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 REPLY BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

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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 earlier.

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.

As to Respondent's argument (AB 12) that appellate review of the refusal to conduct an evidentiary hearing on trial counsel's failure to call a blood splatter expert was waived earlier, Petitioner would respond that the legal issue involved here pertains to *all* witnesses that he complained were not called on his behalf by trial counsel--it is the legal issue at hand, which *was* preserved, and not the act of repeating all the individual names of the potential witnesses originally alleged by Petitioner, which controls here.

Furthermore, while Respondent argues that it is in the best interests of judicial economy to uphold the summary denial of Petitioner's postconviction motion here, the effect of such a holding would be just the opposite: the conflict would remain between the district courts of Florida, thus inviting future legal contests, and Petitioner's postconviction claims could be raised through a modified motion for relief, this time complying with what Respondent argues should have

been alleged earlier.[1]

On the issue of *availability*, Respondent argues there was no allegation that Jerry Hopkins was available to testify at Petitioner's trial since his case was resolved by plea on March 24, 1997, and Petitioner's trial was in September 1996. (AB 5; 1) Actually, the *then* status of any plea negotiations between Mr. Hopkins and the state, and whether trial counsel for Petitioner considered a continuance in order to wait for Mr. Hopkins to become available are interesting areas of inquiry that an evidentiary hearing might resolve, for or against Petitioner. Additionally, trial strategy concerns mentioned by Respondent (AB 13; 16) as to why counsel *may* have chosen *not* to call available witnesses would be the subject of inquiry at an evidentiary hearing, and without that hearing, Petitioner could not be expected to convince a court that the failure to do something was ineffectiveness rather than strategy.

Although Respondent minimizes the prejudice in the failure to call Mr. Hopkins on Petitioner's behalf, one of the critical items which the witness could have told jurors about, according to Petitioner's motion at page 16, would have

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[1]The requirement of a showing of *availability* did not exist in Petitioner's district when he originally filed his Rule 3.850 motion and thus he should not be barred from filing a second motion if necessary. *See generally* Wright v. State, 2003 WL 21511313 (Fla. July 3, 2003)

been the fact that Petitioner was only in the victim's house "a matter of seconds." This would have direct bearing on whether Petitioner could have had the time to locate or produce a weapon and use it 13 times to kill the woman, all apparently without Mr. Hopkins hearing anything unusual. In fact, the state made a point of disputing Petitioner's contention that there was an insufficient time period in which to commit murder--a dispute that points out the need for an evidentiary hearing. (R 118)

And, while Respondent also minimizes the need for testimony to verify that Mr. Hopkins told his mother a woman had been murdered and he was "in trouble", because "Hopkins has pled guilty" (AB 15-16), this plea did not take place until months after Petitioner's trial, as noted above.

Respondent argues that this Honorable Court has receded from Gaskin v. State, 737 So.2d 509 (Fla. 1999) because the subsequent Ford v. State, 825 So.2d 358 (Fla. 2002) quoted from a fourth district case (even though the quoted case predated Gaskin.[2]) Interestingly, this Court sided with the fourth district and held that in situations where trial strategy in not calling a witness was at issue, an evidentiary hearing was required. Ford at 360.

As for the State's reliance upon this Court's Patton v. State, 784 So.2d 380

[2] Jackson v. State, 711 So.2d 1371 (Fla. 4th DCA 1998)

(Fla. 2000), Petitioner would point out that the text quoted by Respondent concerns ineffective assistance of counsel at a resentencing hearing where that defendant wanted his attorney to present cumulative testimony by unnamed, and perhaps nonexistent (or *unavailable*) witnesses about matters that his other witnesses had given "substantial" testimony about, already. *Id* at 392. This is hardly proof of this Court 'receding' from earlier rulings.

Petitioner respectfully prays for the remand of this cause to the lower court for a new trial, or 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.[3]

[3] *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.

Petitioner relies upon the facts and arguments cited within the Initial Brief for this appellate issue.

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,

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_____

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COUNSEL FOR PETITIONER

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, Jr., 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 7th day of July 2003.

CERTIFICATE OF FONT

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

_____

MARVIN F. CLEGG
ASSISTANT PUBLIC DEFENDER