IN THE SUPREME COURT OF FLORIDA

TOMMY SANDS GROOVER,

Appellant,

v.

CASE NO. 86,623

STATE OF FLORIDA,

Appellee.

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

CORRECTED
ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This summary is offered to supplement and clarify Groover's factual statement.

In February 1982 Tommy Groover, Robert Parker, Elaine Parker, and Billy Long were arrested in connection with the murders of Richard Padgett, Nancy Sheppard, and Jody Dalton. Long and Elaine Parker pled guilty to lesser charges, and Groover and Parker stood trial separately for three counts of first-degree murder. Evidence produced at both trials showed that Groover shot and killed both Padgett and Dalton and that Long shot and killed Sheppard. Groover's jury convicted him of three counts of first-degree murder, while Parker's jury convicted him of two counts of first-degree murder and one count of third-degree murder.

A Duval County grand jury indicted Groover for the first-degree murders of Padgett and Sheppard. (R 2).[1] Richard Nichols, Groover's original trial counsel, negotiated a plea agreement with the state by which Groover pled guilty to killing Padgett in exchange for a life sentence. (R 23). The agreement was conditioned on Groover's full cooperation with the state and his

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[1] "R," "T," and "ST" refer to the record, transcript, and supplemental transcript from Groover's trial. "PCR" refers to the record in the instant case.

testimony "at any and all proceedings concerning the deaths of Richard Padgett, Nancy Sheppard, and a young woman known as Jody Dalton." (R 23). Prior to entering his plea on May 18, 1982, Groover made an inculpatory statement (R 128) and in July 1982 submitted to being deposed by his codefendants' counsel. (R 493). Shortly thereafter, however, Groover refused to cooperate further with the state.

The plea agreement provided that, if Groover failed to cooperate, his statements would be used against him and that the state would seek the death penalty. (R 23). At a hearing on August 12, 1982 Nichols moved to withdraw from representing Groover. (ST 87). After hearing Nichols and Assistant State Attorney Ralph Greene, the trial court questioned Groover (ST 89-90), allowed Nichols to withdraw, and appointed Brent Shore to represent Groover. (ST 91). Also in August 1982 the state filed an amended indictment charging Groover with killing Padgett, Sheppard, and Dalton. (T 33). On August 30, 1982 Shore moved for withdrawal of Groover's guilty plea (R 29), which the trial court granted. (R 30).

At trial in January 1983 the jury convicted Groover of all three counts of first-degree murder (T 1615), and, in the penalty proceeding, recommended that he be sentenced to life imprisonment

for killing Padgett and Sheppard and to death for killing Dalton. (R 252-54). The trial judge agreed with the jury's recommendation for the Dalton (death) and Sheppard (life imprisonment) murders, but overrode the recommendation and sentenced Groover to death for Padgett's murder. (R 297).

Groover appealed his convictions and sentences, and this Court, finding no merit to any of the issues, affirmed the convictions and sentences. Groover v. State, 458 So. 2d 226 (Fla. 1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985). After the signing of his death warrant, Groover filed his first Florida Rule of Criminal Procedure 3.850 motion in June 1986. The trial court denied that motion summarily, and Groover appealed to this Court. This Court remanded for an evidentiary hearing on trial counsel's effectiveness for not inquiring into Groover's competency to stand trial and for failing to have Groover evaluated by a mental health expert. Groover v. State, 489 So. 2d 15 (Fla. 1986). The Court held the other issues raised on appeal to be without merit and/or to be procedurally barred.

Pursuant to the remand, the trial court held a two-day evidentiary hearing. The trial court denied relief and Groover appealed. This Court affirmed the denial of relief. Groover v. State, 574 So. 2d 97 (Fla. 1991).

While his first postconviction motion was pending before this court, Groover filed a second rule 3.850 motion. The trial court denied relief, and Groover appealed. This Court affirmed the trial court's action, finding the issues raised either procedurally barred or without merit. Groover v. State, 640 So. 2d 1077 (Fla. 1994).

In October 1994 Groover filed a 375-page petition for writ of habeas corpus in federal district court, raising thirty issues. Several of these issues had never been raised in state court, however, and on December 2, 1994 Groover filed a motion with the federal court asking that his federal petition be held in abeyance so that he could go back to state court. Also on that date Groover filed a petition for writ of habeas corpus with this Court, arguing that appellate counsel rendered ineffective assistance, and his third motion for postconviction relief, arguing that the reduction of Parker's sentence is newly discovered evidence. (PCR 11-26). This Court denied the petition for writ of habeas corpus. Groover v. Sinsletarv, 656 So. 2d 424 (Fla. 1995).

On February 2, 1995, without permission from the trial court, Groover filed an unverified amended motion that included a second claim, i.e., that the State Attorney's Office, the Attorney General's Office, and the Florida Parole Commission had not

complied with his public records requests. (PCR 41-45). The state moved to dismiss the amended motion arguing that it was not verified, Groover had not asked for and received permission to amend, and the public records claim was time barred. (PCR 46-49). The trial court ruled on Groover's motions on May 30, 1995. After discussing the merits of the claim that Groover's sentence should be reduced, the trial court denied the first version of Groover's third motion for postconviction relief and granted the state's motion to dismiss the amended motion. (PCR 57). Groover then filed a motion for rehearing, alleging that his counsel never received the state's motion to dismiss and that the court erred in its rulings on his motions. (PCR 88-91). The trial court denied rehearing (PCR 97), and this appeal ensued.

SUMMARY OF ARGUMENT

Issue I: The trial court correctly found that Groover and his codefendant Parker were not equally culpable. The newly discovered evidence of Parker's reduced sentence provides no basis for relief, and the trial court's order should be affirmed.

Issue II: The trial court did not err in not requiring the parties to argue the merits of the motion in person.

Issue III: The trial court did not err in not holding an evidentiary hearing because the record conclusively shows that Groover is not entitled to relief.

Issue IV: Groover has shown no reversible error in the trial court's dismissal of the amended motion.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT CORRECTLY FOUND NO **MERIT TO THE NEWLY DISCOVERED EVIDENCE CLAIM.**

Robert Parker, the only one of Groover's codefendants to be tried for killing Padgett, Sheppard, and Dalton, has had his death sentence for killing Sheppard reduced to life imprisonment. Parker v. State, 643 So. 2d 1032 (Fla. 1994). Groover, on the other hand, has always been under a sentence of life imprisonment for Sheppard's murder; his death sentences for killing Padgett and Dalton remain unaffected. As he did before the trial court, Groover argues that, pursuant to Scott v. Dusser, 604 So. 2d 465 (Fla. 1992), the reduction of Parker's sentence is newly discovered evidence that requires that his death sentences be reduced as well. The trial court correctly held that there is no merit to this claim.

Abron Scott and Amos Robinson were tried separately for killing their victim, convicted, and sentenced to death. This Court affirmed Scott's conviction and sentence. Scott v. State, 494 so. 2d 1134 (Fla. 1986). Although it affirmed Robinson's conviction, the Court vacated his death sentence and remanded for resentencing. Robinson v. State, 487 So. 2d 1040 (Fla. 1987). At

the new penalty proceeding the trial court agreed with the newly empaneled jury's recommendation and sentenced Robinson to life imprisonment. In a motion for postconviction relief Scott argued that Robinson's life sentence was newly discovered evidence that, if known at trial, would have mitigated Scott's sentence. Scott, 604 So. 2d at 467-68. The trial court, however, summarily denied this claim. In considering the claim on appeal this Court set out two requirements that must be satisfied

> to set aside a conviction or sentence because of newly discovered evidence. First, the newly asserted facts "must have been unknown by the trial court, or by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial."

Id. at 468 (citations omitted, emphasis in original). The Court observed that "Scott and Robinson had similar criminal records, were about the same age, had comparable low IQ's, and were equally culpable participants in the crime." Id. Thus, the Court agreed that Scott met both parts of the above-quoted test: "Accordingly, we hold that in a death case involving equally culpable defendants the death sentence of one codefendant is subject to collateral

review under rule 3.850 when another codefendant subsequently receives a life sentence." Id. at 469.

Parker's newly imposed life sentence could not have been known until 1994 and satisfies the first part of the Scott test. Groover, however, cannot satisfy the second part of that test. Scott is distinguishable from the instant case because Groover and Parker were not "equally culpable defendants." Because of the difference in their culpability, the disparate treatment accorded Parker would not "probably produce an acquittal on retrial" for Groover.

Parker was tried in February 1983, after Groover had been convicted and sentenced. Parker's jury convicted him of first-degree murder for the deaths of Padgett and Sheppard, but found him guilty of only third-degree murder for Dalton's death.[2] Although Parker's jury recommended life imprisonment for both first-degree murder convictions, the trial court overrode one of those recommendations and sentenced him to death for the Sheppard

[2] This history of Parker's case is taken from his direct appeal opinion. Parker v. State, 458 So. 2d 750 (Fla. 1984), cert. denied, 470 U.S. 1088, 105 S. Ct. 1855, 85 L. Ed. 2d 152 (1985).

homicide.[3] The trial court found that the state established six aggravators to support Parker's death sentence for Sheppard's murder, but this Court disagreed as to two of those aggravators. Parker v. State, 458 So. 2d 750, 754 (Fla. 1984), cert. denied, 470 U.S. 1088, 105 s. ct. 1855, 85 L. Ed. 2d 152 (1985). Even without those aggravators, however, this Court affirmed Parker's death sentence. Id. at 755. The United States Supreme Court eventually vacated that sentence and remanded for reconsideration because, on direct appeal, the Florida Supreme Court did not perform a harmless error analysis. Parker v. Duaaer, 489 U.S. 308, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991). On remand this Court ordered Parker's death sentence reduced to life imprisonment. Parker v. State, 643 so. 2d 1032 (Fla. 1994).

As set out before, this Court found that Scott and Robinson were equally culpable and virtually indistinguishable. Groover and Parker, on the other hand, are clearly and easily distinguishable from one another. The state proved that Groover shot and killed both Dalton and Padgett. E.g., Parker, 458 So. 2d at 752. Parker, although involved in these murders, did not actually kill any of

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[3] As stated earlier, Groover received two death sentences for killing Dalton and Padgett. The trial court sentenced Groover to life imprisonment for Sheppard's killing.

the victims. Id. Groover was convicted of three counts of first-degree murder, while Parker was convicted of only two counts of first-degree murder. Groover's jury recommended death for Dalton's murder and life imprisonment for Sheppard's and Padgett's; Parker's jury recommended life imprisonment for both of his first-degree murder convictions. Groover received two death sentences - for Dalton and Padgett; Parker received only one for Sheppard. All four of Groover's aggravators were affirmed on appeal, Groover, 458 so. 2d at 229; two of Parker's were held invalid. Parker, 458 So. 2d at 754.

Given the differences between Groover and Parker, especially their different culpabilities, the reduction of Parker's sentence for Sheppard's murder is irrelevant to Groover's two death sentences for his killing Dalton and Padgett. As this Court has long recognized: "It is permissible to impose different sentences on capital codefendants where their various degrees of participation and culpability are different from one another." White v. Dugger, 523 So. 2d 140, 141 (Fla.), cert. denied, 488 U.S. 871, 109 S. Ct. 184, 102 L. Ed. 2d 153 (1988); Cardona v. State, 641 So. 2d 361 (Fla. 1994), cert. denied, 115 S. Ct. 1122, 130 L. Ed. 2d 1085 (1995); Hannon v. State, 638 So. 2d 39 (Fla. 1994); Seinorst v. Singletary, 638 So. 2d 33 (Fla. 1994); Colina v.

State, 634 So. 2d 1077 (Fla. 1994); Robinson v. State, 610 So. 2d 1288 (Fla. 1992), cert. denied, 114 S. Ct. 1205, 127 L. Ed. 2d 553 (1994); Coleman v. State, 610 So. 2d 1283 (Fla. 1992), cert. denied, 114 S. Ct. 321, 126 L. Ed. 2d 267 (1993); Hoffman v. State, 474 so. 2d 1178 (Fla. 1985). Groover's disparate treatment is warranted by the facts, as the trial court determined.

Groover ignores the fact that he, not Parker, killed both Dalton and Padgett and that he and Parker were not equally culpable codefendants. Instead, he claims that "Parker was the chief instigator of the offense **and exercised** total control and dominance over Mr. Groover." (Initial brief at 6). Groover complains that at Parker's trial the state **claimed** that Parker instigated the murders and intimidated him and Long into committing them. (Initial brief at 7). He sets out **a** minute portion of the testimony of one of more than twenty state witnesses against Parker (initial brief at 7-8) and implies that the state improperly took inconsistent positions in the two trials, i.e., blaming everything on Groover in his trial and everything on Parker in his.

Groover's defense was that he participated in these murders **only** because he was afraid of Parker. Groover, 458 So. 2d at 227. In closing argument Groover's counsel argued that he **was** not guilty. (E.g., T 1478). The prosecutor then told the jurors that

Groover "wants you to try Billy Long and Tinker [Robert] Parker and Elaine Parker, but he's on trial here today" and that "you're not here to make value judgments about guilt among people, you're here to determine whether or not he's guilty." (T 1520-21). Defense counsel then blamed everyone else connected with the case instead of Groover (T 1554) and argued that Groover was the fall guy for the others. (T 1575). Most of the evidence that Groover cites as distinguishing him from Parker (initial brief at 7-8, 10-12) was brought out at his trial,

Parker, on the other hand, claimed that Groover's threats against his family forced him into cooperating in the victims' murders. Parker, 458 So. 2d at 752. The state argued in closing that Parker controlled events the night the victims were killed (e.g., Parker record at 2155) and that, under the law of principals, Parker must be treated as if he had done all the things that the other participants did. (Parker record at 2184). Defense counsel pointed out that Groover killed Dalton and Padgett and that Long killed Sheppard. (Parker record at 2191). He argued that Parker did nothing to further the killings and did not actively participate in them. (Parker record at 2193).

Obviously, as evidenced by the convictions, neither Groover's jury nor Parker's believed their theories of defense. In his

sentencing order the trial judge noted that only Groover's testimony, and not any other evidence, supported the coercion claim and disposed of that claim by stating:

> "On various occasions during the hours of the crime each of them was armed while the other was not. Had defendant been threatened at any time by Parker, he had the opportunity to escape or to defend himself.
>
> The evidence of this seven-day trial belies defendant's contention of duress and/or dominance of Parker or any other person. In fact, it was the action of defendant in trying to collect the drug debt from Padgett which set the entire sequence of homicidal events into motion."

Groover, 458 So. 2d at 229 (quoting the trial court's findings of fact). This Court approved these findings in affirming Groover's convictions and sentences, and the trial court noted them in denying relief in this case. (PCR 56).

That the state did its best to convict each defendant of the charges against him and that the same evidence was not introduced at both trials is essentially irrelevant. "The purpose of a criminal trial is not to gauge defendants against each other, but to gauge their alleged crimes against the requirements of the law. Sometimes this may mean that one or more defendants will receive a harsher penalty." Espinosa v. State, 589 So. 2d 887, 895 (Fla. 1991) (Kogan, J., dissenting), reversed on other grounds, 112 S.

Ct. 2926, 120 L. Ed. 2d 854 (1992). Moreover, "the state attorney has complete discretion in deciding whether and how to prosecute." State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986).

The state has no duty to inform a trial court and jury that it took an inconsistent position in the trial of another defendant. Parker v. State, 542 So. 2d 356 (Fla. 1989). When there is no necessary contradiction in the state's positions in codefendants' trials, no due process violation occurs. Parker v. Singletary, 974 F.2d 1562 (11th Cir. 1992); see also Bush v. Singletary, 988 F.2d 1082, 1088 (11th Cir. 1993) ('The petitioner must prove that misleading evidence was presented and that it was material in obtaining his conviction"). Even though the state emphasized Parker's involvement when it tried him, it proved in Parker's trial that Groover killed both Dalton and Padgett. It proved the same thing in Groover's trial. There was, therefore, no real contradiction between the evidence presented at Groover's trial and that presented at Parker's.

The trial court's comparison of this case with Hannon (PCR 56-57) and its citation of Cardona, Steinhorst, and Coleman (PCR 57) were proper. This Court agreed that all of those defendants were more culpable than their codefendants, just as Groover was more culpable than Parker. Contrary to Groover's contention, Scott

(Paul) v. State, 657 So. 2d 1129 (Fla. 1995), is not on point. Paul Scott's codefendant, whom Scott claimed was the actual killer, is now free; Parker is still in prison and likely to stay there for life. Also, it has long been established that Groover, not Parker, was the actual killer.

As the trial court held, Groover has failed to demonstrate that he and Parker were equally culpable codefendants. Without such a showing he cannot meet the second part of the Scott test, i.e., he has not shown that Parker's reduced sentence for Sheppard's death, if known at trial, would probably have prevented his receiving two death sentences for killing Dalton and Padgett. This is especially true because the sentence for Dalton's murder was based on the jury's recommendation of death. Because Groover has not met the Scott test, and because this Court affirmed all four aggravators found by the trial court, there is no need for this Court to perform a harmless error analysis, like it did on Parker's remand, and consider the evidence Groover introduced in an attempt to mitigate his sentence. Parker's receiving a lesser sentence would be of little or no weight in mitigation for Groover due to the difference in their culpability. This Court, therefore, should affirm the trial court's denial of relief.

ISSUE II

WHETHER THE TRIAL COURT CORRECTLY DENIED THE POSTCONVICTION MOTION WITHOUT HEARING THE PARTIES IN PERSON.

Groover argues that the court erred by denying his third motion for postconviction relief without allowing counsel to argue in support of the motion in person. There is no merit to this issue.

In Huff v. State, 622 So. 2d 982, 983 (Fla. 1993), this Court held "that henceforth the judge must allow the attorneys to appear before the court and be heard on an initial 3,850 motion." (Emphasis supplied). The Court went on further and stated: "This does not mean that the judge must conduct an evidentiary hearing in all death penalty postconviction cases. Instead, the hearing before the judge is for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion." Id. Since Huff, this Court has reiterated the procedure set out in that case. E.g., Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1993) ("in a death case a trial court must give the parties the opportunity to appear in person to argue the postconviction motion and whether an evidentiary hearing is needed") (footnote omitted); Jackson v. Dusser, 633 So. 2d 1051, 1054 (Fla. 1993) ("trial judge must allow counsel for death penalty

defendants to orally argue the legal issues presented in an initial motion for postconviction relief") (emphasis supplied).

Huff, Lopez, and Jackson are distinguishable from this case because in each of those cases an initial rule 3.850 motion was at issue. This, however, is Groover's third motion for postconviction relief. As demonstrated in issue III, infra, all of the facts needed to decide the newly discovered evidence issue were apparent on the face of the motion and the record and no evidentiary hearing was needed to develop other facts. The motion is self-explanatory, and there was no need to have the parties argue in person.

Groover also argues that, because he did not receive a copy of the state's motion to dismiss, "the court's summary denial was predicated, in part, on argument by the State to which Mr. Groover had no opportunity to respond." (Initial brief at 23). This is incorrect. The trial court denied the original third motion on the merits and dismissed the amended motion. The state's motion to dismiss argued that the amended motion lacked verification and permission to amend and was untimely. (PCR 46-48). The state never responded to the merits of the newly discovered evidence claim until its response to Groover's motion for rehearing. (PCR 94-95). Moreover, as pointed out in the state's response to Groover's motion for rehearing, failing to receive a copy of the

State's motion to dismiss, while unfortunate, was not the state's fault. (PCR 92-93). No improper ex parte communication occurred. See Swafford v. State, 636 So. 2d 1309 (Fla. 1994).

Contrary to Groover's contention, his third postconviction motion should not have been treated as if it were a first rule 3.850 motion. Groover has failed to demonstrate what argument would have accomplished and has shown nothing that prejudiced him. The trial court committed no error in not having the parties argue the motion in person, and the court's order should be affirmed in all respects.

ISSUE III

WHETHER THE TRIAL COURT CORRECTLY DENIED GROOVER'S MOTION WITHOUT HOLDING AN EVIDENTIARY HEARING.

The trial court summarily denied Groover's third motion for postconviction relief. Groover now argues that the court should have held an evidentiary hearing. There is no merit to this issue.

A trial court need not hold an evidentiary hearing on a postconviction motion when the movant's claims are conclusively rebutted by the record. Rose v. State, 617 So. 2d 291 (Fla. 1993); Roberts v. State, 568 SO. 2d 1255 (Fla. 1990). Here, as the trial court held, the record conclusively shows that Groover and Robert Parker were not equally culpable:

> In the Padgett murder, the defendant was the only triggerman. While Padgett begged for his life, the defendant shot him in the head and then reloaded his gun and shot him again. In the Dalton murder, the defendant once again was the only triggerman. After kicking and beating Dalton, the defendant shot her five times in the head and body. In the Sheppard murder, although the defendant was not the triggerman, he encouraged Long to "shoot her [Sheppard] again" and offered Long a knife so that he could cut her throat. Further, as to the Sheppard murder, the court notes that there is no disparity between the defendant's sentences and Parker's sentence as the defendant and Parker were both convicted of first degree murder and both received life sentences. As the evidence shows, the defendant was clearly more culpable than his codefendant, Parker. Accordingly, the defendant's death sentences are not disproportionate when compared with Parker's life sentences as the defendant was more culpable than Parker. Hannon v. State, 638 so. 2d 39, 44 (Fla. 1994); see also Cardona v. State, 641 So. 2d 361, 365 (Fla. 1994); Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994); Coleman v. State, 610 So. 2d 1283, 1287 (Fla. 1992).

(PCR 56) (footnote omitted). As demonstrated in issue I, supra, the record supports the trial court's findings. An evidentiary hearing is needed only when there are issues of fact that cannot be resolved conclusively from the record. Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990).

In Scott the trial court summarily denied Scott's newly discovered evidence claim. 604 So. 2d at 468. On appeal this

Court decided the issue on its merits on the pleadings and record and saw no need for an evidentiary hearing. The same is true in the instant case because all of the facts needed to determine the issue are apparent on the record. The record conclusively shows, as found by the trial court, that Groover and Parker were not equally culpable. Because no facts were in dispute, the trial court correctly found no necessity for an evidentiary hearing. There is no merit to this issue, and the trial court's order should be affirmed.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY DISMISSED GROOVER'S AMENDED POSTCONVICTION MOTION.

The trial court denied Groover's original third postconviction motion and dismissed the amended motion because it was not verified, because he did not receive permission to file an amended motion, and because the public records requests were untimely. Groover complains about the dismissal, but demonstrates no reversible error.

Groover first claims that the court erred in holding that he should have received permission from the court before filing the amended motion. Groover claims that Florida Rule of Civil Procedure 1.190(a) gives him the right to amend his motion when and

as he chooses, but has not demonstrated that such rule controls this case. See Steinhorst v. State, 636 So. 2d 498, 500 (Fla. 1994) ('rule 1.540 applies only to civil causes, not to collateral claims associated with a criminal conviction"). Moreover, Groover shows no good reason why postconviction movants should be allowed to amend their motions arbitrarily. Instead, as noted in Lee v. State, 217 So. 2d 861 (Fla. 4th DCA 1969), allowing the amendment of a postconviction motion is within the trial court's discretion. Groover's reliance on Brown v. State, 596 So. 2d 1026 (Fla. 1992), Rozier v. State, 603 So. 2d 120 (Fla. 5th DCA 1992), and Rivet v. State, 618 So. 2d 377 (Fla. 5th DCA 1993), is misplaced because none of those cases holds that postconviction movants can amend their motions as a matter of right. Brown did not address the issue. The Rozier court found an abuse of discretion in refusing to allow a pro se movant to file a critical affidavit. In Rivet the court found similarly where the movant tried to cure a deficient oath.

In his original third rule 3.850 motion Groover requested 'leave to supplement his claims with additional facts as they become available, to add claims, and to provide a memorandum of law in support of his claims for relief." (PCR 28). The court never ruled on this request, and, in fact, Groover filed the amended

motion without asking if the court agreed to that filing. The trial court properly relied on Smith v. State, 636 So. 2d 171 (Fla. 2d DCA 1994). Groover has demonstrated no abuse of discretion in the trial court's dismissing the amended motion for failing to receive the court's permission to file that motion.

Groover also complains that the court should not have dismissed the amended motion because it was not verified. There is no merit to Groover's claim that "[a]ny amendment filed should be considered verified because the original motion was verified." (Initial brief at 28). Postconviction movants must use one of the oaths in Florida Rule of Criminal Procedure 3.897 to verify their motions because "[i]nformation in the motion must be based on personal knowledge." Shearer v. State, 628 So. 2d 1102, 1103 (Fla. 1993); Scott v. State, 464 So. 2d 1171 (Fla. 1985). Without a verification an amended motion could include information not known to the movant. Allowing unverified amendments, therefore, would defeat the purpose of requiring postconviction motions to be verified. There is no error in summarily denying unverified motions. Anderson v. State, 627 So. 2d 1170 (Fla. 1993). Thus, the trial court did not err in dismissing the amended motion for lack of verification. See PCR 50 (unpublished order in Cruse v. State, no. 84,091, attached to motion to dismiss).

Groover argues that "[a claim in a rule 3.850 motion regarding Chapter 119 public records is not a separate claim for relief" (initial brief at 29) and that, therefore, a motion amended to raise such claim need not be verified. Claim II in the amended motion asks for the trial court's assistance and forebearance and, therefore, is a claim for relief. Again, allowing unverified amendments would defeat the purpose of requiring postconviction motions to be verified. Even if the public records claim were not a claim for relief, Groover has shown no good reason to excuse the lack of verification.

The trial court also correctly held the public records claim to be time barred. In the amended motion Groover complains that he has not received public records from the State Attorney's Office, the Attorney General's Office, and the Florida Parole Commission. (PCR 41). The parole commission's records are not subject to the public records law. Asay v Florida Parole Commission, 649 So. 2d 859 (Fla. 1994), cert. denied, 116 S. Ct. 591, 133 L. Ed. 2d 505 (1995). Moreover, because Groover could have sought the parole commission's records in a prior proceeding, this claim is procedurally barred. White v. Dugger, 663 So. 2d 1324 (Fla. 1995).

Groover has been on death row since 1983 and filed his first motion for postconviction relief a decade ago. He has been

represented by the Capital Collateral Representative (CCR) since 1986. However, he made the instant public records requests of the Attorney General's Office and the State Attorney's Office on September 11, 1994, well outside the two-year limit in rule 3.850. Thus, the trial court correctly found these requests to be time barred. See Zeigler v. State, 632 So. 2d 48 (Fla. 1993), cert. denied, 115 S. Ct. 104, 130 L. Ed. 2d 52 (1994); Agan v. State, 560 So. 2d 222 (Fla. 1990); Demps v. State, 515 So. 2d 196 (Fla. 1987).

Even if this Court finds that Groover's public records issue should be addressed, such finding should not disturb the trial court's denial of the original third 3.850 motion because the newly discovered evidence claim has no merit. As explained earlier, the court properly dismissed the amended motion, which raised the public records claim, because it was not verified and because Groover did not have the trial court's permission to file the amendment. If and when the records requested from the State Attorney's Office and the Attorney General's Office are examined and a cognizable issue is discovered, such could be raised in another motion with leave of court.

CONCLUSION

Based on the foregoing, this Court should affirm the trial court's denial of relief on Groover's third motion for postconviction relief. The Court should also affirm the dismissal of the amended motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Gail Anderson, Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 5th day of June, 1996.

Barbara J. Yates

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