IN THE SUPREME COURT OF FLORIDA

TOMMY SANDS GROOVER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 79-199

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

(A) PROCEDURAL HISTORY

Tommy Sands Groover and Robert Lacey Parker committed a series of brutal murders on February 6, 1982. The details of the crimes are not germane to the issues on appeal and are adequately reported in Groover v. State, 458 So.2d 226 (Fla. 1984).

On direct appeal, Groover raised eight issues:

(1) Whether the trial court allowed evidence of collateral offenses to become an improper feature of the trial.

(2) Whether the prosecutor engaged in improper argument.

(3) Whether the prosecutor asserted personal knowledge of non-record facts during cross-examination of Mr. Groover.

(4) Whether the defendant's motion to suppress should have been granted.

(5) Whether the trial court erred in overriding the jury's life recommendation.

(6) Whether the trial court's penalty phase jury instructions were erroneous:

(A) By allowing the jury to consider a simultaneous, felony conviction.

(B) By failing to instruct on all aggravating factors.

(C) By failing to define "heinous, atrocious and cruel" or "cold, calculated, premeditated."[1]

(7) Whether the trial court failed to consider mitigating evidence.

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[1] The Appellant never objected to the standard instruction at trial nor did he request a more detailed instruction (R 1697, 1714). The State noted this deficiency on appeal. (State's Brief at 45).

(8) Whether the death penalty was justified for Groover's crimes.

Relief was denied, on the merits or without comment, on all counts. Groover v. State, id.

Mr. Groover filed a motion for post-conviction relief, raising fourteen claims. Twelve of the claims were denied summarily as either procedurally barred or baseless[2], but an evidentiary hearing was ordered as to certain claims of ineffective counsel. Groover v. State, 489 So.2d 15 (Fla. 1986).

After an evidentiary hearing on the issue of counsel's competence, relief was denied on the merits. That ruling was upheld on appeal,. Groover v. State, 574 So.2d 97 (Fla. 1991).

While this appeal was pending, Groover filed another motion for post-conviction relief.

The petition raised the following claims:

(1) A claim that non-statutory mitigating evidence was not considered.
(2) A Booth v. Maryland, 482 U.S. 496 (1987) claim.
(3) A claim that the jury was incorrectly instructed on the "HAC" factor.

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2 The issues and their disposition are clearly set out in the Court's opinion at 489 So.2d 16, 17. Claims I and III (ineffective counsel, failure to investigate mental health issues) were remanded for a hearing. Claims II and XI (use of Groover's statements at trial) were procedurally barred. Claim IV (ineffective counsel, failure to use cumulative mitigating evidence) was denied as meritless. Claim V (a Brady claim) was denied on the merits. Claim VI (improper argument by the prosecutor) was denied as procedurally barred. Claims VII and XIII (prosecutorial vindictiveness for not pleading) were procedurally barred. Claim VIII (defense attorney misconduct) was rejected as meritless. Claim IX (defense attorney's failure to advise Groover of possible sentence) was denied as meritless. Claim X (failure to use intoxication defense) was denied as meritless. Claim XIV (sentencing error - reliance upon non-statutory aggravator) was denied as meritless.

(4) A similar claim regarding the "cold-calculated-premeditated" (CCP) factor.
(5) A "burden shifting jury instruction" claim.
(6) A claim that "felony murder" creates an automatic aggravating factor.
(7) A claim that jury was misled regarding unbridled mercy.
(8) (The same as Point 7).
(9) The jury was misled regarding its function at sentencing (R 1-36).

A hearing was conducted during which both sides were allowed to argue the issues.

Claims 2-9 were identified as procedurally barred and properly dismissed (App.B). Claim 1 was refuted by the record (since the "Hitchcock" instruction was not given) and by the determination that all mitigating evidence was considered (App. B).

(B) Facts

On appeal, Mr. Groover raises four claims. The facts pertaining to each are as follows:

FACTS: Point I

The State submitted a proposed order to Judge Olliff with a copy to CCR (Appellant's "A"). The order was signed (Appellant's "B"). No other details are known.

FACTS: Point II

CCR filed a motion to disqualify Judge Olliff because some interviewer, researching a magazine article, obtained some comment from the judge regarding judges who simply sentence according to the jury's suggestion. The motion was denied as facially deficient (R-94).

A second motion was filed which accused Judge Olliff of "ex parte communications" with the state. The motion was based upon nothing more than a "cryptic" note indicating that a former employee of the State Attorney's Office had contacted the Attorney General's Office (to see if they had a copy of the petition) and Judge Olliff's office to see who would preside over the case (SR-26).

CCR represented that the note proved that some "secret meeting" had been held, prompting a strong objection to it as conjectural.

There was nothing in the note to indicate a meeting or to indicate communications between Judge Olliff and the Attorney General (SR 26). The prosecutor challenged CCR to state that it had not, at various times, also called Judge Olliff or any other judge to check on a case (SR-27).

In reply, the CCR attorney refused to respond to the State's question, (SR 27-28), but confessed that the note "doesn't say anything." (SR-28). Counsel then tried to argue that all communications of any kind are barred per se, prompting the Court to ask:

> "Counsel, in all candor, are you serious?" (SR-28).

Again, the motion was denied as facially deficient (SR-28).

FACTS: POINT III

The issue of whether the trial judge considered non-statutory mitigating evidence was resolved on direct appeal. The jury instruction condemned in Hitchcock v. Dugger, 481 U.S. 393 (1987) was not given in this case.

FACTS: POINT IV

Point IV argues the propriety of various arguments and instructions found to be procedurally barred (App. "B"). No factual development is necessary.

SUMMARY OF ARGUMENT

The Appellant has raised four points on appeal.

Points I and II are both legally and factually baseless assertions of judicial misconduct. The trial court neither engaged in improper ex parte contact with the state nor "failed" to disqualify itself. Groover's motions for disqualification were facially deficient.

Points III and IV misstate facts and law in an effort to revive and litigate baseless and procedurally barred claims. Claim III seeks to reargue the Lockett issue from Groover's direct appeal while Claim IV assembles a host of barred claims.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN SIGNING AN ORDER IDENTICAL TO A PROPOSED ORDER SUBMITTED BY THE STATE

Mr. Groover's first point on appeal contests the propriety of Judge Olliff's adoption of a "proposed order" submitted by the state. The record does not reflect the events surrounding the submission and execution of the order and any claim of misconduct is purely speculative. In particular, there is no evidence of any contact between the court and the prosecutor. The State merely submitted a proposed order to the court and to Mr. Groover's lawyers (CCR). CCR never filed an objection or a motion for rehearing after the order was signed. The fact that the proposed order was submitted to CCR defeats any assumption of ex parte communication or a perceived misconduct. Huff v. State, 622 So.2d 982, 984 (Fla. 1993).[3]

In Rose v. State, 601 So.2d 1181 (Fla. 1992) and in Huff v. State, supra, this Court addressed the problem of judicial requests for the preparation of orders, in Rose and in Huff, the petitioners had filed "first" Rule 3.850 actions that raised substantial claims. Indeed, in Rose, the state stipulated to the need for an evidentiary hearing.

In both cases, the trial judge denied relief without conducting any hearing or even allowing the attorneys to appear for argument. This key element was discussed in Huff, supra, at 983:

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[3] Huff, of course, is prospective only.

> "Because of the severity of punishment at issue in a death penalty post-conviction case, we have determined that henceforth the judge must allow the attorneys the opportunity to appear before the court and be heard in an initial 3.850 motion. . . . If this practice had been followed in the instant case the Court might not be faced with the issue of whether Huff's due process rights were violated. (emphasis added).

The case at bar meets the factual criteria noted in Huff.

First, this was not an initial petition. This was a successive petition which raised one false allegation and eight procedurally barred claims (see Points III and IV below).

Second, the state moved for dismissal on procedural grounds and CCR's reply did not even answer the state's claims of procedural bar (R 71-93).

Third, a hearing was conducted and CCR was given a full opportunity to argue all claims (SR 20-41). At the end of the hearing, Judge Olliff announced that he would rule on the motions (SR 40).

Although Rose v. State, supra, declares that this Court is not concerned with questions of "actual prejudice", we submit that the facts of this case must be considered.

Judge Olliff's order found claims II - IX procedurally barred. CCR never, in its reply to the state's response or at the hearing before Judge Olliff, denied that these issues were barred. Thus, since CCR was given opportunities for both oral and written replies to the procedural issue and declined to pursue them, it strains credibility to argue - as they now argue - that some "ex-parte argument" was necessary for the Court to rule on an undisputed point. If the "image of impropriety" is

the key (Rose, supra), the case at bar clearly offers no "image" of misconduct as to the barred claims.

Judge Olliff's order on the "Hitchcock" issue simply tracks the record (i.e., the "Hitchcock" instruction was not given, the Court had Lockett v. Ohio, 438 U.S. 586 (1978) and the jury and the Court both considered non-statutory mitigating evidence.) (Appendix B). This set of findings, again, did not necessitate any ex parte discussion with the state because they were simple statements regarding the content of an undisputed record. Cf. Jackson v. State, 599 So.2d 103 (Fla 1992); Dragovitch v. State, 492 So.2d 350 (Fla. 1986). Thus, no "appearance of impropriety" appears to exist on the facts of this case. Cf. Jackson v. State, 599 So.2d 103 (Fla. 1992); Dragovitch v. State, 492 So.2d 350 (Fla. 1986).

Given the fact that the requirements of Huff were satisfied, plus the state's submission of the proposed order to CCR prior to Judge Olliff's adoption of the order, plus the undisputed nature of the findings, plus, the failure of CCR to object or move for rehearing, it is clear that the appellate argument of technical error by Judge Olliff (for signing the order too soon) clearly does not warrant reversal. At most, this record reflects nothing more than the adoption of a proposed order that was submitted to all parties. The State had no idea when the order would be signed, if it was adopted by the court at all. Rose, supra.

POINT II

THE APPELLANT'S MOTIONS TO DISQUALIFY THE TRIAL JUDGE WERE CORRECTLY DENIED AS FACIALLY DEFICIENT

Mr. Groover made two attempts to remove Judge Olliff from his case.

The first motion for disqualification alleged that Judge Olliff should be disqualified due to comments he allegedly made in a 1988 interview with William S. Geimer, a researcher preparing a law review article (R 51). Neither the interview nor the article had anything to do with Groover's case (R 51). The affidavit from Mr. Geimer does not quote Judge Olliff and is simply a hearsay - recollection from a dubious source.

The affidavit says:

> 5. "Judge Olliff told me of his belief that judges who put great weight on jury life recommendation were often just looking for a way avoid [sic] imposing the death sentence. He further observed that he thought that requiring a sentencing verdict was a great burden on jurors, and that he was no longer interested in knowing the numerical breakdown of recommendations. He said he considered the recommendations, but could not say to what extent.
>
> 6. Judge Olliff also said that in two early cases that were the subject of the interview, he had called the Attorney General's Office for advice when preparing the sentencing order.
>
> (R 51).

Judge Olliff did not rule on the merits of Groover's claim of judicial bias nor did he rule on the veracity of this affidavit. As a general challenge to the alleged political opinions of the Judge, as well as a non-specific hearsay

accusation of ex parte contact not linked to this case, the affidavit and, by extension, Groover's motion were facially insufficient to compel disqualification. Jones v. State, 446 So.2d 1059 (Fla. 1984); Keenan v, Watson, 525 So.2d 477 (Fla. 5th DCA 1988); Quince v. State, 592 So.2d 669 (Fla. 1992). Indeed, in Quince, the appellant sought the recusal of the trial judge for "derogatory" comments made, five years before, about out-of-state lawyers. The comments in question were made during a speech to a local bar association and, like the comments at bar, were not connected to any particular case. This Court held that Mr. Quince had no well founded fear of judicial bias and agreed that the motion was facially deficient.[4]

While Mr. Groover's first motion enjoyed the "support" of a hearsay affidavit, his second motion was not supported by any evidence at all, a point conceded by CCR in open court.

Apparently, CCR found an undated note, in the state's files, written by a former assistant named Jenkins. (Jenkins was not the prosecutor in this case.) The note said that Jenkins spoke to the "Attorney General" (the person spoken to is not named) and that that office had the Rule 3.850 motion. The note also said that Judge Olliff's division would handle the case.

As confessed by CCR, the note does not say that the Attorney General spoke to Judge Olliff or that any three-way discussion to

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[4] It should be noted that Judge Olliff's comments were critical of the judiciary for not carefully reviewing record evidence and did not reflect any bias in favor of or against either a life or death sentence. Here, of course, Judge Olliff was not going to sentence Mr. Groover, so any comments regarding "jury overrides" were not relevant anyway.

place. Thus, when counsel attempted to argue that such a meeting could be implied, the Court was moved to reply:

> "Counsel, in all candor, are you serious?" (SR 28)

Given the confession that the motion was not supported by any evidence, it was denied as facially deficient.

In Tafero v. State, 403 So.2d 355, 361 (Fla. 1981), this Court held:

> "The test of the sufficiency of an affidavit for disqualfication for prejudice is whether or not the sworn statement shows that the movant has a well grounded fear of not receiving a fair trial at the hands of the presiding judge. State ex rel Brown v. DeWell, 131 Fla. 566, 179 So. 695 (1938). The facts and reasons given in the sworn affidavit must tend to show personal bias or prejudice. The rule is not intended as a vehicle to oust a judge who has made adverse pretrial rulings.
>
> No bias or prejudice had been demonstrated in this case. The mere fact that Judge Futch was, in the distant past, a highway patrol officer does not support a claim of bias or prejudice. Tafero presented nothing to warrant the judge's disqualification."

While Mr. Tafero at least had a claim that the judge (a former highway patrolman) might be biased due to the victim's stastus (as a highway patrolman), Mr. Groover had absolutely no evidence at all.

Mr. Jenkins was not the prosecutor and Mr. Jenkins was not prohibited from calling the Attorney General's Office. Mr. Jenkins was not prohibited from verifying which judge would handle the case, see, Rose, supra; and not one word in Jenkins' note supports any accusation of a "three way meeting" between himself, the Court, and the Attorney General.

Mr. Groover's brief fails to address the record. It devotes a page to Love v. State, 569 So.2d 807 (Fla. 1st DCA 1990) (describing the Attorney General's Office as an arm of the prosecution) and cites to Beck v. Alabama, 447 U.S. 625 (1980) and Caldwell v. Mississippi, 472 U.S. 320 (1985) for the proposition that capital cases require close attention, but at no time does the brief justify the baseless accusations of "misconduct" (by Judge Olliff, the Attorney General or the prosecutor) by showing any factual or logical basis for same. By its silence, Groover's brief confesses the facial deficiency of the motion.

A party litigant cannot manufacture grounds for recusal. Thus, in Dowda v. Salfi, 455 So.2d 604 (Fla. 5th DCA 1984), the movant was unable to force Judge Salfi's recusal by suing him. Similarly, in Lowe v. State, 468 So.2d 259 (Fla. 2nd DCA 1985), the trial judge was not required to recuse himself even though the judge initiated contempt proceedings against movant's counsel. Here, the charges of judicial bias did not provoke litigation or any contempt action. In addition, movant's counsel confessed to the lack of a factual basis for the motion.

Clearly, the motion was facially deficient and did not compel recusal either by its terms or the mere fact that it was filed.

Appellate relief must be predicated upon more than the unfounded imagining of some attorney. Mr. Groover was obliged, on appeal, to show that his motion was not facially deficient. This he has failed to do and the lower court's order should be affirmed.

POINT III

THE COURT DID NOT ERR IN DENYING MR. GROOVER'S HITCHCOCK V. DUGGER CLAIM

The Appellant's third point on appeal is a baseless claim of so-called "Hitchcock" error. See, Hitchcock v. Dugger, 481 U.S. 393 (1987). The summary disposition of this claim was clearly vested with both factual and legal support.

Mr. Groover was tried long after the decision in Lockett v. Ohio, 438 U.S. 586 (1978). The trial judge was not only aware of Lockett, his instruction to the advisory jury was in accordance with Lockett and was not the limited instruction given in Hitchcock, supra.[5] In fact, after advising the jurors that the (listed) statutory mitigating factors were simply "among" the circumstances they could consider (R 1708), the judge specifically stated

> "And you may also consider any other aspect of the defendant's character or record or any other circumstances of the offense." (R 1708-9).

On direct appeal, Mr. Groover argued that the trial court failed to consider non-statutory mitigating factors, specifically citing Lockett and Eddings v. Oklahoma, 455 U.S. 104 (1982). (Appellant's brief at 44, 45). This Court denied relief. Groover v. State, 458 So.2d 226 (Fla. 1984).

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[5] During the penalty phase, the defense relied upon testimony from Groover's mother regarding Groover's "non-violent nature" and his rescue of his sister from a fire (R 1623-27) as well as "mental mitigation." These facts were later relied upon by defense counsel in his argument relating to non-statutory mitigation (R 1683-86).

The decision in Hitchcock v. Dugger, supra, addressed the propriety of a jury instruction used for a brief period prior to 1979. The instruction was found to have the potential to provoke Lockett error by limiting the advisory jury's review of the evidence. Despite repeated attempts to expand Hitchcock beyond the scope of those cases covered by the decision, this Court has refused to oblige.

In Card v. Dugger, 512 So.2d 829 (Fla. 1987), this Court held that it would not assume the presence of Lockett error in cases where the sentencing judge did not give the Hitchcock instruction. The same decision was made in Harich v. State, 542 So.2d 90 (Fla. 1889); Johnson v. Dugger, 520 So.2d 565 (Fla. 1988); Adams v. State, 543 So.2d 1244 (Fla. 1989); Spaziano v. Dugger, 557 So.2d 1372 (Fla. 1990). The mere fact that the sentencing order tracks the statutory factors does not change this presumption. Johnson v. Dugger, 520 So.2d 565 (Fla. 1988). Indeed, the sentencing order specifically stated:

> "Before imposing sentence, this Court has carefully studied and considered all the evidence and testimony at trial and at advisory sentencing proceedings, the Presentence Investigation Report, the applicable Florida Statutes, the case law, and all other factors touching upon this case." (R 282).

Mr. Groover relies upon two cases having no bearing to the issues at bar. Both Copeland v. Dugger, 565 So.2d 1348 (Fla. 1990) and Thomas v. State, 546 So.2d 717 (Fla. 1989) were legitimate "Hitchcock" cases involving both the faulty jury instruction and record evidence of Lockett error. Mr. Groover's citation to selectively irrelevant cases only heightens the

conspicuous absence of Card, Harich, Adams and Johnson from his brief, as well as any citation to the relevant portions of the sentencing order.

Finally, the States notes that in Daugherty v. State, 533 So.2d 287 (Fla. 1988), this Court upheld the denial of collateral Hitchcock relief under virtually identical circumstances.[6] Again, Groover fails to cite or distinguish Daugherty.

Mr. Groover is not entitled to relief in the absence of any Hitchcock error and he is not entitled - in the absence of any Hitchcock instruction - to use the Hitchcock decision as a device for circumventing the procedural bar governing reargument of the Lockett claim from his original appeal.

POINT IV

THE TRIAL COURT DID NOT ERR IN APPLYING VALID PROCEDURAL BARS TO THE APPELLANT'S REMAINING CLAIMS

The final point on appeal is nothing more than a collection of procedurally barred claims.

Claim A is a claim of error under Booth v. Maryland, 482 U.S. 496 (1987) which, due to Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720 (1990) has been carefully reworded to delete any citations to Booth. This issue was not raised at trial or on appeal and is procedurally barred. Grossman v. State, 525 So.2d 833 (Fla. 1988); Eutzy v. State, 541 So.2d 1143 (Fla. 1989); Preston v. Dugger, 531 So.2d 154 (Fla. 1988); Jones v. Dugger,

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6 Thre, as here, a correct instruction was given at trial and, on appeal, a claim of Lockett error was denied.

533 So.2d 290 (Fla. 1988); King v. State, 597 So.2d 780 (Fla. 1992); Brown v. State, 596 So.2d 1026 (Fla. 1992).

Claim B is a procedurally barred complaint about "burden-shifting" jury instructions. Once again, Groover fails in his duty to apprise the court that the claim is barred. Byrd v. State, 597 So.2d 252 (Fla. 1992); Davis v. State, 589 So.2d 896 (Fla. 1991); Roberts v. State, 568 So.2d 1259 (Fla. 1990); Atkins v. State, 541 So.2d 1165 (Fla. 1989); Adams v. State, 543 So.2d 1244 (Fla. 1989); Harich v. State, 542 So.2d 90 (Fla. 1989).

Claim C is an "automatic aggravating factor" claim that was not raised at trial or on appeal and is therefore procedurally barred. Harich v. State, supra; Kennedy v. State, 547 So.2d 912 (Fla. 1989); Glock v. State, 537 So.2d 99 (Fla. 1989).

Claim D is an "unbridled mercy" claim that was not preserved at trial or on appeal and thus not preserved for collateral review. Harich v. State, supra; Atkins v. State, supra; Glock v. State, supra.

Claim E relies upon Espinosa v. Florida, 505 U.S. 120 L.Ed.2d 854 (1992), in challenging the propriety of the jury instructions on the "heinous, atrocious, cruel" (HAC) and "cold, calculated, premeditated" (CCP) factors following the penalty phase of Groover's trial.

The defense never objected to either instruction (R 1697, 1714) and, on appeal, only questioned the sufficiency of the "HAC" jury instruction in defining the phrase. The State opposed the claim on procedural grounds (Appellee's Brief at 45) and this Court denied relief without opinion.

This claim was and is procedurally barred. Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 326 (1992); James v. State, ___ So.2d ___, (Fla. 1993) 18 Fla. L. Weekly S.139; Kennedy v. Singletary, 602 So.2d 1285 (Fla. 1982) upheld this procedural bar. Sims v. Singletary, 622 So.2d.980 (Fla. 1993); Rose v. State, 617 So.2d 291, (Fla. 1993); Atkins v. Singletary, 622 So.2d 931 (Fla 1993); Marek v. Singletary, ___ So.2d ___, (Fla. 1993), 18 Fla.L.Weekly S.473.

It should be noted, in addition, that this murder spree by Mr. Groover (and his associates) was accompanied by such horrible facts as to qualify for a finding of "heinous, atrocious or cruel" under any standard. Marek v Singletary, ___ So.2d ___ (Fla. 1993) 18 Fla. L. Weekly S.473.

Judge Olliff, reviewing the evidence in aggravation following the advisory jury's recommendations of death (for the Dalton murder) and life (for the Padgett and Sheppard murders), only imposed death for the Dalton and Padgett murders. As to the Padgett murder, the sentencer found: (R 293-297)

Fact

> The events of that fateful evening lasted for hours as Padgett desperately tried to save his own life. He endured threats with a loaded pistol, physical beating and hours of abuse, and went through torturous hours before he was finally shot in the head by the defendant.
>
> During the agonizing hours of his abduction, Padgett knew his fate was sealed and he was especially aware of it as he was driven to his place of execution; so certain was he, that he fell to his knees and begged for mercy. His terror was magnified as defendant pointed the pistol at his head and snapped the trigger three or four times before it finally fired, killing Padgett.

> The defendant toyed with the victim during the hours of the ordeal - as a cat with a mouse. The severe and continuous emotional strain of Padgett was cruel, heinous and atrocious in the extreme."

Regarding the murder of Jody Dalton, Judge Olliff found:

Fact

> Jody Dalton was tricked by the defendant into thinking she was on an outing at the lake. She performed fellatio upon him as he planned her murder because she knew of the disposal of the murder gun and of the Padgett killing.
>
> She was stripped of her clothing, taunted, ridiculed, kicked and beaten by the defendant for some period of time before he shot her five times and dumped her into the lake.
>
> She was aware that she was to be killed because of her knowledge of the Padgett killing - yet she had to suffer the unendurable emotional trauma of certain death before she finally died."

Since Groover was not sentenced to death for the Sheppard murder, the Court did not discuss her demise.

Under any standard of review these crimes were heinous, atrocious and cruel. See, Gorby v. State, ___ So.2d ___ (Fla. 1993) 18 Fla.L.Weekly S.623; Cf. Thompson v. State, 619 So.2d 261 (Fla. 1993); Slawson v. State, 619 So.2d 255 (Fla. 1993).

It should also be noted that the advisory jury did not recommend death sentences on all three murders even though it was "incorrectly instructed." Thus, contrary to the myth that juries, unless unstrictly controlled, "automatically" suggest[7]

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[7] Espinosa seems to be based upon this assumption. Similarly, Witherspoon v. Illinois, 391 U.S. 510, 521 (1968) criticized what it called juries that were "uncommonly willing to condemn a man to die." That assumption was refuted in Bumper v. North Carolina, 391 U.S. 543 (1968) wherein a jury, which was selected in the same "biased" manner as the Witherspoon jury, returned a

death, it is clear that Groover's jury carefully considered the evidence and distinguished the Dalton, Padgett and Sheppard murders.

Claim F - The "majority vote of the jury" issue was not preserved at trial or on appeal and was barred under Harich, Atkins, Glock supra.

CONCLUSION

The Appellant is not entitled to relief.

Respectfully submitted,

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life sentence and thus rendered Witherspoon "irrelevant" and proved its "fallacious assumption" (see, Bumper at 544 and J. Black's dissent at 555).

In Caldwell v. Mississippi, 472 U.S. 320 (1985), this approach surfaced again when it was assumed that a jury would recklessly sentence a defendant to death if it felt that the final authority for imposing a sentence rested elsewhere. This approach was in contrast to Dobbert v. Florida, 432 U.S. 282 (1977), in which the Court opined that a jury that felt as though it was "let off the hook" could just as easily vote for "life" and, thus, allow the difficult decision for death to be made somewhere else.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Michael J. Minerva Esq., and Ms. Gail E. Anderson, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 13 day of January, 1994.

MARK C. MENSER
Assistant Attorney General