IN THE SUPREME COURT OF FLORIDA

NO. 84,807

TOMMY SANDS GROOVER,

Petitioner,

v.

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

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ARGUMENT

The Petitioner, Tommy Sands Groover, hereby replies to the response of Respondent Singletary. The failure to reply to any issue contested by the Respondent is not a waiver of that claim.

Respondent suggests that Mr. Groover is raising his claim of ineffective assistance of appellate counsel as a means of obtaining a second appeal, citing McCrae v. Wainwright, 439 So. 2d 868 (Fla. 1983)("A habeas petition 'should not be used as a vehicle for presenting issues which should have been raised at trial and on appeal'"). Response to Petition for Writ of Habeas Corpus at 9. However, Respondent concedes that habeas corpus is the proper vehicle to raise a claim of ineffectiveness of appellate counsel. Response to Petition for Writ of Habeas Corpus at 6-7. Respondent fails to explain, and indeed cannot explain, how Mr. Groover could have raised ineffective assistance of appellate counsel during trial or on appeal. The only way Mr. Groover can raise this claim, consistent with this Court's precedent, is by petition for writ of habeas corpus.

The ineffectiveness of Mr. Groover's appellate counsel is a violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the principal claim of his petition. Evitts v. Lucey, 469 U.S. 387 (1985). The criteria for proving a claim of ineffective assistance of appellate counsel mirror the standard set out for similar claims dealing with trial counsel. Mr. Groover must point to specific errors or

omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and that the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985), citing Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985).

Mr. Groover has presented to this Court a petition alleging that he was denied the effective assistance of counsel on direct appeal of his convictions for first degree murder and his sentences of death. In this petition, as required by Wilson, he has set out "specific errors and omissions" which show that his appellate counsel's performance fell well below the range of professionally acceptable performance. These errors include, among other issues, appellate counsel's failure to raise Mr. Groover's first trial counsel's breach of duty of loyalty and failure to preserve Mr. Groover's attorney-client privilege, the trial court's imposition of the death penalty in retaliation for Mr. Groover exercising his right to a jury trial, prosecutorial vindictiveness in indicting Mr. Groover for the third murder after he withdrew his guilty plea, the sentencing court's consideration of nonstatutory aggravating factors, and the erroneous jury instruction requiring a majority vote to recommend life. These failures of direct appeal counsel seriously undermine any confidence in Mr. Groover's convictions and

sentences of death. The performance of counsel compromises the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Wilson; Johnson.

Respondent did not explain how acceptable performance of appellate counsel can be reconciled with the failure to present to the Florida Supreme Court fundamental issues of law when a man's life rests in the balance. This Court has stated:

> The propriety of the death penalty is in every case an issue requiring the closest scrutiny.

Wilson v. Wainwright, 474 So. 2d at 1164. This Court cannot maintain its close scrutiny when counsel fails to point out significant violations of state and federal law that have led to the imposition of the death sentence.

This Court has admitted that its own review of any case 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 v. Wainwright, 474 So. 2d at 1164. Mr. Groover was deprived of this type of zealous advocacy on direct appeal. Because he was deprived of effective representation numerous errors in Mr. Groover's case were not pointed out to the Florida Supreme Court on direct appeal. The deficient performance of appellate counsel has prejudiced Mr. Groover to such a degree

that there is no longer any confidence in the convictions and sentences of death.

Mr. Groover has presented to this Court fundamental violations of the federal Constitution by which he was denied the basic right of effective assistance of counsel on direct appeal. This Court stated in Wilson, at 1164:

> ...the basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law.

This is the first time Mr. Groover is presenting to this Court his lack of zealous counsel on direct appeal. He has set out specific instances of ineffective assistance. Mr. Groover will stand on the facts and law cited in the six sub-parts of his petition, and will address Respondent's suggestion that this Court adopt a time limit for habeas corpus.

Respondent has urged this Court to institute a restriction on the time in which one may file a petition for writ of habeas corpus with this Court.[1] Response to Petition for Writ of

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[1]In adopting Fla. R. Crim. P. 3.851 (1994), this Court also adopted a timetable for filing petitions for writ of habeas corpus, so that a petitioner must file for habeas corpus at the same time he files his initial brief on appeal of the circuit court's denial of his Rule 3.851 motion. Fla. R. Crim. P. 3.851(2). The rule applies to cases of death-sentenced individuals whose conviction and sentence becomes final after January 1, 1994, and thus does not apply to Mr. Groover. Petitioner suggests that this Court's promulgation of a timetable of indeterminate period rather than a fixed period of time acknowledges that habeas corpus should not be restricted by hard and fast procedural rules. See Anglin v. Mayo, 88 So. 2d 918 (Fla. 1956).

Habeas Corpus at 6-8. Such a rule would be antithetical to the very nature of the writ. In addition, to apply a newly-created time bar to Mr. Groover, without notice, would violate his due process rights. For the reasons discussed herein, Mr. Groover urges this Court to reject Respondent's suggestion.

Respondent seeks to draw a parallel between the time limitations of Fla. R. Crim. P. 3.850 and 3.851, suggesting a similar one- or two-year limitation should apply to habeas corpus. This suggestion misapprehends the significant differences between a motion for postconviction relief pursuant to Rule 3.850/3.851 and the writ of habeas corpus.

Rule 3.850 was created following the United States Supreme Court's decision in Gideon v. Wainwright, 372 U.S. 335 (1962). The Rule was intended to prevent a flood of habeas petitions from inundating the Florida Supreme Court by requiring defendants to apply first to the trial court in which they were convicted and sentenced, thus placing the fact-finding function in the circuit courts. Roy v. Wainwright, 151 So. 2d 825 (Fla. 1963); Gerald Kogan & Robert Craig Waters, The Operation and Jurisdiction of the Florida Supreme Court, 18 Nova L. Rev. 1151, 1261 (1994). It is clear, however, that Rule 3.850 was not intended to supplant habeas corpus. Postconviction issues remain which are cognizable only in habeas corpus. The error at issue in this petition, ineffectiveness of appellate counsel, may be brought only in a petition for habeas corpus. Smith v. State, 400 So. 2d 956, 960

(Fla. 1981); Martin v. Wainwright, 497 So. 2d 872, 874 (Fla. 1986).

This Court knows well the history of the writ of habeas corpus. The Constitution of the State of Florida guarantees that, "The writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const. Its constitutional guarantee imbues habeas corpus with special status, which this Court has long recognized.

> The writ of habeas corpus is a high prerogative writ of ancient origin designed to obtain immediate relief from unlawful imprisonment without sufficient legal reason. . . . The writ is venerated by all free and liberty loving people and recognized as a fundamental guaranty and protection of their right of liberty.

Allison v. Baker, 11 So. 2d 578, 579 (1943). In fact, habeas corpus is a centuries-old right, deserving of more protection than even a constitutional right. A lower court has written:

> The great writ has its origins in antiquity and its parameters have been shaped by suffering and deprivation. It is more than a privilege with which free men are endowed by constitutional mandate; it is a writ of ancient right.

Jamason v. State, 447 So. 2d 892, 894 (Fla. 4th DCA 1983), approved 455 So. 2d 380 (Fla. 1984), cert. denied, 469 U.S. 1100 (1985). Regarding the application of procedural rules to petitions seeking the writ, this Court explained:

> [H]istorically, habeas corpus is a high prerogative writ. It is as old as the common law itself and is an integral part of our own democratic process. The procedure for the granting of this particular writ is not to be circumscribed by hard and fast rules or

> technicalities which often accompany our consideration of other processes. If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.

Anglin v. Mayo, 88 So. 2d 918, 919-20 (Fla. 1956) (emphasis added). Most recently this Court has said:

> The fundamental guarantees enumerated in Florida's Declaration of Rights should be available to all through simple and direct means, without needless complication or impediment, and should be fairly administered in favor of justice and not bound by technicality.

Haag v. State, 591 So. 2d 614, 616 (1992). The obvious relationship between habeas corpus and the constitutional guarantee of liberty explains why habeas corpus is the only writ specifically guaranteed by the Declaration of Rights of the Constitution of Florida. Gerald Kogan & Robert Craig Waters, The Operation and Jurisdiction of the Florida Supreme Court, 18 Nova L. Rev. 1151, 1258 (1994). As the history of habeas corpus makes clear, imposing a time limit on the filing of petitions for habeas corpus would frustrate the writ's ancient purpose and subvert its constitutional guarantee.

Further, Respondent has failed utterly to plead facts sufficient to establish prejudice by Mr. Groover's alleged delay in filing his petition. Respondent's sole contention is that, "This delay prejudices the state, as evidenced by the federal

proceedings being held in limbo until resolution of the latest state proceedings." Response to Petition for Writ of Habeas Corpus at 8. This bald statement fails to explain any particularized prejudice, that any prejudice was caused by Mr. Groover's alleged delay, and that the alleged delay was unreasonable. Contrary to Respondent's bare allegations, this Court should determine these issues first. The only prejudice that may result is to Mr. Groover, who will be forced to litigate in federal court before this Court has finally settled these matters. This Court's consideration of Mr. Groover's habeas petition "may avoid unnecessary constitutional adjudication and minimize federal-state tensions." Giles v. Maryland, 386 U.S. 66, 81-82 (1967). "[A]ffording the state courts the opportunity to decide in the first instance is a course consistent with comity, cf. 28 U.S.C. Sec. 2254, and a full and fair hearing in the state courts would make unnecessary further evidentiary proceedings in the federal courts." Id. at 81. See also Ex parte Royall, 117 U.S. 241, 251 (1886) (state courts "bound" to protect rights secured by the federal constitution).

While Respondent has failed to plead particularized prejudice or that any prejudice was caused by Mr. Groover, Respondent has alleged: "[T]here is no reason that Groover could not have raised the instant issue in a timely manner, thereby avoiding the further delay that, inevitably, will now result." Response to Petition for Writ of Habeas Corpus at 7. Respondent mischaracterizes the procedural history of this case. Mr.

Groover has not sat on known rights since his convictions and sentences became final. Mr. Groover filed his first motion for postconviction relief on June 1, 1986. After that motion was denied and his appeal of that motion was pending in this Court, Mr. Groover filed a second motion for postconviction relief alleging Hitchcock[2] error, which motion was filed within the time limits set by this Court.[3] The circuit court denied Mr. Groover's second motion, and he appealed. This Court affirmed the denial, and denied rehearing on August 15, 1994. Mr. Groover has litigated his case continuously since his convictions and sentences became final. Any fault for the length of time it takes to litigate a death case cannot be laid on Mr. Groover, as he has followed the rules and precedent of this Court in litigating his case.

Respondent alleges that Mr. Groover is raising an issue that could have been brought before this Court ten years ago. Response to Petition for Habeas Corpus at 8. Respondent also points out that Mr. Groover has been represented by the Office of the Capital Collateral Representative (CCR) for almost ten years. Id. at 7.

This Court has acknowledged that CCR has been unable to represent properly all death penalty inmates in postconviction, and that that inability caused substantial delays in cases of

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[2]Hitchcock v. Dugger, 481 U.S. 393 (1987).

[3]Hall v. State, 541 So. 2d 1125 (Fla. 1989).

inmates represented by CCR. See In re Rule of Criminal Procedure 3.851, 626 So. 2d 198, 199 (Fla. 1993)(Commentary). "It is no secret that the Office of the Capital Collateral Representative has been underfunded and without the necessary resources to meet the legal needs of the 300-plus inmates on Florida's Death Row." Id. at 200 (Barkett, C.J., dissenting). This Court has made an express finding that underfunding of CCR caused delays in cases of CCR's clients. In the face of that finding, any alleged delay in Mr. Groover's case cannot be deemed unreasonable. The reason is clear: Mr. Groover's lawyers are underfunded, understaffed, and overworked. The crushing case load of Mr. Groover's attorneys prevented the adequate research and preparation required for a death penalty case, and so violated Mr. Groover's rights to due process under both the United States Constitution and Florida law. Respondent cannot establish that Mr. Groover has caused unreasonable delay that has caused particularized prejudice to Respondent.

Respondent's suggestion that this Court adopt a time limitation for the filing of petitions for habeas corpus is a radical suggestion wholly out of proportion with the perceived problem. There has been no sweeping change in law, as was Gideon v. Wainwright, prompting a restriction of habeas corpus. This Court has never held that petitions for habeas corpus must be

filed within a certain time; indeed such a rule would be anathema to the very nature of habeas corpus.[4]

CONCLUSION

For the foregoing reasons, Mr. Groover asks this Court to reject Respondent's suggestion that a time limit be imposed for the filing of petitions for writ of habeas corpus. Mr. Groover has raised a claim of ineffective assistance of appellate counsel in his petition, as this Court has ruled is proper. Mr. Groover was denied the effective assistance of counsel on direct appeal to the Florida Supreme Court in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Mr. Groover has presented six specific errors and omissions by appellate counsel, and has demonstrated how each deficiency prejudiced him. He has also shown that confidence in the appellate result is seriously undermined. This Court should grant habeas relief.

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[4]In a Florida case nearly on point, petitioner sought a writ of error coram nobis to set aside a criminal conviction. The circuit court found the petition untimely filed. This Court held that, unlike Rule 3.850, there is no time limitation for filing a petition for writ of error coram nobis. This Court held further that the petition was not barred by laches because the State had not been prejudiced by the delay. Malcolm v. State, 605 So. 2d 945 (Fla. 3rd DCA 1992). The same result is required here.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 30, 1995.

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