IN THE SUPREME COURT OF FLORIDA



TOMMY SANDS GROOVER,

Appellant,

v.

CASE NO. 73,756

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

Mr. Groover's statement is not accepted.

(a) Statement of the Case

Tommy Groover and Robert Parker were small time drug pushers. On February 6, 1982, they murdered Richard Padgett, Nancy Sheppard and Jody Dalton. Padgett owed money to Groover and Parker for drugs and was killed. Dalton and Sheppard were potential witnesses to Padgett's murder and were killed. The details of this aspect of the case are set forth in **Groover v. State**, 458 So.2d 226 (Fla. 1984), **cert. denied**, 105 U.S. 1877 (1985).[1]

Mr. Groover filed a motion for post-conviction relief raising fourteen assorted claims. Most were procedurally barred under various restrictions, others were facially meritless. Two claims (Issues I and III), were held worthy of further development and were remanded for an evidentiary hearing within 60 days. **Groover v. State**, 489 So.2d 15 (Fla. 1986).

Issue I was an allegation that Groover was incompetent to stand trial. Issue III was an allegation that Groover was "denied" an effective mental health evaluation due to the incompetence of two separate defense attorneys.[2]

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[1] This Honorable Corut is also directed to co-defendant Parker's cases, reported as: **Parker v. State**, 458 So.2d 750 (Fla. 1984), **cert. denied**, 470 U.S. 1088 (1985); **Parker v. State**, 491 So.2d 532 (Fla. 1986); **Parker v. Dugger**, ____ F.2d ____, Case No. 88-3189 (11th Cir. June 19, 1989).

[2] The "illiterate", "brain damaged" and "retarded" Tommy Groover provided CCR with a sworn verification of his 3.850 petition signed in his own hand.

Pursuant to the remand, Groover (through counsel) filed a public-records (or Chapter 119), demand and filed various motions for discovery. (R 37, 40, 60, 66).[3] Groover withheld these motions until the day before his evidentiary hearing (after 3:00 p.m.), at which time his requests for "time", additional funds and leave to add claims were filed. (T 11, 17, 28, 37).

A full and fair Rule 3.850 hearing was conducted in which Groover called a number of witnesses, as did the State. At the end of the hearing, both sides were permitted to file written and final arguments. (T 692-693). These arguments were later filed. (R 74, 101).

The Circuit Court did an extensive order in which every important witness was carefully analyzed. (R 112-212). The Circuit Court apparently agreed with the State's analysis and relied upon the State's representations and arguments in part of its order. (R 201-212). Only twelve of one hundred pages quoted the State's brief.

(b) Statement of the Facts

Mr. Groover's petition melodramatically portrayed him as a docile, easily led, retarded, brain damaged drug addict who was nefariously doped-up and led to his current fate by ghoulish state workers while his defense was passed from one incompetent lawyer to another. Given an evidentiary hearing, the Appellant's case dissolved as follows:

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[3] Due to non-consecutive numbering, the record will be cited as (R-page no.), and the transcript will be cited as (T-page no.).

Groover's first witness was one William White. (T 43). White was qualified as an expert-attorney witness four times in the past, but always for the defense. (T 64). White is opposed to capital punishment. (T 64).

No matter the restrictions of our procedural rules, White thought every defendant should have a mental evaluation. (T 66).

White's "research" behind his expert testimony did **not** include reading Groover's trial transcripts. (T 67). White confessed that he had no idea whether an evaluation would have helped Groover or not. (T 67). White agreed, however, that Groover's employment as a dope dealer would affect defense strategy. (T 67).

White never spoke to Brent Shore (trial counsel) nor did he know what medication Groover took. (T 67, 69-70). In sum, White based his testimony on the "facts" as CCR related them. (T 67).

Dr. Francis Smith met Groover just two days before the Rule 3.850 hearing, in jail, to diagnose a previously unalleged hearing problem. (T 74). As an audiologist she was not competent to gauge retardation. (T 75). She felt Groover had a problem with high frequency sounds (T 77-83) and felt Groover would not hear every word in a normal conversation. (T 85).

Dr. Smith, again, was limited in her preparation by the editing and channeling of data by CCR. (T 97). She was given "summaries", but not Groover's hundreds of pages of lucid testimony. (T 98). In one place (in the transcript), where she actually read a request (by Groover), to repeat something, she found that his problem was with vocabulary, not his hearing. (T 100-101).

Groover's next witness was Dr. Merikangas. (T 105).

Merikangas interviewed Groover "at lunch today" (T 108) and found his memory patchy. (T 111). Merikangas was willing - on the basis of this interview and a file prepared by CCR - to attest to the entire panoply of alleged mental problems claimed by Groover. (T 105-136).

On cross, it was determined that this "doctor" had performed no research at all into any relevant facts. He was ignorant of Groover's violent criminal record. (T 137). He never spoke to Groover's trial lawyers. (T 141). He never spoke to the prosecutors (T 141) but flatly stated he would not believe anything they said anyway. (T 141). He never read the trial transcripts. (T 147).[4] He said Groover's ability to communicate with counsel was "unimportant". (T 148).

When confronted with school records showing that Groover would not do his work and was a bully, Merikangas quickly and without any factual basis said Groover was merely "reacting" to abuse from the **other** children. (T 151).

The doctor also rejected (as unworthy of belief) the jury verdict at bar (T 151) because he does not believe juries.

Groover's next expert was Dr. Harry Krop. (T 162). On direct, Krop stated that he saw Groover at CCR's request. (T 165). Krop felt Groover had an overall "IQ" of 60. (T 168). Krop said that Groover's past showed evidence of brain damage.

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[4] He also never bothered to read Groover's 224-page deposition, his plea colloquy, his suppression hearing testimony or 100 pages of trial testimony. (T 151-152). Yet, this "doctor" maintained that Groover was incapable of testifyfing, was "docile" and "easily led". (T 128-136).

(T 177). This evidence included injuries to Groover's mother during pregnancy, the fact Groover had a fever once as a child, and narcotics or substance abuse. (T 177).

Krop said that Groover was denied access to special education classes as a child due to a "heart murmur". (T 184). Krop said Groover was docile and that his violent criminal record did not indicate otherwise. (T 186).

In his final analysis, Dr. Krop conceded that it was "hard to say" if Groover was incompetent in 1983 (T 188) and that Groover **is competent now.** (T 188).

On cross, Krop again attributed Groover's violent conduct to everyone except Groover. (T 190-191). Krop noted that Groover's IQ, in Seventh Grade was "verbal" 69, performance 83 and overall 73. (T 191). Krop rejected these scores just as he rejected reports by Groover's teachers. (T 192).

Krop never spoke to Groover's lawyers, (T 194) but he would **not** challenge defense counsel's determination that Groover was competent before trial. (T 195). Krop said Groover could communicate with counsel (T 197) and was aware of the nature of the charges. (T 197). He did not know Groover's "level of functioning" during trial. (T 197). As usual, CCR did not provide Krop with trial or other relevant transcripts. (T 199).

In sum (T 210-211), Krop could not give a definitive opinion due to a lack of data. This led to Mr. Krop's findings being assailed by Mr. Olive. (T 213).

Groover's next expert was Dr. Sam Greenburg, a dermatologist who had switched to psychiatry or psychology. (T 220). Greenburg was qualified as a psychologist. (T 220).

Greenburg questioned Groover's judgment (T 224) due to a "proverbs test" and other tests. (T 220-223, 224).[5] Greenburg felt Groover's problems were more emotional than organic. (T 226). Based upon these tests and the CCR packet, Greenburg felt Groover was passive, docile and incompetent. (T 231).

As usual, Greenburg never spoke to the lawyers (T 235), never read Groover's statements (T 235), never read his deposition (T 236), never read his testimony at the suppression hearing (T 236), and never read his trial testimony. (T 236). Greenburg at least confessed that he should have read those documents. (T 237).

Greenburg then said that "if" Groover gave hundreds of pages of testing and withstood thousands of cross-examination questions that this would be totally inconsistent with the diagnosis and would be "puzzling". (T 238). Greenburg had no opinion on Groover's sanity (T 239), and agreed Groover could act (on tests) to lower his scores. (T 240).

Groover's next witness was attorney Richard Burr, who merely testified how he would have handled this case based upon hindsight. (T 248-280). Burr is notoriously active in his opposition to the death penalty and rendered this opinion without reading the trial transcripts (T 283) or interviewing the attorneys or others who worked on the case. (T 283-284). (Oddly enough, his criticism of trial counsel centered on "lack of

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[5] In one test, Groover said that if he saw a stamped, addressed, envelope on the floor he would not pick it up but rather would keep walking. Greenburg found this "abnormal", stating that Groover should have said he would pick up the letter and go mail it. (T 224).

investigation"). While Burr did point to some instances of "poor memory" in Groover's deposition. (T 287). Burr agreed Groover's memory seemed to fail primarily when the questions asked which tended to incriminate Groover. (T 285).

Burr had only tried one capital case in his entire career. (T 293).

Penny Scott (Groover's sister) testified to his troubled youth and drug use. (T 300-318). She herself was a drug addict and topless dancer. (T 320-321). Penny noted that Groover was a shoplifter. (T 318). Penny also allowed "retarded" Tommy to baby-sit her children. (T 324). "Retarded" Tommy sold drugs. (T 322). "Retarded" Tommy, as a boy, built model cars and airplanes and could follow instructions. (T 323).

Lois Hancock (Groover's mother), who did testify at the penalty phase, came forward with additional "facts" she "would have" related if asked. (T 331-343). Lois knew very little about Tommy's adult criminal or employment records. (T 347). Curiously, she said Groover's courtroom testimony was "not as good" as it "usually was". (T 349-350).

Sabrina Marshburn, Groover's other sister, testified about his youth and drug use. (T 350-357). She was also a dope user and topless dancer. (T 360-363).

Lillian Hurt, a neighbor, testified that Groover spent his youthful afternoons at her daycare center as one of 285 children. (T 365). Groover had the ability to learn but took no interest. (T 366). Groover did not learn his church "verses". (T 368). She last saw Groover eleven years ago. (T 370).

Groover then called attorney Brent Shore as a hostile witness. (T 374-375). Shore had worked for a time in the State Attorney's Office. (T 379).

Groover did not want to waive the attorney-client privilege "any more than necessary" (T 382) and wanted the pressure of an ethical violation pending against counsel to prevent the possible utterance of damaging testimony. (T 382).

Defense counsel (Shore) never ordered a psychological or "hearing" tests. (T 385). Shore only learned Groover had been taking Mellaril when he read Groover's deposition. (T 392-393). Groover told Shore that he was receiving Mellaril because he could not sleep. (T 394). Mr. Olive (CCR) again tried to invoke the attorney-client privilege and the State responded by noting that once attacked, counsel has a right to defend himself under the statute. (T 396-399).

Mr. Shore was adamant that, "from his shoes" in 1982, he would defend Groover the same way. (T 410).

On cross, Mr. Shore related his extensive trial experience. (T 411). Groover, he said, manifested no behavior which would serve as a red flag. (T 419). Shore spoke to Groover's family (T 411) and received none of the stories presented now. No one said Groover was retarded or an addict. (T 414).

Groover's sisters were adjudged by counsel to be bad witnesses (T 413) but Groover's mother was used. (T 415).

Groover himself told counsel he used drugs from time to time but never while working. (T 416-417). Groover wanted no mention of drugs in his defense. (T 417-418). Groover and

counsel felt that testimony attributing drug use, during the crime, would undermine Groover's story that he was "merely present" while Parker did the killings. (T 418).

Groover did not appear to have mental problems (T 419) and counsel could not, in good faith, move for an evaluation. (T 419). When counsel read Groover's "PSI" and saw indicia of mental problems, he confronted Groover's family and was told Groover had no problems. (T 420). Groover denied ever seeing a psychiatrist and manifested no symptoms, (T 421) despite perhaps 24 visits with counsel. (T 422).

Groover never manifested a hearing problem. (T 427).

Groover understood the charges (T 429) and the sentence. (T 429). Groover insisted on withdrawing the plea, (T 431) apparently because he would rather die than do 25 years without parole. (T 429).

Counsel had represented incompetent defendants before (T 436) and he had no doubt that Groover was not incompetent. (T 443).

The State put on its case next. Its key witnesses testified as follows:

Ralph Greene, the prosecutor, was unaware of Groover's medication. (T 484). He found Groover competent (T 486-488) and not hard of hearing. (T 485).

Groover was not "easily manipulated", as shown by his withstanding of hours of cross-examination. (T 494).

CCR moved to strike Greene's testimony because he was the prosecutor. (T 500-501). The motion was denied. (T 501).

Richard Nichols, Groover's other attorney, testified next. (T 510). Nichols also had extensive trial experience both as a prosecutor and a defense lawyer. (T 511-512). In 1978, Nichols even won a acquittal while defending an Outlaws motorcycle gang member in a capital case. (T 513).

Nichols withdrew when he perceived potential conflict after Groover reneged on the plea bargain he had worked out. (T 513-515).

Nichols won Groover a plea for life despite his central role in the murders. Nichols and Groover were concerned someone else, especially Elaine Parker, might cut a deal "first" and subject Groover to trial. (T 532-534).

Nichols said Groover never displayed signs of mental problems (T 521-524) or hearing loss. (T 533). Groover consulted his family prior to pleading and was not just "led into" a plea. (T 526-527).

Nichols could not, in good faith, move for psychiatric assistance under Fla.R.Crim.P. 3.210. (T 535).

Nichols said that once Groover pled, locked in a sentence and became a government witness he no longer attended every deposition, though he did remain available for consultation. (See T 531).

Attorney Mark Arnold testified that Groover showed no mental problems while on Mellaril and being deposed. (T 570-571, 574). Groover fielded hundreds of questions from co-defendants' counsel over seven hours. (T 571). Groover was not hard of hearing. (T 573).

Bruce Weintraub, who prepared Groover's "PSI", interviewed Groover for over two hours and found no problems. (T 582). Groover also seemed normal to Rick Baesler. (T 590-593).

Dr. Miller, a psychiatrist, testified next.

Miller stated that the medication given to Groover would not render him incompetent. (T 618). Mellaril will not generate disturbances that would result in incompetence. (T 618). Mellaril's impact varies from person to person, with heavier dosages necessary for drug addicts. (T 619-620).

Miller stated that review of Groover's testimony was very important to any evaluation. (T 619). Groover's testimony was germane, appropriate and lucid. (T 622).

On cross, Miller showed that dosages of up to 800 mg. of Mellaril can be given for "psychotic manifestations." (T 624). (Groover only received - at most, 400 or 500 mg. for a short period of time - then his dosage was **reduced**). (See T 630).

Had Groover ever been overdosed, he would have been drowsy, had slurred speech, stammered, suffered impediments to his thought processes or even suffered from ataxia tremors. (T 632). In proper doses, Mellaril **normalizes** behavior. (T 629).

Marilyn Fowler, the jail's mental health counselor, saw Groover 15-20 times and found no evidence of retardation or disorientation. (T 649-650).

Dr. Antoine Innocent, who had qualified as an expert 2300 times (T 658), prescribed the Mellaril Groover received. (T 660). Dr. Innocent's prescription was moderate given Groover's drug history. (T 666). Groover did not appear retarded or deaf.

(T 667-668). The prescribed dosage did not detract from Groover's (trial) competence. (T 669).

Dr. Steven Murray, testifying just as an M.D., saw Groover 4 to 6 times in jail (T 683-684) and did not find him deaf or retarded. (T 685).

Both the State and the defense presented written final arguments. The court accepted the State's as more accurate and adopted it as part of a much larger final order. The parties' memoranda were filed on July 31, 1986. The court's order was published on August 26, 1988. (R 112-212). The court took its time and did not rubber stamp the State's memo.

## SUMMARY OF ARGUMENT

The trial court thoroughly reviewed and considered the testimony and evidence before it in deciding that Mr. Groover was not incompetent to stand trial and that his lawyers were not ineffective. Given the existence of substantial record support for these findings, the decision must be affirmed.

## ARGUMENT

### ISSUE I

THE TRIAL COURT'S DETERMINATION THAT MR. GROOVER WAS COMPETENT AND THAT TRIAL COUNSEL WERE EFFECTIVE IN THEIR REPRESENTATION SHOULD BE AFFIRMED

Mr. Groover's first point on appeal raises two distinct issues. First, Groover challenges his competence to stand trial. Second, he challenges the competence of his attorneys for failing to raise or investigate a mental health defense. These issues will be disposed of in order.

At the outset, we would note that this Honorable Court, starting with **Tibbs v. State**, 397 So.2d 1120 (Fla. 1981), long ago held that it would not permit appellate review to be exploited as a "trial **de novo**", "by transcript". The only issue on appeal, therefore, is the existence of record support for the lower court's decision. The evidence is discussed only to facilitate that process. **Ferguson v. State**, 471 So.2d 631 (Fla. 1982).

#### (A) Groover's Competence

At the outset, the State will respond to certain factual averments in Mr. Groover's brief which are clearly incorrect.

First, Mr. Groover's counsel's attempt at interpreting the Physician's Desk Reference (P.D.R.) is incompetent and unsupported by medical testimony. Counsel is not an expert in pharmacology and cannot offer his own testimony to augment his record.

Second, on page (9), Groover's brief alleges that Groover was taking Vistaril at the same time he was taking Mellaril, citing to page (T 666). The testimony at (T 666) is clear: Groover was taken off Vistaril before being placed on Mellaril.

Third, Dr. Antoine Innocent **did** explain why Mellaril was given to Groover (to combat depression and sleeplessness). (T 660). Groover's behavior was monitored and his competence was not affected. (T 669). Groover, as a drug user, could tolerate higher doses of Mellaril, **et al**, than a regular patient could, a fact conspicuous by its absence from Groover's brief.

Mr. Groover's theory of the case was most unsettling. Groover's sworn petition alleged that he was retarded, brain damaged, addicted and incompetent prior to his arrest; and that the court permitted him to be doped, tried and sentenced to death while he was little more than a zombie. This argument, while good theater, is simply absurd.

To manufacture a supporting case, Groover hired the most reliable anti-death-stable "experts" he could find. Dr. Krop, Dr. Merikangas, Mr. White and Mr. Burr require no introduction. Groover also hired an audiologist, Dr. Smith, at virtually the last minute so he could insert a new, unpled, clam of deafness into his 3.850 hearing. Groover also hired an expert, Dr. Greenburg, who ended up disappointing him.

Overzealous advocates will sometimes become so wrapped up in the justness of their cause that, in preparing their witnesses, they will forget to give them all the requisite data. This, apparently, is what happened here and the results were catastrophic for Groover; to-wit:

> (1) After leading Dr. Smith down the primrose path of saying Groover could neither hear nor express himself competently, CCR abandoned Smith to cross-examination. Dr. Smith had never seen Groover's hundreds of pages of depositions and courtroom testimony in which he manifested none of the difficulties she had predicted.
>
> (2) Poor Dr. Greenburg, also "set up" by incomplete data, was frankly "puzzled" when, for the first time, he saw transcripts in which Groover behaved in a manner contrary to Greenburg's predictions.
>
> (3) Dr. Krop flatly responded by stating that he would **not** opine that Groover was incompetent (a fact missing from Groover's brief) and, in addition, he declared that Groover is competent now. This declaration evoked a comical cross-examination in which Mr. Olive attacked his own witness' conclusions regarding competence as being based upon too little data. (T 213).

This desolate presentation could not be rescued by Dr. Merikangas, a strident ideologue whose anti-death testimony in **Bertolotti v. State**, 534 So.2d 386 (Fla. 1988), was rejected by his brethren as, in their words, "hogwash". So strident was Merikangas that he declared he did not need records to render an opinion, he did not care if the transcripts contradicted his theory, he did not believe in jury verdicts and he would never accept as truthful any information given to him by a prosecutor. Despite Rule 3.211, Merikangas felt that Groover's ability to consult with his lawyer was unimportant. Merikangas came across, even in the transcripts, as a pompous and biased witness, saying what he was hired to say at any cost.

Taken in its best possible light, the testimony of Groover's experts established nothing more than the possibility of organic mental problems or low intelligence. Neither of these conditions

compel a finding of incompetence to stand trial. **Bush v. Wainwright**, 505 So.2d 409 (Fla. 1987); **James v. State**, 489 So.2d 737 (Fla. 1986); see also **Penry v. Lynaugh**, 492 U.S. ____, 106 L.Ed.2d 256 (1989). Furthermore, the "diagnoses" of Groover's experts were simply too tentative and imprecise, due either to lack of data or their stated inability to reach a conclusion, see **James v. State**, 489 So.2d 737 (Fla. 1986), see also **Card v. State**, 497 So.2d 1169 (Fla. 1986), to compel a finding of incompetence. Indeed, the Court would not have been obliged to follow the findings of Groover's experts in any event. **Wallace v. Kemp**, 757 F.2d 1102 (11th Cir. 1985); **Strickland v. Francis**, 738 F.2d 1542 (11th Cir. 1984); **Bundy v. Dugger**, 850 F.2d 1402 (11th Cir. 1988); **Booker v. State**, 413 So.2d 756 (Fla. 1982); **Card v. State, supra.**

Of course, the propriety of the lower court's opinion becomes even more obvious when we factor into this equation the compelling evidence offered by the State.

Unlike Groover's experts, our experts were given all relevant facts. Unlike Groover's witnesses, the State's witnesses (except Dr. Miller) saw, heard and interacted with Groover **at the trial** or **before.** Unlike Groover's circumstantial case, in which assumptions regarding competence were made, the State put on direct evidence in the form of records and eyewitness testimony.

As noted in **Bundy v. Dugger**, 675 F.Supp. 622 (M.D. Fla. 1987), **aff'd**, 850 F.2d 1402 (11th Cir. 1988), trial courts are entitled to believe the expert and opinion testimony that is

corroborated by the trial record. That, in a nutshell, is what Judge Olliff did.

(B) Competence of Counsel

Mr. White and Mr. Burr did not base their so-called expert testimony on the standards set forth in **Strickland v. Washington**, 466 U.S. 688 (1984), but rather relied upon hindsight and personal strategic preferences in assessing counsels' performance. Neither expert researched the case, read all the records or even bothered to interview both trial lawyers or anyone else involved in the case. (Both uninformed lawyers, Burr and White, when had the effrontery to question Nichols' and Shores' investigations).

Mr. White baldly stated that counsel should always seek psychiatric evaluations in every capital case whether the client manifested symptoms of mental illness or not. This, of course, is not even the proper legal standard. See Fla.R.Crim.P. 3.210(b). It does, however, reflect the tendency of some lawyers, especially in death cases, to simply file boilerplate claims (**Hitchcock, Booth, Strickland** claims, etc.) no matter what the truth is.

Mr. Burr at least took the trouble to look at swatches of select testimony in an effort and bolster his opinion. Burr lifted comments by Groover, out of context, to manufacture "red flags" that frankly are barely visible even by hindsight. For example, Burr alleged that Groover's deposition reflects (see ROA 398-400) an inability to use a ruler that translates into retardation or mental illness. An intelligent examination of the transcript shows us that:

(1) Groover approximated the size of a handgun but, due to **illiteracy**, not illness, would not use a ruler.

(2) Groover approximated the size of the gun and expressed that size **in inches.**

(3) Groover also guessed the **make**, manufacture and caliber of the gun. In doing so, he mentioned his (memory) of what Parker usually carried as a weapon.

None of Groover's remarks reflected mental illness and assuredly not mental illness sufficient to question competence.

Mr. Burr's theories that counsel must always "investigate" mental status and do so until a favorable diagnosis is obtained were rejected in two cases in which he participated as counsel. **Foster v. Strickland**, 707 F.2d 1339 (11th Cir. 1983), and **Foster v. Dugger**, 823 F.2d 402 (11th Cir. 1987). Those cases clearly hold that counsel is under no duty to pursue favorable mental health evaluations, to exhaustively investigate when initial investigations provide no basis for additional research, or to shop for friendly doctors of the ilk of a Merikangas. Even **Strickland**, which involved a similar claim to the one at bar, places no such burden on counsel. See **Washington v. State**, 397 So.2d 285 (Fla. 1981); **Blanco v. State**, 507 So.2d 1377 (Fla. 1987).

Groover, of course, had to prove that he received totally incompetent assistance from two highly qualified trial lawyers "back to back." Logically, one lawyer might have erred, but **two** lawyers? This assertion is very unreasonable, at best.

The simple truth is that Groover's lawyers spoke to his family. These relatives, at that time, offered no information

such as they gave collateral counsel on the "eve" of Groover's execution. Groover gave no information to counsel. Groover manifested no symptoms of incompetence.

Groover was, however, going to defend himself on a theory that he was merely present while Parker and Long murdered the victims. This defensive strategy required a showing that Groover had a good memory and could be believed. This defense is inconsistent with the now-touted "zombie" defense and clearly shows us that Groover never intended to question his competence. Under these circumstances - and given Groover's obvious competence to stand trial - Groover cannot show the "probability" of a different result necessary to establish the prejudice prong of **Strickland** even if he could prove "error". **Lambrix v. State,** ____ So.2d ____ (Fla. 1988) [13 F.L.W. 697].

Tommy Groover came across as competent to **everyone** who dealt with him. At his hearing, he failed to produce even one witness (from the trial) who would attest to any suspicions regarding his competence. Counsel cannot be compelled to raise baseless claims just to stave off future collateral attacks. **Strickland, supra,** and cannot be compelled to raise sanity or competency issues when they do not question their client's abilities. **Blanco, supra.**

Since Groover was "competent", there is no foundation for any claim that counsel erred in not having him tested (since there was no "incompetence" to be found anyway).

Groover, therefore, has established neither error nor prejudice under **Strickland.** What he has shown is the desire to retry his case under an alternative strategy. This, in the words

of the Ninth Circuit, would (if allowed) be a total "perversion of justice". **Curry v. Wilson**, 405 F.2d 110 (9th Cir. 1968). The law is supposed to involve a search for the truth. It is not a poker game in which murderers continually receive new cards until the can construct a winning hand.

Groover was an active participant in the crime spree of February 6, 1982. Indeed, co-defendant Parker - using a defense similar to Groover's - has alleged that he (Parker) was dominated by Tommy Groover. See **Parker v. State**, 491 So.2d 532 (Fla. 1986); **Parker v. Dugger**, ____ F.2d ____, Case No. 88-3189 (11th Cir. 1989). At all time relevant to this cause, Groover was sane and competent.

## ARGUMENT

### ISSUE II

MR. GROOVER WAS NOT "DENIED" A MENTAL HEALTH EXAMINATION

Groover's second point again presents a double argument. First, Groover seems to argue that the trial court was obliged to order an examination of Groover **sua sponte.** Second, Groover says his lawyers were incompetent for not having him evaluated and then raising an insanity defense. Both claims are readily refuted.

(A) Trial Court Error

Groover's brief, at page 29, quotes half of a sentence from **Ake v. Oklahoma**, 470 U.S. 68, 84 L.Ed.2d 53 (1985), to misstate the applicable legal standard. Groover's brief says that "a defendant is entitled to an independent competent mental health expert evaluation when the State makes his or her mental state relevant to "his criminal culpability" and to the punishment he might suffer."

The truth is, **Ake** says that a defendant is "entitled" to a mental health evaluation when, in the above noted situation, the defendant "demonstrates to the trial judge" the need for an evaluation. (**id.**, at L.Ed.2d 66). In fact, the rest of the sentence only half-quoted by Groover says that the assistance of a psychiatrist "may" (not "shall") be crucial.

The transcripts of the trial show that Groover never demonstrated incompetence to the court. That is why the issue was not argued on appeal and why the transcripts are not relied upon by Groover or his hired-gun "experts" now.

Groover's cited cases do not help him either.

In **Futch v. Dugger**, 874 F.2d 1483 (11th Cir. 1989), the defendant was declared incompetent by a psychiatrist and, apparently, defense counsel knew it.

In **W.S.L. v. State**, 470 So.2d 828 (Fla. 2nd DCA 1985), the defendant, in a murder-sexual battery case, was a nine year child who abused a small baby.

In **Hill v. State**, 473 So.2d 1253 (Fla. 1985), the defendant was recommended for psychiatric treatment prior to trial, he could not communicate with counsel and he behaved oddly in court.

Groover communicated with counsel, he appeared competent, he testified on his own behalf at length and in detail. His behavior was appropriate. There is simply no evidence that Groover was not processing information or acting incompetently at the time. **Bundy v. Dugger**, 675 F.Supp. 622 (M.D. Fla. 1987); **Bundy v. Dugger**, 850 F.2d 1402 (11th Cir. 1988). Without manifesting symptoms, no hearing or evaluation was required. **Collins v. Housewright**, 664 F.2d 181 (8th Cir. 1981); **Williams v. Bordenkircher**, 696 F.2d 464 (6th Cir. 1981); **Scarborough v. United States**, 683 F.2d 1323 (11th Cir. 1982); **Reese v. Wainwright**, 600 F.2d 1085 (5th Cir. 1979); **Thomas v. Kemp**, 796 F.2d 1322 (11th Cir. 1986); **Fallada v. Wainwright**, 819 F.2d 1564 (11th Cir. 1987), and **Boag v. Raines**, 769 F.2d 1341 (9th Cir. 1984).

Groover has failed to establish (1) his incompetence, and (2) record behavior that the trial judge failed to notice. Thus, his first claim fails.

(B) Trial Counsel

Groover next raises the tired old argument that trial counsel must investigate and prepare a mental health defense in every single case. His "expert", Mr. Burr, is a well known unsuccessful proponent of this discredited theory. **Foster v. Strickland, supra**, and **Foster v. Dugger, supra.**[6]

Groover appeared competent to two successive, capable and experienced trial lawyers in a row. These lawyers and Groover settled upon a trial strategy that would portray Parker and Long as the killers while Groover was "merely present". This defense meant that Groover - who was to testify - had to establish both credibility and a good memory; **not** drug use, irrational conduct and a bad memory. Groover can point to no law requiring his counsel to put forward conflicting evidence (at either phase of the trial) or faulting counsel for making a strategic choice - even if "bad". In fact, counsel cannot be faulted at all for their strategic decision. **Beckham v. Wainwright**, 639 F.2d 262 (5th Cir. 1981); **Foster v. Strickland, supra; Foster v. Dugger, supra; Willis v. Newsome**, 747 F.2d 605 (11th Cir. 1985). Here, we must recall that Nichols won Groover a "plea" that might have gone to Parker's wife in a footrace. That plea required Groover to testify - and Groover did, for a time. An "incompetent" Groover could not reap the strategic benefits of the plea. When Mr. Shore got this case, Groover's competence and ability to both

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[6] As noted before, expert opinions do not bind the courts anyway. This is particularly true of lawyer-experts in capital collateral proceedings. See e.g., **Lusk v. State**, 498 So.2d 902 (Fla. 1986).

plead and testify were well established. Mr. Shore, as an ethical attorney, could not be expected to raise or pursue a meritless "incompetence" defense in violation of Fla.R.Crim.P. 3.210(c). Even though counsel learned Groover was getting Mellaril as a sleeping aid, we note that medication can render a defendant competent, too, Fla.R.Crim.P. 3.215(c) and thus not require counsel to manufacture a particular defense.

Counsel, if judged from **their** shoes, "at the time", **Winfrey v. Maggio**, 664 F.2d 550 (5th Cir. 1980), cannot be faulted.

As usual, Mr. Groover relies upon an egregious interpretation of **Strickland v. Washington**, 466 U.S. 688 (1984), which, in reality, has nothing to do with the actual test for attorney competence set forth in that case.

To prevail, Groover must establish error that is not just "unreasonable", (since **Strickland specifically says** that error, even if professionally unreasonable, is not enough) but error making counsel the equivalent of no counsel at all. He then must show actual (not speculative) prejudice sufficient to undermine confidence in the result.

Trial counsel tried to save the defendant's life. Groover, like Bundy, rejected a life-saving plea.

Trial counsel could not in good faith seek a competency evaluation - a fact that has been corroborated by others who dealt with Groover "at the time" and questioned only be pseudo-experts who never saw Groover or read this record.

Trial counsel were **not dealing** with an incompetent client. That simple fact, of course, knocks the pins out from under

Groover's entire case, since he cannot show that a "competency" challenge would have prevailed.

Absent "error" or "prejudice" counsel were not successively ineffective.

## ARGUMENT

### ISSUE III

### GROOVER RECEIVED A FAIR TRIAL

Groover's assault on the trial court as biased and unfair is beneath response. The court - confronted with two memoranda - one following the facts and the other not - adopted the credible argument as a small fraction of a 100 page order.

Groover's claims of the court's "true feelings" (pg.68), deliberate ignoral of defense "evidence" (pg.69), "grossly selective review" (pg.70), "reaching at all straws" (pg.71), "bias against Groover" (pg.71), "allocating to the State" the duty to decide the case (pg.72), in an **ex parte** manner (pg.72) **et al**, are a sad, and facially paranoid, assault upon a trial court by the losing side.

Groover "lost" because he did not put on a credible case. Groover lost because he failed to be honest with his experts. Groover lost because Drs. Krop and Greenburg were unable to say he was incompetent even though **he** hired them. (The same is true for Mr. White and Dr. Smith). If this taste leaves "a sour taste" (brief, pg.73) with Groover, it is his own fault.

The State will not further dignify Groover's brief.

## CONCLUSION

The trial court's order denying relief is supported by the record and should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Billy H. Nolas, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 25th day of September, 1989.

MARK C. MENSER
Assistant Attorney General