IN THE SUPREME COURT OF FLORIDA

PAUL MICHAEL NELSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC02-1418

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Victim Georgia May Tobler was found dead at her residence of multiple stab wounds on Saturday, April 13, 1996. (R1: 80)

Petitioner was indicted by a grand jury for first-degree murder. (R1: 98, 118) On September 27, 1996, Petitioner was convicted after a jury trial of the lesser offense of second-degree murder. (R2: 215, 368) He was given a sentence at the top of the 1995 guidelines of 423.5 months incarceration. (R1: 124)

Petitioner appealed his conviction and sentence to the Fifth District Court of Appeal. On January 8, 1999, the Fifth District affirmed Petitioner's conviction and sentence in an opinion which may be found at **Nelson v. State**, 725 So. 2d 412 (Fla. 5th DCA 1999). The opinion contains a recitation of the underlying facts of the crime.

Petitioner sought review of the Fifth District's decision in this Court. However on June 7, 1999, this Court denied review. The decision may be found at **Nelson v. State**, 733 So. 2d 516 (Fla. 1999)(table).

On May 24, 2000, Petitioner filed a motion for post-conviction relief. (R1: 28-48) The motion alleged three grounds for relief:

1) The prosecutor knowingly submitted the allegedly perjured testimony of Katrina Boyter:

a) That she had called the police. However, detectives testified that they were the ones who contacted Boyter.

b) That she did not know the victim. But she also testified that the victim was a “nice lady” and that it was “ashame [sic] that she had to die like that”.

c) That Petitioner and Hopkins left her presence from 8:30 p.m. until 12:15 a.m. Boyter had made previous statements that they had been gone no longer than 30 minutes.

d) That she was not on crack cocaine at the time of the crime.

2) Ineffective assistance of counsel for failing to investigate, interview, and call as witnesses at trial the following individuals:

a) Jerry Hopkins, who would have testified:

1. That Petitioner did not take a knife from Hopkins’ house, and did not have a knife when they went to the victim’s house.

2. That when Petitioner exited the victim’s house Petitioner said, “I think she’s friggin dead.”

3. That the two returned to Hopkins’ residence, where Hopkins gave Petitioner some clothes to change into because Petitioner’s were bloody.

4. That Hopkins never displayed any bloody pants

to Ann Hopkins.

5. That Hopkins never told Ann that “some old woman” had been murdered, and that he was in trouble.

6. That Hopkins and Ann argued because Hopkins wanted money to buy more crack cocaine for Boyter and himself.

7. That Ann and Boyter did not get along because Ann felt that Boyter was influencing Hopkins to use crack cocaine excessively.

8. That he and Boyter had been on a crack smoking marathon session for several days and had smoked some the night of the crime.

b) Ann Hopkins, who would have testified:

1. That Boyter did not like Ann because Ann disapproved of her relationship with Hopkins.

2. That the night Hopkins and Boyter came to her house, Hopkins wanted money to buy crack cocaine.

3. That Hopkins never showed Ann any bloody pants, never told her that he was in trouble, and never said anything about a woman being murdered.

c) Russell Harris, who would have testified:

1. That on the night that he saw Boyter and Hopkins at the Jet Gas Station that they were drinking.

d) a blood spatter expert, who would have testified:

1. That it was physically impossible for

Petitioner to have blood only on his pants if Petitioner had killed Tobler.

3) The trial court erred in permitting defense counsel to waive a 12-person jury, and Petitioner's right to testify, without obtaining a personal waiver from Petitioner.

On June 29, 2000, Petitioner filed a supplemental motion for postconviction relief in which he additionally alleged that he was entitled to be resentenced under the 1994 guidelines pursuant to **Heggs v. State**, 759 So. 2d 620 (Fla. 2000), because the 1995 guidelines under which he had been sentenced were unconstitutional. (R1: 109)

On July 27, 2000 the State filed a response, with attachments, to Petitioner's motion for postconviction relief and supplemental motion for postconviction relief. (R1: 117-185) As to Ground I of the motion the State responded:

a) In light of the fact that the Petitioner gave a statement to police putting himself at the murder scene handling Georgia Mae Tobler's body at or near the time she was murdered, it is not particularly relevant whether Boyter contacted the police or the police contacted her prior to her revelation to them that Petitioner had been at Tobler's house at or near the time that she was murdered and had handled her body to the extent that the pants he had been wearing were soaked with her blood.

b) Whether or not Boyter knew Tobler was irrelevant to whether Petitioner murdered her, and any possible impeachment that may have resulted from establishing an acquaintance between the two would not likely have been significant enough to have changed the jury's verdict.

c) Any discrepancy in return times in an approximate time frame is inadequate to demonstrate that Boyter gave, or that the State knowingly elicited, perjured testimony.

As to Ground II of the motion, the State responded in pertinent part:

a) Hopkins was a codefendant in this case whose own case was resolved by plea on March 24, 1997, and there is no allegation that Hopkins was available to testify in Petitioner's trial. Even if he had been available, the alleged substance of his testimony does not support a finding of prejudice.

b) Petitioner failed to allege that Ann Hopkins was available to testify at trial. Even if she had been available, the alleged substance of her testimony would have been either inadmissible, irrelevant, or would not likely have changed the outcome of the case. Moreover, defense counsel advised the prosecutor that he did have an investigator interview Ann, and defense counsel determined that she did not have any information to merit calling her as a witness.

c) Petitioner failed to allege that Russell Harris was available to testify at trial. Even if he had been available, his alleged ability to impeach Boyter regarding the collateral matter of her consumption of alcohol on the night of the murder could not begin to outweigh the fact that Petitioner's own statement to the police largely corroborated Boyter's account of what she saw and was told about Tobler's death.

d) Petitioner's motion fails to identify the prospective blood spatter expert in any meaningful way, and the allegations as to what the expert would have testified to are conclusory and have no factual basis.

Within the response the State also conceded that Petitioner was entitled to be resentenced under the 1995 guidelines. (R1: 124)

On November 7, 2000, the trial court entered an order granting Petitioner's motion for resentencing under the 1994 guidelines. (R1: 200) The court would later clarify that it had treated Petitioner's supplemental motion for postconviction relief as a motion to correct illegal sentence pursuant to **Fla. R. Crim. P. 3.800**. (R1: 213)

On December 5, 2000, the trial court render its order (with attachments) granting in part and denying in part Petitioner's motion for postconviction relief. (R2: 215-266) The order summarily denied Grounds I and II of Petitioner's

motion as legally insufficient or refuted by the record. As to Ground I, the court found:

a) A review of the trial transcript showed that Boyter never directly stated that she had contacted police because she was having nightmares about the crime. She testified that she contacted her mother after she began having nightmares, and exactly what occurred after she confided in her mother was not specifically testified to by Boyter. Boyter's testimony was entirely consistent with other witnesses as to how police came to believe Petitioner was a suspect. Petitioner failed to demonstrate that Boyter perjured herself.

b) There was nothing in Boyter's testimony to indicate that Boyter was lying when she stated she did not personally know the victim. Therefore Petitioner failed to demonstrate that Boyter gave false testimony in this respect. And even if Boyter did know the victim, any impeachment value would not probably have changed the outcome of the trial.

c) There is no support for Petitioner's contention that Boyter testified falsely about Petitioner not being in her presence from 8:30 p.m. - 12:30 a.m. on the night of the crime.

d) Petitioner failed to demonstrate that even if Boyter was under the influence of drugs at the time of the offense, the State knew or had the opportunity to know that.

As to Ground II of the motion, the court found *inter alia* that:

a) Petitioner's claim is facially insufficient in that he failed to allege that Hopkins was available to testify at trial.

b) Petitioner's claim is facially insufficient in that he failed to allege that Ann Hopkins was available to testify at trial. Even if she had been available, her purported testimony would have been either inadmissible, irrelevant and/or would not have changed the outcome of the case.

c) Petitioner's claim is facially insufficient in that he failed to allege that Russell Harris would have been available to testify at trial.

The court further found that an evidentiary hearing was required on the issue of whether defense counsel had prevented Petitioner from testifying at his trial. (R2: 221)

The evidentiary hearing on Ground III was held on February 9, 2001. Testimony was heard from both of Petitioner's trial counsels, the investigator who had worked for the defense team, and Petitioner himself. The trial court denied relief as to Ground III of the motion. (R2: 401) Petitioner was then resentenced under the 1994 guidelines to 268 months incarcer-ation, which was again at the top of the guidelines. (R2: 402)

Petitioner appealed the denial of his postconviction motion to the Fifth District Court of Appeal. On April 12, 2002, the Fifth District affirmed the trial court's denial of Petitioner's postconviction motion. The decision may be found at **Nelson v. State**, 816 So. 2d 694 (Fla. 5th DCA 2002). Therein the Fifth District agreed with the trial court that Petitioner's claim of ineffective counsel for failing to call, interview or investigate witnesses was facially insufficient, because Petitioner had failed to allege that any of the witnesses had been available for trial.

As to the claim that the prosecutor had suborned perjury during trial, the Fifth District held that the trial court had also properly summarily denied that claim:

> Review of the transcript which was attached by the trial court to its order reveals that the witness' testimony was entirely consistent with the testimony of the other State witnesses, and any internal disparity in her testimony was not shown to have been deliberately false or misleading. *See* **Correll v. State**, 698 So. 2d 522, 524 (Fla. 1997) (holding that trial court properly denied motion for post-conviction relief without a hearing where record demonstrated that challenged testimony was merely corroborative and irrelevant).

Nelson, 816 So. 2d at 695.

On January 29, 2003, this Court accepted jurisdiction to review the April 12, 2002 decision of the Fifth District Court of Appeal.

SUMMARY OF THE ARGUMENT

Issue I: The trial court properly summarily denied the allegation of ineffective assistance of trial counsel for failure to call certain witnesses. Petitioner has failed to demonstrate any prejudice due to defense counsel's failure to call the witnesses. Alternatively, even if this Court finds that Petitioner made a showing of substantive prejudice in the omission of the testimony of each of the individuals he believes his attorney should have called at trial, this claim was still facially insufficient because Petitioner failed to allege that each of these witnesses was available for trial if they had been called.

Issue II: The trial court properly denied Petitioner's claim that the prosecutor deliberately used perjured testimony. This allegation in Petitioner's motion was facially insufficient. Petitioner admits in his motion that defense counsel was aware of Boyter's prior statement as to how she came into contact with the police. Therefore defense counsel easily could have impeached Boyter on this minor point during cross-examination if he had so chosen. An allegation of this type is facially deficient where there is no allegation of any circumstances not known to the defense at the time of the trial.

The other points of Boyter's testimony which Petitioner

claims constituted perjury were also facially insufficient claims, because they constitute nothing more than an allegation that her trial testimony was inconsistent with her prior statements.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY SUMMARILY DENIED THE ALLEGATION OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO CALL CERTAIN WITNESSES.

In Ground II of his postconviction motion, Petitioner claimed that he received ineffective assistance of counsel because defense counsel had failed to investigate, interview, and call as witnesses at trial the following individuals: Jerry Hopkins, Ann Hopkins, Russell Harris, and a blood spatter expert.

In Petitioner's appeal to the Fifth District Court of Appeal of the denial of his postconviction motion, his brief addressed only the summary denial of the claim of ineffectiveness pertaining to the failure to investigate/interview/call codefendant Jerry Hopkins, Jerry's mother Ann Hopkins, and Russell Harris. Petitioner made no allegation of error regarding the summary denial of the claim of ineffectiveness pertaining to the failure of defense counsel to investigate/interview/call a blood spatter expert. As such, appellate review of the failure to conduct an evidentiary hearing on defense counsel's failure to investigate/interview/call a blood spatter expert was waived on appeal to the Fifth District and is procedurally barred in this appeal.

1. Jerry Hopkins:

In his motion Petitioner asserted that Jerry Hopkins would have testified:

a) Petitioner did not take a knife with him when the two men left Hopkins' house to go to the victim's residence.

b) When Petitioner left the victim's residence and returned to the truck where Hopkins was waiting, Petitioner uttered, "I think she's friggin dead."

c) The two then returned to Hopkins' residence, where Hopkins gave Petitioner some clothes to change into because Petitioner's were bloody.

d) Hopkins never displayed the bloody pants to Hopkins' mother, Ann Hopkins.

e) Hopkins would deny that he had ever told his mother that some old woman had been murdered, and that he was in trouble.

f) Hopkins and his mother had argued after the murder because Hopkins wanted money to purchase more crack cocaine for his girlfriend (Boyter) and himself.

g) Hopkins' mother (Ann) and Boyter did not get along because Ann felt that Boyter was influencing Hopkins to use crack cocaine excessively.

h) Hopkins and Boyter had been on a marathon crack cocaine smoking session for several days, including the day of

the murder. (R1: 43)

A decision not to raise certain possible defenses or call certain witnesses is ordinarily a matter of personal judgment and strategy within the prerogatives of defense counsel. *See* **State v. Eby**, 342 So. 2d 1087 (Fla. 2d DCA 1977), **cert. dism.**, 346 So. 2d 1248 (Fla. 2d DCA 1977). All districts agree that, in order to present a facially sufficient motion alleging ineffective assistance of counsel for failure to call witnesses, it must set forth: (1) the identity of prospective witnesses; (2) the substance of the witness' testimony; and (3) an explanation as to how the omission of the testimony prejudiced the outcome. *See, e.g.,* **Highsmith v. State**, 617 So. 2d 825 (Fla. 1st DCA 1993), **rev. dism.**, 775 So. 2d 288 (Fla. 2000); **Odom v. State**, 770 So. 2d 195 (Fla. 2d DCA 2000); **Puig v. State**, 636 So. 2d 121 (Fla. 3d DCA 1994); **Catis v. State**, 741 So. 2d 1140 (Fla. 4th DCA 1998), **rev. denied**, 735 So. 2d 1284 (Fla. 1999); **Schopper v. State**, 790 So. 2d 471 (Fla. 5th DCA 2001).

Respondent addresses each of these purported points of Hopkins' testimony in turn:

a) As the State argued in its response to Petitioner's motion, Hopkins' purported testimony does not rule out the possibility that Petitioner had a knife concealed in his clothes when he entered the victim's residence, or that he

armed himself while in the residence. (R1: 118) Therefore the omission of this testimony did not prejudice the outcome.

b) At the hearing on the postconviction motion held February 9, 2001, Petitioner testified that when he came out of the house and returned to the truck where Hopkins was waiting, "I was yelling to [Hopkins] that somebody killed Georgia Mae." (R2: 387-88) This is quite different than the allegation contained in his motion, and therefore Petitioner has refuted his own allegation. Perhaps more to the point, *it was undisputed that when Petitioner came out of the house, Georgia Mae Tobler was dead*. Therefore it simply cannot be said that the outcome of Petitioner's trial was prejudiced by the omission of testimony to the effect that when Petitioner came out of the house, he told Hopkins that Tobler was dead.

c) It was undisputed that Hopkins provided Petitioner with a change of clothes. No prejudice has been shown in the omission of this purported testimony by Hopkins.

d) It was undisputed, and Petitioner admitted himself, that he did indeed have Tobler's blood on his pants. Therefore no prejudice has been shown in the omission of testimony as to whether those bloody pants were shown to Ann Hopkins or not - it is simply irrelevant. (R1: 117, 148) No prejudice has been shown by the omission of this testimony.

e) As for whether Hopkins stated to his mother that a woman had been murdered and he was in trouble, it was undisputed that a woman had been murdered and that Hopkins knew about it: Petitioner admits he told Hopkins that the victim was dead when Petitioner came out of the victim's house with blood on his pants. (R2: 387-88) Moreover, since Hopkins has pled guilty to accessory after the fact in this case, it cannot be disputed that he was indeed "in trouble" regarding Tobler's murder. (R1: 118) No prejudice has been shown regarding the omission of this testimony of Hopkins which would have actually had the effect of *contradicting* Petitioner's version of events put forth in his motion and to which he testified at the evidentiary hearing in this cause. *See* **Squires v. State**, 558 So. 2d 401 (Fla. 1990) (Ineffectiveness is not shown when a witness is not used who could have provided exculpatory as well as damaging evidence).

f) As the trial court ruled, any testimony pertaining to whether Hopkins and his mother had an argument *after* the murder regarding whether the mother would give Hopkins money for crack cocaine would have been irrelevant to any issue at trial and therefore would have been inadmissible. (R2: 218)

g) Whether the mother (Ann) and Hopkins' girlfriend (Boyter) liked each other would have been irrelevant to any issue at trial and therefore inadmissible. No prejudice has

been shown by the omission of this testimony.

h) Even if Petitioner had produced evidence at trial that Boyter had been using crack cocaine at the time she made the observations concerning the bloody pants when Petitioner had returned to the house, *evidence of her alleged drug use would not contradict the fact that Petitioner had blood on his pants, and that he returned to the Hopkins' residence at the time Boyter said he did*. Moreover, as the State pointed out in its response to Petitioner's motion, "the collateral matter of her consumption of alcohol on the night of the murder could not begin to outweigh the fact that the defendant's own statement to the police largely corroborated Boyter's account of what she saw and was told about Tobler's death. Thus, this potential testimony would not likely have changed the outcome of the case." (R1: 119, 136-39) No prejudice has been shown by the omission of Hopkins' testimony on this point.

2. Ann Hopkins:

Petitioner stated in his motion that Jerry Hopkins' mother, Ann Hopkins, would have testified as follows:

a) Boyter did not like Ann because Ann disapproved of Boyter's relationship with her son, Hopkins.

b) That after the crime when Hopkins awakened his mother Ann, he wanted money to buy crack cocaine, but Ann did not want to give it to him.

c) Hopkins never showed Ann any bloody pants, never said he was in trouble, and never said anything about a woman being murder. (R1: 44)

Initially it should be noted that defense counsel did indeed subpoena Ann for deposition in this case before trial. (R2: 237-38) Defense counsel's final bill for representation in this cause reflects that he did talk to Ann on September 13, 1996. (R2: 264) Therefore it cannot be said that he failed to investigate the possibility of calling her. Respondent addresses each of the points of her purported testimony as follows:

a) Whether Ann and Boyter liked each other would have been irrelevant to any issue at trial and therefore inadmissible. No prejudice has been shown by the omission of this testimony.

b) Any testimony pertaining to whether Hopkins and his mother had an argument *after* the murder regarding whether the mother would give Hopkins money for crack cocaine would have been irrelevant to any issue at trial and therefore inadmissible.

c) Boyter never testified that Hopkins had showed her the blood-soaked pants in the presence of Ann. Instead, Boyter had testified that Hopkins had showed her the pants as the two of them were driving away in the truck. (R1: 119, 136)

Therefore Ann's purported testimony that Hopkins never showed her (Ann) the bloody pants would not have contradicted any testimony presented at trial. It was undisputed, and Petitioner admitted himself, that he did indeed have Tobler's blood on his pants. (R1: 148) Therefore no prejudice has been shown in the omission of testimony as to whether those bloody pants were shown to Ann Hopkins or not - it is simply irrelevant.

As for whether Hopkins stated to his mother that a woman had been murdered and he was in trouble, it was undisputed that a woman had been murdered and that Hopkins knew about it: Petitioner admits he told Hopkins that the victim was dead when Petitioner came out of the victim's house with blood on his pants. (R2: 387-88) Moreover, since Hopkins has pled guilty to accessory after the fact in this case, it cannot be disputed that he was indeed "in trouble" regarding Tobler's murder. (R1: 118) No prejudice has been shown regarding the omission of this testimony of Ann which would have actually had the effect of *contradicting* Petitioner's version of events put forth in his motion and to which he testified at the evidentiary hearing in this cause. *See* **Squires v. State**, 558 So. 2d 401 (Fla. 1990)
(Ineffectiveness is not shown when a witness is not used who could have provided exculpatory as well as damaging evidence).

3. Russell Harris:

Petitioner alleged in his motion that Harris would have testified that the evening he observed Boyter and Hopkins at the Jet Gas Station, they were drinking. (R1: 44)

It should be noted that the State's answer to demand for discovery listed Harris as a potential witness, but his "address is unknown at present". (R1: 91) Additionally, Petitioner's motion *does not even allege which evening Harris allegedly observed Boyter and Jerry Hopkins at the Jet Gas Station and is facially sufficient for this reason alone*.

But even if Petitioner had alleged that the observation was made on the night of the murder, and even if Harris had been called and had testified as set out in Petitioner's motion, "his impeachment, if any, of Boyter regarding the collateral matter of her consumption of alcohol on the night of the murder could not begin to outweigh the fact that the defendant's own statement to the police largely corroborated Boyter's account of what she saw and was told about Tobler's death. Thus, this potential testimony would not likely have changed the outcome of the case." (R1: 119, 136-39)

In light of the above, the trial court properly summarily denied Ground II of Petitioner's motion, as Petitioner failed to demonstrate any prejudice resulting from the fact that Jerry Hopkins, Ann Hopkins, and Russell Harris were not called

as witnesses at trial by defense counsel. Although the trial court's ruling was only partially based on this reasoning, an appellate court is required to affirm a defendant's conviction when the ruling of the trial court is correct, albeit for the wrong or different reasons. *See* **Belvin v. State**, 585 So. 2d 1103 (Fla. 2d DCA 1991).

Alternatively, even if this Court finds that Petitioner made a facially sufficient showing of substantive prejudice in the omission of the testimony of these witnesses because of defense counsel's failure to call any or all of them, there is still the issue of Petitioner's failure to allege that each of these witnesses would have been available to testify at trial.[1] The First, Third, and Fourth District Courts of Appeal have held that in order to present a facially sufficient claim of ineffective assistance of counsel for failure to call witnesses, the motion must allege that the witnesses were available to testify. *See* **Highsmith v. State**, 617 So. 2d 825 (Fla. 1st DCA 1993), **rev. dism.**, 775 So. 2d 288 (Fla. 2000); **Puig v. State**, 636 So. 2d 121 (Fla. 3d DCA 1994); **Catis v. State**, 741 So. 2d 1140 (Fla. 4th DCA 1998), **rev. denied**, 735 So. 2d 1284 (Fla. 1999).

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[1]Jerry Hopkins was legally unavailable to testify at Petitioner's trial, as his case had not yet been resolved and he had a Fifth Amendment privilege not to testify in Petitioner's case. Moreover, the record indicates that the State did not have any known address for Harris. (R1: 91)

On the other hand, the Second District has held that a motion need not allege availability of the witness in order to be facially sufficient. *See* **Odom v. State**, 770 So. 2d 195 (Fla. 2d DCA 2000); **Tyler v. State**, 793 So. 2d 137 (Fla. 2d DCA 2001).

The Fifth District has now squarely aligned itself with the First, Third, and Fourth Districts in its opinion rendered in the instant case.

If this Court decides that Petitioner failed to make a showing of substantive prejudice in the omission of the testimony of each of the individuals he believes his attorney should have called at trial, then this sub-issue is not ripe for review in this particular case. However, should this Court decide that a facial showing of substantive prejudice has been made as to the testimony of any of these witnesses, then this Court is faced with the issue of whether a defendant must specifically allege that the witness was available for trial in order to make a facially sufficient claim of ineffective assistance of counsel for failure to call that witness.

Respondent posits that, practically and logically, a defendant should be required to allege availability. There is no point in wasting the time and preparatory efforts of the judge, postconviction counsel, and the prosecutor, not to

mention taking up space on the docket of a trial court already tremendously overburdened, to conduct an evidentiary hearing on this type of claim if the witness could not have appeared at trial anyway. The strongest testimony becomes irrelevant if the speaker would have been unavailable to give it:

> A hearing is reserved for those cases where a defendant can articulate a basis for one. Without such a procedural screening mechanism, the burden on trial judges would be overwhelming, as they would be required to hold evidentiary hearings based on a mere conclusory pleading of ineffect-iveness of counsel, rather than on a basis of facts which, if proven, would justify post-conviction relief.

Cunningham v. State, 748 So. 2d 328 (Fla. 4th DCA 1999).

Respondent urges this Court to hold that the First, Third, Fourth, and Fifth Districts are correct in requiring a defendant to allege availability in order to make a facially sufficient claim of ineffective assistance of counsel for failure to call a witness at trial. In the instant case the Fifth District held that:

> [I]n order to set forth a facially sufficient claim of ineffective assistance of counsel based upon counsel's failure to call a witness, a post-conviction motion must allege that the witness was available to testify. This conclusion logically flows from the fact that a post conviction ineffective assistance of counsel claim which is based upon counsel's failure to call witnesses must include 'an explanation as to how the admission of this evidence prejudiced the outcome of the trial.' [citation omitted]. Counsel's failure to call a witness who was unavailable to testify at trial could not logically prejudice the outcome of a

defendant's trial.

Nelson v. State, 816 So. 2d 694 (Fla. 5th DCA 2002). The Fifth District's reasoning is soundly bottomed on **Strickland v. Washington**, 466 U.S. 668 (1984)[2] and should be affirmed.

Gaskin v. State, 737 So. 2d 509 (Fla. 1999), **appeal after remand**, 822 So. 2d 1243 (Fla. 2002) requires an in-depth analysis to understand its impact on this issue. In **Gaskin**, the defendant alleged that the trial court erred in denying his claim of ineffective counsel on the ground that it had been insufficiently pled, because Gaskin had failed to name the witnesses he intended to call and state whether they had been available to testify at trial. In finding that the trial court erred in holding the claim facially insufficient, this

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[2]**Strickland** held that in order to demonstrate ineffective assistance of trial counsel, a defendant must establish that: (1) counsel made errors so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment, and that (2) the deficient performance of counsel prejudiced the defense.

The Fourth Circuit Court of Appeals has explained the application of the prejudice requirement of the **Strickland** standard:

> With respect to the prejudice requirement, the petitioner 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' The level of certainty is something less than a preponderance; it need not be proved that counsel's performance more likely than not affected the outcome. Instead, the petitioner need only demonstrate 'a probability sufficient to undermine confidence in the outcome.' [citations omitted].

Young v. Catoe, 205 F.3d 750, 759 (4th Cir. 2000).

Court stated in a footnote:

> Contrary to the trial court's finding, however, there is no requirement under rule 3.850 that a movant must allege the ***names and identities*** of witnesses in addition to the ***nature of their testimony*** in a postconviction motion. [] *See* Fla. R. Crim. P. 3.850(c).
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> * * *
>
> Likewise, nothing in the rule states that a movant must allege the ***identities*** of witnesses, ***the nature of their testimony***, ***or their availability to testify***. It is during the evidentiary hearing that Gaskin must come forward with witnesses to sub-stantiate the allegations raised in the post-conviction motion. Therefore, we hold that it was error for the trial court to require Gaskin to plead the identities of witnesses in order to be entitled to a hearing. [Emphasis added].

Gaskin, 737 So. 2d 509, n. 10 (Fla. 1999). In other words, in footnote 10 of **Gaskin** this Court stated there was no requirement to allege: 1) the names of witnesses defense counsel should have called, 2) the nature of their testimony, nor 3) that the witnesses had in fact been available to testify at trial.

The fact that this Court chose to relegate the comment in **Gaskin** to a footnote shows that it is more properly characterized as dicta rather than a holding of the case. Additionally, subsequent decisions show that this Court has effectively receded from this dicta in **Gaskin** on all three factors mentioned therein.

As for the first two **Gaskin** factors, Respondent would

direct this Court's attention to **Ford v. State**, 825 So. 2d 358 (Fla. 2002), in which this Court was asked to resolve a conflict between the Fifth District's opinion in **Ford v. State**, 776 So. 2d 373 (Fla. 5th DCA 2001), and the Fourth District's opinion in **Jackson v. State**, 711 So. 2d 1371 (Fla. 4th DCA 1998).

In analyzing the conflict, this Court quoted extensively from the facts and holding of the Fourth District's decision in **Jackson**:

> Appellant's first ground included an allegation of ineffective assistance based on trial counsel's failure to call certain named witnesses to the shootout. In the motion, Appellant stated that they were willing and available to testify that Appellant was not the shooter, for the purpose of rebutting state witnesses who testified to seeing Appellant commit the offenses.
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> * * *
>
> [T]he failure to call witnesses can constitute ineffective assistance of counsel ***if*** the witnesses may have been able to cast doubt on the defendant's guilt, and ***the defendant states in his motion the witness' names and the substance of their testimony,*** and explains how the omission prejudiced the outcome of the trial. [citation omitted]. Appellant's motion met these ***requirements***[.] [Emphasis added].

After setting out this portion of the Fourth District's **Jackson** opinion in **Ford**, this Court then went on to state:

> We agree with the analysis in **Jackson** and conclude that on the basis of the allegations in this petition that an evidentiary hearing should have been required in order to resolve whether

what counsel did was tactical.

Ford, 825 So. 2d at 361. Thus, by agreeing with the quoted language in **Jackson** which characterized the witness names and the substance of their testimony as "requirements", this Court in **Ford** effectively overruled footnote 10 of **Gaskin** as to the first two factors listed therein.

As for the third factor in **Gaskin**, (the one at issue in the instant appeal), this Court has decided another case which appears to now favor a requirement that availability must also be alleged when a postconviction claimant makes this type of allegation. In **Patton v. State**, 784 So. 2d 380 (Fla. 2000), the defendant alleged that his counsel was ineffective for failing to call additional witnesses who would have corroborated the mitigating testimony presented by his sister and stepsister. In affirming the summary denial of this claim, this Court stated:

> Much of the information provided by [the sister and stepsister] was corroborated by the expert witnesses. ***Additionally, Patton has failed to indicate that there are persons available who would corroborate the sisters' testimony*** and has failed to specify the degree of corroboration. [] This allegation also has ***not been sufficiently pled.*** [Emphasis added].

Id.

In light of this Court's more recent decisions in **Ford** and **Patton**, it appears that this Court has effectively receded from footnote 10 of **Gaskin**. The later decisions of **Ford** and

Patton indicate that the three factors listed in footnote 10 of **Gaskin** are now all required allegations for facial sufficiency of this type of claim.

In sum, the rule that emerges from this Court's more recent cases is that when a defendant makes a claim in a postconviction motion that trial counsel was ineffective for failing to call certain witnesses at trial, the defendant is required to allege: 1) the names of the witnesses; 2) the substance of their testimony; and 3) how the failure of defense counsel to call the witness prejudiced the outcome of the case. As part of this third requirement, a defendant should be required to allege that if the witness had been called, he would have been available to testify at trial.

This makes logical sense in light of **Strickland**, which requires a defendant to make a showing of prejudice as a result of counsel's failure to call the witnesses. If the witnesses would not have been available to testify even if defense counsel had elected to call them, then *ipso facto* no prejudice can possibly be shown as a result of defense counsel's failure to do so. It would be a tremendous waste of judicial resources to require an evidentiary hearing on a claim for which it would be impossible to show prejudice. Requiring a defendant to swear under oath that the witnesses were available is a sound policy which comports in all

respects with **Strickland**, which requires a showing of prejudice.

In **Cunningham**, the Fourth District Court of Appeal analyzed footnote 10 of **Gaskin** and tried to understand the exact nature of this Court's intent therein. Prior to **Gaskin**, the Fourth District had held in **Catis v. State**, 741 So. 2d 1140 (Fla. 4th DCA 1998), **rev. denied**, 735 So. 2d 1284 (Fla. 1999) that a postconviction motion was facially insufficient because it failed to "name the witnesses, did not allege that the witnesses would have been available to testify, and did not specify the content of their testimony."

In **Cunningham**, the Fourth District examined whether their holding in **Catis** was still good law in light of footnote 10 of **Gaskin**, an opinion rendered after **Catis**. In finding that **Catis** was still viable, the Fourth District stated:

> As we read [] **Gaskin**, the court was primarily concerned - - at least for purposes of whether a defendant is entitled to a hearing - - with the trial court-imposed requirement that the rule 3.850 motion name witnesses for the hearing and specify the precise nature of their testimony.
>
> * * *
>
> We [] do not read footnote 10 in **Gaskin** as overruling an abundance of precedent from the supreme court itself and the district courts of appeal as well concerning the requirement in ***ordinary cases*** under rule 3.850 that the defendant make a brief statement of the facts relied upon in support of the motion. Accordingly, our decision in **Catis** was not a legal aberration; it follows a line of authority

> tracing back to **Smith v. State**, 445 So. 2d 323, 325 (Fla. 1983), where the supreme court discussed the pleading requirements for ineffective assistance of counsel claims in Rule 3.850 motions[.]
>
> * * *
>
> In fact, footnote 10 in **Gaskin** does not mention **Smith** or the numerous cases following it.
>
> * * *
>
> This conclusion is not undone by the more recent decision in **Peede v. State**, 748 So. 2d 253 (Fla. 1999).[3]
>
> * * *
>
> We again note that ***Gaskin and Peede were death penalty cases***. [Emphasis added].

Cunningham, 748 So. 2d at 329-31.

This Court should hold that it has effectively receded from footnote 10 of **Gaskin** in its later cases of **Ford** and **Patton**. Alternatively, as the Fourth District suggests in **Cunningham**, this Court should hold that footnote 10 of **Gaskin** is limited only to death penalty cases (because, as noted in

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[3]Petitioner's reliance upon **Peede v. State**, 748 So. 2d 253 (Fla. 1999) is misplaced. **Peede** addresses whether a 3.850 claim is facially insufficient when a defendant fails to allege that witnesses *needed for a postconviction evidentiary hearing would be available to testify at the hearing held at some point in the future*. In contrast, the issue in the instant case is whether a facially sufficient claim of ineffectiveness is made when a defendant fails to allege that witnesses *who should have been called by defense counsel to testify at a trial held in the past were in fact available to do so at that time*. **Peede** provides this Court with no enlightenment at all as to the issue presented in the instant case.

Cunningham, "death is different"), and does not apply to "ordinary cases" such as the instant one. Either way, the First, Third, Fourth and Fifth Districts are correct in requiring an allegation of witness availability for a claim of this nature to be facially sufficient.

ISSUE II

THE TRIAL COURT PROPERLY SUMMARILY DENIED PETITIONER'S CLAIM THAT THE PROSECUTOR DELIBERATELY USED PERJURED TESTIMONY. (Restated).

In Ground I of his postconviction motion, Petitioner alleged that the prosecutor knowingly submitted the false and/or materially misleading testimony of Katrina Boyter. According to Petitioner, Boyter made the following false statements during her trial testimony:

a) She was the one who called the police, (when in fact the police went looking for her).

b) She did not know the victim.

c) Petitioner and Jerry Hopkins had left the house at 8:30 a.m. and did not return until approximately 12:15 a.m.

d) She had not used cocaine on the evening of the crime when she made the observation of the blood on Petitioner's pants, an observation to which she later testified at trial.

Both on appeal of the denial of his postconviction motion to the Fifth District, as well as in the instant appeal, Petitioner's brief addresses only the failure to conduct an

evidentiary hearing regarding whether the prosecutor knowingly presented perjured testimony regarding the first statement: that Boyter was the one who had called the police. Therefore that is the only statement which will be addressed herein. Appellate review of the failure to conduct an evidentiary hearing on the prosecutor's eliciting the other statements is waived. *See* **Gillman v. State**, 346 So. 2d 586 (Fla. 1st DCA 1977)(When the assignment of error is not argued in the appellate brief, it is considered abandoned).

The police report contained in the appendix attached to Petitioner's motion indicates that Detectives Greenhalgh and Lee first made contact with Boyter at the residence of a Mr. Green after being told by Boyter's mother that Boyter could be found at that location. Neither of the detectives' reports indicates that they had any trouble locating Boyter, or that she was hesitant to cooperate. (R1: 80, 83)

On cross-examination of Boyter by defense counsel at trial, Boyter testified that she had called her mother because she was having nightmares about the murder. (R1: 226)

The following exchange occurred during redirect examination of Boyter at trial:

> [PROSECUTOR]: So you called your mother and talked to her?
>
> [BOYTER]: Yes.
>
> [PROSECUTOR]: Without telling us what the two

> of you talked about, ***is that why you decided to call the police?***
>
> [BOYTER]: **Yes, it was.** [Emphasis added]. (R2: 226)

To establish that the State knowingly presented false testimony in violation of **Giglio v. United States**, 405 U.S. 150 (1973), a defendant must show: 1) that the testimony was false; 2) that the prosecutor knew the testimony was false; and 3) that the statement was material. *See* **Craig v. State**, 685 So. 2d 1224, 1226 (Fla. 1996). "The thrust of **Giglio** and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony, and that the prosecutor *not fraudulently conceal such facts from the jury*." [Emphasis added]. **Id.** at 1226-7, *quoting* **Routly v. State**, 590 So. 2d 397, 400 (Fla. 1991).

Petitioner's allegation in his motion was legally insufficient. As he himself repeatedly pointed out in his motion, as well as on page 25 of his brief, the police report was available to the prosecutor *and to defense counsel* long before trial. (R1: 35) Therefore defense counsel could easily have impeached Boyter on this minor point if he had so chosen, because he was just as aware of how she came to talk to the police as the prosecutor. Because defense counsel had this knowledge, Petitioner's claim that the prosecutor knowingly used perjured testimony was facially insufficient and properly

summarily denied. *See* **Williams v. State**, 642 So. 2d 67 (Fla. 1st DCA 1994)(Allegation that state had knowingly used perjured testimony was facially deficient where there was no allegation of any action on part of prosecution to bring about a change in testimony or of any circumstance not known to defense at time of trial); **DeHaven v. State**, 618 So. 2d 337 (Fla. 2d DCA 1993)
(Defendant must have been unaware at time of trial that testimony was perjured in order to obtain relief on the ground of prosecutorial misconduct for use of perjured testimony), **rev. denied**, 626 So. 2d 204 (Fla. 1993); **Kilgore v. State**, 631 So. 2d 334 (Fla. 1st DCA 1994)(Allegation of state's knowing use of perjured testimony did nothing more than allege inconsistency between witness' trial and deposition testimony).

Additionally, as pointed out in the State's response to Petitioner's postconviction motion, "[i]n light of the fact that the defendant gave a statement to police putting himself at the murder scene handling Georgia Mae Tobler's body at or near the time she was murdered, it is not particularly relevant whether Boyter contacted the police or the police contacted her prior to her revelation to them that the defendant had been at Tobler's house at or near the time that she was murdered and had handled the body [] to the extent

that the pants he had been wearing were soaked with Tobler's blood. The defendant had told the police that much himself." (R1: 117, 148) The Fifth District in effect agreed with this reasoning when it stated in its opinion that Boyter's testimony was consistent with and corroborative of other witnesses. Therefore Petitioner has failed to make a showing of materiality as to how it came about that Boyter came in contact with the police, as required by the third prong of **Guilio**.

While the trial court's summary denial of Ground I was not based on the above reasoning, an appellate court is required to affirm a defendant's conviction when the ruling of the trial court is correct, albeit for wrong or different reasons. *See* **Belvin v. State**, 585 So. 2d 1103 (Fla. 2d DCA 1991).

CONCLUSION

WHEREFORE, Respondent prays that this Court affirm the decision of the Fifth District Court of Appeal, which affirmed the denial of Petitioner's postconviction motion. In so doing, this Court should find that the First, Third, Fourth and Fifth Districts correctly require a defendant to allege that the witness was available for trial to make a facially sufficient claim that trial counsel was ineffective for failing to call the witness, and that the Second District is in error in failing to require an allegation of availability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the Public Defender's box at the Fifth District Court of Appeal to Marvin F. Clegg, Assistant Public Defender, via the Public Defender's box at the Fifth District Court of Appeal, (mailing address 112 Orange Avenue, Suite A, Daytona Beach, FL 32114) on this 17th day of June, 2003.

_____

COUNSEL FOR RESPONDENT

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR RESPONDENT