IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,182

TOMMY SANDS GROOVER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Groover's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied relief on all claims. No evidentiary resolution of the facts was allowed. This appeal follows.

Citations in this brief shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "R. ___" followed by the appropriate page number, and the original trial transcript from that proceeding shall be referred to as "RT. ___." The record on appeal of the denial of the first (1986) Rule 3.850 motion shall be referred to as "M. ___." The record on appeal after remand for the evidentiary hearing shall be referred to as "H. ___," and "H.T. ___" shall designate the transcript of the Rule 3.850 evidentiary proceedings before the trial court. The record on appeal of the denial of the second (1989) Rule 3.850 motion shall be referred to as "M2. ___." All other references shall be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Groover has been sentenced to death. The resolution of the issues in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be

appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Groover accordingly requests that the Court permit oral argument.

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STATEMENT OF THE CASE

On January 11, 1983, Tommy Groover was convicted on three counts of first degree murder (R. 255). A jury recommended advisory sentences of life on Count I and Count II. The jury recommended a death sentence on Count III (R. 252-54). The Court overrode the jury's recommendation and sentenced Mr. Groover to death on Count I, to life imprisonment on Count II, and to death on Count III on February 18, 1983 (R. 268-270).

On direct appeal to this Court Mr. Groover raised several claims attacking his convictions and death sentences, one of which was a pre-Hitchcock claim. In this claim Mr. Groover argued that the trial court had failed to considered the nonstatutory mitigation in both the jury override death sentence as well as the non-jury override death sentence. The trial court's failure to consider nonstatutory mitigation was raised in Issues V and VIII of Mr. Groover's direct appeal initial brief. In Issue VIII, the following argument was made:

> An examination of the trial court's sentencing order reveals that the judge improperly limited his consideration to the statutorily enumerated mitigating circumstances contrary to the dictates of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, supra. (R-273-299). The trial judge, in his order, merely made findings negating each of the statutory mitigating circumstances, but totally failed to acknowledge the existence of nonstatutory mitigating circumstances, which the record undoubtedly supported. The trial judge, by limiting himself to the statutorily enumerated mitigating circumstances, not only violated the Eighth and Fourteenth Amendments, but also failed to consider

> numerous circumstances which militate against the imposition of the death penalty.

(Appellant's Initial Brief on Direct Appeal at 44). Mr. Groover went on to cite his history of drug and alcohol abuse, and other nonstatutory mitigation evident in the record on which the jury could have relied for its life recommendations and which the trial court should have considered (Id. at 44-45).

In Issue V, Mr. Groover argued that the trial court failed to consider the nonstatutory mitigation when the trial court decided to override the jury's life recommendation for count I of the indictment. Mr. Groover argued that "there was evidence introduced relative to nonstatuory mitigating factors which could have influenced the jury to return a life recommendation" (Appellant's Direct Appeal Initial Brief at 39).

However, this Court never directly addressed the trial court's failure to consider nonstatuory mitigation in its direct appeal opinion and affirmed the convictions and sentences. Groover v. State, 458 So. 2d 226 (Fla. 1984). As for Issue V concerning the trial court's override of the jury's life recommendation this Court held:

> Neither do we find error in the trial judge's override of the jury's recommendation that Groover receive a life sentence for the Padgett murder. No mitigating circumstances were found concerning Groover's participation in any of the homicides...In the face of the existence of these four aggravating circumstances, we find nothing in the facts of this case upon which the jury could rationally have based the recommendation of a life sentence.

Groover v. State, 458 So. 2d 226, 229 (Fla. 1984) (citation omitted) (emphasis added).

Mr. Groover filed his original Motion to Vacate Judgment and Sentence on June 1, 1986, and the trial court summarily denied relief on the same date. An appeal from the denial was taken to this Court. One of the claims which Mr. Groover raised in his original 3.850 motion was that trial counsel was ineffective in not presented certain nonstatutory mitigation. In rejecting this claim on appeal from the trial court's denial of the 3.850 motion, this Court held:

> Claim IV alleges ineffective assistance of counsel for failing to present more evidence in mitigation at appellant's sentencing proceeding. This claim is meritless as the evidence now claimed to have been omitted centered on appellant's history of drug use and troubled family background. This evidence is largely cumulative to that presented by appellant at trial.

Groover v. State, 489 So. 2d 15, 17 (Fla. 1986) (emphasis added).

The mitigation that this Court referred to regarding Claim IV of Mr. Groover's original 3.850 motion was substantial and compelling (M. 32-56, 66-68). Essentially, this Court maintained in its opinion that significant nonstatutory mitigation was presented at Mr. Groover's trial. However, this Court never addressed in its opinion what effect the nonstatutory mitigation presented at trial had on the propriety of circuit court's imposition of two death sentences. Groover v. State, 489 So. 2d 15, 17 (Fla. 1986).

This Court remanded for an evidentiary hearing to determine trial counsel's ineffectiveness for "failing to inquire into his [Mr. Groover's] competency to stand trial and for failing to order a psychiatric evaluation of appellant." Groover v. State, 489 So. 2d 15, 17 (Fla. 1986). An evidentiary hearing was conducted and the lower court denied relief. An appeal from the denial was taken and this Court affirmed the trial court's order. Groover v. State, 574 So. 2d 97 (Fla. 1991).

While the appeal from the trial court's denial of the competency issue was pending in this Court, Mr. Groover filed his second Motion to Vacate Judgment and Sentence on July 31, 1989, pursuant to the dictates of this Court. Mr. Groover's case presents a valid claim for relief pursuant to the analysis of Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), its predecessors, and its progeny. This Court had dictated that this claim be filed within two years of the Hitchcock opinion. See Hall v. State, 541 So. 2d 1125 (Fla. 1989). Other valid Rule 3.850 claims were also presented in Mr. Groover's motion.

On August 14, 1991, during the pendency of the second Rule 3.850 motion, Mr. Groover filed a Motion to Disqualify Judge maintaining that Judge Olliff had formed opinions regarding jury life recommendations which would unavoidably prejudice his decision in Mr. Groover's case. Pending before the trial court was a Hitchcock claim in which Mr. Groover argued that the trial court did not considered nonstatutory mitigation when deciding to

override the jury's life recommendation. Mr. Groover specifically alleged:

> 1. Judge Olliff has formed opinions regarding jury life recommendations which will unavoidably prejudice his decision in Mr. Groover's case. In an interview with Professor William S. Geimer, Judge Olliff stated his belief that judges who put great weight on jury life recommendations [are] often just looking for a way [to] avoid imposing the death sentence. (Affidavit of William S. Geimer, Affidavit B). Professor Geimer concluded:
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> > . . . a life recommendation for a capital defendant in Judge Olliff's court would almost certainly not be given the wight to which it is entitled under Florida law as I understand it. See, e.g. Tedder v. State, 322 So. 2d 908, 910 (1975).
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> (Id.).
>
> 2. These comments made by Judge Olliff indicate a refusal to properly apply Florida law in a capital case. Judge Olliff expresses a bias against capital defendants, particularly those in cases of a jury life recommendation. This bias will affect Judge Olliff's decisions concerning Mr. Groover and has resulted in a prejudgment of the issues.

(M2. 42). This Motion to Disqualify Judge was denied as being legally insufficient (M2. 94).

A second Motion to Disqualify Judge was filed September 24, 1991, maintaining that ex parte communication had taken place between Judge Olliff and the state. Mr. Groover's counsel discovered evidence of the ex parte communication in materials given to Mr. Groover pursuant to a public records request:

> Upon perusal of the State Attorney's file, counsel for Mr. Groover discovered an inter-office memo from the desk of Anthony Jenkins

> (Appendix B) indicating a meeting or telephone call attended by Mr. Jenkins, the Attorney General and Judge Olliff. There is no indication that defense counsel was present or aware of this discussion.

(M2. 100). This Motion to Disqualify Judge was denied (M2. 109).

On November 12, 1991, defense counsel received (via regular U.S. mail) a copy of the State's proposed order filed with the trial court summarily denying Mr. Groover relief (App. A).[1] On November 15, 1991, the trial court signed the State's order summarily denying the motion for post-conviction relief (App. B). The order was retyped verbatim and signed by the trial judge. It was signed before Mr. Groover could file an objection to the State's proposed order. This appeal followed.

SUMMARY OF ARGUMENT

1. Mr. Groover was denied due process in his Rule 3.850 proceedings when the lower court signed the State's order denying relief without affording Mr. Groover an opportunity to object to the order.

2. Mr. Groover was denied due process in his Rule 3.850 proceedings when the judge denied motions to disqualify based upon the judge's preformed opinions regarding jury life recommendations and upon the judge's ex parte contact with the State.

3. The trial judge failed to consider nonstatutory mitigating factors in sentencing Mr. Groover to death, in

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[1]Neither this document nor the trial court's order denying the Rule 3.850 motion are in the record on appeal. These documents are appended to this brief.

violation of the Eighth and Fourteenth Amendments. The trial judge's oral and written sentencing findings discuss only the statutory mitigating factors. This error was not harmless, as the record contains substantial evidence supporting nonstatutory mitigating factors. Further, trial counsel's presentation of and argument on mitigation was constrained by his perception of statutory limits on the consideration of mitigation. For example, trial counsel confined his penalty phase closing argument to a discussion of the statutory mitigating factors. Substantial nonstatutory mitigation was available but not presented because of counsel's perception of the law. Mr. Groover is entitled to resentencing.

4. Numerous errors occurred at Mr. Groover's penalty phase and sentencing in violation of the Eighth and Fourteenth Amendments. Individually and cumulatively, these errors entitle Mr. Groover to resentencing.

ARGUMENT I

MR. GROOVER WAS DENIED DUE PROCESS ON HIS RULE 3.850 MOTION TO VACATE IN VIOLATION OF THE LAWS OF THE STATE OF FLORIDA AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE CIRCUIT COURT SIGNED THE STATE'S PROPOSED ORDER DENYING MR. GROOVER RELIEF WITHOUT AFFORDING MR. GROOVER AN OPPORTUNITY TO MAKE OBJECTIONS.

On November 12, 1991, defense counsel received (via regular U.S. mail) a copy of the State's proposed order filed with the trial court denying Mr. Groover relief (App. A). On November 15, 1991, the trial court signed the state's order summarily denying

the motion for post-conviction relief (App. B). The order was retyped verbatim and signed by the trial judge (Compare the State's proposed order (App. A) with the trial court's order denying Mr. Groover relief (App. B)). It was signed before the Mr. Groover could file an objection to the State's proposed order. There is no indication in the record what prompted the submission of State's proposed order.

The due process violation in Mr. Groover's case is similar to what occurred in Rose v. State, 601 So. 2d 1181 (Fla. 1992), and Huff v. State, 622 So. 2d 982 (Fla. 1993). In Rose, this Court reversed the denial of Rule 3.850 relief because it "appeared" that the State and trial judge had ex parte communications during which the State was directed to prepare the order denying relief and the order was signed without giving Mr. Rose an opportunity to object to its contents. This Court maintained that "[u]nder these facts we must assume that" ex parte communication had taken place. Rose v. State, 601 So. 2d at 1182-83.

In Huff, the State submitted a proposed order denying Huff all relief. However, the record did not "reflect when the proposed order was submitted or what prompted the submission." Mr. Huff's counsel received a copy of the proposed order on a Friday and the trial court signed the order as submitted on the following Monday "before Huff had the opportunity to raise objections or submit an alternative order." This Court concluded in Huff:

> Even though the factual circumstances of the instant case are somewhat different from those in Rose, we find that the same due process concerns expressed in Rose are also present in this case. Rose was denied due process of law because his counsel was never served a copy of the proposed order; thereby depriving Rose of the opportunity to review the order and to object to its contents. In the instant case, CCR received a copy of the proposed order on Friday before the court signed it on Monday. This did not afford Huff a sufficient opportunity to review the order, much less to object to its contents.

Huff, 622 So. 2d at 983.

Rule 3.850 proceedings are governed by the principles of due process. Huff v. State, 622 So. 2d 982 (Fla. 1993); Holland v. State, 503 So. 2d 1250 (Fla. 1987). Due process cannot be squared with the treatment that the motion to vacate received in this capital case. A 3.850 movant "should [be] afforded an opportunity to raise objections and make alternative suggestions to the order before the judge sign[s] it." Huff v. State, 622 So. 2d 982, 983 (Fla. 1993). Due process requires notice and an opportunity to be heard. However, at no time was Mr. Groover advised or given an opportunity to object to the State's proposed order. Mr. Groover was entitled to a full and fair independent resolution from the court. Given the heightened scrutiny which the Eighth Amendment requires in capital proceedings, a resolution such as the one involved in this case violated due process. See Huff v. State, 622 So. 2d 982, 983 (Fla. 1993). ("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 on an initial 3.850 motion").

In Huff, this Court found that the facts did not "support an assumption that the trial court and the State engaged in an improper ex parte communication regarding the order." This Court relied on the State's cover letter that accompanied the proposed order which stated that the State expected CCR to submit their own proposed order. Huff v. State, 622 So. 2d 982, 984 (Fla. 1993). However, in Mr. Groover's case no such language was forthcoming in the State's cover letter that accompanied the proposed order. The State's cover letter had only one sentence: "Please find enclosed a proposed order I have sent to Judge Olliff." (App. A). As noted above, like Rose and Huff, the record does not reflect what prompted the submission of the state's proposed order. "Under these facts we must assume that the trial court, in an ex parte communication, had requested the State to prepare the proposed order." Rose v. State, 601 So. 2d at 1182-83.

The Code of Judicial Conduct emphasizes the importance of an independent and impartial judiciary in maintaining the integrity of the fact-finding process. See Code of Judicial Conduct, Canon 1, Canon 2A, Canon 3A(4), Canon 3C. Canon 3A(4) emphasizes, "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor

consider ex parte or other communications concerning a pending or impending proceeding." (Emphasis added).[2]

When a court is required to make legal determinations and findings of fact, "the findings must be based on something more than a one-sided presentation of the evidence . . . [and] require the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy, but by both." Simms v. Greene, 161 F.2d 87, 89 (3rd Cir. 1947). A death-sentenced inmate deserves at least as much.

> [T]he reviewing court deserves the assurance [given by even-handed consideration of the evidence of both parties] that the trial court has come to grips with apparently irreconcilable conflicts in the evidence... and has distilled therefrom true facts in the crucible of his conscience.

E.E.O.C. v. Federal Reserve Board of Richmond, 698 F.2d 633, 640-41 (4th Cir. 1983), quoting Golf City, Inc. v. Sporting Goods, Inc., 555 F.2d 426, 435 (5th Cir. 1977).

Mr. Groover was entitled to all that due process allows -- a full and fair hearing by the court on his claims. Huff; Rose. These rights were abrogated by the circuit court's adoption of the state's factually and legally erroneous order. The proceedings should be voided and this case should be remanded for a full and fair hearing before a new circuit judge for a proper resolution of the issues. This Court must set aside the order denying Mr. Groover's motion for post-conviction relief and

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[2]Canon 3A(4) of the Code of Judicial Conduct was the Canon relied upon by this Court in Mr. Rose's case. See Rose, 601 So. 2d at 1183.

remand for proceedings consistent with relief granted in Rose and Huff.

ARGUMENT II

MR. GROOVER WAS DENIED A FULL AND FAIR HEARING ON HIS RULE 3.850 MOTION TO VACATE IN VIOLATION OF THE LAWS OF THE STATE OF FLORIDA AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE CIRCUIT COURT DENIED THE MOTIONS TO DISQUALIFY THE JUDGE.

On August 14, 1991, Mr. Groover filed a Motion to Disqualify Judge maintaining that Judge Olliff had formed opinions regarding jury life recommendations which would unavoidably prejudice his decision in Mr. Groover's case. Pending before the trial court was a Hitchcock claim in which Mr. Groover argued in part that the trial court did not consider nonstatutory mitigation when deciding to override the jury's life recommendation. Mr. Groover specifically alleged:

> 1. Judge Olliff has formed opinions regarding jury life recommendations which will unavoidably prejudice his decision in Mr. Groover's case. In an interview with Professor William S. Geimer, Judge Olliff stated his belief that judges who put great weight on jury life recommendations [are] often just looking for a way [to] avoid imposing the death sentence. (Affidavit of William S. Geimer, Affidavit B). Professor Geimer concluded:
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> > . . . a life recommendation for a capital defendant in Judge Olliff's court would almost certainly not be given the wight to which it is entitled under Florida law as I understand it. See, e.g. Tedder v. State, 322 So. 2d 908, 910 (1975).
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> (Id.).

> 2. These comments made by Judge Olliff indicate a refusal to properly apply Florida law in a capital case. Judge Olliff expresses a bias against capital defendants, particularly those in cases of a jury life recommendation. This bias will affect Judge Olliff's decisions concerning Mr. Groover and has resulted in a prejudgment of the issues.

(M2. 42) (emphasis added). This Motion to Disqualify Judge was denied as being legally insufficient (M2 94).

Mr. Groover is entitled to full and fair Rule 3.850 proceedings, see Holland v. State, 503 So. 2d 1354 (Fla. 1987), including the fair determination of the issues by a neutral, detached judge. The aforementioned circumstances of this case are of such a nature that they are "sufficient to warrant fear on [Mr. Groover's] part that he would not receive a fair hearing by the assigned judge." Suarez v. State , 527 So. 2d 191, 192 (Fla. 1988).

This Court has repeatedly held that where a movant meets these requirements and demonstrates, on the face of the motion, a basis for relief, a judge who is presented with a motion for disqualification "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Suarez v. State, 527 So. 2d 191 (Fla. 1988) (emphasis added); Livingston v. State, 441 So. 2d 1083 (Fla. 1983); Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978); Digeronimo v. Reasbeck, 528 So. 2d 556 (Fla. 4th DCA 1988); Ryon v. Reasbeck, 525 So. 2d 1025 (Fla. 4th DCA 1988); Fruhe v. Reasbeck, 525 So. 2d 471 (Fla. 4th DCA 1988); Lake v. Edwards, 501 So. 2d 759 (Fla. 5th DCA 1987); Davis v. Nutaro, 510 So. 2d 304 (Fla. 4th DCA 1986); ATS Melbourne,

Inc. v. Jackson, 473 So. 2d 280 (Fla. 5th DCA 1985); Gieseke v. Moriarty, 471 So. 2d 80 (Fla. 4th DCA 1985); Management Corp. v. Grossman, 396 So. 2d 1169 (Fla. 3rd DCA 1981).

To establish a basis for relief a movant:

> need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938). See also Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

Livingston, 441 So. 2d at 1086 (emphasis added). Certainly, in this case where the trial court had expressed an opinion "that judges who put great weight on jury life recommendations [are] often just looking for a way [to] avoid imposing the death sentence" is a matter where "a litigant may reasonably question a judge's impartiality."

Due process guarantees the right to a neutral detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." Carey v. Piphus, 425 U.S. 247, 262 (1978). The United States Supreme Court has explained that in deciding whether a particular judge cannot preside over a litigant's trial:

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of

> bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

Taylor v. Hayes, 418 U.S. 488, 501 (1974).

Moreover, a second Motion to Disqualify Judge was filed on September 24, 1991, maintaining that ex parte communication had taken place between Judge Olliff and the state. Mr. Groover's counsel discovered evidence of the ex parte communication in materials given to Mr. Groover pursuant to a public records request. In this motion Mr. Groover alleged:

> On August 25, 1991, a hearing was held in the above-entitled case at which the Office of the State Attorney was ordered to comply with Mr. Groover's public records request pursuant to sec. 119.01 et seq., Fla. Stat. (1989). Said records were delivered to the Office of the Capital Collateral Representative on September 18, 1991. Upon perusal of the State Attorney's file, counsel for Mr. Groover discovered an inter-office memo from the desk of Anthony Jenkins (Appendix B) indicating a meeting or telephone call attended by Mr. Jenkins, the Attorney General and Judge Olliff. There is no indication that defense counsel was present or aware of this discussion.

(M2. 100). This Motion to Disqualify Judge was also denied (M2. 109).

The trial court's ex parte discussions with the State denied Mr. Groover his right to have his case adjudicated by an

impartial tribunal, in violation of Florida law, due process, equal protection, and the Eighth and Fourteenth Amendments. The ex parte communication between the trial court and the State denied Mr. Groover "the cold neutrality of an impartial judge:"

> Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments. As Justice Overton has said in this Court:
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> > [C]anon [3A(4)] implements a fundamental requirement for all judicial proceedings under our form of government. Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties. This canon was written with the clear intent of excluding all ex parte communications except when they are expressly authorized by statutes or rules.
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> In re Inquiry Concerning a Judge: Clayton, 504 So. 2d 394, 395 (Fla. 1987).
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> We are not here concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell:

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. . . . The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
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> . . . The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

State ex rel. Davis v. Parks, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939). Thus, a judge should not engage in any conversation about a pending case with only one of the parties participating in that conversation. Obviously, we understand that this would not include strictly administrative matters not dealing in any way with the merits of the case.

Rose v. State, 601 So. 2d 1181 (Fla. 1992)(emphasis added).

Mr. Groover was entitled to impartial legal determinations, not determinations made by the opposing party:

> The attorney general of the state is not a disinterested expert in a criminal case but, in fact, is an arm of the prosecution. See section 16.01, Fla. Stat. (1989). Ex parte communication between a trial judge and assistant attorney general concerning a pending criminal case is totally inappropriate and will mandate reversal if: 1) The defense has requested that the trial judge recuse himself or has requested a mistrial which is denied; 2) where the defendant can demonstrate that there was prejudice as a result of the improper communication; or 3) the judge is sitting as the trier of fact. See Livingston v. State,

441 So. 2d 1083 (Fla. 1983); State v. Steele, 348 So. 2d 398 (Fla. 3rd DCA 1977).

Love v. State, 569 So. 2d 807, 810 (Fla. 1st DCA 1990).

In capital cases, judicial scrutiny must be more stringent than it is in non-capital cases. As the United States Supreme Court indicated in Beck v. Alabama, 447 U.S. 625 (1980), special procedural rules are mandated in death penalty cases in order to insure the reliability of the sentencing determination. "In a capital case, the finality of the sentence imposed warrants protections that may or may not be required in other cases." Ake v. Oklahoma, 470 U.S. 68, 87 (1985)(Burger, C.J., concurring). Thus, in a capital case such as Mr. Groover's, the Eighth Amendment imposes additional safeguards over and above those required by the Fourteenth Amendment. In Caldwell v. Mississippi, 472 U.S. 320 (1985), for example, a prosecutor's closing argument in the penalty phase was found to violate the Eighth Amendment's heightened scrutiny requirement even though a successful challenge could not be mounted under the Fourteenth Amendment. See Caldwell, 472 U.S. at 347-52 (Rehnquist, J. dissenting); Adams v. Dugger, 816 F.2d 1493, 1496 n.2 (11th Cir. 1987).

The impartiality of the judiciary is especially important in "this first-degree murder case in which [Mr. Groover's] life is at stake and in which the circuit judge's sentencing decision is so important." Livingston, 441 So. 2d at 1087. The court's adverse predisposition would surely prevent Mr. Groover from ever receiving fair treatment before the court.

In Livingston and Suarez, this Court concluded that the failure of the judge to disqualify himself was error due to apparent prejudgment and bias against counsel, and predetermination of the facts at issue. Consequently, the Court reversed and the matter was remanded for proceedings before a different judge. In Suarez, the issue arose after a post-conviction hearing in a capital case. There the trial court erred in failing to grant a motion to disqualify after expressing an opinion as to the issues before the court prior to receiving testimony.

A fair hearing before an impartial tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing. Suarez teaches that even the appearance of prejudgment is sufficient to warrant reversal.

Mr. Groover sought to disqualify Judge Olliff because of the ex parte contact and his biased opinion regarding life recommendations. Certainly, Mr. Groover's well founded contentions constitute legally sufficient grounds for disqualification. See Rogers v. State, 18 Fla. L. Weekly S414 (Fla. July 1, 1993). This Court must set aside the order denying Mr. Groover's motion for post-conviction relief and remand for proceedings consistent with relief granted in Rose and Huff.

ARGUMENT III

MR. GROOVER'S DEATH SENTENCE VIOLATES LOCKETT V. OHIO, EDDINGS V. OKLAHOMA AND HITCHCOCK V. DUGGER BECAUSE THE SENTENCING JUDGE LIMITED HIS CONSIDERATION OF MITIGATING FACTORS TO THOSE LISTED IN FLORIDA'S DEATH PENALTY STATUTE AND BECAUSE THE PARTICIPANTS OPERATED UNDER THIS SAME VIEW; AS A RESULT, MR. GROOVER'S SENTENCE OF DEATH WAS OBTAINED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The proceedings resulting in Mr. Groover's sentences of death violate the constitutional mandates of Hitchcock v. Dugger, 481 U.S. 393 (1987). The sentences of death resulted from the constitutionally improper restriction on the consideration of nonstatutory mitigating factors, and a constrained interpretation of the statute employed by the trial court in these capital proceedings. The sentencing court constrained itself from considering matters which mitigated against a sentence of death but which were not "enumerated" in the restrictive statutory list (see Fla. Stat. sec. 921.141 (1973)). This restrictive statutory construction caused the judge to ignore nonstatutory mitigation. Mr. Groover's resulting sentence of death was neither individualized nor reliable, and violates Hitchcock v. Dugger and its progeny.

The constitutional error in this case was so pronounced that this issue was raised on direct appeal over four years before Hitchcock v. Dugger became the law of the land. Following Mr. Groover's convictions on three counts of first degree murder, the jury recommended advisory sentences of life on Count I and Count II. The jury recommended a death sentence on Count III (R. 252-

54). The Court overrode the jury's recommendation and sentenced Mr. Groover to death on Count I, to life imprisonment on Count II, and to death on Count III on February 18, 1983 (R. 268-270).

On direct appeal Mr. Groover raised a claim maintaining the trial court had failed to consider the nonstatutory mitigation in both the jury override death sentence as well as the non-jury override death sentence. The trial court's failure to consider nonstatutory mitigation was raised in Issues V and VIII of Mr. Groover's direct appeal initial brief. In Issue VIII, the following argument was made:

> An examination of the trial court's sentencing order reveals that the judge improperly limited his consideration to the statutorily enumerated mitigating circumstances contrary to the dictates of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, supra. (R-273-299). The trial judge, in his order, merely made findings negating each of the statutory mitigating circumstances, but totally failed to acknowledge the existence of nonstatutory mitigating circumstances, which the record undoubtedly supported. The trial judge, by limiting himself to the statutorily enumerated mitigating circumstances, not only violated the Eighth and Fourteenth Amendments, but also failed to consider numerous circumstances which militate against the imposition of the death penalty.

(Appellant's Initial Brief on Direct Appeal at 44). Mr. Groover went on to cite his history of drug and alcohol abuse, and other nonstatutory mitigation evident in the record on which the jury could have relied on for its life recommendations and which the trial court should have considered (Id. at 44-45).

In Issue V, Mr. Groover argued that the trial court failed to consider the nonstatutory mitigation when the trial court decided to override the jury's life recommendation for count I of the indictment. Mr. Groover argued that "there was evidence introduced relative to nonstatuory mitigating factors which could have influenced the jury to return a life recommendation" (Appellant's Direct Appeal Initial Brief at 39).

However, this Court never directly addressed the trial court's failure to consider nonstatutory mitigation in its direct appeal opinion and affirmed the convictions and sentences. Groover v. State, 458 So. 2d 226 (Fla. 1984). As for Issue V concerning the trial court's override of the jury's life recommendation this Court held:

> Neither do we find error in the trial judge's override of the jury's recommendation that Groover receive a life sentence for the Padgett murder. No mitigating circumstances were found concerning Groover's participation in any of the homicides...In the face of the existence of these four aggravating circumstances, we find nothing in the facts of this case upon which the jury could rationally have based the recommendation of a life sentence.

Groover v. State, 458 So. 2d 226, 229 (Fla. 1984) (citation omitted) (emphasis added).

Mr. Groover filed in his original 3.850 motion a claim maintaining that trial counsel was ineffective in not presenting certain nonstatutory mitigation. In rejecting this claim on appeal from the trial court's denial of the 3.850 motion, this Court held:

> Claim IV alleges ineffective assistance of counsel for failing to present more evidence in mitigation at appellant's sentencing proceeding. This claim is meritless as the evidence now claimed to have been omitted centered on appellant's history of drug use and troubled family background. This evidence is largely cumulative to that presented by appellant at trial.

State v. Groover, 489 So. 2d 15, 17 (Fla. 1986) (emphasis added).[3]

Essentially, this Court has put Mr. Groover in a Catch-22 situation. In this Court's direct appeal opinion, it held that there was "nothing in the facts of this case" (mitigation) to support the jury's recommendation of life on Count I in which the trial court overrode. Groover v. State, 458 So. 2d 226, 229 (Fla. 1984). On the other hand, in this Court's opinion rejecting the ineffective assistance of counsel claim in Mr. Groover's 1986 post-conviction motion this Court held that the nonstatutory mitigation "is largely cumulative to that presented by appellant at trial." Groover v. State, 489 So. 2d 15, 17 (Fla. 1986).

The trial court has managed to put Mr. Groover in this same Catch-22 situation. The trial court's order denying Mr. Groover's Motion For Post Conviction Relief asserted that the records shows that the "court considered both statutory and nonstatutory mitigating circumstances in determining the death penalty was appropriate" (App. B). However, the trial court

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[3]The mitigation that this Court refers to in Claim IV of Mr. Groover's original 3.850 motion was substantial and compelling (M. 32-56, 66-68).

never explained what in the record makes this showing and never addressed what effect the nonstatutory mitigation presented at trial had on the trial court's override of the jury's recommendation of life.

An overview of Mr. Groover's trial record reveals substantial and compelling mitigation. The trial record is saturated with evidence of the use of drugs and alcohol. The State's own witnesses attested to the heavy use of drugs and alcohol on the day and night of the murders. The County Medical Examiner, Dr. Peter Lipkovic, testified that he arranged for tests of Richard Padgett's blood. The tests showed .18 percent blood alcohol, and the presence of PCP (TR. 680). Dr. Lipkovic testified that the use of alcohol might exaggerate the effects of PCP (TR. 682-83).

Dr. Lipkovic also testified that Nancy Sheppard's blood showed the presence of trace amounts of morphine (TR. 685). Dr. Bonifacio Floro, an Assistant Medical Examiner, performed the autopsy of the woman identified as Jody Dalton. Blood toxicology tests found the presence of alcohol and cocaine (TR. 697).

On cross-examination, William Long, the man who actually shot and killed Nancy Sheppard, testified that Tommy Groover and he consumed quaaludes at about 8 p.m. (TR. 858), drank several beers, and smoked a "dime bag" containing a half ounce of marijuana (TR. 856-860). Another State witness, Morris Johnson, testified that he, Richard Padgett, and Tommy Groover shared a gram of "T" (PCP) and got "really fried" (TR. 934).

Tommy Groover took the stand and confirmed that he had injected PCP along with Richard Padgett and Morris Johnson. He was so "messed up" by the drug that he started sanding a hole in his sister's car (TR. 1248). At his pretrial deposition as a State witness against Tinker Parker, Tommy Groover testified that he injected some "T" (PCP) before 10 o'clock on the morning of the homicides. He also took LSD and quaaludes, and drank three or four six packs of beer (R. 495). He explained he did not recall what had been said that day. Id.

Describing the fight with Richard Padgett, Tommy Groover said he was "wasted"; he had taken more drugs than Tinker Parker who was "pretty high" (R. 813). He again stated that he had also taken "acid" (LSD), "T" (PCP), and quaaludes (R. 814). When pressed for details, Tommy Groover explained he simply could not remember because he was "wasted" (R. 537; 563; 578). Tommy Groover explained that he had taken more drugs than anybody else (R. 578). All told, Tommy Groover, as a State witness testified he consumed:

> (i) 2 quarter sacks of pure uncut PCP -- a third of a gram (R. 655). This affected him mentally so that he "did not know what he was doing" (R. 656).
>
> (ii) a case of beer (R. 657).
>
> (iii) some marijuana, which "kicked him right back to the PCP "high" (R. 670).
>
> (iv) at least 300 mg. of quaaludes (R. 661).

Further, testimony showed that Mr. Groover had never previously been know to be violent. It was shown that on

November 8, 1978, appellant had risked his own life to rescue his sister and her children from their burning home (TR. 1731-32).

Notwithstanding the trial court's order asserting that the record shows that the "court considered both statutory and nonstatutory mitigating circumstances in determining the death penalty was appropriate," it is obvious in the sentencing order, that the sentencing judge in Mr. Groover's case "assumed . . . a prohibition [against nonstatutory mitigation]," and constrained his review of nonstatutory mitigation. Hitchcock, 481 U.S. at 397. See also Thomas v. State, 546 So. 2d 716 (Fla. 1989). In its sentencing order, the court discussed the statutory aggravating factors it deemed applicable. Then, the court looked at, reviewed, and considered, only statutory factors for mitigation.

The trial court misunderstood the relevance of the error in Mr. Groover's case. Its order overlooked precedents such as Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989)(sentencer cannot be constrained from providing "full consideration of evidence that mitigates against the death penalty . . ."). The dictates of Hitchcock bind the trial judge as well as the sentencing jury. Messer v. Florida, 834 F.2d 890, 892 (11th Cir. 1987); Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987); Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988). In Mr. Groover's case, the record demonstrates that consideration of mitigation was limited to the statutory mitigating factors and the proceedings did not afford independent, "serious", McCrae v. State, 510 So. 2d 874, 880

(Fla. 1987), or "full", Penry, consideration of nonstatutory mitigating factors.

Essentially, post-Hitchcock, courts do not look for explicit evidence on the record that nonstatutory mitigation was not considered, but instead look for affirmative indications that nonstatutory mitigation was independently and seriously considered by the sentencer. If no such indications appear, Hitchcock error has occurred. Post-Hitchcock, if the record reflects ambiguity as to the consideration the judge may or may not have given to nonstatutory mitigation, relief is proper: the very ambiguity renders the proceedings constitutionally unreliable, the sentence unindividualized and the proceedings' results tainted. If the record leaves any ambiguity about whether the sentencing judge considered factors which would support a lesser sentence, then resentencing is required. Thomas v. State, 546 So. 2d 716 (Fla. 1989); Copeland v. Dugger, 565 So. 2d 1348 (Fla. 1990)(trial court's written order expressly confined its consideration to statutory mitigation).

The sentencing order aptly demonstrates that the trial court ignored the nonstatutory mitigating value of the evidence presented by Mr. Groover. Rather, the court simply considered statutory mitigation, and went no further. It is clear that only statutory mitigating circumstances were considered. There is no reference to any other mitigation presented. This Court has specifically held that Hitchcock overturned the notion that "mere presentation" of nonstatutory mitigation was enough to satisfy

the eighth amendment. Waterhouse v. State, 522 So. 2d 341 (Fla. 1988). This Court concluded that Hitchcock required the sentencer to actually consider the nonstatutory mitigation. The facts in Mr. Groover's case are virtually identical to those in Cheshire v. State, 568 So. 2d 908 (Fla. 1990). In Cheshire, this Court held that "the trial court may not constitutionally limit itself solely to considering statutory factors, as the court below apparently did in its written order." Cheshire, 568 So. 2d at 912, citing Hitchcock. Though the trial court in Cheshire did mention nonstatutory mitigation in its oral statements at sentencing, there was no mention of nonstatutory mitigation in the written sentencing order. Mr. Groover's sentencing judge did not mention nonstatutory mitigation in either the oral pronouncements at sentencing or the written sentencing order.[4]

In light of the substantial nonstatutory mitigation in record, the trial court's failure to nonstatutory mitigation is not harmless beyond a reasonable doubt. In this case the trial court was required to apply two different standards to the

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[4]The record is clear that the judge did not consider nonstatutory mitigation. However, even if the record reflects ambiguity as to the consideration the judge gave to nonstatutory mitigation, relief is proper: the very ambiguity renders the proceedings unreliable and the sentence unindividualized. This Court has granted relief pursuant to Hitchcock when "the record . . . leaves unresolved the question of whether the trial court considered nonstatutory mitigating evidence." Thomas v. State, 546 So. 2d 716 (Fla. 1989). It is "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978), that "require[s] us to remove any legitimate basis for finding ambiguity concerned the factors actually considered." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982)(O'Connor, J., concurring).

nonstatutory mitigation -- one standard for the jury's life recommendation and another standard to the jury's death recommendation. As for the death recommendation, if the trial judge was reasonably convinced that the nonstatutory mitigation was established then the Court must weigh the nonstatutory mitigation against any aggravating circumstances established beyond a reasonable doubt. Clearly, evidence of Mr. Groover's history of drug and alcohol abuse was uncontested and primarily presented through the State's own witnesses. The fact that Mr. Groover risked his own life to rescue his sister and her children from their burning home was not challenged by the State. This compelling mitigation was never considered by the trial court.

As for the jury's life recommendation, the trial court was required to determine whether the evidence of nonstatutory mitigation established "a reasonable basis in the record to support the jury's recommendation" of life. Here, the nonstatutory mitigation in the record established more than a reasonable basis for the jury's life recommendation and precluded an override by the trial court. In Stevens v. State, 522 So. 2d 1082 (1989), this Court explained the proper consideration that trial court is required to give a jury's life recommendation:

> "A jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community...." Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988). Under the standard set forth in Tedder v. State, a trial judge may not override a jury recommendation of life unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." 322 So.2d 908, 910

> (Fla. 1975). If there is a reasonable basis in the record to support the jury's recommendation, an override is improper. Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987). In some instances, the presence of valid mitigating circumstances discernible from the record may be the decisive factor when determining whether a reasonable basis exists for the life recommendation. Id.; Francis v. State, 529 So.2d 670, 677 (Fla. 1988)(Barkett, J. dissenting). If it can be determined that the life recommendation was based on valid mitigating factors, then an override may be improper. Ferry v. State, 507 So.2d at 1376.

Stevens v. State, 522 So. 2d 1085 (1989).

Moreover, trial counsel's efforts were similarly constrained by the operation of state law and his perception of statutory constraints on the consideration of mitigation. See Hall v. State, 541 So. 2d 1125 (Fla. 1989); Smith v. Dugger, 758 F.Supp. 688 (N.D. Fla. 1990). Trial counsel was straightjacketed by pre-Hitchcock opinions which constrained him from challenging the State's contention that there was "not a single solitary mitigating factor," although a wealth of nonstatutory mitigating evidence existed in Tommy Groover's case. Trial counsel was constrained from utilizing available nonstatutory mitigation, and limited his closing arguments exclusively to statutory mitigation (TR. 1675, statutory mitigating factor a; TR. 1677, statutory mitigating factors b, c and d; TR. 1679, statutory mitigating factor e; TR. 1681, statutory mitigating factors f and g).

To the extent counsel's belief was not reasonable, Mr. Groover submits that trial counsel's view involved ineffective assistance of counsel which prejudiced Mr. Groover. As a result

of trial counsel's view, a wealth of nonstatutory mitigation never reached the jury and court charged with the task of determining Mr. Groover's fate. Had defense counsel's efforts not been constrained, an investigation would have presented Mr. Groover's jury with a substantial and compelling case in favor of life. It would have made Mr. Groover more human in the eyes of the jury and court, and presented a background which cries out for compassion.

Tommy was born April 3, 1958, in Jacksonville, Florida. His mother, Lois Hancock, had separated from Tommy's father, Daniel Groover, by the time of Tommy's birth due to Mr. Groover's alcoholic tantrums which frequently left her badly beaten. These beatings continued even when she was pregnant. Lois describes the abuse:

> I had to leave Daniel before I even knew I was pregnant with Tommy because I just couldn't take his abuse any longer. We always had trouble because of his drinking. He would drink at a bar or somewhere and then come home and beat up on me. I never knew why he did that. It just seemed like he would get mad about something while he was out and take it out on me. When I was pregnant with Lee, he beat me up so bad that he almost killed me. He'd jump on me and tear me up. I was afraid if I didn't take it, that he would go after one of the kids. Finally, I couldn't take it any more, so I left.
>
> When I left Daniel, I was about two months pregnant with Tommy. I had been pregnant while I was still with Daniel, and he had beaten me at least twice in that time. He would tie me down on the bed, sit on my stomach, and beat me real bad on the face and head. I was terrified of what that did to the baby I was carrying. After Tommy was

> born and it was obvious that he was different from other children his age, I thought his father's beating me while I was pregnant had damaged Tommy.

(Affidavit of Lois Hancock) (M. 311-12).

Daniel Groover's alcohol abuse and temper were well known to the neighbors. Pearl Williams, who was landlady for the Groover during the time Tommy's mother was pregnant with Tommy, describes Daniel Groover as an alcohol who was mean as a snake. (Affidavit of Pearl Williams) (M. 321-24). She had seen first hand the damage that Daniel Groover wrought when he was drunk:

> Lois and the children were in such need that she finally decided she had to go to court to try to get child support from (Daniel) James Groover. She couldn't handle doing that on her own, so I had to help her fill out papers and go before Judge Dorcas Drake. I went with her to the hearing, and I shall never forget what she looked like that day. She was black and blue over her entire body from a beating James Groover had given her. Lois showed me all the places he had hit her and all the bruises. Her buttocks were dark blue, almost black. James Groover had struck blows with his fists to her head, face, neck, breasts and abdomen. When he had finished that, he'd thrown her down the entire flight of outside stairs that led down from their second-story apartment to the ground below. The neighbors who lived below them saw him do it and told me about it.
>
> The most frightening thing was that <u>Lois was pregnant with Tommy at the time of this beating</u>. I don't know how she survived it, and I was horrified to think about what it would do to the baby.

(M. 322).

The rest of Lois's pregnancy with Tommy was difficult as well. Illnesses during the pregnancy complicated birth, and Tommy suffered the damaging consequences:

> My pregnancy with Tommy was not easy. About seven and a half months into pregnancy, I had low hemoglobin and had to have a pint of blood every week. Then, three or four weeks before Tommy was born, I had a kidney infection and my feet and legs swelled up real bad. I was going to a County Clinic for checkups. The clinic just had nurses and to see a doctor, I had to go to the hospital. The nurses at the clinic told me I should go to the hospital and see a doctor to get the problem cleared up. I didn't go to the hospital, but tried to take care of the problem by myself. Tommy was supposed to be born on March 27, but I didn't go into labor until April 3. I always thought that the terrible swelling kept me from going into labor. Once labor started, it didn't last that long, but it was very difficult. There were at least two nurses and three doctors in the delivery room. There was so much commotion in the room that I couldn't tell what was going on or what the problem was. People were running around trying to get blood for me, but getting the wrong kind and having to go get more. Every time Tommy seemed ready to be born, he would turn a different direction and wouldn't come out. Finally, the doctors had to pull him out with forceps.

(Affidavit of Lois Hancock) (M. 312).

Consequently, Tommy's head was "flat as a fritter" at birth, and stayed that way for months (M. 312). Lois massaged Tommy's head during this period, trying to get it "normal," a process which in itself may have exacerbated the birth-related brain defect. During this period, Tommy could not hold down food and constantly threw up milk. When he got over the milk problem, Lois recognized a character trait that stalked Tommy all of his

life: "He was a lot different from other baby boys I had been around -- much quieter" (M. 313). This uncharacteristic infant quietness was symptomatic of the brain damage which shaped Tommy's life.

Lois was required to exist and manage in a manner known and suffered only by abused, abandoned, and ignored single mothers. She was destitute with a family, and while neighbors tried to help, public assistance was not forthcoming, and she strictly fended for herself (M. 310-24). She had to get a job working at night in a nursing home and to try to raise three children during the day. She lived with her sister and her sister's five children for a short period. They were so destitute, they "were lucky if [they] got a peanut butter sandwich everyday" (Affidavit of Penny Lee Groover) (M. 30). Their father absolutely refused to pay any support, and came around only to sexually abuse Tommy's sisters, Sabrina Groover and Penny Lee Groover, "breathing his horrible beer breath" (M. 292-308). This abuse began when Sabrina was two years old, but no one believed it or acted to stop it (M. 293).

When Tommy was nine months old, the "family" moved in with Roy Brooks. He was the only real father the children knew, but he was never around either. He worked as a truck driver, and was away for extended periods of time. Lois and Roy had two children who had to be given away due to the impossible financial conditions (M. 292-308).

When Tommy was three years old, he ran a high and sustained fever for about a week. After it continued unabated, Lois finally took him to a doctor who treated the fever, and it subsided.

Evidence of Tommy's brain damage surfaced early. All who were around him acknowledge that Tommy was "different" as an infant and toddler (M. 292-324). He had difficulty even conceptualizing children's games and because of his inability to play right, the other children would complain and harass him (M. 323). This childhood hazing foreshadowed the complete rejection and ridicule Tommy was to receive as he later failed miserably in school. Pearl Williams watched Tommy's struggle with secret dread: "I explained to the children that [Tommy] would learn ... eventually, though I feared privately that he never would, knowing, as I did of the injuries his mother had sustained during her pregnancy" (M. 323).

Tommy was in fact programmed <u>not</u> to learn, and school did nothing to break his inherent limitations. As school records indicate, Tommy's achievement in first grade was abysmal, and subsequent grades were worse (M. 366-67). The following is a sampling from the records:

> Three months into first grade, Tommy was described as "not yet doing first grade work. I'm sure that he will have to repeat first grade." The problem was that his "[p]rogress is poor in <u>all</u> areas," as he had trouble following directions and organizing time. Nevertheless, with "D" and "F" grades, he was "socially promoted" to the second grade.

In the second grade, Tommy predictably could not do second grade work. He consistently performed way below his peers, and was retained in the second grade. An evaluation of his social and personal assets graded out at the lowest possible score. He was then pushed through the third grade with "unsatisfactory" and "failing" scores. Fourth and fifth grades were the same, with continued low marks all around, but with complete abdication of responsibility by teachers and counselors. Tommy continued to be socially promoted and could not read or write the simplest sentence. He was "totally unprepared for the fifth grade," with a teacher determining "not [to] force[] Tommy to attempt work which he is not able to do." He was later socially promoted to the seventh grade, socially promoted to the ninth grade, and retained in the ninth grade.

The reasons for his ineptitude became partially apparent to school officials in the seventh grade, but they did nothing but ignore the issue. He was referred to and tested by school psychological services. Background information confirmed that he "has not performed at grade level for many years." Upon psychological testing, it was discovered that Tommy was mentally retarded, and placement in an "educable mentally retarded" program was recommended, but did not occur. "His language development seems to be somewhat impaired by the inability to call to consciousness an interpretation of facts and experiences which he should have gained from surrounding environment." Of course, his "surrounding environment" had unjustifiably promoted him at school, and ignored him at home. In a classic understatement of testing results, the school psychiatrist opined:

> "Tommy's Bender record indicates a perceptual lag."

The difficulties Tommy experienced at school were apparent to his family, though no attempt was made by the family to combat these difficulties and make school the positive experience it should have been. Tommy's sister, Penny Lee, explains it:

> From the time he first started school, he couldn't handle the school work. He was just very, very slow. His problems got worse in the third grade. He had a teacher, Miss Pope, who I had for the third grade too. I was a good student, and Miss Pope expected Tommy to be as good as I was. She would get real mad at Tommy and yell, "Why can't you be like your sister?" That's not what Tommy needed. He needed patience and understanding, and he got real frustrated with Miss Pope. She'd call him a worthless bum, and it just broke his heart. He didn't know what to do or how to learn. I always thought he needed special help, but the schools didn't help him and our father wouldn't give any money to get Tommy the help he needed.

> Tommy went through school to about the ninth or tenth grade without ever learning to read or write. He was put from the seventh grade right into the ninth grade just because of his age, not because he could do the school work. People humiliated him so bad about not being able to read and write that Tommy sometimes skipped school. He was frustrated and embarrassed and very hurt that people said mean things to him. People would say something like, "We could write you a nasty letter and you would not even know what it said."

(M. 304). Tommy's sister Sabrina agrees:

> Tommy had always had problems ever since I can remember. From the first grade, he couldn't do school work. He could not learn to read or write. Sometimes, schools put him in slower groups, but that didn't help him either. He didn't learn, but he kept getting put forward in school. He'd get promoted just because of his age, not because he could do the work. When Tommy was in his early 20's, he couldn't even spell words like "cat," "rat," or "go," and he didn't know his ABC's.

(M. 295). Mom saw it too:

> Tommy always had problems in school. He had always been different from other children and slower about learning things. He had to repeat the second grade, and then in the third grade he suddenly couldn't do anything. He forgot everything he had learned. At least in the second grade, he was trying to learn his ABC's and could write "cat" and "dog", but in the third grade, he couldn't do that anymore. He got very nervous and fidgety about school work. When I sat him down at the table to try to help him with his homework, he would get more and more nervous. It finally got so he didn't bring home any homework. I'd ask him what he'd been doing in school or if he had homework, and he'd say, "I don't know." He couldn't understand anything that was going on at school, and so he didn't know what to do at home.

(M. 315). As Lois recalls, the school problems led to home problems, which led to more school problems, and ultimately to unsuccessful psychiatric treatment:

> About this same time -- when Tommy was about nine years old -- he was having other problems too. He got so frustrated with school that he skipped sometimes. A couple of times I had him put in a juvenile shelter for skipping or staying away from home. Tommy also started wetting the bed when he was about nine years old. He hadn't done that since he was a little baby. Tommy was very uptight about school and his step-father would get on him about it, whipping Tommy. When I asked Tommy why he wet the bed, he said, "Momma, Daddy makes me wet the bed. He yells at me all the time." Poor Tommy would sit up all night trying not to wet the bed, but would finally wet the bed anyway just before it was time to get up. The school said we should go to a child psychiatrist, so for a time Tommy, his step-father and I went to see the psychiatrist once a week. The psychiatrist would talk to Tommy for a while and then to us. None of that seemed to be doing Tommy any good, so I stopped taking him.

> Tommy never did get anywhere with learning. He kept getting passed on to the next grade, but not because he was learning anything. He needed to be in slow classes, but nobody seemed interested in helping him, so he went up in the grades without learning anything. By the time he left school, Tommy still couldn't read or write.

(M. 315-16).

Because Lois Hancock worked constantly in an attempt to manage an almost inherently unmanageable family situation, it was not easy for her to observe and control the ignorant and mean-spirited actions by others to which Tommy was susceptible and subjected. Lois noticed that Tommy started "having other problems too" at age 9, but she did not know what Tommy's sisters, and a couple of friends knew -- at age 9, Tommy was seduced into huffing glue by a 24-year-old neighbor. This spoiled any chance Tommy may have had to simply survive in his already brain-damaged condition.

Sister Penny relates the tragedy that began with Tommy's simple-minded fascination with model toys:

> Even though he couldn't do school work, Tommy was real good at working with his hands. His favorite thing was putting together models of things like cars and airplanes. They were his pride and joy, and he covered his bedroom with them. Tommy put a model together every day. As soon as he finished one, he'd go out and get another one. We never had a problem knowing what to get him for his birthday or for Christmas -- we always got him models. If Sabrina got mad at Tommy, she knew she wasn't supposed to hit him, so she would break one of his models. He was so proud of them, that was the easiest way for her to take her anger out on him.

> When Tommy was about 9 years old, a man named Billy Hersch got Tommy to start huffing toluene, lacquer thinner, and the glue that came with the models. Billy was about 24 years old and a disabled veteran. Billy would say to Tommy, "The hell with those model cars. Let's put the glue in a bag and sniff it." He showed Tommy how to put toluene or glue in a plastic bag like a bread bag and then put his head in the bag and breathe the fumes. When I saw Tommy after he had huffed something, he would drool and couldn't talk. I would ask him where he had gotten the stuff and who was getting him to do this, and he would mumble in a little baby voice, "Bilwy." I could smell the stuff all over his breath. He always smelled like gasoline or kerosene. Another boy, Danny Sheffield, showed Tommy how to do this with gold paint, too. They'd put that in a bread bag and huff it too. This went on just about every day for at least two years, and maybe three years. It just ate Tommy's brain up. He had never had a good mind, but after he started huffing toluene, his mind got worse and worse.

(M. 305-06).

Sister Sabrina knew it too:

> Tommy always was real good with his hands. His favorite thing was putting models together. He figured out how to do that all by himself because he couldn't read the directions that came with the models. When he was 9, 10, and 11 years old, Tommy was putting together 2 or 3 models every day.
>
> About that same time, a guy named Billy Hersch, who was older than Tommy, got Tommy involved in sniffing things like toluene and paint thinner. Billy had Tommy doing that all the time. When I would see Tommy after he'd been huffing toluene, he'd be spaced out, he couldn't walk, and he didn't know where he was. After he'd done it for a while, even when he wasn't high on the toluene, you could tell it had damaged him. He wasn't himself anymore. He had always been slow mentally, but he got even worse.

(M. 296).

The most graphic and saddening description of Tommy's toluene abuse comes from his childhood friend and step- brother, Jimmy Brooks:

> When Tommy was about 8 or 9 years old, he would climb up a tree in the yard with his tube of glue and a sack every day. He would fall out of the tree because he was so buzzed he didn't know what he was doing. When he would land, he was already so stoned he would just get up and walk off like nothing had happened. I thought it was funny. I sniffed some glue and paint, too, but never like Tommy did. He did it all the time. Looking back on it, he might have learned to sniff glue from me, but I was not the one that taught him the other stuff he did after that.
>
> At about age 9 or 10, he really got into paint thinner. I don't know where he picked up that habit, but he had a group of friends and that's all they did for a couple of years. I heard them call it "toolene," but to me it's still paint thinner, or the same stuff that's in it. They would use a soaked rag inside a bag or a can they had cut in two and then put back together, and huff the fumes. Tommy did that every day, at least three or four times a day until he was 13 or 14.
>
> I remember when Tommy was about 11 he put his bed up in the garage. He sniffed so often, the garage smelled like a body shop. Tommy started smoking grass about the same time he went from glue to paint thinner and kept that up from then on. It's a wonder the garage didn't blow up.

(M. 288-89).

These toxic substances unquestionably damaged Tommy's already incomplete brain. Scientific literature has long recognized and warned of the dangerous neurological damaging aspects of organic solvent abuse. See articles at M. 510-521:

Knox, J., and Melson, J., "Permanent Encephalopathy from Toluene Inhalation," New England Journal of Medicine vol. 275 (26), pp. 1494-6 (1966); Grabski, P., "Toluene Sniffing Producing Cerebellar Degeneration," The American Journal of Psychiatry, Vol. 18, pp. 461-2 (1961) ("Toluene can produce irreversible cerebral degeneration . . . ."); Strub, R., Organic Brain Syndrome: An Introduction to Neurobehavioral Disorders, F.A. Davis Co., Philadelphia, 1981 ("[M]any investigators in this field are convinced that irreversible central nervous system damage does occur in young people who clinically misuse these solvents"); Kaplan, H., and Sadock, B., "Drug Dependence," Comprehensive Textbook of Psychiatry/IV, p. 1012 (1985). Experts verify the scientific literature:

> The inhalation of glue and toluene in large doses regularly causes irreversible brain damage, especially when used by younger individuals.

(Affidavit of Samuel I. Greenberg, M.D.) (M. 222).

> The prolonged daily use of toluene can slow thinking and is associated with organic brain damage.
>
> The medical and scientific community recognized the causal relationship between toluene use and brain damage in the 1970's. Research, reports and literature documenting the phenomenon were available through medical and mental health professionals throughout the nation at the time of Mr. Groover's trial in 1982.

(Affidavit of Herbert Schaumburg, M.D.) (M. 230) (See also Affidavit of Benjamin David Greenberg, Ph.D.) (M. 253-54).

Toluene led Tommy naturally to the abuse of illicit drugs. His weakened mental make-up made him malleable to others, like Billy Hersch, who pushed and prodded him into ignorant self-abuse. Tommy literally ended with an addiction to PCP, one of the most physically destructive illicit drugs known. Those around him provide the gruesome evidence, and experts supply the grim diagnosis: Tommy Groover further destroyed parts of his brain through his socially and congenitally-produced proclivity for drug abuse.

Sister Penny details the easy step from toluene to PCP:

> Tommy had been retarded all his life, and after he got started on the toluene, he was on drugs all the time too. The toluene started Tommy's drug problems, and from then on, someone was always giving him some kind of drug, and he stayed high every day. Tommy didn't know what drugs were until he met Billy Hersch. Once when Tommy was about 13, Billy gave him some acid. Tommy came home with his head all shaved. He felt really stupid, and said Billy had given him the acid and then shaved his hair off. Billy or somebody else was always getting drugs and then getting Tommy to come along with them. Billy would say, "This ain't gonna hurt you," and Tommy didn't know any better than to go along with him and do what Billy wanted him to do. Over the years Tommy used every kind of drug there was, including marijuana, acid, cocaine, speed and quaaludes. Tommy also drank a lot of alcohol. Once, Danny Sheffield and Tommy took my car, and when they brought it back there was an empty beer keg in the back.
>
> Tommy's problems with the toluene and the drugs all got started because he was so easily influenced by other people. He was easy to talk into things and couldn't say "no" to people. Billy Hersch and Danny Sheffield were just two of the people who got Tommy to do things that weren't good for him.

(M. 306-07).

Sister Sabrina saw it also:

> Ever since he started huffing toluene, I've hardly seen Tommy straight a day in his life. He was high on something every day. A couple times he tried to get out of that life, but it never worked. When he got married, he thought his life would change for the better and he could get away from the drugs, but his wife was a drug addict and kept him involved in drugs. One time, Tommy decided to go to a drug rehabilitation center in Jacksonville, so my husband and I took him there. Tommy was supposed to stay there for 30 days, but he left after no more than a week or two. He was too messed up to be able to do anything for himself.
>
> All of Tommy's problems, first with the toluene and then with the drugs, happened because he was always getting led into things by other people. Because he was mentally slow, it was easy for other people to get him into things. Just like when he signed his son away for adoption -- he was too trusting and didn't know how to tell when people were doing something that would hurt him. And he didn't have the common sense to know what to do or how to avoid following other people around and doing what they wanted him to do.

(M. 297).

Lois Hancock was especially aware that her son was easily led into self-destructive activities by pitiless peers out for their own self-interested "highs":

> Tommy never seemed to be around people his own age. His buddies were always people older than him. And that caused him problems. Tommy would be at home, doing something on his own and somebody would come along and get him to go somewhere with them. I didn't know it at the time, but what was happening is that people were getting Tommy involved with things he shouldn't do, like drugs. People thought they could use Tommy -- I guess because he was slow and couldn't

> read or write -- and so they kept messing with him. Tommy didn't know what to do. He trusted and loved everybody and didn't see any fault in other people. He worried all the time about not being able to read and write and didn't have a lot of self-confidence. Tommy wanted people to like him, so he'd go along with what they wanted from him. Tommy got pretty messed up on drugs and one time went to a drug rehabilitation center to try to straighten out. He had gotten on some "T", got in pretty bad shape, and decided he didn't want to be like that. After he came home from the drug rehabilitation center, he stayed around the house. But some guys came looking for him to get him into drugs again. They'd use some line on him like their car was broken down and they needed his help, and Tommy would go along with them. This happened over and over again. Tommy wasn't able to say "no" to these people and was too slow and trusting to understand that they weren't doing him any good.

(M. 317-18).

Step-brother Jimmy Brooks was aware of Tommy's drug use as well:

> Tommy started hard stuff when he was about 14: cocaine, PCP, heroin, quaaludes, uppers, downers, whiskey, beer, mushrooms, LSD, Delaudid, hash, whatever he could get his hands on. His mother left my father in 1974, but Tommy stayed with my dad for a while after the separation. Tommy was shooting PCP in his arm every day by the time of the separation, as well as all the other things, including speed, that I've said here.
>
> I know all this because I saw it as it happened.

(M. 289).

Tommy's half-brother, Malcolm Johns, further underscores the nightmare Tommy was going through at the time of the offense:

I am Tommy Groover's half-brother. I was born 12/19/62. My natural mother was Lois Groover Brooks. I was reared by foster-parents from birth and I did not meet Tommy or my natural mother until the summer of 1979. At the time Tommy was already shooting PCP every day. He was also doing LSD, quaaludes, cocaine, heroin, marijuana, hash, liquor and beer.

On the evening before the day the killings occurred, Tommy Groover took a syringe, U-100 I think, and injected what looked like between 35 and 40 cc's of rocket fuel into his left arm. I was on his right side and could see the needle, and the syringe going into his left arm. His veins were out, so he didn't need any tourniquet or pantyhose or anybody's hand to bring up the vein.

Rocket fuel is like a synethic heroin, that I understand is used as horse tranquilizer. It is called T or PCP. He put a quarter in a teaspoon (a quarter is $25), stuck the needle in a cup of water, drew up maybe 30 cc's of water and squirted it in the spoon with the T. My sister says a quarter's worth of T is about the same size as a half teaspoon of sugar. Tommy used a Marlboro cigarette filter to filter out the trash when he was drawing the stuff back out of the spoon. He shot that into his arm. He and I were drinking Canadian Lord Calvert and Wild Turkey 101 out of glasses, mixed with a little Coke and ice. There was just the two of us, and he and I drank the whole liter bottle of Calvert. I left when the Calvert bottle was half gone, and I am sure he finished it by himself after I left, because when Tommy got to drinking like that he couldn't quit.

I was with him from 10:15 a.m. until 2:30 p.m. Later on about 5 p.m. we got together again at the Sugar Shack, where Tim Nugent had brought him. We went out behind the building and smoked four joints among six people. This was about 5:45 p.m. I understand that Tim and Tommy were together the rest of the evening.

> Tommy is the kind of guy who will do whatever anyone else is doing with drugs. He's like that with other things too -- he's always been easy to get to do what other people want him to do. I suppose it's because he's retarded and slow.

(Affidavit of Malcolm Johns) (M. 333-34).

All of these family members would have told the trial judge, the sentencing jury, defense counsel, and the State any and all of this information about Tommy at the time of trial. No one asked. Jimmy Brooks came from Tennessee to Jacksonville to attend the trial, and sat silent because no one asked.

The drugs Tommy became addicted to, especially PCP, further destroyed his brain and produced violent behavior where none had existed before. Scientific literature, and the opinions of experts, reveal the self-damage caused by PCP.

Phencyclidine, commonly known as PCP, produces maladaptive behavioral effects, such as belligerence, impulsivity, unpredictability, impaired judgment and assaultiveness. Chronic abuse of PCP may produce a prolonged organic brain disorder, which may or may not leave permanent residual cognitive impairment. (See M. 523-76).

Experts confirm the literature:

> Scientific literature and research report that PCP abuse is associated with bizarre and unpremeditated violent behavior. PCP-related violent behavior has been observed in a variety of settings from controlled experiments to hospital emergency rooms. Repeated PCP ingestion increases the probability of psychotic reactions in humans and can cause a schizophrenic-like state. PCP causes pronounced alterations in perceptions of reality and disordered

> thought, which result in a significantly lessened ability to conform conduct to the requirements of the law.
>
> In one study, researchers reported that violence associated with PCP ingestion had no consistent relation to a history of aggressive behavior in the absence of PCP or other drug use. Michael Fauman, Ph.D., M.D., and Beverly Fauman, M.D., "Chronic Phencyclindrine (PCP) Abuse: A Psychiatric Perspective," Journal of Psychedelic Drugs, Vol. 12 (3-4), pp. 307-15 (1980).
>
> The associative relationship between PCP and violent behavior is conclusively documented in the literature and has been well known to mental health professionals and research scientists for over a decade.

(Affidavit of Benjamin Greenberg, Ph.D.) (M. 253-54).

It is clear that there was a wealth of non-statutory mitigation which could have been presented on behalf of Mr. Groover at the penalty phase. It is apparent from the record that all participants in the sentencing process - the court, the prosecutor and the defense counsel - acted in accordance with the then-prevailing view that Florida's capital sentencing statute did not permit consideration of non-statutory mitigation. There is no doubt that the "contents of these affidavits [and nonstatutory mitigation] are sufficient to negate the conclusion that the Hitchcock error was harmless. The merits of the claims can only be determined by an evidentiary hearing." Meeks v. Dugger, 576 So. 2d 713, 716 (Fla. 1991).

Further, the trial court order denying Mr. Groover relief overlooked the well-settled requirements of Rule 3.850. Rule 3.850 expressly provides that, "[i]f the motion, files, and

records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing . . . [and] a copy of that portion of the files and records that conclusively shows that the prisoner is entitled to no relief **shall** be attached to the order." (emphasis added).

As noted above, the trial court's order simply asserted that the records shows that the "court considered both statutory and nonstatutory mitigating circumstances in determining the death penalty was appropriate" (App. B). However, the trial court never explained what in the record makes this showing and never addressed what nonstatutory mitigation was considered. In Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990), this Court ruled that, because the trial court "failed to attach to its order the portion or portions of the record conclusively showing that relief is not required," the Court had "no choice but to reverse the order under review and remand for a full hearing conforming to rule 3.850." Similarly, here, an evidentiary hearing is required.

It matters not whether proper mitigation is before the sentencer -- the issue is whether that evidence was meaningfully and properly considered. Hitchcock requires reversal of a death sentence where the sentencer does not provide meaningful consideration and does not give effect to the evidence in mitigation. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). It would be a remarkable exercise in speculation to conclude that the aggravating circumstances which were found in Mr. Groover's case,

beyond a reasonable doubt, outweigh the substantial mitigating circumstances which should have been considered by the court. See Hall v. State, 541 So. 2d 1125 (Fla. 1989). An evidentiary hearing is required. See Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991). This Court must vacate Mr. Groover's unconstitutional sentences of death. Relief is warranted.

ARGUMENT IV

MR. GROOVER'S SENTENCING PHASE WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH INDIVIDUALLY AND CUMULATIVELY DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. FURTHER MR. GROOVER'S WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL.

It is Mr. Groover's contention that each of the errors discussed below individually warrants relief. Further, these claims should be considered in the aggregate, for when the separate infractions are viewed in their totality it is clear that Mr. Groover did not receive the fundamentally fair process to which he was entitled under the Eighth and Fourteenth Amendments. See Ray v. State, 403 So. 2d 956 (Fla. 1981).

A. MR. GROOVER'S RIGHT TO A RELIABLE CAPITAL SENTENCING PROCEEDING WAS VIOLATED WHEN THE STATE URGED THAT HE BE SENTENCED TO DEATH ON THE BASIS OF IMPERMISSIBLE "VICTIM IMPACT" EVIDENCE, IN VIOLATION THE EIGHTH AND FOURTEENTH AMENDMENTS AND FLORIDA CONSTITUTION.

Mr. Groover was sentenced to death on the basis of constitutionally impermissible victim impact evidence and argument. The State began introducing victim impact information as early as its closing statement in the guilt phase. There it set the stage for arguing that Mr. Groover should receive the

death penalty based on the personal characteristics of the victims. While characterizing Mr. Groover as a "shark", a "predator[] who feed[s] on the human misery produced by . . . drugs," the prosecutor characterized one of the victims as "a pathetic young lady, girl, really alone, lost, poor, unknown." (TR. 1510-11). He characterized another of the victims as a "young girl on her birthday. That was her birthday, 17." (TR. 1513)(See also TR. 1520, 1550).

In the penalty phase closing argument, the prosecutor's arguments became stronger. He painted a portrait of Jody Dalton as being a sad human being who had a chance to straighten out her life, until she was murdered (TR. 1636); Richard Padgett as a "poor man" who was trying to pay off his debts (TR. 1640); and, Nancy Sheppard was "a child, just barely one day older than 16 years old, a child" (TR. 1643). The prosecutor urged the jury to sentence Mr. Groover to death in order not to "cheapen the life and lives of decent people," "and you cheapen Nancy Sheppard's life if you can't face up to taking his life for killing her and murdering her." (TR. 1660). "[P]oor little Jody Dalton; and this child, this child, she had a right to live. All three, each and every one." (TR. 1659).

Such arguments are precisely what was forbidden. But beyond that, the sentencing judge was asked to consider, and did consider (R. 282; TR. 1753) the Pre-Sentence Investigation Report prepared on Mr. Groover. In that PSI, the feelings of several people were expressed, including the following:

> Detective Bradley, Investigating Officer, recommends the subject be sentenced to death on all three counts. Detective Bradley states the subject is a liar, murderer who has no regard for human life and is a con artist for trying to blame someone else.
>
> Mrs. Shirley Baisden, Richard Padgett's mother, stated that she never met or knew of Tommy Groover. Mrs. Baisden states that the subject is an animal for what he has done and the cruelty they did to her son is unreal and hard to understand. Mrs. Baisden states she is very, very bitter and hopes justice is done.
>
> Mrs. Sheppard, Nancy Sheppard's mother, states that her daughter was not a bad girl who got along find with everyone. Mrs. Sheppard states that these were brutal killings and her family feels that the death penalty is just for the defendant.
>
> * * *
>
> This writer feels that the subject was involved 100 percent in these murders and knew what was going to happen all along. The victims were brutalized with these homicides being committed in a cold, calculated and premeditated manner, without the pretense of moral or legal justification. The subject began killing on 2/5/82 and continued these murderous acts within the next 48 hours. This writer feels that the subject showed no respect for human life and killed these unfortunate individuals for absolutely no reason.
>
> It is believed that any decision the court may arrive at, as to sentencing, regardless of its severity, would be justified.

(PSI, p. 9-10).

This Court has held similar comments made by prosecutors to be improper in Taylor v. State, 583 So.2d 323 (Fla. 1991), Jackson v. State, 522 So. 2d 802 (Fla. 1988) and Hudson v. State, 538 So. 2d 829 (Fla. 1989). This record is replete with error.

Mr. Groover was sentenced to death on the basis of impermissible "victim impact" and "worth of victim" argument which this Court has condemned as early as 1981 in Welty v. State, 402 So. 2d 1159 (Fla. 1981). Since Welty, this Court has consistently held that victim impact evidence and argument are inadmissible and deny the defendant "as dispassionate a trial as possible." Welty, at 1162. See Jones v. State, 569 So. 2d 1234 (Fla. 1990). Victim impact information clearly lies "outside the scope of the jury's deliberations." Taylor v. State, 583 So. 2d 323 (Fla. 1991)(citing Jackson v. State, 522 So. 2d 802 (Fla.), cert. denied, 488 U.S. 871 (1988)). In Grossman v. State, 525 So. 2d 833 (Fla. 1988), this Court held the introduction of victim sympathy constitutes non-statutory aggravation, impermissible in Florida. The considerations in these cases are the same improper considerations urged on the jury in Mr. Groover's case.

Counsel's ignorance of the law was deficient performance which prejudiced Mr. Groover. He failed to insure that the law of this Court was enforced and that these extraneous matters were not considered by the judge who overrode the jury's life recommendation. Relief is warranted.

B. THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. GROOVER OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE.

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .

> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Groover's capital proceedings. To the contrary, the burden was shifted to Mr. Groover on the question of whether he should live or die. In so instructing a capital sentencing jury, the court injected misleading and irrelevant factors into the sentencing determination, thus violating Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 486 U.S. 356 (1988). Mr. Groover's jury was erroneously instructed, as the record makes abundantly clear (see TR. 1659, 1706, 1708 1712). Mr. Groover had the burden or proving that life was the appropriate sentence. Counsel's failure to object was as a result of ignorance of the law and constituted deficient performance which prejudiced Mr. Groover. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Mr. Groover's sentence of death is neither "reliable" nor "individualized." This error undermined the reliability of the jury's sentencing determination and prevented the jury and the judge from assessing the full panoply of mitigation presented by Mr. Groover. For each of the reasons discussed above, the Court must vacate Mr. Groover's unconstitutional sentence of death.

C. MR. GROOVER'S SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Under Florida law, capital sentencers may reject or give little weight to any particular aggravating circumstance. A jury may return a binding life recommendation because the aggravators are insufficient. Hallman v. State, 560 So. 2d 233 (Fla. 1990). The sentencer's understanding and consideration of aggravating factors may lead to a life sentence.

Mr. Groover was convicted of three counts of first-degree murder (R. 266). The trial court found the "felony murder" aggravating circumstance (R. 292). The court found that the kidnapping served as the underlying felony to satisfy the "felony murder" aggravating circumstance (R. 292). The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for the conviction.

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 112 S. Ct. 1130 (1992). The sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder. Every felony murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment. This is so because an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death

penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing process unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). Because Mr. Groover was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. This aggravating factor was an "illusory circumstance" which "infected" the weighing process; this aggravator did not narrow and channel the sentencer's discretion as it simply repeated elements of the offense. Stringer, 112 S. Ct. at 1139. In fact, this Court has held that the felony murder aggravating factor alone cannot support the death sentence. Rembert v. State, 445 So. 2d 337 (Fla. 1984). Yet the trial court did not apply this limitation in imposing the death sentence.

Recently the Wyoming Supreme Court addressed this issue in Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991). In Engberg, the Wyoming court found the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance to violate the eighth amendment because use of such an aggravating factor does not narrow the class of persons eligible for death.

Wyoming, like Florida, provides that the narrowing occur at the penalty phase. See Stringer v. Black. The use of the "in

the course of a felony" aggravating circumstance is thus unconstitutional. Engberg, 820 P. 2d at 92. Because Florida's capital sentencing statute requires a weighing process, this error cannot be harmless in this case:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 112 S. Ct. at 1137.

This claim is cognizable in these proceedings on the basis of Stringer v. Black. Mr. Groover was denied a reliable and individualized capital sentencing determination, in violation of the sixth, eighth, and fourteenth amendments. Relief is proper at this time.

D. THE JURY WAS MISLED BY INSTRUCTIONS AND ARGUMENTS THAT SYMPATHY TOWARDS MR. GROOVER WAS NOT A PROPER CONSIDERATION. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE.

The jury in Mr. Groover's trial was told by the State that feelings of sympathy could play no part in their deliberations as to Mr. Groover's ultimate fate (TR. 1657). The jury was never informed that a different standard, one allowing for consideration of mercy or sympathy, was applicable at the penalty phase. This was fundamental error. In Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985), the court found that statements of prosecutors, which may mislead the jury into believing personal feelings of mercy must be cast aside, violate fifth amendment principles. Requesting the jury to reject any sympathy toward

the defendant undermined the jury's ability to reliably weigh and evaluate mitigating evidence. The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Sympathy based upon mitigating evidence must be considered.

The State's argument constrained the jurors in their proper evaluation of mitigating factors, preventing them from allowing their natural tendencies of human sympathy to enter into their determination of whether any aspect of Mr. Groover's character justified the imposition of a sentence other than death. This error undermined the reliability of the jury's sentencing determination and prevented the jury from fully assessing all of the mitigation presented by Mr. Groover. Moreover, counsel's failure to object to these instructions was ineffective assistance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). For each of the reasons discussed above, this Court should vacate Mr. Groover's sentence of death.

E. FLORIDA'S STATUTE SETTING FORTH THE "COLD, CALCULATED, AND PREMEDITATED" AND "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE ARE FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THIS AGGRAVATING CIRCUMSTANCES WERE NOT CURED IN MR. GROOVER'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE. AS A RESULT, MR. GROOVER'S SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The United States Supreme Court's opinions in Richmond v. Lewis, 113 S.Ct. 528 (1992) and Espinosa v. Florida, 112 S.Ct.

2926 (1992) establish that this Court erred in its analysis of Mr. Groover's claim raised on direct appeal that the Florida Statute, setting forth the aggravating circumstance of "cold, calculated and premeditated" and "heinous, atrocious or cruel" were vague and overbroad under the Eighth Amendment. (Appellant's Initial Brief on Direct Appeal at 41-44). Richmond and Espinosa requires a resentencing before a jury in Mr. Groover's case.

The issue in Richmond was whether an Arizona aggravating factor, statutorily defined as "especially heinous, atrocious, cruel or depraved," was constitutional as applied. In analyzing the issue, the United States Supreme Court stated:

> The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. See e.g., Maynard v. Cartwright, 486 U.S. 356, 361-364 (1988); Godfrey v. Georgia, 446 U.S. 420, 427-433 (1980). Second, in a "weighing" State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other valid aggravating factors obtain. See e.g., Stringer v. Black, 503 U.S. ___, ___ (1992) (slip op., at 6-9); Clemons v. Mississippi, supra, at 748-752. Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error. See Lewis v. Jeffers, 497 U.S. 764 (1990); Walton v. Arizona, 497 U.S. 639 (1990). Finally, in federal habeas corpus proceedings, the state court's application of the narrowing construction should be reviewed under the "rational factfinder" standard of Jackson v. Virginia, 443 U.S. 307 (1979). See Lewis v. Jeffers, supra, at 781.

113 S.Ct. at 535.

Reasoning that a majority of the Arizona Supreme Court had found that the trial Court had applied the "heinous, atrocious, cruel or depraved" aggravating circumstance contrary to that court's narrowing construction, but had thereafter failed to apply that narrowing construction through an appellate reweighing or to conduct any meaningful harmless error analysis, the United States Supreme Court vacated Mr. Richmond's sentence of death and remanded for a new sentencing.

The same result is required here. The constitutional error in Mr. Groover's case is directly on point with the error discussed in Richmond. In Mr. Groover's case, the Florida Statute defines the aggravating factors at issue as follows: "[t]he capital felony was especially, heinous, atrocious or cruel . . . [t]he capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification." Fla. Stat. section 121.141(5)(h), (i). The statute does not further define these aggravating factors. This statutory language is facially vague. Richmond, 113 S.Ct. at 535 ("there is no serious argument that [the heinousness factor] is not facially vague").[5]

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[5]This Court has held the statutory language on of cold, calculated and premeditated to be unconstitutionally vague and overbroad and thus has found that a narrowing construction was necessary. Porter v. State, 564 So. 2d 1060 (Fla. 1990). However, Mr. Groover's jury was not advised of the narrowing construction.

In Mr. Groover's case, the penalty phase jury was not given "an adequate narrowing construction," but instead was simply instructed on the facially vague statutory language.[6] As previously explained in Walton v. Arizona, 110 S. Ct. 3047, 3057 (1990): "It is not enough to instruct the jury in the bare terms of an aggravating circumstances that is unconstitutionally vague on its face." The facially vague statutory language was applied by the sentencer in Mr. Groover's case. Thus, Richmond controls: "Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand." 113 S.Ct. at 535. Simply finding that "an adequate narrowing construction" exists is not enough, according to Richmond. The narrowing construction must have been applied in a "sentencing calculus."

In Mr. Groover's case, the facially vague and overbroad statute was unconstitutionally applied. The jury did not receive the narrowing constructions, simply receiving the facially vague

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[6]This Court has narrowed the application of subsection (i), holding that "calculated" consists "of a careful plan or prearranged design," Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), that "premeditated" refers to a "heightened" form of premeditation which is greater than the premeditation required to establish first-degree murder, Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). This Court requires trial judges to apply limiting constructions and consistently rejects this aggravator when these limitations are not met. See, e.g., Green v. State, 583 So. 2d 647, 652-53 (Fla. 1991); Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985).

statutory language. Since under Florida law the judge was required to give great weight to the jury's verdict, Mr. Groover's death sentence is tainted by the facially vague and overbroad statute. Espinosa v. Florida, 112 S. Ct. 2926 (1992).

In a pre-trial motion, Mr. Groover objected to Florida's vague and overbroad aggravating circumstances in a Motion to Declare Florida Statute Section 921.141 Unconstitutional (TR. 93). Mr. Groover specifically argued:

> 14. The enumerated Aggravating and Mitigating Circumstances are unconstitutionally vague and over broad, in violation of Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

Despite defense counsel's objections to the vague and overbroad aggravating circumstances the jury was given the following instruction:

> ...And that the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. And that the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(TR. 1707).

While this Court has adopted narrowing constructions of this statutory provision, the United States Supreme Court held in Richmond that, not only must a state adopt "an adequate narrowing construction," but that construction must also be applied either by the sentencer or by the appellate court in a reweighing in order to cure the facial invalidity. Richmond, 113 S.Ct. at 535

("Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand.").

In Mr. Groover's case, the narrowing construction was not applied by one of the constituent sentencers. His penalty phase jury was not given "an adequate narrowing construction," but instead was simply instructed on the facially vague statutory language. As the United States Supreme Court recognized in Espinosa, in Florida a sentencing judge in a capital case is required to give the jury's verdict "great weight." As a result, it must be presumed that a sentencing judge in Florida followed the law and gave "great weight" to the jury's recommendation. 112 S. Ct. at 2928. Certainly nothing in Mr. Groover's case warrants setting aside that presumption. Florida law requires that where evidence exists to support the jury's recommendation, it must be followed. Scott v. State, 603 So. 2d 1275 (Fla. 1992). Here the judge considered, relied on, and gave great weight to the tainted jury recommendation. A "new sentencing calculus" free from the taint, as required by Richmond, had not been conducted. The judge was not free to ignore the tainted death recommendation. Scott.

Richmond demonstrates that Mr. Groover was denied his Eighth Amendment rights. His jury was permitted to consider "invalid" aggravation because the aggravating factors specified by Fla.

Stat. § 921.141 (5) (h) (i) were unconstitutionally vague. The jury was not given the proper narrowing construction so the facial unconstitutionality of the statute was not cured. Relief is required because the jury is a sentencer:

> Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

Espinosa, 112 S. Ct. at 2928.

Therefore, even if "the trial court did not directly weigh any invalid aggravating circumstances," it must be "presume[d] that the jury did so." Id. In imposing the death sentence, the trial court presumably considered the jury recommendation, also presumably giving it the "great weight" required by Florida law. Id. Thus, "the trial court indirectly weighed the invalid aggravating factor[s] that we must presume the jury found. This kind of indirect weighing of . . . invalid aggravating factor[s] creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, . . . and the result, therefore, was error." Id.

Considering invalid aggravating factors adds thumbs to "death's side of the scale," Stringer, 112 S. Ct. at 1137, "creat[ing] the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Id. at 1139. The error resulting from the unconstitutional instructions

regarding the "cold, calculated and premeditated" and heinous, atrocious or cruel circumstances provided to Mr. Groover's jury were not harmless beyond a reasonable doubt. "[W]hen the weighing process has been infected with a vague factor the death sentence must be invalidated." Stringer, 112 S. Ct. at 1139. In Florida, the sentencer weighs aggravation against mitigation in determining the appropriate sentence. Stringer. Thus, assessing whether an error occurring during the sentencing process was harmless or not requires assessing the effect of the error on the weighing process.

In Mr. Groover's case, the jury must be presumed to have considered invalid statutory provisions and to have weighed these factors against the mitigation. Espinosa. Unless the State can establish beyond a reasonable doubt that the consideration of the invalid statutory provisions had no effect upon the weighing process, the errors cannot be considered harmless.

The substantial mitigation in the record establishes that the error was not harmless beyond a reasonable doubt. The trial record reveals substantial and compelling mitigation. The trial record is saturated with evidence of the use of drugs and alcohol. The State's own witnesses attested to the heavy use of drugs and alcohol on the day and night of the murders. The County Medical Examiner, Dr. Peter Lipkovic, testified that he arranged for tests of Richard Padgett's blood. The tests showed .18 percent blood alcohol, and the presence of PCP (TR. 680).

Dr. Lipkovic testified that the use of alcohol might exaggerate the effects of PCP (TR. 682-83).

Dr. Lipkovic also testified that Nancy Sheppard's blood showed the presence of trace amounts of morphine (TR. 685). Dr. Bonifacio Floro, an Assistant Medical Examiner, performed the autopsy of the woman identified as Jody Dalton. Blood toxicology tests found the presence of alcohol and cocaine (TR. 697).

On cross examination, William Long, the man who actually shot and killed Nancy Sheppard, testified that Tommy Groover and he consumed quaaludes at about 8 p.m. (TR. 858), drank several beers, and smoked a "dime bag" containing a half ounce of marijuana (TR. 856-860). Another State witness, Morris Johnson, testified that he, Richard Padgett, and Tommy Groover shared a gram of "T" (PCP) and got "really fried" (TR. 934).

Tommy Groover took the stand and confirmed that he had injected PCP along with Richard Padgett and Morris Johnson. He was so "messed up" by the drug that he started sanding a hole in his sister's car (TR. 1248). At his pretrial deposition as a State witness against Tinker Parker, Tommy Groover testified that he injected some "T" (PCP) before 10 o'clock on the morning of the homicides. He also took LSD and quaaludes, and drank three or four six packs of beer (R. 495). He explained he did not recall what had been said that day. Id.

Describing the fight with Richard Padgett, Tommy Groover said he was "wasted"; he had taken more drugs than Tinker Parker who was "pretty high" (R. 813). He again stated that he had also

taken "acid" (LSD), "T" (PCP), and quaaludes (R. 814). When pressed for details, Tommy Groover explained he simply could not remember because he was "wasted" (R. 537; 563; 578). Tommy Groover explained that he had taken more drugs than anybody else (R. 578). All told, Tommy Groover, as a State witness testified he consumed:

(i) 2 quarter sacks of pure uncut PCP -- a third of a gram (R. 655). This affected him mentally so that he "did not know what he was doing" (R. 656).

(ii) a case of beer (R. 657).

(iii) some marijuana, which "kicked him right back to the PCP "high" (R. 670).

(iv) at least 300 mg. of quaaludes (R. 661).

Further, testimony showed that Mr. Groover had never previously been know to be violent. It was shown that on November 8, 1978, Mr. Groover had risked his own life to rescue his sister and her children from their burning home (TR. 1731-32).

The Florida Supreme Court has recognized that the factors urged by Mr. Groover are mitigating and would preclude a jury override if a life recommendation were returned. See, e.g., Perry v. State, 522 So. 2d 817 (Fla. 1988); Foster v. State, 518 So. 2d 901 (Fla. 1987). Instructional error cannot be harmless where there was evidence in mitigation upon which a properly instructed jury could have premised a life recommendation. The jury must then be allowed to balance the statutorily defined

aggravating circumstances and the evidence in mitigation and make a sentencing recommendation.

The opinions in Espinosa and Richmond demonstrate the error in the Florida Supreme Court's analysis of Mr. Groover's challenge to the facial infirmity of the statutory language defining two aggravating circumstances applied to him. Espinosa and Richmond require that Mr. Groover receive a new sentencing proceeding in front of a jury that comports with the Eighth Amendment.

To the extent that Mr. Groover's trial counsel failed to preserve this issue, counsel was ineffective. In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Counsel's ignorance was deficient performance that prejudiced Mr. Groover. As a result, a resentencing is required.

F. THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. GROOVER'S DEATH SENTENCE WAS THUS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE.

The jury in Mr. Groover's sentencing trial was erroneously instructed on the vote necessary to recommend a sentence of death or life. As decisions of this Court have made clear, the law of Florida is not that a majority vote is necessary for the recommendation of a life sentence; rather, a six-six vote is sufficient for the recommendation of life. Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 471 U.S. 1143 (1985); Harich v. State, 437 So. 2d 1082 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). However, Mr. Groover's jury was erroneously informed that, even to recommend a life sentence, its verdict had to be by a majority vote. These erroneous instructions are like the misleading information condemned by Caldwell v. Mississippi, 472 U.S. 320 (1985), and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert, denied, 109 S. Ct. 1353 (1989), because

they create "a misleading picture of the jury's role." Caldwell, 472 U.S. at 342 (O'Connor, J., concurring). As in Caldwell, the instructions here fundamentally undermined the reliability of the sentencing determination, for they created the risk that the death sentence was imposed in spite of factors calling for a less severe punishment, in violation of the most fundamental requirements of the Eighth and Fourteenth Amendments.

There can be no question that the jury charged with deciding whether Mr. Groover should live or die was erroneously instructed. The trial court erroneously instructed the jury that a majority vote was necessary for recommending either life imprisonment or death (TR. 1709).

The incorrect statements that the jury had to reach a majority verdict "interject[ed] irrelevant considerations into the fact finding process, diverting the jury's attention from the central issue" of the whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). Counsel failed to know the law and object. This was ineffective assistance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). This error by itself undermined the reliability of the jury's sentencing determination; however, it must also be analyzed in conjunction with all the other incorrect jury instructions and the total effect on Mr. Groover's Sixth, Eighth and Fourteenth Amendment rights. For each of the reasons discussed above, this Court should vacate Mr. Groover's unconstitutional sentence of death.

G. CONCLUSION.

Each of the errors discussed above individually warrants relief. Moreover, the cumulative effect of the combined errors also warrants relief. In Jones v. State, 569 So. 2d 1234 (Fla. 1990), this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether:

> even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.
>
> Seaboard Air Line R.R. Co. v. Ford, 92 So. 2d 160, 165 (Fla. 1956) (on rehearing); see also,e.g., Alvord v. Dugger, 541 So. 2d 598, 601 (Fla. 1989) (harmless error analysis reviewing the errors "both individually and collectively"), cert. denied, ____ U.S. ____, 110 S. Ct. 1834, 108 L.Ed.2d 963 (1990); Jackson v. State, 498 So. 2d 906, 910 (Fla. 1986) ("the combined prejudicial effect of these errors effectively denied appellant his constitutionally guaranteed right to a fair trial").

Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991). Recently in Amos v. State, 18 Fla. L. Weekly S163 (Fla. Mar. 18, 1993), this Court ordered a new trial on the basis of cumulative error in the guilt phase of a capital trial.

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe

punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U.S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effect of errors must be carefully scrutinized in capital cases.

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In Mr. Groover's case, relief is proper.

CONCLUSION

For all the reasons discussed above, Mr. Groover respectfully urges the Court to reverse the lower court's order, remand for full and fair proceedings and for an evidentiary hearing, vacate Mr. Groover's unconstitutional sentence of death, and grant all such other relief as the Court deems just.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 30, 1993.

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November 6, 1991

Beth Wells
Office of the Capital Collateral
Representative
1533 South Monroe St.
Tallahassee, FL

Re: State of Florida vs. Tommy Sands Groover

Dear Ms. Wells:

Please find enclosed a proposed order I have sent to Judge Olliff.

Sincerely,

Laura Starrett

Laura Starrett
Assistant State Attorney

jtp

STATE ATTORNEY NO.: 82-11280

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

CASE NO.: 82-1657-CF

DIVISION: CR-F

STATE OF FLORIDA

vs.

TOMMY SANDS GROOVER

PROPOSED ORDER DENYING
MOTION FOR POST CONVICTION RELIEF

This cause having come before the Court on the defendant's Motion for Post Conviction Relief, and the Court having considered the record, pleadings and arguments of counsel and finds that:

1. The defendant's allegations 2 - 9 are procedurally barred in that they were raised or could have been raised on direct appeal.

2. The defendant's allegation 1 alleges a violation of Hitchcock v. Dugger. However the instruction used in Hitchcock limiting consideration of any nonstatutory mitigating circumstances was not used in this case. This Court had the benefit of the ruling in Lockett v. Ohio at the time of sentencing. The record shows that the jury considered nonstatutory mitigating circumstances and as sentence this Court considered both statutory and nonstatutory mitigating circumstances in determining the death penalty was appropriate.

WHEREFORE, it is ORDERED that the Motion for Post Conviction Relief is denied.

DONE AND ORDERED at Jacksonville, Duval County, Florida, this _____ day of November, 1991.

R. HUDSON OLLIFF
CIRCUIT JUDGE

/fcr

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 82-1657CF

DIVISION CR-F

STATE OF FLORIDA

v.

TOMMY SANDS GROOVER

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2. The defendant's allegation 1 alleges a violation of Hitchcock v. Dugger. However, the instruction used in Hitchcock limiting consideration of any nonstatutory mitigating circumstances was not used in this case. The court had the benefit of the ruling in Lockett v. Ohio at the time of sentencing. The record shows that the jury considered nonstatutory mitigating circumstances and at sentence this court considered both statutory and nonstatutory mitigating circumstances in determining the death penalty was appropriate.

Wherefore, it is ORDERED that the Motion for Post Conviction Relief is denied.

DONE AND ORDERED at Jacksonville, Florida, on November 15, 1991.

R. Hudson Olliff

R. HUDSON OLLIFF, CIRCUIT JUDGE

Copies:

Laura Starrett, Asst. State Attorney.

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