IN THE SUPREME COURT OF FLORIDA

NO. 84807

TOMMY SANDS GROOVER,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Department of Corrections, State of Florida,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION OF CLAIMS

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Groover was deprived of the effective assistance of counsel on direct appeal, that the proceedings resulting in his convictions and death sentences violated fundamental constitutional imperatives, and that his death sentences are neither fair, reliable, nor individualized.

PROCEDURAL HISTORY

Mr. Groover was indicted on two counts of first degree murder on February 25, 1982 (R. 2). Mr. Groover entered a plea of guilty to one count of murder, pursuant to a negotiated agreement, made several official statements at the prosecution's request, and was deposed by the co-defendants' attorneys, where he again made statements. Thereafter, Mr. Groover's attorney withdrew the guilty plea. Subsequently, Mr. Groover was reindicted, this time on three counts of murder (R. 33). The new indictment was based on the statements elicited from Mr. Groover after his guilty plea.

On January 11, 1983, Mr. 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 Mr. Groover raised several claims attacking his convictions and death sentences. This Court affirmed the convictions and sentences. Groover v. State, 458 So. 2d 226 (Fla. 1984). Certiorari review was denied. Groover v. Florida, 471 U.S. 1009 (1985).

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, which 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, raising the issue presented in Hitchcock v. Dugger, 481 U.S. 393 (1987), among other issues. On November 15, 1991, the trial court summarily denied the second motion for postconviction relief. Mr. Groover appealed. This Court affirmed the denial of postconviction relief. Groover v. State, 640 So. 2d 1077 (Fla.

1994). Mr. Groover's motion for rehearing was denied August 15, 1994. On October 17, 1994, a habeas corpus petition was filed in the Federal District Court for the Middle District of Florida. That petition is pending.

Citations in this petition 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 "TR. ___." 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. ___." The trial of Robert Parker (Florida Supreme Case Number 63,700) transcripts and records shall be referred to as "PT. ___." All other references shall be self-explanatory or otherwise explained herein.

JURISDICTION TO ENTERTAIN PETITION AND TO GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla.

1977); Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985), and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Groover's convictions and sentences of death, and of this Court's appellate review. Mr. Groover's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief is more than proper. This Court therefore has jurisdiction to entertain this petition and to grant habeas corpus relief.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Groover asserts that his capital conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United

States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

MR. GROOVER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS REQUIRED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Mr. Groover's direct appeal was marked by a total lack of advocacy on the part of direct appeal counsel. The lack of appellate advocacy on Mr. Groover's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Appellate counsel's written and oral presentations on direct appeal, along with the meritorious issues which were not presented, demonstrate that his representation of Mr. Groover involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986).

The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Groover. "[E]xtant legal principles...provided a clear basis for ... compelling appellate arguments[s]." Fitzpatrick, 490 So. 2d at 940. The issues were preserved at trial and available for presentation on appeal. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and

correctness of the outcome." Wilson, 474 So. 2d at 1164. When "[t]he propriety of the death penalty is in every case an issue requiring the closest scrutiny," Wilson, 474 So. 2d at 1164, appellate counsel's failure to raise any issue regarding the manner in which the penalty phase was conducted demonstrates appellate counsel's "failure to grasp the vital importance of his role as a champion of his client's cause." Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165. (emphasis in original). In Wilson, this Court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Wilson, 474 So. 2d at 1165. In Mr. Groover's case appellate counsel failed to act as a "zealous advocate," and Mr. Groover was therefore deprived of his right to the effective assistance of counsel by the failure of direct appeal counsel to raise the following issues to the Florida Supreme Court. Mr. Groover is entitled to a new direct appeal.

A. TOMMY GROOVER'S FIRST LAWYER BREACHED HIS PROFESSIONAL DUTY OF LOYALTY TO HIS CLIENT BY WITHDRAWING IN ORDER TO SERVE AS A WITNESS AGAINST HIS CLIENT, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Defense counsel Nichols breached his professional duty of loyalty to Mr. Groover when he withdrew from Mr. Groover's case in order to serve as a witness for the State against Mr. Groover. The Sixth Amendment right to counsel implicitly includes the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970); Chatom v. White, 858 F.2d 1479, 1484 (11th Cir. 1988), cert. denied, 489 U.S. 1054 (1989); see Powell v. Alabama, 287 U.S. 45, 53 (1952). Mr. Groover was entitled to have the "guiding hand of counsel at every step in the proceedings against him." Powell, 287 U.S. at 69. With the ever-present threat of a death sentence, the assistance of his attorney was clearly a "necessit[y], not [a] luxur[y]." United States v. Cronic, 466 U.S. 648, 653 (1984) (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

The first duty an attorney owes to a client is that of undivided loyalty. Florida Code of Professional Responsibility EC 5-1. A lawyer is also professionally obligated to preserve the confidences and secrets of his or her client. DR 4-101. "A lawyer owes the obligation to advise the client of the attorney client privilege and timely to assert the privilege unless it is waived by the client." EC 4-4. Nor does the duty to preserve the client's confidences terminate with employment. EC 4-6.

Despite his clearly established professional obligation to place his loyalties first and foremost with his client, the

attorney initially appointed to represent Tommy Groover sought to withdraw as Mr. Groover's lawyer in order to permit himself to be called as a witness against his client. There is no more glaring possible breach of the duties of loyalty and confidentiality. The State was not entitled to Mr. Nichols' testimony, which was privileged. Nor was the State's desire for this privileged testimony a proper basis for stripping Tommy Groover of his attorney altogether. Finally, Mr. Nichols' testimony against Tommy Groover's interests at a suppression hearing should have been excluded as an infringement of Tommy Groover's right to counsel.

After negotiations between his lawyer, Richard D. Nichols, and Chief Assistant State Attorney Ralph Greene, Tommy Groover "agreed" to plead guilty to one count of first degree murder, on the conditions that the State would make a binding recommendation that he be sentenced to life imprisonment rather than death, and that the State would dismiss a second first degree murder charge and an aggravated assault charge. Tommy Groover also "agreed" to cooperate with the State in its other prosecutions related to the Padgett, Sheppard, and Dalton homicides. Mr. Nichols erroneously advised his client that "if he went ahead and actually gave his statements at that time it was my opinion that the statement would be admissible against him" (TR. 160).

There is considerable dispute over the circumstances of Tommy Groover's meeting with Ralph Greene on May 17, 1982, and over what precisely was said during Mr. Groover's conversations

with Mr. Greene and with his attorney before he agreed to plead guilty and to cooperate. Following these discussions, however, Tommy Groover "agreed" -- as an express condition of the plea agreement--to give an inculpatory statement. Based upon his attorney's advice that any statement he made could be used against him, Tommy Groover "agreed" to this condition. Tommy Groover was completely unaware that Florida law prohibited the use of such statements, and that an express waiver was required. Fla. Stat. sec. 90.410.

Tommy Groover entered a formal plea of guilty and signed a written plea agreement on May 18, 1982. The plea agreement incorporated the understanding that if he did not cooperate with the State, "that the sworn statement which I have given may be used against me" (TR. 62; R. 23). Subsequently, on August 12, 1982, Mr. Nichols informed the trial court that Mr. Groover would no longer cooperate with the State (TR. 88). Mr. Nichols also advised the Court that the prosecutor, Ralph Greene, had told him that "he may attempt to call me as a witness, and <u>if the rule and ethics allow</u>, I assume I will have to be a witness. And I don't think there is any way I could continue to represent Mr. Groover" (TR. 87).

Mr. Nichols never discussed the attorney client privilege with his client, nor did he undertake the cursory inspection of the Florida Code of Professional Responsibility which would have revealed that the "rules and ethics" did not allow him to forsake his client to serve as a witness for the State. At this point,

no one had alleged that Mr. Nichols had committed any impropriety in advising Mr. Groover about the guilty plea, and he therefore had no basis for serving as a witness or withdrawing as counsel.

Subsequently, a new lawyer appointed to represent Mr. Groover filed motions to withdraw the guilty plea and to suppress the statements Mr. Groover had given as part of the plea negotiations. The State did, as promised, call Mr. Nichols to testify against his former client. Ironically, however, the prosecutor who negotiated the plea agreement--Ralph Greene--did not withdraw. He testified on behalf of the State, and then resumed his place at counsel table. Mr. Greene subsequently exploited his position as counsel to "testify" without taking an oath during his trial cross examination of Mr. Groover.

Tommy Groover's discussions with his lawyer about plea negotiations were privileged. His lawyer had an absolute professional obligation to advise Tommy Groover of this fact, and to assert the privilege when the State indicated that it would seek his testimony. In fact, he did neither. He abandoned the interests of his client, without investigating the rudimentary ethical principles which governed his conduct.

Mr. Groover was incompetent to waive any attorney/client privilege. The effect of the acts of the prosecutor and Mr. Nichols was to deprive Mr. Groover of the loyal advocate to whom he was entitled. Mr. Nichols' conduct contrary to the interests of his client deprived Mr. Groover of his right to the assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments.

The practice followed in this case must be condemned, because it would permit the State, at its option, to disqualify defense attorneys. See United States v. Rogers, 602 F. Supp. 1332, 1350 (D. Colo. 1985) (calling this "the ultimate tactical advantage"). This type of State interference with the right to counsel violates the Sixth Amendment even without any showing of prejudice. United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 2048 (1984); Geders v. United States, 425 U.S. 80, 91 (1976); Powell v. Alabama, 287 U.S. 45, 71 (1932).

"[I]t is beyond dispute that the sixth amendment guarantee of effective assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence . . . and the right to counsel's undivided loyalty." Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). "The assistance of counsel means assistance which entitles an accused to the undivided loyalty of his counsel and which prohibits the attorney from ... undertaking the discharge of inconsistent obligations." People v. Washington, 461 N.E.2d 393, 396 (Ill.) cert. denied, 469 U.S. 1022 (1984). Because the right to counsel's undivided loyalty "is among those constitutional rights so basic to a fair trial . . . [its] infraction can never be treated as harmless error . . . . [W]hen a defendant is deprived of the presence and assistance of his attorney . . . in, at least, the prosecution of a capital offense, reversal is automatic." Holloway v. Arkansas, 435 U.S. 475, 489 (1978)(citations omitted). Defense counsel is guilty of an actual conflict of interest when he engages in

activity that is "adverse to those of the defendant, . . ." Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979).

Even though the general rule is that a criminal defendant who claims ineffective assistance of counsel must show both a lack of professional competence and prejudice, a defendant predicating an ineffectiveness claim on a conflict of interest faces no such requirement. Strickland v. Washington, 466 U.S. 668, 693 (1984); Kimmelman v. Morrison, 477 U.S. 365, 381 n.6 (1986); Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980). He need not show that the lack of effective representation "probably changed the outcome of his trial." Walberg v. Israel, 766 F.2d 1071, 1075 (7th Cir.), cert. denied, 474 U.S. 1013 (1985). Rather, "it is well established that when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances the error cannot be considered harmless." Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1982), cert. denied, 456 U.S. 1011 (1982).

Although conflicts of interest arise in a variety of contexts, courts have distinguished between those that are per se violations of the Sixth Amendment and those in which the defendant must show that the conflict "actually affected" counsel's performance.[1] Some conflicts are so invariably

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[1]Allegations of conflict of interest in the context of multiple representations, where the defendant fails to object at trial, are governed by the Cuyler standard under which the defendant must show that the conflict of interest "actually affected the adequacy of his representation. . . ." Cuyler v. Sullivan, 446 U.S. 335, 349 (1980). See also People v. Washington, 461 N.E.2d 393, 397 (Ill. 1984)("where a defendant

pernicious, so without the possibility of any redeeming virtue that they are "always real, not simply possible, and . . . by [their] nature, [are] so threatening as to justify a presumption that the adequacy of representation was affected." United States v. Cancilla, 725 F.2d at 870. In those kinds of conflicts, courts refrain from searching the record to determine what could or should have been done differently, and instead invoke a rule of per se illegality. See United States v. Cronic, 466 U.S. at 658 (1984)("There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified"). The per se standard is invariably applied where, as here, Mr. Groover's trial attorney withdrew from the case in order to serve as a witness for the state against Mr. Groover and in violation of Mr. Groover's Sixth Amendment rights. See, e.g., Solina v. United States, 709 F.2d 160, 167-69 (2d Cir. 1983)(Friendly, J.); Berry v. Gray, 155 F. Supp. 494 (W.D. Ky. 1957); Zurita v. United States, 410 F.2d 477 (7th Cir. 1969).

This issue was apparent from the face of the record, yet direct appeal counsel ignored it. Failure to raise this issue on

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alleges ineffective assistance of counsel due to conflicts arising from joint representation of co-defendants, the per se rule is not applicable"). In the context of multiple representations, merely demonstrating a conflict of interest without also showing that the conflict "actually affected" counsel's performance is not a sixth amendment violation because those kinds of "conflicts" are open, common and often beneficial to defendants; "thus, they invariably raise the possibility of harmful conduct that often does not exist in fact." United States v. Cancilla, 725 F.2d 867, 870 (2d Cir. 1984)(emphasis in original).

appeal constitutes ineffective assistance of counsel. Since the issue constituted per se reversible error, Mr. Groover was prejudiced by appellate counsel's omission. Habeas corpus relief is warranted.

B. THE DEATH SENTENCE IMPOSED FOR THE MURDER OF RICHARD PADGETT PUNISHED TOMMY GROOVER FOR EXERCISING HIS CONSTITUTIONAL RIGHT TO A JURY IN VIOLATION OF NORTH CAROLINA V. PEARCE.

Tommy Groover agreed to plead guilty to the first degree murder of Richard Padgett and to cooperate with the State in its prosecutions of Robert Parker, Elaine Parker, and Joan Bennett, in exchange for the State's promise to dismiss charges of the first degree murder of Nancy Sheppard and a charge of aggravated assault. The State also agreed to recommend a sentence of life imprisonment (R. 23). It was also a condition of Tommy Groover's plea agreement with the State that the trial judge would follow the State's sentencing recommendation and impose a sentence of life imprisonment without possibility of parole for 25 years (R. 134).

The State and the sentencing judge therefore concurred in the belief that life imprisonment was the appropriate sentence for the homicide of Richard Padgett. After hearing all of the evidence admitted at trial, the jury agreed with this decision, and also recommended a sentence of life imprisonment. Nevertheless, the sentencing judge overrode the jury's recommendation, and imposed a death sentence (R. 297).

The decision to impose death rather than a life sentence for the same crime to which Mr. Groover had previously entered a

guilty plea improperly penalized him for exercising the most basic right our criminal justice system affords: a right to a trial by jury. The effect of the sentence is to deter others from exercising their right to jury trial, and thereby, to diminish the force of the constitutional provisions which guarantee that right. Especially when the increased penalty is death, the imposition of an enhanced sentence after a defendant withdraws a plea of guilty violates the rule of North Carolina v. Pearce, 395 U.S. 511 (1969).

The appropriateness of a death sentence cannot, consistent with the Eighth Amendment, turn upon whether the defendant stood trial or pleaded guilty. See United States v. Jackson, 390 U.S. 570 (1968). The sentencing judge initially believed that life imprisonment was the appropriate sentence for this crime. The facts set forth in the State's proffer to the court concerning the Padgett homicide and Tommy Groover's own statement provided the same factual basis for sentencing presented to the court after trial. A death sentence may not be imposed for a defendant's withdrawal of guilty plea. The sentence of death for the Padgett homicide violates the Eighth Amendment.

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).

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 v. State, 441 So. 2d 1083, 1087 (Fla. 1983). The court's adverse predisposition after Mr. Groover exercised his right to a jury trial would surely prevent Mr. Groover from ever receiving fair treatment before the court.

A death sentence may not be imposed for a defendant's withdrawal of guilty plea. For this reason, the sentence of death for the Padgett homicide violates the Eighth Amendment. North Carolina v. Pearce. Failure to raise this claim on appeal constitutes ineffective assistance of counsel, which prejudiced Mr. Groover. Habeas corpus relief is warranted.

C. THE STATE'S INDICTMENT OF THE THIRD MURDER, FOLLOWING MR. GROOVER'S WITHDRAWAL OF HIS GUILTY PLEA, POSED A "REALISTIC LIKELIHOOD OF [PROSECUTORIAL] VINDICTIVENESS." UNITED STATES V. GOODWIN, 457 U.S. 368.

In return for an agreement to give a sworn statement to the Assistant State Attorney and to testify against other defendants regarding the crimes, the State agreed to permit Mr. Groover to enter a plea to one count of the two-count indictment charging the murders of Richard Padgett and Nancy Sheppard, and further agreed that the State would recommend a life sentence. A written plea of guilty and negotiated sentence was filed and Tommy Groover's plea of guilty was accepted by the court.

After the plea, Mr. Groover sat for a deposition taken by attorneys representing the other individuals charged with the offenses. Subsequently, a hearing was held, the upshot of which was that attorney Richard Nichols was allowed to withdraw as Mr. Groover's defense counsel, and attorney Shore was appointed as defense counsel.

Eight days later, a hearing was held on a defense motion to withdraw the plea. The court asked Mr. Groover:

> Do you understand, then, that once you withdraw the plea, then you will go to trial on the indictment <u>on these two murders</u>?
>
> (TR. 97)(emphasis added).
>
> * * *
>
> And you wish to withdraw your plea and go to trial on the crimes of murder in the first degree <u>on these two counts</u> as I have just read to you?

(TR. 99)(emphasis added).

After this proceeding, the State immediately indicted Tommy Groover with the third murder: Jody Dalton. The complexion of the prosecution had radically changed. Other co-defendants, previously scheduled to be tried first, had their trials postponed (R. 104). Tommy Groover was set for trial first. Upon conviction and at sentencing, the jury recommended life imprisonment on the original two counts and death on Jody Dalton.

These circumstances pose a realistic likelihood that "the prosecutor's charging decision was motivated by a desire to punish [Mr. Groover] for doing something that the law plainly allowed him to do . . . [T]hey pose a realistic likelihood of

vindictiveness." United States v. Goodwin, 457 U.S. 368, 384 (1982). Nothing in the record indicates that the prosecutor had "uncovered additional information that suggested a basis for further prosecution" or that he "simply came to realize that information possessed by the State had a broader significance." Id. at 381. Nothing indicates that "at this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized." Id. The Court in Goodwin noted that "a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision." Id. at 381. Under the facts of this case, the completed plea negotiations are analogous to an "initial trial." Under the facts of Goodwin, "the timing of the prosecutor's action suggests that a presumption of vindictiveness is not warranted." By contrast, a presumption of vindictiveness is warranted in this case.

The Fourteenth Amendment's Due Process Clause demands, at a minimum, that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative ... of a sovereignty ... whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). "A prosecutor must refrain from improper methods calculated to produce a wrongful conviction." United States v. Rodriguez, 765 F.2d 1546, 1549 (11th Cir. 1985) (citing Berger).

Here, the prosecutor's actions strongly suggest that the State acted out of vindictiveness toward Mr. Groover in violation of Mr. Groover's constitutional rights. Goodwin. This issue was apparent on the face of the record, yet direct appeal counsel ignored it. Failure to raise this claim on appeal constitutes ineffective assistance of counsel which prejudiced Mr. Groover. Habeas corpus relief is warranted.

D. THE SENTENCING JUDGE IMPROPERLY CONSIDERED NONSTATUTORY AGGRAVATING FACTORS THAT SO PERVERTED THE SENTENCING PHASE OF MR. GROOVER'S TRIAL THAT IT RESULTED IN THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In considering whether the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, Justice Brennan wrote:

> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause -- that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif.L.Rev. 839, 857-60 (1969).

Furman v. Georgia, 408 U.S. 238, 274, (1972) (Brennan, J., concurring)(footnote omitted).

The Supreme Court has also held:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 2969 (1976).

Aggravating circumstances specified in Florida's capital sentencing statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979). The Florida Supreme Court, in Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977) stated:

> [W]e must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
>
> [Strict application of] "the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Id. at 1003. See also Riley v. State, 366 So. 2d 19 (Fla. 1979); Robinson v. State, 520 So. 2d 1 (Fla. 1988).

"Florida is a weighing state; the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances." Parker v. Dugger, 111 S. Ct. 731, 738 (1991). When the sentencer weighs "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." Stringer v. Black, 112 S. Ct. 1130 (1992). The sentencer's reliance on wholly improper and unconstitutional non-statutory aggravating factors applied that prohibited thumb in violation of the Eighth Amendment.

Before imposing sentence, the sentencing judge was asked to consider, and did consider (R. 282; TR. 1753) the Pre-Sentence Investigation Report (PSI) 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). Considerations such as those urged in the PSI are improper in a capital sentencing.

Additionally, the theme of the court's sentencing order was the relationship of the homicides for which Tommy Groover was sentenced to the abuse of drugs. It was unfair to sentence Tommy Groover to death for his uncontrollable desire for drugs and alcohol, since this desire stems directly from congenital organic brain damage which predisposed him to drug use. But even if Tommy Groover could properly be blamed for using drugs, it was not appropriate for the court to rely on evidence of alleged criminal activity of which Tommy Groover was never convicted.

The court began its description of the facts of the case by noting:

> The evidence at trial showed that all defendants and all the victims -- except Nancy Sheppard -- were drug pushers or drug users. The defendant was a pusher and Richard Padgett owed him money for drugs.

(R. 275). The sentencing judge offered the following "comment" in his Order:

> 4. COMMENT OF THE COURT
>
> This was the first defendant to be convicted of three first degree murders in this Circuit since the reenactment of the capital punishment law, and before that for such a long period of time that memory fails to reveal a similar conviction. This historical fact is significant because these murders are a direct result of the drug culture which has spread over this state and nation like an evil plague.
>
> Crime has advanced to another plateau with the coming of the drug plague. Murders are more wanton, vicious and numerous -- it is slaughter on a grand scale.
>
> These murders and the sentences imposed on this convicted murderer should be a horrifying and stunning example of the monumental stupidity of using illegal drugs.
>
> With the exception of Nancy Lee Sheppard -- all of the victims and defendants were either drug users or pushers and young Nancy was murdered because of her association with them.
>
> The lesson must be learned -- illegal drug use is a certain path to moral, physical and emotional ruin and possible death -- not only to those who use such drugs but also to those who associate with them.

(R. 281).

The trial judge's consideration of the opinions in the PSI and of Mr. Groover's drug addiction and alleged criminal activity not resulting in a conviction starkly violated the Eighth

Amendment, and the trial judge's consideration and reliance upon these nonstatutory aggravating factors prevented the constitutionally required narrowing of the sentencer's discretion. See Maynard v. Cartwright, 486 U.S. 356 (1988); Lowenfield v. Phelps, 484 U.S. 231 (1988); Stringer v. Black; Sochor v. Florida, 112 S. Ct. 2114 (1992); Espinosa v. Florida, 112 S. Ct. 2926 (1992). As a result, these impermissible aggravating factors evoked a sentence that was "an unguided emotional response," a clear violation of Mr. Groover's constitutional rights. Penry v. Lynaugh, 492 U.S. 302 (1989).

Mr. Groover's sentence of death therefore violates the Eighth and Fourteenth Amendments, see Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977); Barclay v. Florida, 463 U.S. 939, 955 (Fla. 1983), and should not be allowed to stand. Failure to raise this issue on direct appeal constitutes ineffective assistance of counsel which prejudiced Mr. Groover. Habeas relief is warranted.

E. MR. GROOVER'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. GROOVER TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. GROOVER TO DEATH.

Under Florida law, 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 court shifted to Mr. Groover the burden of proving whether he should live or die.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985).

The prosecutor's argument and the judicial instructions at Mr. Groover's capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Groover, but also unless Mr. Groover proved that the mitigation he provided outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Groover to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed). This standard obviously shifted the burden to Mr. Groover to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. According to this standard, the jury could not "full[y] consider" and "give

effect to" mitigating evidence. Penry, 492 U.S. 302, 327-28 (1989). This burden-shifting standard thus "interfered with the consideration of mitigating evidence." Boyde v. California, 494 U.S. 370, 377 (1990). Since "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481 U.S. 279, 306 (1987), the argument and instructions provided to Mr. Groover's sentencing jury, as well as the standard employed by the trial court, violated the Eighth Amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned. See Simmons v. South Carolina, 114 S. Ct. 2187, 1994 W.L. 263483 (1994).

As explained below, the standard which the judge instructed Mr. Groover's jury, and upon which the judge relied, is a distinctly egregious abrogation of Florida law and therefore Eighth Amendment principles. See McKoy v. North Carolina, 494 U.S. 433, 454 (1990)(Kennedy, J., concurring)(a death sentence arising from erroneous instructions "represents imposition of capital punishment through a system that can be described as arbitrary or capricious"). In this case, Mr. Groover, the

capital defendant, was required to prove that life was the appropriate sentence, and the jury's and judge's consideration of mitigating evidence was limited to mitigation "sufficient to outweigh" aggravation.

At several points, the State maintained in its closing argument that the jury was to determine whether the mitigating circumstances outweigh the aggravating circumstances:

> The jury form -- the verdict form, basically, as the Judge will explain to you, if you get to number one and you find sufficient aggravating circumstances do exist to recommend the sentence of death and they are not outweighed by the mitigating circumstances, then you recommend that sufficient aggravating circumstances do exist to base -- and that sufficient mitigating circumstances do not exist and put a check there. And then you recommend a sentence of death.

(TR. 1659)(emphasis added).

In his penalty phase instructions to the jury, the judge instructed the jury that it was their job to determine if the mitigating circumstances outweighed the aggravating circumstances:

> Now, ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crimes of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given to you by the Court and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, whether sufficient mitigating

> circumstances exist to outweigh the aggravating circumstances found to exist.

(TR. 1706)(emphasis added). This erroneous standard was then repeated to the jury by the judge later in his instructions:

> If you find that the aggravating circumstances do not justify the death penalty, then your advisory sentence would be one of life imprisonment without the possibility of parole for 25 years. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(TR. 1707-08)(emphasis added).

Finally, in closing remarks to the jury, the trial judge again instructed the jury that it was their job to determine if the mitigating factors outweighed the aggravating factors:

> Now, if you find under number one that sufficient aggravating circumstances do exist to justify sentence of death, then you will go to paragraph number two and if you find, however, that sufficient mitigating circumstances do exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death, then your verdict would be as to number three based on those considerations the defendant should be sentenced to life imprisonment. If, however, going back to paragraph number one, if you find that sufficient aggravating circumstances do exist to justify a sentence of death, and under paragraph two you find sufficient mitigating circumstances do not exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death, then your verdict as to number three would be based on those considerations the defendant should be sentenced to death.

(TR. 1711-12) (emphasis added).

The consistent repetition of this erroneous burden-shifting instruction and the prosecutor's specific emphasis on the improper weighing process misled the jury. The inevitable result is a shift to Mr. Groover of the burden to prove a life sentence appropriate. Furthermore, it is obvious that the trial court itself viewed the weighing process in this improper light. Before sentencing Mr. Groover, the court stated:

> [T]he Court finds that there are one or more aggravating circumstances in the first count, that is, the Padgett murder and the third count, the Dalton murder, which has been established beyond a reasonable doubt. I find that there are no mitigating circumstances that outweigh the aggravating circumstances in the first count, that is, the Padgett murder and the third count, the Dalton murder. I find that the appropriate sentence in the first count is death. I find that the appropriate sentence in the third count is death.

(TR. 1753)(emphasis added).

The detriment is thus clear. The court believed that Mr. Groover had the burden of proving sufficient mitigation existed to outweigh the aggravating factors. The court viewed the jury's sentence in this light and used this improper standard in its own sentencing decision.

The instructions violated Florida law. The instructions shifted the burden of proof to Mr. Groover on the central sentencing issue of whether he should live or die. The jury was not instructed in conformity with the standard set forth in Dixon.

In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 486 U.S. 367 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). Thus, the jury was precluded from considering mitigating evidence and from evaluating the "totality of the circumstances" in considering the appropriate penalty. State v. Dixon, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered.

Therefore, Mr. Groover is entitled to relief in the form of a new sentencing hearing in front of a jury, due to the fact that his sentencing was tainted by improper instructions. Appellate counsel's failure to raise this issue on direct appeal was a result of ignorance of the law and constituted deficient performance prejudicial to Mr. Groover. Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Mr. Groover's sentence of death was neither "reliable" nor "individualized."

F. THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURORS MATERIALLY MISLED THE JURORS AS TO THEIR ROLE AT SENTENCING AND CREATED AN UNACCEPTABLE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. GROOVER'S DEATH SENTENCE WAS THUS IMPOSED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Groover's trial judge misinstructed the jury that a majority vote was required for a recommendation of a life sentence. (TR.1709-10). In Alvord v. State, 322 So. 2d 533 (1975), cert. denied, 428 U.S. 923 (1976), this Court established that a recommendation for death required a majority vote. This Court has expressly recognized that a majority is not required for a life recommendation. Rose v. State, 425 So. 2d 521 (1982); Patten v. State, 467 So. 2d 975 (Fla. 1985). Thus a six-six vote is a life recommendation. Moreover, under Florida law, a life recommendation which has a reasonable basis within the meaning of Tedder v. State, 322 So. 2d 908 (Fla. 1975), constitutes an acquittal of the death sentence. Wright v. State, 586 So. 2d 1024 (Fla. 1991).

The instructions to Mr. Groover's jurors were clearly in error. The trial judge told the jurors that a majority vote was required for life.

The trial court erroneously instructed the jurors:

> Now, in these proceedings it is not necessary that the advisory sentences of the jury be unanimous. Your decision may be a majority of the jury; however, the fact that the determination of whether a majority of you recommend a sentence of death or a sentence of life imprisonment can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.

(TR. 1709-10) (emphasis added).

Florida law is plain: a split vote is a life vote. The instructions were simply wrong. At the very least, they were egregiously misleading. While a single sentence in the total instructions told the jury that a six-six vote was a life recommendation, the remainder of the instructions repeatedly stated that a majority vote was required to return any verdict. In total, the inaccurate instructions violate the Eighth Amendment because they inject factors irrelevant to a personal, individualized sentencing determination. McKoy, 494 U.S. at 454 (Kennedy, J., concurring) ("it represents imposition of capital punishment through a system that can be described as arbitrary or capricious.") Any death sentence arising from such instructions is unreliable; it violates the Eighth Amendment's prohibition against arbitrary and capricious capital sentences. Woodson v. North Carolina, 428 U.S. 280 (1976).

The United States Supreme Court has recognized the need for correct jury instructions during Florida's capital penalty phase. Espinosa v. Florida, 112 S. Ct. 2926 (1992); Hitchcock v. Dugger, 481 U.S. 393 (1987). Florida juries must receive accurate penalty phase instructions. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Mr. Groover's jury was not merely confused or misled; it was clearly given wrong instructions. The error exists in the instructions themselves -- the prejudice is the unreliability and

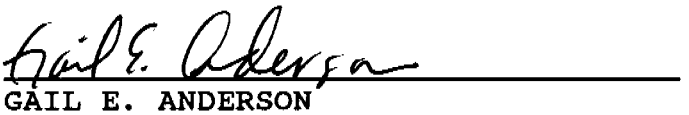
arbitrariness of the sentence. Lockett v. Ohio, 438 U.S. 586 (1978).

The trial court incorrectly told the jury that a majority vote was necessary for a life sentence. These instructions themselves render Mr. Groover's death sentence constitutionally invalid. Appellate counsel's failure to raise this issue on direct appeal was deficient performance which prejudiced Mr. Groover. Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Habeas relief is warranted.

CONCLUSION

Appellate counsel's failure to bring constitutional error to the attention of this Court on direct appeal undermines confidence in the fairness and correctness of the outcome of the appeal. Wilson, 474 So.2d at 1165. If these claims, discussed above, had been presented to this Court, it is at least reasonably likely that the outcome would have been different. This Court should grant habeas corpus relief on the basis of the clear violation of Mr. Groover's rights to effective appellate counsel which Mr. Groover has presented in these proceedings.

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to all counsel of record on December 2, 1994.



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