IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,199

TOMMY SANDS GROOVER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY 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.

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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.

The State asserts that because there is no evidence of "ex parte communication or a perceived misconduct" Mr. Groover is not entitled to relief under Rose v. State, 601 So. 2d 1181 (Fla. 1992), and Huff v. State, 622 So. 2d 982 (Fla. 1993) (Answer at 7). However, the State misses the point in Rose and Huff on why there was a violation of the defendants' right to due process. The due process issue was not contingent on ex parte communication on the merits. Instead, this Court maintained:

> 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 v. State, 18 Fla. L. Weekly S396 (Fla. July 1, 1993).

Similarly, this Court explained in Rose that the ex parte communication created a situation where the defendant was not given "notice of receipt of the order, a chance to review the order, or an opportunity to object to its contents." Rose v. State, 601 So. 2d at 1182 (Fla. 1992).

Here, on November 12, 1991, Mr. Groover's 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. On November 15, 1991, the trial court signed the State's order summarily denying the motion for post-conviction relief. It was signed before Mr. Groover could file an objection to the State's proposed order.

Next, the State suggests that there was no dispute concerning the record as it related to the Hitchcock claim (Answer at 9). However, Mr. Groover has argued that there is affirmative indication in the record that the trial court did not consider nonstatutory mitigation. See Argument III. Although a hearing was held and the trial judge said that he would rule on the motion, the trial judge did not ask the State to prepare an order or recite his findings. Therefore, when the State sent the proposed order and Mr. Groover wasn't given time to object to the order, the State was in effect given an additional opportunity to argue its position without Mr. Groover being given the same opportunity. This is exactly the type of unfair advantage that this court attempted to remedy in Rose and Huff.

Further, the State suggests that Mr. Groover's motion for rehearing would have cured any due process error (Answer at 7). This Court was confronted with a similar situation in Rose and Huff where in both cases motions for rehearing were filed following the summary denial of Rule 3.850 motions. In Huff this Court held that due process demands that "Huff should have been

afforded an opportunity to raise objections and make alternative suggestions to the order before the judge signed it." Huff v. State, 18 Fla. L. Weekly S396 (Fla. July 1, 1993). This Court went on to say"'[T]he essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered.' Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990)." Id. 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 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.

Here, the State concedes that Judge Olliff had made the comments cited in Mr. Groover's brief which were the basis of the motoin to disqualify (Answer at 3). However, the State argues that Mr. Groover's motion was "facially insufficient to compel disqualification" (Answer at 11). The State cites Tafero v. State, 403 So. 2d 355, 361 (Fla. 1981), for the proposition that Mr. Groover did not have "a well grounded fear of not receiving a fair trial at the hands of the presiding Judge." Id. The State is stretching bounds of disbelief on this point. 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 v. State, 441 So. 2d 1083, 1086 (Fla. 1983)(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" (M2. 42) is a matter where "a litigant may reasonably question a judge's impartiality." 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.

In Livingston v. State and Suarez v. State, 527 So. 2d 191 (Fla. 1988), 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. 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.

In its Answer Brief, the State has made several inaccurate assertions. Initially, the State maintains that the "summary disposition of this claim was clearly vested with both factual and legal support" (Answer at 14). However, the trial court's order denying Mr. Groover's Hitchcock claim was void of "factual and legal support":

> 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 show 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."

(Initial Brief at App. B). The trial court never explained what in the record makes this showing that the Court considered "nonstatutory mitigating circumstances."

The trial court order 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). 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.

Not only is the trial court's order factually insufficient, but it is also legally insufficient as well. Despite the State's assertion to the contrary that the trial court's order is vested with "legal support," the trial court's order only cites Lockett v. Ohio. The trial court maintains that the court "had the benefit of the ruling in Lockett v. Ohio at the time of sentencing." However, there are several cases where this Court has granted Hitchcock relief despite the fact Lockett v. Ohio, 438 U.S. 586 (1978), had been decided before the defendant had

been sentenced. See Way v. Dugger, 568 So. 2d 1263 (1990); Thomas v. State, 546 So. 2d 716 (1989); O'Callaghan v. State, 542 So. 2d 1324 (1989); Waterhouse v. State, 522 So. 2d 341 (1988); Combs v. State, 525 So. 2d 853 (1988); Copeland v. Dugger, 565 So. 2d 1348 (1990); Mikenas v. Dugger, 519 So. 2d 601 (1988).

In Woods v. Dugger, 711 F. Supp. 586 (M.D. Fla. 1989),[1] the District Court found Hitchcock error even though Mr. Woods' trial occurred in 1983, long after Lockett. The Court in Woods found that though the jury was not prevented from considering the nonstatutory mitigation, "the sentencing judgment indicate[d] that the state trial judge [] committed the same error as did the state trial judge in Hitchcock." Woods v. Dugger, 711 F. Supp at 602. This same Hitchcock error, failure by the judge to consider the nonstatutory mitigation, was present in Mr. Groover's trial. The State's conclusion that there can be no Hitchcock violation when the judge gives the post-Hitchcock instruction is in error. When it is apparent from the record that the sentencing judge did not consider nonstatutory mitigating evidence, a new sentencing proceeding is mandated. Foster v. State, 518 So. 2d 901, 902 (Fla. 1987), citing Hitchcock; Copeland v. Dugger, 565 So. 2d 1348, 1349 (Fla. 1990)(trial court's written order expressly confined its consideration to statutory mitigation).

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[1]Woods was reversed on appeal on other grounds. See Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991). In fact the State had conceded Hitchcock error and conducted a resentencing hearing before the appeal to the Eleventh Circuit occurred.

Next the State relies on certain language in the sentencing order, maintaining that such language is proof positive that the trial court considered nonstatutory mitigation:

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

(Answer at 15). However, this language does not state any reference that the trial court considered nonstatutory mitigating factors. In fact, the trial court's order listed each of the statutory mitigating factors, but made no recognition of the abundance of nonstatutory mitigation on the record (R. 282-89).

Further, in the court's oral pronouncement at sentencing, the court made no recognition of nonstatutory mitigation (R. 1747- 54). In fact, in the oral pronouncements at sentencing the court maintained that it had "summarized all of the mitigating . . . circumstances" that apply in this case:

> Before imposing sentence I have studied the Court file, I have read the motions, I have read the applicable cases, I have considered the PSI, I have considered all factors in this case. <u>And I have summarized in this 28 pages [written findings] all of the aggravating and mitigating circumstances, whether they do or do not apply to this case</u>.

(R. 1752-53) (emphasis added). Here, the court maintains that all the factors that could be considered in Mr. Groover's case would be found within the written findings. Yet, the written

findings of the court is void of any reference to nonstatutory mitigating factors (R. 273-300).

Finally the State argues that there is a "conspicuous absence of Card, Harich, Adams and Johnson" from the appellant's brief and that Mr. Groover "failed to cite or distinguish" his case from Daugherty v. State, 533 So. 2d 287 (Fla. 1988). However, the State failed to notice the distinction between Daugherty and Mr. Groover's case. First, in Daugherty and the other cases cited above, there is no jury override of a life recommendation as there is in Mr. Groover's case. Secondly, there is no affirmative Statement by this Court that there was sufficient mitigation presented at trial to overcome a claim of ineffective assistance of counsel. 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). The mitigation that this Court refers to in Claim IV of Mr. Groover's original 3.850 motion is substantial and compelling (M. 32-56, 66-68).

In light of this finding by the Court, it is highly improbable that the trial court considered nonstatutory

mitigation. Regarding the conviction on which the jury recommended life, 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. See Tedder v. State, 322 So. 2d 908 (1975). 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. See Stevens v. State, 522 So. 2d 1082 (1989)

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 known 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.

Finally, the most distinguishable fact between Daugherty and Mr. Groover's case is that in Daugherty there is no affirmative indication in the record that the trial court did not consider nonstatutory mitigation as there is in Mr. groover's case. As noted above, the trial court in its oral pronouncement of sentence maintained that all the factors that could be considered and would be considered in Mr. Groover's case would be found

within the written findings (R. 1752-53). Yet, the written findings of the court is void of any reference to nonstatutory mitigating factors.

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). This case is identical to Woods, and as the State conceded there, a new sentencing is required.

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.

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.

In its Answer Brief, the State argues that this claim is procedural barred (Answer at 17, 18). However, Mr. Groover raised this claim 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).

On direct appeal to this Court, Mr. Groover made the following argument:

> As previously noted, the jury was instructed that aggravating circumstances could be found if the crime was "especially wicked, evil, atrocious or cruel" or if the crime was committed "in a cold, calculated and premeditated manner without any pretense of moral or legal justification." Appellant contends that these instructions failed to adequately channel the jury's discretion by "'clear and objective standards' that provide 'specific and detailed guidance'", Godfrey v. Georgia, 446 U.S. 420, 428 (1980), thereby rendering his penalty phase constitutionally deficient. Cf. Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).
>
> In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), this Court defined the terms heinous, atrocious or cruel as follows:
>
> > It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of

> others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> In Cooper v. State, 336 So.2d 1133 (Fla. 1976), the court recognized the necessity for a proper instruction defining the terms "especially heinous, atrocious or cruel." Likewise, this Court has recognized that the aggravating circumstance of cold, calculated and premeditated does not automatically apply upon the finding of a premeditated murder. See, Jent v. State, 408 So.2d 1024 (Fla. 1981); Combs v. State, 403 So.2d 418 (Fla. 1981). However, the instructions given here totally failed to limit the jury's discretion in finding these aggravating circumstances. Because the jury was given inadequate guidance in its determination of the penalty issue, the death recommendation is unconstitutionally tainted and a new sentencing trial is required.

(Appellant's Initial Brief on Direct Appeal at 43-44). It is clear that this issue was objected to at trial, and raised and considered by this Court on direct appeal. It is thus not procedurally barred.

As noted in Mr. Groover's Initial Brief, 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 v. State, 112 S. Ct. 2926 (1992), 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.

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.

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 February 28, 1994.

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