IN THE SUPREME COURT OF FLORIDA

PAUL NELSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	FSC CASE NO. SC02-1418
	)	
STATE OF FLORIDA,	)	FIFTH DCA CASE NO. 5D01-625
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S MERIT BRIEF

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PRELIMINARY STATEMENT

For purposes of this brief, the symbol "R" shall represent the pages in the two volume Record on Appeal, including the transcripts as renumbered for this Record, by the clerk. Counsel for Petitioner is relying upon photocopied portions of the Record on Appeal, Petitioner having requested counsel's original copy of the Record as noted below.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted in 1996 of the second-degree murder of Georgia Mae Tobler, following a St. Johns County jury trial. (R 215; 368) He was originally sentenced to 423.5 months in prison. (R 124) This conviction was appealed to the Fifth District Court of Appeal, and in 1999 his conviction and sentence were affirmed in Nelson v. State, 725 So.2d 412 (Fla. 5th DCA 1999). This Court denied review at Nelson v. State, 733 So.2d 516 (Fla. 1999) .

On May 24, 2000, Petitioner filed a Motion for Postconviction Relief under Rule 3.850, Florida Rules of Criminal Procedure and raised three main points:

1. that he was deprived of a fair trial and due process when the prosecution knowingly submitted perjured testimony,

2. that he received ineffective assistance of counsel for failing to produce favorable witnesses at trial and due to certain conflicts, and

3. the trial court erred in permitting Petitioner to waive various rights without proper inquiry or record. (R 28; 30-73)

Petitioner had been represented at trial by attorneys Patrick Canan and Robert McCloud, who were assisted by investigator John O'Malley. (R 315-367) He was represented at his 3.850 hearing by attorney Brent Woolbright. (R 314)

A Supplemental Motion was filed June 29, 2000 based on *Heggs*[1] (R 108-111)

The state responded to Petitioner's motions by moving for summary denial or a hearing on contested issues, and by conceding to the applicability of *Heggs.* (R 124)

Perjured Testimony Claim

Specifically, as to the first argument, Petitioner swore that Katrina Boyter, the state's 'lead witness' against him, perjured herself when she indicated she called the police to report her knowledge when in reality her information came forth as a result of police investigating a separate offense with which she could have been charged criminally. (R 31-35) Petitioner argued this was material because it disguised her motive for testifying and thus kept from the jury issues concerning her credibility. (R 35)

He also alleged her testimony was perjurious concerning her acquaintance with the deceased, time periods involving Petitioner's whereabouts, and Ms. Boyter's use of crack cocaine the evening she witnessed blood-soaked pants. (R 36) Petitioner alleged facts within his motion, of his own knowledge, to support the cocaine allegation and argued the prosecutor knew or "reasonably should have"

[1] Heggs v. State, 759 So.2d 620 (Fla.2000).

known of Ms. Boyter's familiarity with the decedent and her other alleged perjury. (R 38) Regarding the materiality of this perjury, Petitioner argued the acquaintanceship of the two women could have motivated Ms. Boyter to "exaggerate, or prevaricate the amount of blood purportedly observed on Nelson's pants." (R 38-39)

About the perjury allegations, the trial judge found in his order of December 5, 2000 (R 223) that Ms. Boyter never *directly* stated she contacted the police. (R 216) However, the transcript attached by the court revealed the question by the prosecutor and the key answer:

> Q: Without telling us what the two of you talked about, *is that why you decided to call the police?*
>
> A: Yes, it was.

(R 226) (*emphasis* added)

Regarding whether Ms. Boyter knew the decedent, the trial judge found no evidence to conclusively contradict Ms. Boyter's testimony. (R 216)

Ineffective Assistance Claim

Concerning the ineffective assistance claims, Petitioner first argued his counsel should have called to testify Jerry and Ann Hopkins, Russell Harris and a blood splatter expert. (R 43) Mr. Hopkins was Petitioner's codefendant who

Petitioner alleged was engaged in a 'marathon session of smoking crack' leading up to the crime in question. (R 31; 38; 43) Regarding Mr. Hopkins, it was alleged that he could have testified Petitioner did not take a knife from Hopkins' house before going to the decedent's home, and that Petitioner only stayed inside the victim's home a few seconds before returning to say he thought she was dead. (R 43) Further, Ann Hopkins could have testified about Jerry's cocaine cravings. Mr. Harris could have testified about seeing Ms. Boyter and Mr. Hopkins drinking at a gas station one night. Finally, the expert could have testified that it would have been 'physically impossible' for Petitioner to have blood on his pants alone, if he had killed the victim. (R 44) The import of this testimony was further explained in the motion. (R 45)

In the attached portion of the trial transcript provided with Petitioner's motion, Mr. Canan announced before trial that he had tried to subpoena Ms. Boyter and another witness, without success, due to their moving around, and he requested time to question them before trial if the state planned to call them to the stand. (R 176)

Regarding trial counsel's failure to depose Ms. Boyter, Petitioner argued that the latter witness was a key witness against him and counsel needed more than the requested five minutes to interview her before trial, so that he could attack her

credibility before the jury in a meaningful manner. (R 47-49) He also argued counsel was ineffective for failing to move for a change of venue. (R 50) Due to the popularity of the decedent, whose death was covered in the local media and who was black, unlike Petitioner, Petitioner argued a motion should have been made. (R 51) This argument was based, additionally, on racial attacks upon Petitioner in the jail and upon his opinion that local unrest put pressure on the local jury to return a verdict that would not cause further racial disturbance. (R 52)

Petitioner also argued that he did not intelligently waive his right to a jury of twelve persons, based upon poor advice from his trial counsel. (R 53)

Next, Petitioner argued that trial counsel promised evidence to the jury which was never forthcoming, thus eroding his credibility to Petitioner's harm. (R 55-58) This claim rested in part upon Petitioner's next argument: that trial counsel and one investigator 'outvoted' a co-counsel and told him not to testify. (R 60) A conflict of interest was alleged as well, in that defense counsel Canan was also counsel in another case of more notoriety at the time and Petitioner argued that this case, with its change of venue, placed harmfully conflicting demands upon Mr. Canan's time. (R 64) Petitioner claimed this prevented counsel from attempting to depose Ms. Boyter or call a spatter expert. (R 68)

In his order of December 5, 2000, the trial judge found that Petitioner failed

to demonstrate that the codefendant Jerry Hopkins or Ms. Hopkins or Russell Harris were *available* to testify and he ruled that the motion was therefore "facially insufficient," relying upon. Additionally, the proposed testimony of Ms. Hopkins would not have affected the case outcome, if admissible, the court found. (R 217)

Regarding the alleged ineffectiveness for failure to depose Ms. Boyter, the trial judge found this "conclusively refuted" by the record showing attempts to subpoena the woman. (R 218; 240)

The venue argument was found to "severely exaggerate the extent of the pretrial publicity," and concerning Mr. Canan's personal or professional time conflicts as alleged by Petitioner, the trial court found documented hours of counsel's preparation to be sufficient rebuttal. (R 219; 222)

Waivers Were Not Knowingly Made Claim

Finally, Petitioner argued that the trial judge committed reversible error in permitting Petitioner to waive his rights to a 12-person jury and to testify, without an explanation of those rights and dialogue to discern whether these waivers were knowing and voluntary. (R 73) An affidavit accompanied Petitioner's motion. (R 101) The attached portion of the trial transcript revealed that the state had not revealed to the trial court just before trial week, whether it was seeking the death penalty. (R 178)

Evidentiary 3.850 Hearing

An evidentiary hearing was held on February 9, 2001, in response to allegations that only Petitioner could testify concerning (the advice he was given with regard to his ability to testify). (R 221) Regarding the waiver of the twelve-person jury, the trial judge denied Petitioner's claim as without legal merit, based upon State v. Griffith, 561 So.2d 528 (Fla. 1990)[2]. Concerning the waiver of his right to testify and whether the trial court erred in not getting this waiver on the record, the trial court dismissed this based upon Torres-Arboledo v. State, 524 So.2d 403, 410 (Fla. 1988).

At the hearing, motion counsel called Mr. Canan after invoking the rule, who testified he had thought the evidence before trial was 'close' and discussed Petitioner's prior record in relation to whether he took the witness stand. (R 318) Although he was lead counsel, he had advice from Mr. McCloud during the trial and although he believed there were ongoing conversations regarding Petitioner testifying or not, he could not visualize one specific conversation after the state rested. (R 319-322)

Mr. Canan said he left the decision up to Petitioner, concerning him testifying

[2] "... we do not agree that a record showing of the defendant's personal knowing and intelligent waiver of a twelve-person jury is required." Griffith at 529

and "(h)e ultimately decided not to take the stand. It was his decision..." (R 322) Mr. Canan noted that Petitioner had "said his piece" to the sheriff's department through a written statement that had come into evidence, he didn't think Petitioner had much to add to that. (R 323)

Mr. Canan could not recall whether he announced the decision on the record but stated he normally does not volunteer details about this decision. (R 326-327) He denied attempting to stop Petitioner from testifying. (R 329) Mr. Canan did not recall Petitioner ever saying he wanted to testify. Instead, Mr. Canan believed Petitioner made his decision against testifying based on his best interests and not fear of a specific prior record. (R 335-336; 360)

Second chair attorney McCloud testified he sat through parts of the trial and met with Petitioner at jail, as well. He recalled discussing the pros and cons of Petitioner testifying but was not sure if there was a firm strategy regarding this before trial began. (R 338-340) He could not recall any recommendation from Mr. Canan, but thought he probably mildly recommended Petitioner should testify. (R 344- 350)

Mr. O'Malley testified about his investigative work in the case and said Mr. Canan was opposed to Petitioner testifying because of a prior conviction for violence--"he said it could open up the door to a lot of...." (R 362) Mr. O'Malley

said he believed he personally told Petitioner that if it were him (O'Malley), he would not testify because the jury might say there was a propensity for violence. (R 364)

Mr. O'Malley said he recalled being at the jail with the client and Mr. Canan, while the attorney explained the prosecution could use the defendant's prior record. The investigator did not recall any time during the trial where the two attorneys and he met with the client concerning whether to testify and expressed a doubt that the attorneys would consult him anyway. (R 364-366)

Petitioner testified at the hearing and said he told both attorneys from the outset that he wished to testify. During the trial, he recalled a discussion where Mr. Canan opposed Petitioner testifying but Mr. McCloud urged it, saying "I'll do the direct." (R 370-371) However, the investigator sided with Mr. Canan and that ended the discussion for that day, which also saw the last state witness testify. (R 372-373)

Petitioner said he was not asked for his opinion at all, and the attorneys were not talking directly to him. They did not tell him what questions to expect or what his answers should be if he testified but a mock run-through was held at the jail where Mr. McCloud acted as prosecutor. (R 374-375) He was told if he took the stand, that would open the door for the state to get into prior convictions. (R375-

376)

When the defense rested, Petitioner said he asked Mr. Canan “what about me testifying?” Mr. Canan shrugged in response. Petitioner did not raise this issue with the judge and did not recall being present during the jury instruction. The defendant said he was confused, thought he had no ‘say’ in the matter--“I had never been through no kind of criminal proceeding before, I really had no knowledge of it.” (R 379-381)

Petitioner said his testimony would have been critical for him because he was the only person present at the scene, except for Jerry Hopkins who was about 15' outside the house where the murder occurred. The defendant stated his testimony would have been basically what he stated to police but he would have stressed the time frames involving Ms. Boyter, her crack binge, and his trip to the decedent’s to purchase more crack for her. The decedent’s dog was not barking as usual, the screen door was unlatched, as was the inner door, which were usually locked in Petitioner’s previous five to seven trips there. (R 382-385)

Petitioner called the victim’s name several times and things seemed suspicious to him so he peered into the house and saw the body partially on the couch. He ran to her and there was blood everywhere and he testified he lifted her up, using his knee to assist with her weight and then he heard “an air sucking noise”

and looked to see if she was breathing. (R 385-386) He couldn't tell and noticed blood everywhere, crack cocaine "all over the floor", some money lying around and he grabbed a crack piece before hearing somebody in the bedroom. (R 387)

He ran out the door, yelled to Mr. Hopkins that someone had killed the woman, and showed him the blood on his pants to counter his disbelief. He said they returned to Mr. Hopkins' place within 25 minutes--just before 9 p.m.--and his friend brought him a pair of pants and told him to change and put the soiled pants in a garbage bag. Then he was told to drink a beer and calm down, while Ms. Boyter was 'crazy' and yelling about the crack. Petitioner said he left, and returned about 11 p.m. whereupon he waited for them to return from borrowing more crack money. (R 388-390)

Petitioner said these time elements are what he would have 'changed' to correct Ms. Boyter's version. He said the next day he went to get his pants which were soaking in a drinking water cooler, and he put them out to dry, which was the last he saw of them. He stated Mr. Hopkins kept telling him to avoid getting involved in this because they were both on probation, and Mr. Hopkins had endured a similar mishap with a little girl before. They agreed during later discussions to keep quiet about the murder--Petitioner had a commercial driving license that he was worried about as well and "I made a real bad call, you know, I

should have called the police." (R 390-393)

Upon cross examination, Petitioner said his decision was to testify but his attorneys never explained this was his choice to make. Although he wasn't given the choice, he maintained the misadvise about his prior record still played a factor. (R 395-397) At the completion of his testimony in the 3.850 hearing, defense counsel also stated Petitioner wished to preserve his other motion grounds even though a hearing had not been granted on those aspects. (R 398)

The trial judge announced that there was insufficient showing of ineffective assistance of counsel and no record of Petitioner ever requesting to testify. Later, Judge Mathis issued a written order with findings that Petitioner's two trial attorneys properly advised him regarding impeachment and his prior record, and that Petitioner did not prove that he was prevented from testifying against his wishes but made the decision himself. (R 298)

The court proceeded to its *Heggs* resentencing, setting aside its earlier sentence. Petitioner was adjudicated guilty of second degree murder, and committed to the "department of connections" for 268 months with credit for 1,751 days. (R 400-402) The new scoresheet revealed a range of between 160.95 and 268.25 points. (R 297)

A Notice of Appeal was filed on February 20, 2001, and for purposes of

this appeal, the Office of the Public Defender was appointed on February 26, 2001. (R 299; 309) On April 12, 2002, the Fifth District affirmed the trial court's denial of Petitioner's motion for postconviction relief. Nelson v. State, 816 So.2d 694 (Fla. 5th DCA 2002)

On April 23, 2002, Petitioner sought rehearing or certification of the conflict which the Fifth District's opinion noted between Highsmith v. State, 617 So.2d 825 (Fla. 1st DCA 1993) and Odom v. State, 770 So.2d 195 (Fla. 2d DCA 2000). This was denied on May 24, 2002.

On May 8, 2002, Petitioner requested that appellate counsel withdraw from his case, forward the Record on Appeal to his prison address, and he instructed counsel not to file a Notice to Invoke Discretionary Jurisdiction with this Court. Accordingly, counsel filed a Motion to Withdraw on May 9, 2002, which was denied by the Fifth District.

Petitioner filed a *pro se* Notice to Invoke Discretionary Jurisdiction on June 21, 2002 and filed an "Emergency Motion to Dismiss Appointed Counsel" with this Court. The latter was denied, along with the Office of the Public Defender of the Seventh Judicial Circuit's Motion to Withdraw, citing a conflict of interest based upon Petitioner's writings, on May 6, 2003. Jurisdiction was accepted on January 29, 2003. Nelson v. State, 837 So.2d 411 (Fla. 2003)

SUMMARY OF ARGUMENT

Petitioner should be given an evidentiary hearing on his 3.850 claims that the trial prosecutor's deliberate use of perjured testimony affected his verdict, and deprived him of his rights to Due Process. Further, an evidentiary hearing should be granted concerning whether trial counsel was ineffective for failing to question or call certain witnesses for Petitioner's defense which could have affected his verdict. This Court should resolve the conflict amongst Florida's district courts concerning the latter issue by holding that defendants need not investigate and swear that witnesses would have been available to testify in order to obtain a hearing on whether counsel was ineffective.

POINT ONE

THE LOWER COURT ERRED WHEN IT DENIED PETITIONER AN EVIDENTIARY HEARING ON HIS 3.850 CLAIM THAT HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO QUESTION OR CALL CERTAIN WITNESSES FOR HIS DEFENSE WHICH COULD HAVE AFFECTED HIS VERDICT.

Petitioner seeks a new trial after being convicted of the second degree murder of Georgia Mae Tobler, a woman Petitioner states he found already dead in her home after he went there to buy crack cocaine for the state's key witness, Katrina Boyter. (R 28; 382-387; 31-35) To that end, he filed a postconviction motion for relief which was summarily denied as to two out of three issues.

A defendant is entitled to receive an evidentiary hearing on a post-conviction motion for relief unless the court record, on its face, *conclusively* shows that no relief is warranted, or the motion is legally insufficient. Nelson v. State, 816 So.2d 694 (Fla. 5th DCA 2002)

In this case, the trial court denied Petitioner a hearing, relying upon Highsmith v. State, 617 So.2d 825 (Fla. 1st DCA 1993) to write that the motion was facially insufficient in that it failed to allege the availability of the witnesses. (R 217) However, Highsmith does not establish Florida law as requiring a movant to allege the availability of a witness:

> In cases involving claims of ineffective assistance of counsel based on counsel's alleged failure to investigate and to interview witnesses, a facially sufficient motion must include the following allegations: (1) the identity of the prospective witnesses; (2) the substance of the witnesses' testimony; and (3) an explanation as to how the omission of this evidence prejudiced the outcome of the trial.

Id. at 826. [3]

Further, it is important to note that in this particular case, one of the witnesses Petitioner sought to have testify was his codefendant, and another was a blood spatter expert. The availability of the former is not something peculiarly within Petitioner's knowledge, and the availability of a blood spatter expert to testify about how Petitioner's clothing came to be stained is also not something Petitioner should have to ascertain before swearing under oath to his motion.

Even if Highsmith suggested that precedent in the first district, the issue is not settled as the law across Florida:

> First, this court has held that a facially sufficient motion alleging ineffective assistance of counsel for

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[3]The troublesome language appears later at page 827: Although Petitioner expressed an implicit uncertainty concerning the witnesses' willingness to testify at trial, case law on point has required only that the defendant allege the witness was available to testify--not that the named witness would testify willingly. *See Smith v. State,* 601 So.2d 611 (Fla. 1st DCA 1992); *Williamson v. State,* 559 So.2d 723 (Fla. 1st DCA 1990); *Robinson v. State,* 516 So.2d 20 (Fla. 1st DCA 1987).

> failure to call witnesses must set forth (1) the identity of the prospective witness; (2) the substance of the witness's testimony; and (3) an explanation as to how the omission of the testimony prejudiced the outcome. *See* Robinson v. State, 659 So.2d 444, 445 (Fla. 2d DCA 1995). While the First and Third Districts have held that the motion must also allege that the witnesses were available to testify, *see* Highsmith v. State, 617 So.2d 825 (Fla. 1st DCA 1993); Puig v. State, 636 So.2d 121 (Fla. 3d DCA 1994), this court has not followed suit. Therefore, under this district's precedent, the trial court erred in summarily denying Odom's motion on this basis.

Odom v. State, 770 So.2d 195, 197 (Fla. 2d DCA 2000)[4]

With this divergence of opinion in the district courts, the trial court should have considered Mr. Nelson's claims on this issue by their merits, and not summarily dismissed his effort on a technicality. The issue had not been resolved in the Fifth District at that time and Mr. Nelson's motion was not facially insufficient by federal or other state standards. Because no hearing was granted on these issues, the facts contained in his motion must now be accepted by this Court as true. Ford v. State, 825 So.2d 358 (Fla. 2002) [5]

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[4]The Fourth District appears to look for availability as well, in Catis v. State, 741 So.2d 1140 (Fla. 4th DCA 1998)

[5]"Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations as true to the extent they are not refuted by the record." Occhicone v. State 768 So.2d 1037, 1041 (Fla.,2000)

Ineffective assistance of counsel claims involve a mixed question of law and fact subject to plenary review which requires an independent review of the trial court's legal conclusions. Occhicone v. State, 768 So.2d 1037, 1045 (Fla. 2000)

> A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Id. at 1045 (citations omitted)

Petitioner respectfully urges this Court to resolve the conflict between the districts in favor of a clear record:

> The Fifth District's statement in *Ford* resolved, without either a clear trial record basis identified by the trial court or an evidentiary hearing, the factual issue involving the reason why counsel did not call the witnesses identified by the petitioner. We conclude that, in the instant case, to determine the reason why trial counsel did not call the witnesses it was necessary to grant petitioner an opportunity to present evidence.

Ford v. State, 825 So.2d 358, 361 (Fla. 2002)

Certainly this Court has previously not required a *pro se* defendant to go into specifics about witnesses who are available, simply because the rule does not require it:

> As a preliminary matter, we find no merit to the State's argument that some of Peede's claims were legally insufficient simply because he did not allege the specific witnesses who would testify at the evidentiary hearing. Rule 3.850 requires defendants to allege "a brief statement of the facts (and other conditions) relied on in support of the motion." Fla. R.Crim. P. 3.850(c)(6). Although this Court has found that mere conclusory statements alleging ineffectiveness are insufficient, *see, e.g., Kennedy v. Singletary,* 599 So.2d 991 (Fla.1992), we have not required defendants to allege the witnesses who are available to testify at the evidentiary hearing. *See, e.g., Valle v. State,* 705 So.2d 1331, 1333 (Fla.1997).

Peede v. State, 748 So.2d 253, 258 (Fla.,1999)

As argued below, Petitioner submits that the courts have recognized the onerous burden that a defendant would face in attempting to investigate and prepare witnesses in his own case:

> Schopper was represented by counsel, whom he had the right to expect would interview and subpoena needed witnesses. Schopper was not obliged to subpoena, prepare and examine the witnesses himself.

Schopper v. State, 790 So.2d 471, 473 (Fla. 5th DCA 2001)

The Fifth District has previously permitted motions without the allegation of availability being a requirement and has cited with favor districts which favored both sides of the issue. Schopper v. State, 790 So.2d 471 (Fla. 5th DCA 2001) Necessary allegations in motions were outlined, without mention of availability there:

> As this court said in *Hatten* v. *State*, 698 So.2d 899 (Fla. 5th DCA 1997), a claim that counsel failed to investigate or call exculpatory witnesses must be refuted by the record or an evidentiary hearing must be held to determine the facts. Here, Schopper alleges the **identity** of the prospective witness, the **substance** of the witness' testimony and explains how the omission of the testimony **prejudiced** the outcome. See, e.g., *Odom* v. *State*, 770 So.2d 195 (Fla. 2d DCA 2000); *Jackson* v. *State*, 711 So.2d 1371 (Fla. 4th DCA 1998); *Brooks* v. *State*, 710 So.2d 595 (Fla. 1st DCA 1998).

Schopper at 473. (**Emphasis** added)

Finally, this Court, has remanded for evidentiary hearing where the trial court similarly read more into the requirements of Rule 3.850 than actually exist:

> Likewise, nothing in the rule states that a movant must allege the identities of the 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 substantiate the allegations raised in the postconviction 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.

Gaskin v. State, 737 So.2d 509, 514 fn.10 (Fla.1999)

From his imprisoned vantage point, Petitioner cannot be expected, without counsel, to not only *locate* witnesses but also investigate whether *they would have been* available if trial counsel had timely taken proper steps to ensure their presence. Petitioner must swear to a 3.850 motion, yet he cannot reliably assure a court of what *would have happened* if his counsel had been effective and he cannot feasiblely take sworn testimony of the witness or others while incarcerated.

This is the purpose of the 3.850 fact-taking hearing and Petitioner has been deprived of that hearing --one which would resolve the question of availability. In summary, the ruling below does not simply deny relief to a disadvantaged or deprived client--worse, it denies him the opportunity to even *seek* relief in a proper forum.

Therefore, Petitioner respectfully prays for the remand of this cause to the lower court for a full evidentiary hearing on Petitioner's motion for postconviction relief. In the alternative, and without waiving the arguments

above, Petitioner would request that any ruling from this Court be without prejudice to refile a motion alleging availability of witnesses where possible.[6]

[6] *See* Blanca v. State 830 So.2d 260, 261 (Fla. 5th DCA 2002)

POINT TWO

THE LOWER COURT ERRED WHEN IT DENIED PETITIONER AN EVIDENTIARY HEARING ON HIS 3.850 CLAIMS THAT THE TRIAL PROSECUTOR'S DELIBERATE USE OF PERJURED TESTIMONY AFFECTED HIS VERDICT AND PETITIONER WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS.

There was no witness to the murder of Georgia Mae Tobler, and one of the state's main witnesses to the circumstances of Petitioner's involvement with the victim was Katrina Boyter. (R 224-227; 228-234) This woman, according to Petitioner's motion, supported by the trial court record, was either doing crack cocaine on the evening of the murder, or was trying to procure some from Petitioner or his companion. (R 37; 210; 170)

Not until law enforcement questioned Ms. Boyter's parents about a missing truck in a separate investigation, did they tell police that their daughter knew something of Ms. Tobler's death. (R 210-211) The police then located Katrina Boyter and asked her to come to the sheriff's office. (R 231) This information was readily available and carried throughout several police reports and interview transcripts available to counsel. (R 210-234)

However, during the trial, the prosecutor asked Ms. Boyter in front of the

jury a question which presumed that *she* initiated contact with the police, when in fact the police had to track this witness down. (R 78-80; 81; 226)

The trial judge wrote in his order of December 5, 2000, (R 223) that Ms. Boyter never *directly* stated she contacted the police. (R 216) However, the transcript attached by the court revealed the question by the prosecutor and the key answer:

> Q: Without telling us what the two of you talked about, is that why ***you*** *decided to call the police?*
>
> A: ***Yes***, it was.

(R 226)(emphases added)

Earlier, the prosecution asked the witness:

> Q: Ms. Boyter, I just have to ask you the question again. Is there any reason--what was the reason *you* waited the 12 days *to report this to the Sheriff's Office?*
>
> *A:* ...But like I said, I started having nightmares about this lady getting stabbed and *I called my mom and talked to her* and she got on the–

(R 225-226)(*emphasis* added)

Whether the witness uttered all of the magic words or simply

incorporated as her answer what the prosecutor wrongly laid out before her, the effect was the same: she told the jury *she* decided to call the police, which made her look better than a state's witness trying to cover her involvement in a possible vehicle theft as well as her involvement in illegal drugs and her knowledge of a murder.

The standard of review for this issue is set forth in Peede v. State, 748 So.2d 253, 257 (Fla.,1999)(citation omitted):

> To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. *See* Fla. R.Crim. P. 3.850(d). Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record.

Due Process Claim

The question of whether the prosecutor deliberately intended to mislead the jury would have been a matter for an evidentiary hearing that was denied Petitioner. Meanwhile, Petitioner has set forth the grounds which warranted further scrutiny by the trial court instead of relying, at best, on semantics.

While this court must show due deference to the fact-finding abilities of

the trial court, a glaring oversight of facts on the record cannot be ignored by this Honorable Court and the ramifications of the prosecutor's actions during trial, defense counsel's response, if any, at the time, and whether there was a reasonable possibility that these affected the verdict, should be reviewed in an evidentiary hearing rather than being summarily dismissed.

The strict standard announced in State v. DiGuilio, 491 So.2d 1129 (Fla.1986), is whether there is a reasonable possibility that the error complained of affected the verdict. Harmless error, as *DiGuilio* cogently pointed out, is not "a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence." *Id.* at 1139.

Here, where the evidence was totally circumstantial as to whether Mr. Nelson was the murderer, or simply happened upon a crime scene some time later and tried to assist the victim before realizing his own potential liability, the actions of the prosecution and of trial counsel cannot be summarily dismissed as harmless. A similar claim arose in Routly v. Singletary, 33 F.3d 1279, 1286 (11th Cir.1994) (citations omitted):

> In his second claim, Routly contends that Assistant State Attorney Fitos knowingly allowed the State's key witness to commit perjury at deposition and at trial, failed to

> correct the material false statements, and himself suborned perjury.
>
> When a witness conceals, through false testimony, his or her bias against a defendant and the prosecution knows the witness has testified falsely, the prosecution has a duty to correct the false statement. "The thrust of *Giglio* and its progeny [is] to ensure that a jury knows the facts that might motivate a witness in giving testimony...." *Brown v. Wainright,* 785 F.2d 1457, 1465 (11th Cir.1986). To establish a *Giglio* violation, a defendant must demonstrate that the testimony was false, that the state knew the testimony was false, and that the false testimony was material, i.e., there was a reasonable likelihood that the false testimony could have affected the judgment of the jury.

Because of the trial court's failure to permit an evidentiary hearing, Petitioner was deprived of his Due Process rights under the Fourteenth Amendment. This right applies to the situation, as here, where the witness' credibility is key:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by

> the New York Court of Appeals in a case very similar to this one, People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854--855:
>
> > 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter *270 what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. * * * That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'

Napue v. People of State of Ill., 360 U.S. 264, 269-270, 79 S.Ct. 1173, 1177 (U.S. 1959)

While the District Court wrote that a review of the transcript revealed to them that the witness Boyter's "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,"[7] the record *did* not support this conclusion, and this Court under the applicable standard of review is permitted to view the Record for its own determination.

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[7]Nelson v. State, 816 So.2d 694, 695 (Fla. 5th DCA 2002)

Petitioner submits that the false and materially misleading testimony by the state's leading witness in this cause exceed the threshold set by DiGuilio, *supra*, and in this circumstantial case, there is more than a reasonable possibility that the error complained of affected the verdict. Therefore, Petitioner would request that this cause be remanded for a new trial. In the alternative, Petitioner argues the cause should be remanded for an evidentiary hearing where Petitioner can produce testimony and evidence concerning the state actions here and its impact upon his case.

CONCLUSION

Petitioner respectfully requests this Honorable Court to remand this cause to the lower court for a new trial. In the alternative, Petitioner prays for a full evidentiary hearing on his motion for postconviction relief on the issues specified above and any others this Court should find worthy of further scrutiny.

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Charles J. Crist, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Paul Nelson, Inmate # 709180, B2-106L, Holmes Correctional Institution, 3142 Thomas Drive, Bonifay, Florida 32425-0190, this 27th day of May 2003.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

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MARVIN F. CLEGG
ASSISTANT PUBLIC DEFENDER