trial, the defense here specifically requested that the State produce the names and addresses of all persons known to the State who have information which may be relevant to the offense charged. The defense requested oral and written witness statements. Despite this request, the defense was not informed of Loretta Forehand's oral statements to the Pompano Police. The defense also requested that the State produce any material information which would tend to impeach the credibility of the State's witnesses. M. at Exhibit H. Even so, the State did not inform the defense about the promises of leniency made to Ada Johnson, the lenient treatment given Johnson and her husband, or of the results of the State's investigation that showed the existence of two other suspects. Finally, the defense requested all comparative evidence. M. at Exhibit H.

[5/] The Supreme Court has reaffirmed that impeachment evidence falls within the Brady rule. United States v. Bagley, 105 S. Ct. 3375, 3380 (1985) (citing Giglio v. United States, 405 U.S. 150, 154 (1972)). According to the Court, "[s]uch evidence is evidence favorable to the accused,' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." Id. The Court, quoting from its opinion in Giglio further noted that: "When the 'reliability of a given witness may well be determinative of guilt or innocence,' non-disclosure of evidence affecting credibility falls within the general rule of [Brady]." Id. at 3381 (quoting Giglio, 405 U.S. at 154) (other citations omitted).

Despite this request, the bloody footprint was not disclosed to the defense.

In determining whether a new trial is required, the only real issue, therefore, is whether the suppressed evidence was material. As a matter of law, this test is also met. Applying the test articulated in Strickland v. Washington, 466 U.S. 668 (1984), for determining whether a new trial must be granted when evidence is not introduced because of incompetence of counsel, the Supreme Court in Bagley, held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different." Bagley, 105 S.Ct. at 3384. In the present case, there is clearly such a reasonable probability and the motion should not have been summarily denied.

1. The State's Failure To Inform the Defense About Loretta Forehand and the Two Suspects

There can be no question that Loretta Forehand's testimony is both material and exculpatory. When such testimony is examined in light of the evidence of two suspects who had been harassing Carl Peterson, Ken Gardner's testimony about two men other than GORHAM at the crime scene and Philip Portman's testimony that he heard two or more black males running from the crime scene, there is an overwhelming prospect that the jury would have had at least a reasonable doubt as to whether GORHAM killed Carl Peterson. While the State is normally under no obligation to advise the defense of information that is readily available, see,

e.g., United States v. Griggs, 713 F.2d 672, 673-74 (11th Cir. 1983), the State's failure to respond to trial counsel's specific requests may have lulled trial counsel into not pressing for additional information concerning Loretta Forehand.

The State should have told GORHAM's lawyer about Forehand's exculpatory statement. Despite its new formulation, the Supreme Court in Bagley emphasized that the government's conduct is still important to the due process calculus. When a prosecutor does not respond to a specific request, the Court held that it is:

> more reasonable for the defense to assume from the non-disclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption ... The reviewing court should assess the possibility that such effect might have occurred in light of the totality of circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense would have taken had the defense not been misled by the prosecutor's incomplete response.

Id. Accord United States v. New Buffalo Amusement Corp., 600 F.2d 368, 378 (2d Cir. 1979) (defendant's failure to move for a speedy trial excused where he was "lulled into not pressing for trial" by government's conduct); United States v. Carini, 562 F.2d 144, 149 (2d Cir. 1977) (same).

Similarly, the information about the two other suspects, if disclosed, could have been used by the defense to corroborate Ms. Forehand's testimony about the two men leaving the scene. DAVID GORHAM, Kenneth Gardner and Philip Portman also

could have testified regarding these two other suspects. Together with Ms. Forehand's testimony, the jury would have been presented with compelling evidence that a reasonable doubt existed. The State's suppression of her oral statements is, accordingly, a classic violation of Brady and, standing alone, is grounds for granting GORHAM a new trial and should have been considered upon appropriate evidentiary proceedings.

2. The Undisclosed Promises to Ada Johnson

The State committed clear and substantial Brady violations when it failed to disclose to the defense that Ada Johnson had received lenient treatment in return for her testimony. The State then compounded this due process violation by failing to correct her perjured testimony at trial and by affirmatively representing to the jury and Court in closing arguments that she had no reason to lie.

GORHAM's defense centered around his contention that he simply found the Peterson's credit cards in a discarded wallet and that the murderers were the two unidentified men who dropped the wallet as they fled the scene. This version was consistent with the testimony of Kenneth Gardner, a witness called by the State, who testified emphatically that GORHAM was not the person he saw fleeing from the scene. Thus, the State's theory that GORHAM robbed and murdered Peterson rested largely upon the testimony of Ada Johnson, the only witness who identified GORHAM as Carl Peterson's assailant. Despite her obviously crucial role

in condemning GORHAM, the State never disclosed to the defense its promises of leniency on behalf of Ada Johnson and her husband or the actions by the State on Johnson and her husband's behalf concerning the December 28, 1981 charges against them.

When the State depends largely on the testimony of one witness and does not reveal a promise of leniency, the Brady requirements have been violated. Giglio v. United States, 405 U.S. 150 (1972). The State's duty under Giglio is an "affirmative" one, requiring the revelation of "any informal arrangements or promises of leniency, assistance in proceedings before other agencies or courts, or any other inducement which was offered by his office in order to obtain the witness' cooperation." United States v. Bloom, 78 F.R.D. 591, 616-17 (E.D. Penn. 1977). See also Lewinski v. Ristaino, 448 F. Supp. 690 (D. Mass. 1978) (prosecutor is "duty-bound" to "disclose any understanding reached with [the witness] about future prosecution made contingent on his cooperation").

In Giglio, the prosecutor had allowed to go uncorrected the false trial testimony of his principal witness that he had made no deal with the government. In reality, the witness, Taliento, had received a promise that he would not be prosecuted if he testified against Giglio. In reversing Giglio's conviction, the Supreme Court observed:

> Here, the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

405 U.S. at 154-55.

The decision in Giglio controls the present case. In violation of due process, the State kept from the jury that fact that Ada Johnson had received substantial assistance from the State, both for herself and for her husband, in pending cases against them. If the jury had been properly appraised of Johnson's motive to curry favor with the State, the jury might have viewed her entire testimony differently, especially since Johnson had not stated that she had seen GORHAM flee from the murder scene when she first talked with the police. Furthermore, the fact that Ada Johnson had been offered and accepted promises from the State in return for her testimony would have supported GORHAM's contention that Ada Johnson had accepted an offer from the prosecutor similar to the one rejected by Mr. Gardner -- that she and her husband were promised lenient treatment in exchange for testimony implicating the petitioner. Thus, the promises to Johnson would not only have undercut her testimony but would have bolstered Gardner's testimony that GORHAM was not the assailant. Under these circumstances, it is not only possible but

probable, that the jury would have resolved their doubts differently and acquitted the petitioner. See Napue v. Illinois, 360 U.S. 264, 269 (1959) ("[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence").

The State's failure to come forward, even after Ada Johnson flatly denied the existence of any deal, compounds the error. As the Supreme Court recognized in United States v. Agurs, 427 U.S. 97 (1976), the most serious situation in which a Brady violation exists is where:

> The undisclosed evidence demonstrates that the prosecution case includes perjured testimony and that the prosecution knew or should have known of the perjury. In a series of . . . cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury . . . In those cases the Court has applied a strict standard of materiality, not just because they include prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of trial process.

Id. at 103-104 (citation and footnotes omitted) (emphasis added).

"[W]hen it should be obvious to the Government that the witness' answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury." United States v.

Harris, 498 F.2d 1164, 1168-1169 (3d Cir.), cert. denied, 419 U.S. 1069 (1974). See, generally, Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935). Indeed, the State has a duty to correct even "technically correct" testimony by State witnesses, where the failure to do so would be "seriously misleading." Blankenship v. Estelle, 545 F.2d 510, 513 (5th Cir. 1977). Accord Dupart v. United States, 541 F.2d 1148 (5th Cir. 1976); United States v. Iverson, 637 F.2d 799, 803-05 (D.C. Cir. 1980), modified per curiam, 648 F.2d 737 (D.C. Cir. 1981).6/

Indeed, even where the prosecutor knows the defense is in actual possession of evidence to impeach false testimony, the prosecutor still has a duty to correct it. In United States v. Barham, 595 F.2d 231 (5th Cir. 1979), cert. denied, 450 U.S. 1002

6/ The standard of materiality employed by reviewing courts is a function of the actions of defense counsel. If defense counsel askes the witness on cross-examination whether he has been promised anything in exchange of his testimony, and the witness lies or gives a misleading response, the prosecutor is obligated to correct the misstatement if 'any reasonable likelihood' exists that the false testimony could affect the judgment of the jury. The witness need not be guilty of perjury for the non-disclosure of a deal to fall into this category. [Footnote omitted.] The concern in such cases is that the witness has misled the jury as to his motivation in testifying and consequently hampered its ability to evaluate his testimony as a whole. An evasive or incomplete response to questions about motivation can suffice to give the misleading impression that the witness is disinterested and put the prosecutor on notice that some correction is required.

Note, A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses For the Prosecution, 94 Harv. L. Rev. 887, 894 (1981).

(1981), defense counsel had been furnished prior to trial with a letter showing that government witnesses had received promises of leniency but through "inexcusable oversight" neglected to read it. 595 F.2d at 243 n. 17. Both defense counsel and the prosecutor elicited from the witnesses that they had received no such promises. Id. at 241-243. The former Fifth Circuit held that the defendant had not waived his right to contest the false testimony presented. As the court in Barham observed:

> While defense counsel can certainly be charged with knowledge of his files, he cannot be held responsible for the manner in which the Government prosecutes its case. Specifically, defense counsel in this case cannot be held responsible for the prosecutor's questions which unfortunately operated to compound the deceit.

Id. at 243 n. 17. As in Barham, the prosecutor in this case not only failed to correct Johnson's seriously misleading testimony, but affirmatively and improperly exploited it in his closing arguments to the jury, rendering GORHAM's trial fundamentally unfair. See Arango v. State, 467 So.2d 692 at 694 (Fla. 1985).

It is hornbook law that willful use of false testimony from state witnesses on material issues by a prosecutor, who knows the testimony to be perjured, is a ground for post conviction relief from judgment. Porterfield v. State, 442 So.2d 1062, 1063 (1st DCA 1983). See also Hernandez v. State, 368 So.2d 606, 606 (3d DCA 1979) and Bogan v. State, 211 So.2d 74, 77 (2d DCA 1968). As stated in Porterfield,

> the same result obtains when the state, although not soliciting false evidence allows it to go uncorrected when it appears. Napue v. Illinois, 360 U.S. 264 (1959). The principle that a state may not knowingly use false evidence does not cease to apply merely because the false testimony goes only to the credibility of the witness.

Porterfield, 442 So.2d at 1063.

In Porterfield, the petitioner alleged that a state prosecutor knowingly allowed a key government witness to falsely testify that he had received no promises of leniency in exchange for his testimony. Id. The court held that allegation, along with letters and affidavits as proof, that the prosecutor failed to prevent or reveal the perjury raised a prima facie showing for relief. Id. Accord Hernandez, 368 So.2d at 606.

In this case, the petitioner submitted the sworn motion of the key government witness that she had been recommended for leniency on certain criminal charges by the prosecutor and the investigating officer in the GORHAM case. GORHAM also cited the false testimony of the government's witness denying any lenient treatment. Moreover, GORHAM's 3.850 motion cites the prosecutor's use of the perjured testimony in his closing argument. The allegations made by GORHAM, supported by a sworn, public motion as well as by record cites, go beyond the allegations of a prosecutor's failures by omission in Porterfield and Hernandez; here the prosecutor is shown to have actively wielded perjured testimony as a sword against GORHAM. Even more certainly than in

Porterfield and Hernandez, an evidentiary hearing is required on GORHAM's perjury claim.

3. The Bloody Footprints

Also requiring an evidentiary hearing pursuant to GORHAM's Rule 3.850 motion is the prosecutor's misconduct with respect to physical evidence. Despite specific pretrial requests for production, the State did not disclose the existence of a bloody footprint found near or under the victim's body. An analogous situation occurred in Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974). In Patler, the prosecutor in a murder case withheld the results of scientific tests which failed to connect the defendant with items of clothing allegedly worn by the murderer. Although the test results were "neutral," the court recognized that characterizations such as "neutral" are often misleading, because it is precisely the evidence's neutrality which makes such evidence favorable to the defense. "While [the report] does not by any means establish his absence from the scene of the crime, it does demonstrate that a number of factors which could link the defendant to the crime do not." 503 F.2d at 479. See, generally, United States ex rel. Raymond v. Illinois, 455 F.2d 62 (7th Cir. 1971), cert. denied, 409 U.S. 885 (1972) (error for prosecutor to withhold lab report disclosing that no sperm was found on clothing of alleged rapist); Commonwealth v. McElliott, 495 Pa. 75, 432 A.2d 587 (1981) (error to withhold report of inconclusive neutron activation test).

If the footprint evidence in this case had been disclosed, the defense could have made comparison tests to GORHAM's footprint and chemical tests on his shoes to show the absence of blood. The results of such tests, like those in Patler could further corroborate the testimony of Loretta Forehand and Kenneth Gardner that others were responsible for Peterson's death.

Of course, these avenues of investigation have now been foreclosed by the State's conduct. The State had the duty to preserve any evidence that "might" be favorable to GORHAM. United States v. Bryant, 439 F.2d 642, 652 n. 21 (D.C. Cir. 1971). Numerous courts have recognized that the prosecutor's failure to preserve such evidence may constitute a violation of due process. See, generally, Gov't of Virgin Islands v. Testamark, 570 F.2d 1162 (3d Cir. 1978); United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975). Cf. California v. Trombetta, 467 U.S. 479 (1984) (state must preserve evidence of "apparent" exculpatory value where, if destroyed, "the defendant would be unable to obtain comparable evidence by other reasonably available means").

Because the evidence is not available, however, it is virtually impossible to measure its exculpatory quality and its probable impact on the jury. Where evidence is crucial but destroyed by the State, it "becomes an absurdity" to speculate on the full nature of what has been destroyed. People v. Harmes, 38 Colo. App. 378, 560 P.2d 470 (1976) (defendant need not demonstrate videotape of altercation with police was exculpatory).

While GORHAM believes that, in light of the State's suppression of and failure to preserve this evidence, the Court should presume that the footprint was exculpatory, Hilliard v. Spalking, 719 F.2d 1443 (9th Cir. 1983) (destroyed sperm sample presumed prejudicial), these circumstances require a new trial for yet another reason. A new trial should also be granted, because -- as with Ada Johnson's misleading testimony -- the prosecutor improperly exploited the situation in his closing argument.

In closing, the prosecutor repeatedly emphasized to the jury that his case was one of comparison evidence, i.e., a "fingerprint case." See M. at 27 citing Tr. 696, 699-700, 701, 707. Furthermore, the prosecutor pointed out in his arguments before the jury that GORHAM had not produced any evidence to rebut the state's circumstantial evidence regarding the fingerprint on the receipt near Peterson's body. M. at 27 citing Tr. 696-697. Thus, the prosecutor unfairly, and unconstitutionally, capitalized on the State's suppression and destruction of material evidence by emphasizing to the jury that GORHAM did not have any rebuttal evidence whatsoever. The bloody footprint could have shown the jury that a bystander brought the wallet into the garage after GORHAM took the credit cards. Yet, the jury never saw this bloody footprint. It was hidden.

The Supreme Court of Florida emphatically chastised this type of Brady violation in Arango v. State, 467 So.2d 692

(Fla. 1985). In remanding the Arango case to the trial court, the Florida Supreme Court stated:

> The prosecutor was able to argue to the jury that "nothing was kept from you, whatever we have is on the table," that Arango's testimony was "not real because it does not jive with the physical evidence," and, therefore, "does not create a reasonable doubt." We find that due process requires retrial under these circumstances.

Id. at 694. Just as this improper prosecution tactic was an essential erroneous element resulting in the reversal of the verdict in Arango, the same holding should prompt a new trial for GORHAM.

Had the State met its constitutional obligation to fully respond to defense discovery demands, GORHAM would have been able to rebut the State's case. The footprint evidence and its potential fruits, separately and in combination with Loretta Forehand's testimony, evidence of other suspects, and evidence of Ada Johnson's perjury would have affected the judgment of jury. Instead, through grim irony, the state crippled GORHAM's ability to counter its case and then used that lack of ability as a centerpiece in urging his guilt. By repeatedly refusing to disclose exculpatory evidence, destroying other evidence, and then arguing to the jury that GORHAM was guilty because he had no rebuttal evidence, the prosecutor rendered GORHAM's trial fundamentally unfair.

B. GORHAM'S MOTION ALSO RAISED MANIFESTLY TRIABLE ISSUES AS TO WHETHER TRIAL COUNSEL'S CONDUCT VIOLATED GORHAM'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In his Motion, GORHAM argued below that the State bore the responsibility for disclosing to the defense: (1) Loretta Forehand's oral statements; (2) the promises of leniency and the leniency received by Ada Johnson and her husband; (3) the police report concerning other suspects; and (4) the bloody footprint. In so urging, GORHAM acknowledges that the State's obligations under Brady are limited where defense counsel, through due diligence, could have obtained the information through independent investigation. See, generally, United States v. Prior, 546 F.2d 1254, 1259 (5th Cir. 1977).[7/] Accordingly, if the Court finds that trial counsel, and not the State, is to blame, then the petitioner was unconstitutionally denied effective assistance of counsel both at trial and at sentencing. Independent of the State's conduct, trial counsel was ineffective at sentencing for failing to put on any evidence in mitigation.

Failure of a defendant's counsel to provide effective assistance of counsel constitutes a violation of the Sixth and Fourteenth Amendments to the United States Constitution, and

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7/ As noted above, however, even if defense counsel possessed or could have acquired the exculpatory evidence, the State may not improperly exploit it. United States v. Barham, 595 F.2d 231 (5th Cir. 1979), cert. denied, 450 U.S. 1002 (1981).

raises a claim which is cognizable in a Rule 3.850 proceeding. Meeks, 382 So.2d 673; Mikenas v. State, 460 So.2d 359 (Fla. 1984); Henry v. State, 453 So.2d 1387 (Fla. 1st DCA 1984). Under standards established by the United States Supreme Court for measuring the effectiveness of counsel for Sixth Amendment purposes, GORHAM's Motion was abundantly sufficient.

In Strickland v. Washington, 466 U.S. 668, the Supreme Court set forth a two-part test for deciding claims of ineffective assistance of counsel. First, counsel's performance must be evaluated by a standard of reasonably effective assistance. Id. at 687. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. at 688. Counsel's performance must be "reasonable considering all the circumstances." Id. Thus, the standard for review of counsel's performance is the same as that which has long governed such claims in the Fifth and Eleventh Circuits. See MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960) ("counsel reasonably likely to render and rendering reasonably effective assistance").

The second prong of the Strickland test for ineffectiveness requires that the defendant show how the deficient performance prejudiced the defense. Strickland, 466 U.S. at 691.

> However, GORHAM 'need not show that counsel's deficient conduct more likely than not altered the outcome in the case ... The result of a proceeding can be rendered unreliable, and hence the proceeding itself

> unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.'

Id. at 693 (emphasis added).[8/]

To establish the prejudice component under Strickland, the defendant need only show

> that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

See, 466 U.S. at 694.

If the Court does not find fault with the State's conduct, Mr. Gelety rendered ineffective assistance, because he did not conduct a reasonably thorough investigation or make a reasonable decision that particular avenues of investigation were necessary. See Strickland, 466 U.S. 668; United States v. Friel, 588 F. Supp. 1173, 1183 (E.D. Pa. 1984). Mr. Gelety failed to hire a private investigator to determine whether there were other witnesses or relevant evidence. In particular, Gelety failed,

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[8/] In Knight v. State, 394 So.2d 997 (Fla. 1981), the Supreme Court of Florida adopted an "outcome determinative" test derived from United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc). Knight, 394 So.2d at 1000. In rejecting this standard in Strickland, the United States Supreme Court noted that the standard urged in the Brief for the United States as Amicus Curiae is "not quite appropriate." 104 S.Ct. at 2068. The Solicitor General had urged the Court to adopt the DeCoster/Knight standard. See Strickland, Brief for the United States as Amicus Curiae Supporting Petitioners, p. 21.

according to Ms. Forehand's sworn testimony, to interview Loretta Forehand. Nor was she served with a subpoena for sentencing, although her name was listed on the Praecipe. In addition, Mr. Gelety failed to call GORHAM's mother, Elnora Gorham as a witness during sentencing. Finally, Mr. Gelety failed to adequately investigate Ada Johnson to uncover her deal with the State and the State's case to uncover the evidence of the other two suspects. The specific facts in GORHAM's Rule 3.850 Motion showing ineffective assistance of counsel far exceed the threshold for requiring evidentiary proceedings. As is demonstrated in the factual discussion that follows, the lower court plainly erred in its summary denial of the Motion.

1. Loretta Forehand

Loretta Forehand's testimony unquestionably could have affected the jury's evaluation of whether there was a reasonable doubt as to GORHAM's guilt. The failure of defense counsel to contact potential witnesses whose testimony would be even less probative than Mrs. Forehand's has been found to constitute prejudice sufficient to justify a new trial. In Nearly v. Cabana, 764 F.2d 1173 (5th Cir. 1985), defense counsel failed to contact a potential alibi witness and locate witnesses who could have corroborated the defendant's testimony. The court held that the missing testimony might have affected the jury's appraisal of the truthfulness of state witnesses and its evaluation of the relative credibility of conflicting witnesses. Thus, the court

held the defendant established that he was prejudiced by his counsel's failure to investigate.

The Nearly court noted that while the defendant must show there was a reasonable probability that, but for his counsel's unprofessional errors, the results of the proceeding would have been different, a reasonable probability means "a probability sufficient to undermine confidence in the outcome." 764 F.2d at 1178. Thus, in accord with the standard set forth in Strickland, the court in Nearly held that "[a] defendant need not show a counsel's deficient conduct more likely than not altered the outcome of the case." Id. See Strickland, 466 U.S. 668. The omission of Loretta Forehand's probative and exculpatory testimony was "of sufficient gravity to undermine the fundamental fairness of the proceeding and to suggest that a new trial is necessary to ensure that [GORHAM] receives a fair trial." Nearly, 764 F.2d at 1180.

2. Ada Johnson's Promises of Leniency

Mr. Gelety also failed to discover the fact that Ada Johnson had been promised leniency. GORHAM maintains that the State's conduct misled the trial counsel by failing to disclose the deal with Johnson and her husband in the face of Mr. Gelety's specific requests. Nevertheless, post-trial counsel has been able, with the assistance of a court appointed investigator, to uncover this information. Accordingly, if the court finds that the State does not bear the responsibility for this error, then,

GORHAM submits, trial counsel must. But for the State's conduct there can be no excuse for trial counsel's failure to discover this information. As the United States Court of Appeals for the Third Circuit has stated:

> Although the decision whether or not to utilize a particular item of evidence may be a matter of trial strategy within the acceptable bounds of trial counsel's discretion, we believe the failure to investigate a critical source of potential exculpatory evidence may present a case of constitutionally defective representation.

United States v. Baynes, 622 F.2d 66, 69 (3d Cir. 1980); United States v. Baynes, 687 F.2d 659, 666 (3d Cir. 1982).

3. **Evidence of Other Suspects**

DAVID GORHAM identified Tim Carlo as one of the two men fleeing the crime scene. He told Mr. Gelety about Carlo prior to his trial. Mr. Gelety never deposed or interviewed Tim Carlo. Furthermore, Mr. Gelety never discovered that the Pompano Police had two black male suspects and, as a result, he obviously never investigated this lead. When a defendant gave the defense attorney the name of the man that might have committed the murder, there is an ethical and constitutional obligation to undertake a vigorous investigation, especially when a suspect such as Tim Carlo is named by the defendant. Mr. Gelety never thoroughly investigated this suspect and thereby seriously impaired DAVID GORHAM's ability to prove that two men, other than himself, killed Carl Peterson.

4. Inadequate Representation at Sentencing

GORHAM's failure to receive effective assistance extended to the sentencing proceedings. It is well established that a petitioner is denied effective assistance of counsel during sentencing when defense counsel presents no evidence of mitigating circumstances. See, e.g., Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985). The standard for determining effectiveness of counsel is the same for both the guilt and sentencing phases of trial. Messer v. Kemp, 760 F.2d 1080 (11th Cir. 1985).

No mitigating witnesses were presented at GORHAM's sentencing. Whether the failure of witnesses to appear at the sentencing hearing was attributable to Mr. Gelety's failure to obtain proper service or to other causes remains for determination at an evidentiary hearing. However, even in the event that Mr. Gelety was not responsible for the failure of the witnesses he had subpoenaed to appear at the sentencing hearing, he is certainly responsible for his failure to protect the record so that the court's failure to grant a continuance could have been effectively appealed. A motion for continuance on grounds that a witness is absent is procedurally defective when (1) it is not in writing and (2) it does not show the subject matter of the expected testimony and (3) it would be merely cumulative. Fla. Crim. P. 3.190(a)(g), Percznski v. State, 366 So.2d 863 (Fla. 3d DCA 1979); Duncan v. State, 350 So.2d 525, (Fla. 3d DCA 1977); Lyles v. State, 312 So.2d 495 (Fla. 1st DCA 1975) (counsel should also indicate when a witness could not be subpoenaed).

Gelety's oral motion for continuance, unaccompanied by a proffer of testimony, was inexcusably inadequate. The consequences of his failure were severe. Clearly, GORHAM was prejudiced by the failure to present any mitigating testimony at his hearing. The witnesses on the praecipe submitted for the hearing could have testified to GORHAM's background and character. Moreover, Elnora Gorham, David's mother, was prepared to testify as to David's childhood and his father's abandonment of the family. M. at Exhibit G-1. Loretta Forehand's testimony would have indicated that GORHAM could not have been the triggerman, a statutory mitigating circumstance. See Fla. Stat. § 921.141(6)(d).

In the sentencing phase of a capital case, "[w]hat is essential is that the [fact finder] have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976). For that reason, the United States Supreme Court has repeatedly insisted "that the sentencer in capital cases must be permitted to consider any relevant mitigating factor." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). See also Lockett v. Ohio, 438 U.S. 586 (1978). The courts have recognized the importance of the sentencing entity receiving adequate and accurate information concerning the defendant, and have remanded for new sentencing when counsel has failed to present available mitigating character evidence in the penalty phase. See Tyler v. Kemp, 755 F.2d at 745; King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), aff'd on remand, 748 F.2d 1462, 1464 (1984).

In the present case, defense counsel's failure to investigate and present relevant aspects of GORHAM's character and background created an unacceptable risk that the death penalty could, and would, be imposed unconstitutionally. The right to present, and to have the sentencer consider, any and all mitigating evidence is meaningless if counsel fails to look for mitigating evidence or fails to present a case in mitigation at a capital sentencing hearing. **Comment, 83 Col. L. Rev. 1544 (1983).**

If Loretta Forehand, Elnora Gorham and others had testified at the penalty phase, there is a reasonable probability that the result of the proceeding would have been different. The lower court's decision to override the jury's recommendation of life was upheld by this Court, notwithstanding the reversal of 2 of the 4 aggravating circumstances, solely because there was absolutely no evidence in the record of mitigating circumstance. Had mitigation witnesses been presented at the sentencing, then there would have been substantial evidence of mitigation to balance the aggravating circumstances proffered by the State.

5. Failure To Object To Critical Trial Error

Ineffective assistance of counsel is also established by trial counsel's failure to object to unconstitutionally deficient instructions on first degree murder. The indictment in this case charged appellant with one count of first-degree murder and one count of robbery. With the murder charge, the State

proceeded upon both a premeditation theory and a felony murder theory premised upon the robbery. The court also instructed the jury on both theories. Thus, the court instructed that the jury could find GORHAM guilty of first degree murder beyond a reasonable doubt if they found that he killed Carl Peterson with "premeditation." M. at 36 citing Tr. 724-43. However, the court also instructed the jury, in the alternative, that they could find GORHAM guilty of first degree murder if they found that Peterson was killed during a robbery, attempted robbery or escape from a robbery in which GORHAM participated. M. at 36 citing Tr. 744.)

By presenting two different options, the court did not require that the jury reach a unanimous verdict on whether the defendant was guilty under a premeditation or felony murder theory. Thus, under the court's instructions, six jurors could have found GORHAM guilty of premeditated murder while the remaining six believed he was guilty only of felony murder. Similarly, in sentencing GORHAM to the death penalty, the court found as an aggravating circumstance the fact that Peterson was killed during the course of a felony, even though this "aggravating circumstance" could have been the theory upon which the jury convicted GORHAM.

The court further instructed that, in considering the felony murder alternative, the jury could convict GORHAM if either: (1) GORHAM actually killed Peterson; or (2) if Peterson

"was killed by a person other than DAVID GORHAM who was involved in the commission or attempt to commit robbery but DAVID GORHAM was present and did knowingly aid, abet, counsel, hire or otherwise procure the commission of robbery." Id. (emphasis added).

In considering the aiding and abetting/felony murder theory, the court did not instruct the jury that they had to find that GORHAM intended to kill Peterson. On the contrary, the court instructed precisely the opposite: "[i]n order to convict a first degree felony murder, it is not necessary for the State to prove that the Defendant had a premeditated design or intent to kill." Id. (emphasis added).

These instructions violated GORHAM's constitutional rights in three ways. First, the court erred in not requiring the jury to reach a unanimous verdict on whether GORHAM was guilty under a premeditation theory or a felony murder theory; the court's failure to require a unanimous verdict violated GORHAM's Sixth Amendment and due process rights. Second, under the circumstances of this case, reliance on the attempted robbery as an aggravating factor was improper, because the jury may only have found GORHAM guilty in the first instance on a felony murder theory. The robbery should not have been used twice: to convict GORHAM and then to sentence him to death especially where, as here, it was one of only two aggravating circumstances and was used to override the jury's recommendation. Finally, the death penalty imposed by the court violates GORHAM's Eighth Amendment

and due process rights, because, under the court's instructions, the jury may have convicted GORHAM despite not finding that he had the intent to kill Carl Peterson. Trial counsel should have objected to these instructions and made these erroneous instructions on assignment of error on direct appeal.

1. GORHAM's Specific Factual Allegations Of Ineffective Assistance Of Counsel Clearly Required An Evidentiary Hearing.

It is well established that ineffectiveness of trial counsel may establish a basis for relief. Thus, trial counsel's failure sufficiently to investigate exculpatory evidence and call an alibi witness raises substantial issues of ineffective representation sufficient so that an evidentiary hearing is required. For that reason, in Havard v. State, 489 So.2d 875 (Fla. 4th DCA 1986) trial counsel's failure to investigate alibi witnesses who could have substantiated the accused claim of being at a place other than the scene of the crime at the time of its commission, constituted a facially sufficient claim for relief which required either specific record citations refuting the claim, or an evidentiary hearing. Id. See also Majewski v. State, 487 So.2d 32 (1st DCA 1986), reh'g den'd. Just as in Havard and Majewski, trial counsel failed to investigate and discover an alibi witness who could have placed GORHAM away from the scene of the crime at the time of its commission. Just as in Havard and Majewski, this fact raises a sufficient facial claim to entitle GORHAM to an evidentiary hearing on the question of

ineffectiveness of counsel. Further, trial counsel's failure to discover other exculpatory evidence, including the promises made to Ada Johnson and the evidence of other suspects like Tim Carlo, raise precisely the same requirement that an evidentiary hearing be held on this issue.

Another basis for a Rule 3.850 evidentiary hearing was trial counsel's failure to call witnesses at the sentencing hearing. As this Court held in an analogous case, the mere failure to call any witnesses at a sentencing hearing raises a sufficient allegation of inadequate representation to entitle the petitioner to an evidentiary hearing, unless the motion, files, or records in the case conclusively show that the petitioner is not entitled to relief. O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1984). As in O'Callaghan, GORHAM's trial counsel failed to call any witnesses for any purpose, including mitigation, at the sentencing hearing. As the Supreme Court of Florida found in O'Callaghan, GORHAM is thereby entitled to an evidentiary hearing on the issue of ineffectiveness of counsel.

CONCLUSION

This Court, in its opinions in Meeks and O'Callaghan firmly sets forth the standards which trial courts must follow when determining Rule 3.850 motions such as that of DAVID GORHAM's. The summary order dismissing DAVID GORHAM's motion without either an evidentiary hearing or formal explanation why the record conclusively demonstrates no entitlement to relief is error, reversible error. Moreover, on its merits, GORHAM's motion states a myriad of specific facts requiring an evidentiary hearing on his right to a new trial. This Court should remand this case to the trial court with clear instructions regarding the trial court's responsibility to conduct a fair and impartial hearing on GORHAM's Rule 3.850 motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Robert Tietler, Esq., 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 and Paul Zacks, Esq., Suite 600 Broward County Courthouse, 201 S.E. 6th Street, Ft. Lauderdale, Florida 33301, this 5th day of June, 1987.

Andrés Rivero

ANDRES RIVERO