IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,623

TOMMY SANDS GROOVER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Groover's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Groover's claims without an evidentiary hearing.

The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court;

"TR." -- original trial transcript;

"PC-R." -- record on appeal of 1986 Rule 3.850 motion;

"H.T." -- transcript of 1986 circuit court evidentiary hearing;

"PC-R2." -- record on appeal of 1994 Rule 3.850 motion.

"PT." -- record on direct appeal of Robert Parker (Supreme Court case number 63,7000)

All other citations will be self-explanatory or will be otherwise explained.

REOUEST FOR ORAL ARGUMENT

Mr. Groover has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr.

Groover, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

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 11. 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. 268-70).

On direct appeal Mr. Groover raised several claims attacking his convictions and death sentences. The Florida Supreme 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

the Florida Supreme Court. The court remanded for an evidentiary hearing to determine trial counsel's ineffectiveness for "failing to inquire into his [Mr. Groover's] competency to stand trial and for failing to order a psychiatric evaluation of appellant." Groover V. State, 489 So. 2d 15, 17 (Fla. 1986). An evidentiary hearing was conducted and the lower court denied relief. An appeal from the denial was taken and the Florida Supreme 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 the Florida Supreme 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.[1] On November 15, 1991, the trial court summarily denied the second motion for post-conviction relief. Mr. Eroover appealed. The Florida Supreme Court affirmed the denial of post-conviction 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 U.S. District Court for the Middle District of Florida. That petition is pending.

On August 11, 1994, this Court issued its opinion in Parker v. State, 643 So. 2d 1032 (Fla. 1994), vacating the death

[1]The Florida Supreme Court had dictated that this claim be filed within two years of the Hitchcock opinion. See Hall v. State, 541 So. 2d 1125 (Fla. 1989).

sentence of Robert Lacy Parker, Mr. Groover's co-defendant at trial. Mr. Parker was subsequently sentenced to life without parole for twenty-five years by the trial court.

On December 4, 1994, Mr. Groover filed another motion to vacate judgment and sentence with request for leave to amend (PC-R2. 11). Mr. Groover alleged that Parker's life sentence was newly discovered evidence that should be considered in mitigation of Mr. Groover's death sentences. On February 2, 1995, Mr. Groover amended his motion to vacate judgment and sentence with request for leave to amend, and claimed that certain state agencies had not provided public records pursuant to Chapter 119, Florida Statutes (PC-R2. 27). Mr. Groover requested leave to amend his motion once the state agencies complied with Chapter 119 (PC-R2. 28).

On May 30, 1995, the trial court issued a seven-page order denying Mr. Groover's amended Rule 3.850 motion (PC-R2. 52). Mr. Groover was afforded neither an evidentiary hearing on his motion, nor a hearing wherein counsel could present legal argument, pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993). On June 19, 1995, Mr. Groover filed a motion to rehear the trial court's order denying the motion for post-conviction relief (PC-R2. 88). The trial court denied that motion on August 24, 1995 (PC-R2. 97).[2] This appeal followed.

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[2] All Mr. Groover's post-conviction proceedings have been heard by Hon. R. Hudson Olliff, Circuit Judge, who was also Mr. Groover's trial judge.

SUMMARY OF ARGUMENT

1. Since this Court reviewed Mr. Groover's death sentences on direct appeal and in prior post-conviction proceedings, Mr. Groover's co-defendant, Robert Parker, received a life sentence. Parker's life sentence is newly discovered evidence establishing the impropriety of Mr. Groover's death sentences. Scott v. **Dugger**, 604 So. 2d 465 (Fla. 1992). As a result of Parker's life sentence, Mr. Groover is also entitled to life sentences because Parker was the dominant force in the homicides, Mr. Groover acted out of fear of Parker, Mr. Groover was highly intoxicated at the time of the homicides, and Mr. Groover suffers from organic brain damage and mental retardation. The lower court erred in denying relief, and Mr. Groover's death sentences violate the Sixth, Eighth and Fourteenth Amendments.

2. The lower court erred by denying Mr. Groover's motion without providing Mr. Groover an opportunity to present argument on the motion.

3. The lower court erred by denying Mr. Groover's motion without an evidentiary hearing.

4. The lower court erred in denying Mr. Groover's amended motion on the grounds that it was not verified and not permitted, and because his public records issues were untimely.

ARGUMENT I

NEWLY DISCOVERED EVIDENCE THAT MR. GROOVER'S CO-DEFENDANT RECEIVED A LIFE SENTENCE ESTABLISHES MITIGATION THAT DEMANDS MR. GROOVER'S DEATH SENTENCES BE REDUCED TO LIFE. FURTHER, THIS NEWLY DISCOVERED EVIDENCE DEMONSTRATES THAT MR. GROOVER'S DEATH SENTENCES ARE ARBITRARY, CAPRICIOUS, DISPROPORTIONATE, DISPARATE, AND INVALID, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Evidence of a co-defendant's life sentence may be considered in mitigation. Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992); Messer v. State, 330 so. 2d 137 (Fla. 1970); Gafford v. State, 387 So. 2d 333 (Fla. 1980); Brookings v. State, 495 So. 2d 135 (Fla. 1986). In Scott v. Dugger, this Court held that a co-defendant receiving a life sentence subsequent to the defendant's review on direct appeal constitutes newly discovered evidence:

> Even when a codefendant has been sentenced subsequent to the sentencing of the defendant seeking review on direct appeal, it is proper for this Court to consider the propriety of the disparate sentences in order to determine whether a death sentence is appropriate given the conduct of all participants in committing the crime. Witt v. State, 342 So. 2d 497 (Fla.), cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L.Ed.2d 294 (1977). While Witt involved review of a death sentence on direct appeal, this case involves review in a 3.850 proceeding. Scott characterizes Robinson's life sentence, which was imposed after this Court affirmed Scott's conviction and death sentence, as "newly discovered evidence" and, thus, cognizable under Rule 3.850.

Scott (Abron) v. Dugger, 604 So. 2d 465, 468 (Fla. 1992).

Mr. Groover's co-defendant, Robert Parker, had his death Sentence vacated by this Court, Parker v. State, 643 So. 2d 1032

(Fla. 1994), and was resentenced to life. The court's imposition of a life sentence in Mr. Parker's case occurred after this Court had affirmed the conviction and sentence in Mr. Groover's case and was thus unavailable for consideration earlier.

This Court has outlined two requirements a defendant must meet in order to win relief because of newly discovered evidence:

> Two requirements must be met in order to set aside a conviction or sentence because of newly discovered evidence. First, the asserted facts "must have been unknown by the trial court, 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." Hallman, 371 so. 2d at 485. Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Jones v. State, 591 so. 2d 911, 915 (Fla. 1991) The Jones standard is also applicable where the issue is whether a life or death sentence should have been imposed. Id.

Scott, 604 So. 2d at 468.

In Mr. Groover's case, both requirements have been met and relief is appropriate. As noted above, co-defendant Robert Parker's life sentence was not imposed until after Mr. Groover's direct appeal and prior post-conviction proceedings were completed. Thus, this fact could neither have been known nor discovered at the time that this Court previously reviewed Mr. Groover's death sentences.

The second requirement is met because Mr. Parker was the chief instigator of the offense and exercised total control and dominance over Mr. Groover, who suffers from organic brain damage

and mental retardation. See Claims I, III, IV and XII of Mr. Groover's 1986 Motion to Vacate Judgment and Sentence.

Tommy Groover and Robert Parker were tried separately. Judge R. Hudson Olliff presided over both trials. At Robert Parker's trial for the Padgett, Sheppard and Dalton murders, the State introduced plentiful evidence that Mr. Parker, not Tommy Groover, had instigated the murders, and had intimidated Billy Long and Tommy Groover into aiding him. In fact, on the afternoon of February 5, 1982, shortly before Tommy Groover began his efforts to collect money to pay Robert Parker for drugs he had given away, Parker had threatened to kill Groover. To show that he was serious, Parker threw a rope over a tree and told Tommy he would hang him.

Michael Green testified that Robert Parker demanded money owed to him by several people who were gathered outside his trailer on February 5, 1982. Green owed Parker $30 for some PCP. He gave Mr. Parker a .22 caliber pistol as payment (PT. 1565). Mr. Parker took the pistol and began pointing it at other people who owed him money (PT. 1567).

Mr. Green testified that he left for a while. When he returned, he observed:

> **Q:** Okay. You didn't know exactly what time it was?
>
> **A:** I don't exactly recall what time it was. But, anyway, we got back from -- after I caught a ride back over there at Tinker's[3]

[3] "Tinker" is the nickname of Robert Parker.

house, well, got dropped off and Tinker and Tommy was out there and Tommy was --

Q: Out where?

A: Out there in the front yard.

Q: All right.

A: And Tommy was out there and, I mean, Tinker and Tommy was arguing.

Q: What was the substance of this conversation?

A: It must have been over some money because Tinker told Tommy he wanted his goddamn money today.

Q: All right. What else did he say? What was his tone of voice?

A: He was real angry and nervous, you know, pissed off. And he said, kept telling him he wanted his goddamn money today. And Tommy said, you know, "I will give it to you tomorrow. Give me until tomorrow and I will have your money."

Q: What else did Tinker say?

A: Tinker told him that he -- just that he wanted his goddamn money, if he didn't he was going to hang him. And he pointed over there to a rope that was hanging from the tree that had a noose on it.

Q: This is a rope in Tinker's yard.

A: Yes, sir.

Q: All right. How long was it?

A: It was about 50 or 60 foot long. Well, it was over a big old tree limb, it was pretty high, one of them big old pine trees. And the rope was hanging from that.

Q: How was Tommy -- excuse me, Tommy Groover acting?

A: Tommy was scared.

(PT. 1567-68).

In Judge Olliff's findings of fact justifying imposition of the death penalty against Robert Parker, he found:

> The day before the homicidal events began, Parker placed a rope over a tree limb and told Groover he would hang him if he did not pay the drug debt. The day of the homicides Parker again threatened to kill Groover if he did not get the money.
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> * * *
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> [T]he homicidal events started when defendant [Parker] made threats of death to enforce payment of drug debts.
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> * * *
>
> Defendant threatened to kill Groover if he did not get drug money.
>
> Defendant (Parker] threatened and intimidated others but was himself never threatened.
>
> * * *
>
> This defendant is the person who had guns and was armed most of the time and he is the person who repeatedly threatened to kill Groover.

(PT. 476-508).[4]

The State in its litigation involving Robert Parker has also maintained that Mr. Parker was the "ring leader," "ordered all three deaths" and "dominated" Tommy Groover:

> It is virtually beyond dispute that Parker was the leader of a small-time drug business and that he dominated Tommy Groover. At all times relevant to this case, Groover was collecting money for Parker (R 1244) out of

[4] Significantly, Judge Olliff did not attach Parker's sentencing order to the court's order denying Mr. Groover's 1994 Rule 3.850 motion.

> fear that Parker would kill or injure him. (R 1131, 1141, 1177, 1179). Groover was scared of Parker. (R 1244, 1178). Even when Groover was armed, he was obedient to Parker. (R 1182, 1241). The record is devoid of any instances where Groover hit Parker, screamed threats at Parker, gave Parker orders or even stood up to Parker's physical and verbal assaults. At best, Parker's attempt to slough off these murders on his employees are disingenuous. There was no credible evidence upon which the jury's recommendation could have rested.

(Answer of Appellee on Remand at 22-23, Parker v. State, Florida Supreme Court Case No. 63,700).

In weighing Parker's life sentence as it relates to the second part of the Scott test, the lower court failed to consider the substantial and compelling mitigation established at Mr. Groover's trial. The trial record is saturated with evidence of the use of drugs and alcohol. The State's own witnesses attested to the heavy use of drugs and alcohol on the day and night of the murders. The County Medical Examiner, Dr. Peter Lipkovic, testified that he arranged for tests of Richard Padgett's blood. The tests showed .18 percent blood alcohol, and the presence of PCP (TR. 680). Dr. Lipkovic testified that the use of alcohol might exaggerate the effects of PCP (TR. 682-83).

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

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

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

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

(i) 2 quarter sacks of pure uncut PCP -- a third of a gram (R. 655). This affected

him mentally so that he "did not know what he was doing" (R. 656).

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

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

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

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

Finally, Tommy Groover is unusually susceptible to intimidation and domination by others. Because of his low intelligence, resulting from organic brain damage, Tommy Groover depended on others to make decisions for him. Throughout his life, he looked to older siblings and neighbors to give him advice. This advice was frequently contrary to his best interests. These "friends" encouraged Tommy to experiment with drugs, a pattern of behavior Tommy repeated when he met Robert Parker, who sold drugs and used Tommy as a courier.[5]

These facts notwithstanding, the lower court found, "[T]he defendant and Parker were not equally culpable in the murders" (PC-R2. 56). The court further found:

In his motion, the defendant claims that the second requirement is satisfied because the

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[5]This mitigating evidence was not presented at trial, and thus was not considered by Judge Olliff in sentencing Mr. Groover to death.

> defendant was dominated by Parker. However, the court previously determined that the defendant was not acting under the extreme duress or domination of Parker. (Exhibit A, p. 13).

(PC-R2. 56A n.2). The court went on to find that Mr. Groover was in fact more culpable than Parker (PC-R2. 56A). The court, in its order denying Mr. Groover's motion, made no mention of the evidence at trial of Mr. Groover's intoxication, nor did the court attach any portion of the record dealing with Mr. Groover's intoxication. Further, the lower court ignored the record of Parker's trial and the court's own sentencing findings in Parker's case, where the court found that Parker dominated and controlled Mr. Groover. This evidence supports Mr. Groover's contention that Parker was in control.

The flaws of logic in the lower court's order are many. First, the lower court's only citation to the portion of the record attached to its order refers to page 13 of its order sentencing Mr. Groover to death. Page 13 is a discussion of the "extreme duress or substantial domination of another" mitigation circumstance, §921.141(6)(e), Fla. Stat. When sentencing Mr. Groover to death, the lower court rejected the application of the duress or domination mitigating circumstance (PC-R2. 72-73). (PC-R2. 72-73). In rejecting this mitigating circumstance, the lower court found that Mr. Groover was not acting under extreme duress or the substantial domination of Mr. Parker. As this Court has often held, the language of the statutory mitigating circumstance means just what it says: in order for this

mitigating circumstance to apply, the duress must be extreme, or the domination must be substantial. That the lower court rejected the substantial domination mitigating circumstance does not prove that Mr. Groover was not dominated in any way by Parker, much less that Mr. Groover was more culpable than Parker. The lower court found, in sentencing Parker to death, that Parker's participation in the murders was "major and predominant," and that Parker had threatened to kill Mr. Groover if Mr. Groover did not collect the drug debt owed to Parker by victim Richard Padgett. See Groover v. State, 458 So. 2d 226, 229 (Fla. 1984). In now finding that Mr. Groover was more culpable than Parker, the lower court conveniently ignored its finding at the time of sentencing that Parker's participation was "major and predominant."[6]

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[6] See also Parker v. State, 643 So. 2d 1032, 1036-37 (Fla. 1994) (appeal after remand):

> When Groover was unable to pay Parker, Parker allegedly threatened to hang Groover unless the debt was satisfied. Testimony indicated Parker was of a violent temperament, had possession of firearms and was irritated over the drug debt.
>
> ***
>
> Parker was the instigator of the three murders in this case. . . . The killings were instigated by Parker to assure fiscal control over his drug dealers. The people who actually killed the victims and received lesser sentences, in effect, worked for Parker and killed the victims at Parker's behest.

(Overton, J., and Grimes, C.J., dissenting).

It is instructive to examine the facts of Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992), which held that a post-conviction litigant may raise a co-defendant's life sentence, imposed after the litigant was sentenced to death, as newly discovered mitigating evidence. The facts of Scott are as follows:

> [T]he record in this case shows that Scott and Robinson had similar criminal records, were about the same age, had comparable low IQs, and were equally culpable participants in the crime. In a letter to the governor and other members of the Clemency Board, trial judge Susan Schaeffer made the following observations about the relative culpability of the codefendants:
>
> > As to the crime itself, they were both involved in all aspects of it. They both participated in the robbery of the victim, his kidnapping, his beatings, and, although Scott eventually ran the man down with the automobile, it was only after Robinson concocted this method of killing the victim, and, in fact was the first to try, but failed. It is clear that this is not a case where Scott was the "triggerman" and Robinson a mere unwitting accomplice along for the ride. In fact, "there is little to separate out the joint conduct of the codefendants which culminated in the death of the decedent. See Messer v. State, [330 So.2d 137, 142 (Fla.1976), cert. denied, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863)].

Scott, 604 So. 2d at 468. Mr. Groover's case is strikingly similar to Scott. As in Scott, Mr. Groover and Mr. Parker had similar criminal records. As in Scott, Parker was not a "mere unwitting accomplice along for the ride." Unlike Scott, there has been no contention that Mr. Parker has a low I.Q., while

there was uncontroverted evidence presented at Mr. Groover's evidentiary hearing on his 1986 Rule 3.850 motion that he suffered from organic brain damage and had an I.Q. that indicated he was mentally retarded (H.T. 168-71). Mr. Groover's case thus fits squarely within the holding of Scott except that Mr. Groover's case is even more compelling because Mr. Parker was more culpable than Mr. Groover. Even if this Court were to determine that Mr. Groover and Mr. Parker were equally culpable, the imposition of a life sentence for Mr. Groover is nonetheless appropriate. Scott, 604 So. 2d at 469, 470 (vacating Scott's death sentence because his "equally culpable codefendant" had been sentenced to life). The lower court's order thus was contrary to this Court's holding in Scott and the dictates of the Eighth and Fourteenth Amendments to the United States Constitution.

The lower court cited to Hannon v. State, 638 So. 2d 39 (Fla. 1994), for the proposition that "the death sentence of a more culpable codefendant is not disproportionate when a less culpable codefendant receives a less severe punishment" (PC-R2. 56). Hannon is inapposite. As explained above, Mr. Groover was not more culpable than Parker. The evidence shows that each murder was instigated and ordered by Parker. Even the most parsimonious reading of the facts indicates Groover and Parker were equally culpable, in which case Hannon, a case wherein one co-defendant was the more culpable, is inapposite. The lower court's citation to Hannon illustrates its misreading of this

Court's holding in Scott. The issue is not only proportionality; it is mitigating evidence. See Porter v. State, 653 So. 2d 374, 379 (Fla. 1995) (In Scott, "We considered the codefendant's subsequent life sentence newly discovered evidence due to the nature of the mitigator") (emphasis added). The lower court here seemed to think its duty was fulfilled simply by comparing the relative culpability of Mr. Groover and Parker. However, the lower court must add Parker's life sentence to all the other mitigating evidence Mr. Groover presented at trial and in his post-conviction hearing, and determine whether death is an appropriate penalty by weighing anew the aggravating and mitigating circumstances. This the lower court did not do. It is only after the court weighs the aggravating and mitigating factors and finds that death is the appropriate penalty that the court should consider proportionality.

The lower court also cited to Cardona v. State, 641 So. 2d 361 (Fla. 1994); Steinhorst v. Singletary, 638 So. 2d 33 (Fla. 1994); and Coleman v. State, 610 So. 2d 1283 (Fla. 1992), for the proposition that Mr. Groover's death sentences are not disproportionate when compared with Parker's life sentences because Mr. Groover was more culpable (PC-R2. 56A). In Coleman, three co-defendants were tried together. The jury recommended life for each, but the court overrode the jury and sentenced each to death. While the cases were on appeal, the State tried a fourth co-defendant, Williams. One of the original co-defendants, Frazier, agreed to testify for the State against

Williams in exchange for a life sentence. After Frazier was sentenced to life, co-defendant Coleman challenged his death sentence on proportionality grounds. This Court found that Frazier was less involved and less culpable than Coleman. Coleman, 610 So. 2d at 1287. This Court also found that "the potential mitigating evidence presented in [Coleman's] case is of little weight . . . ." Id. For this reason Coleman is inapposite. Mr. Groover introduced mitigating evidence at trial and in his post-conviction proceedings regarding his mental incapacities. This mitigating evidence is directly relevant to Mr. Groover's claim that he was dominated by Parker, and that Parker was more culpable. Coleman apparently introduced no such mitigating evidence.

Cardona is likewise inapposite. This Court upheld the trial court's ruling that Cardona was the more culpable of the two co-defendants. Cardona, 641 So. 2d at 365. Unlike Mr. Groover's case, Ms. Cardona's co-defendant pled guilty to second-degree murder, testified against Cardona, and received a sentence less than death. Id. at 362. Also unlike Mr. Groover's case, there was no compelling evidence presented at sentencing that Ms. Cardona's co-defendant had threatened Cardona with death, or that Ms. Cardona's mental state made her unusually susceptible to domination by her co-defendant.[7]

[7] Cardona did present evidence of cocaine abuse and emotional disturbance due to her changed financial circumstances prior to the murder. The sentencing court gave these factors little weight because Ms. Cardona was suffering from no major mental illness. Cardona, 641 So. 2d at 363.

Finally, the lower court relied on Steinhorst v. Sinsletary, 638 so. 2d 33 (Fla. 1994). On its facts, Steinhorst is wholly inapposite to a claim under Scott. This Court affirmed Steinhorst's death sentence after it had reduced his co-defendant's sentence to life; therefore his co-defendant's life sentence was not newly-discovered evidence. Steinhorst, 638 So. 2d at 35. Second, this Court held that Steinhorst and his co-defendant were not equally culpable. This Court found Steinhorst had fired the fatal shots, whereas his co-defendant was not present at the time of the killings. Id. As discussed above, Mr. Groover was not more culpable than Parker. Parker not only was present at each killing, but he ordered each killing. Steinhorst is inapposite.

A case more on point, yet overlooked by the lower court, is Scott (Paul) v. State, 657 So. 2d 1129 (Fla. 1995). There, in successor post-conviction litigation under warrant, Paul Scott alleged that his co-defendant, Richard Kondian, was the actual killer, and that the State had suppressed evidence at trial that would have established as much. Scott, 657 So. 2d at 1130. This Court ordered an evidentiary hearing, noting that the jury had recommended death for Scott and that Kondian had pled guilty to second-degree murder and was now free. Id. at 1132. Two concurring justices found that the undisclosed exculpatory material could have been used by this Court in its proportionality review of Scott's sentence, due to Kondian's life sentence and greater culpability, and noted that "We repeatedly

have reduced sentences to life where a co-perpetrator of equal or greater culpability has received life or less." Id. at 1133 (Kogan and Anstead, JJ., concurring).

A court's refusal to consider disparate treatment or proportionality as a mitigating factor in a case where, as here, the trial court specifically found that the defendant who received the life sentence (Mr. Parker) was the principal instigator of the murders and threatened to kill his co-defendant (Mr. Groover) would violate Lockett v. Ohio, 438 U.S. 586 (1978) and Eddinss v. Ohio, 455 U.S. 104 (1982). See also Maqwood v. Smith, 791 F.2d 1438 (11th Cir. 1986). Considering all the mitigation introduced at Mr. Groover's penalty phase, the additional evidence of Mr. Groover's low I.Q. and organic brain damage introduced in his post-conviction hearing, and the evidence that Parker dominated Mr. Groover, plus the newly discovered evidence of Parker's life sentence, it is probable that, in a new penalty phase proceeding, a life sentence would be imposed. Scott v. Dugger.

The central constitutional concern of capital punishment jurisprudence is that any death sentence be proportionate. See Gregg v. Georsia, 428 U.S. 153 (1976). Mr. Groover respectfully requests that this Court, on proportionality, disparity, and fundamental fairness grounds, vacate Mr. Groover's death sentences and remand to the lower court for imposition of a life sentence without eligibility for parole for twenty-five years. Scott, 604 So. 2d at 470. At the least, a proper resentencing is

required, at which Parker's life sentence may be taken into account. As it is, no sentencer has been provided a "vehicle" for considering the co-defendant's life sentence. See Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989) (capital sentencer "must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense"). The originally imposed sentences of death in this case are no longer valid and thus can no longer stand in light of the facts that have come to light post-trial and post-direct appeal, and in light of the applicable precedents. The death penalty herein is disparate, arbitrary and capricious.

The new facts which came to light after the affirmance of Mr. Groover's case on direct appeal should now be considered. This Court should vacate Mr. Groover's death sentences and remand for imposition of a sentence of life without eligibility for parole for twenty-five years. In the alternative, this Court should remand to the lower court for a resentencing at which the newly-discovered mitigating evidence of Parker's life sentence can be considered along with the other mitigating evidence in this case.

ARGUMENT II

TEE LOWER COURT ERRED BY DENYING MR. GROOVER'S MOTION WITHOUT PROVIDING MR. GROOVER AN OPPORTUNITY TO ARGUE HIS MOTION, IN VIOLATION OF MR. GROOVER'S RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The lower court summarily denied Mr. Groover's motion without providing Mr. Groover an opportunity to present argument or evidence in support of his motion. The right to present evidence attaches if the files and records do not conclusively show that the defendant is entitled to no relief. Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993)(citing Provenzano v. Dugger, 561 So. 2d 541, 542 (Fla. 1990), Harich v. State, 484 So. 2d 1239, 1240 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984)). However, the defendant in a death penalty case is entitled to an opportunity to present argument in support of his claims before the court denies his motion. Huff v. State, 622 So. 2d 982 (Fla. 1993); Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1993). In Huff, the lower court summarily denied Huff's Rule 3.850 motion without providing Huff an opportunity to argue his motion or to respond to the court's order before the court signed it. This Court held, "Huff should have been afforded an opportunity to raise objections and make alternative suggestions to the order before the judge signed it." Huff, 622 So. 2d at 983 (emphasis in original). The Court found that the lower court denied Huff due process because the court did not give him a reasonable opportunity to be heard. Id. The Court held that "because of the severity of punishment at issue in a death

penalty postconviction case," the court must allow the defendant to be heard on his Rule 3.850 motion before the court rules on the motion. Id. See also Lopez, 634 So. 2d at 1058 ("We hold, therefore, that in the future 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).

Here, Mr. Groover requested the right to be heard on his motion, citing Huff (PC-R2. 11, 27). The lower court denied Mr. Groover's motion without hearing argument from counsel. This summary denial without hearing argument violated Mr. Groover's right to due process. Further, the court's order indicated that it relied on the State's motion to dismiss, which the court's order states was filed on February 27, 1995 (PC-R2. 52). As pointed out in Mr. Groover's motion to rehear the order denying the motion for post-conviction relief, Mr. Groover's counsel never received a copy of the State's motion to dismiss (PC-R2. 88). Thus, the court's summary denial was predicated, in part, on argument by the State to which Mr. Groover had no opportunity to respond. This violates due process. See Rose v. State, 601 So. 2d 1181 (Fla. 1992).

Although Mr. Groover's motion was not his first Rule 3.850 motion, the motion presented a cognizable claim (see Argument I, supra). Since the claim was cognizable, it should have been treated as though it was presented in a first Rule 3.850 motion, and the dictates of Huff therefore should have been followed.

This Court should remand to the lower court with instructions to permit Mr. Groover an opportunity to argue his motion.

ARGUMENT III

THE LOWER COURT ERRED BY DENYING MR. GROOVER'S RULE 3.850 MOTION WITHOUT GRANTING AN EVIDENTIARY HEARING, THUS DENYING MR. GROOVER'B RIGHT TO DUE PROCESS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The law strongly favors full evidentiary hearings in death penalty post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters. Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982). "This Court must determine whether the two allegations . . . are sufficient to require an evidentiary hearing. Under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is not entitled to relief (citations omitted)." Harich v. State, 484 So. 2d 1239, 1240 (Fla. 1986)(emphasis added). "Because an evidentiary hearing has not been held . . . we must treat [the] allegations as true except to the extent that they are conclusively rebutted by the record." 484 So. 2d at 1241 (emphasis added). Accord Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990); Mills v. State, 559 So. 2d 578, 578-579 (Fla. 1990); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984).

Some fact-based post-conviction claims by their nature can only be considered after an evidentiary hearing. Heiney v. State, 558 So. 2d 398, 400 (Fla. 1990). "The need for an

evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be **harmless."** Holland v. State, 503 So. 2d 1250, 1252-53 (Fla. 1987). **"The** movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." State v. Crews, 477 so. 2d 984, 984-985 (Fla. 1985). "Accepting the allegations . . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lishtbourne v. Duaser, 549 so. 2d 1364, 1365 (Fla. 1989).

Mr. Groover has pled substantial, serious allegations that go to the fundamental fairness of his death sentence. Specific **facts** supporting his claims were detailed in his motion. Mr. Groover was -- and is -- entitled to an evidentiary hearing on his Rule 3.850 pleadings. Hoffman. Mr. Groover was -- and is -- entitled in these proceedings to that which due process allows -- a full and fair hearing by the court on his claims. Hoffman; Holland v. State. Mr. Groover's due process right to a full and fair hearing was abrogated by the lower court's summary denials, which did not afford proper evidentiary resolution.

Unlike the Hoffman court, the lower court here did attach to **its** order the portion of the record that, presumably, the court found conclusively showed that Mr. Groover is not entitled to

relief. It must be presumed that the court attached a portion of the record for the purpose of showing conclusively that Mr. Groover was entitled to no relief, because the court referred to the attachment only once, in a footnote. Beyond stating that, "The facts surrounding the three murders are as follows (see "Exhibit A", Sentence of Tommy S. Groover, pp. 3-6)," the court in its order cited to only one portion of the attachment that, presumably, supported the court's conclusion that Mr. Groover was entitled to no relief (PC-R2. 56A at n.2). That one-page portion of the record does not conclusively establish that Mr. Groover is entitled to no relief. See Martin v. State, 20 Fla. L. Weekly D2518 (4th DCA Nov. 15, 1995)("[W]e conclude that the response and the attachments to the trial court's order denying relief do not conclusively refute appellant's claim"); Bolden v. State, 637 So. 2d 337, 338 (Fla. 2d DCA 1994)("The trial court attached part of the record in denying this aspect of Bolden's motion. However, we determine that these portions of the record do not conclusively refute Bolden's allegations . . . ."); Perez v. State, 605 So. 2d 163, 164 (Fla. 2d DCA 1992)("Because the plea colloquy attached to the trial court's order of denial does not adequately refute this claim, we reverse on this point and remand"). Accordingly, this Court should reverse and remand for a full and fair evidentiary hearing as required by Rule 3.850. Hoffman, 571 So. 2d at 450.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. GROOVER'S AMENDED MOTION ON THE GROUNDS THAT IT WAS NOT VERIFIED, NOT PERMITTED, AND BECAUSE HIS PUBLIC RECORDS ISSUES WERE UNTIMELY.

The lower court denied Mr. Groover's amendment to his motion to vacate for three reasons: it was not verified, Mr. Groover did not seek leave of court to amend, and because "the defendant has had ample time to discover public records" (PC-R2. 56-57). As for the lower court's suggestion that Mr. Groover was required to seek permission to amend his motion, there is no such requirement in Fla. R. Crim. P. 3.850. Except where there is a contradictory provision in Rule 3.850, post-conviction proceedings are governed by the rules of civil procedure. Green v. State, 280 So. 2d 701, 702 (Fla. 4th DCA 1973). The Florida Rules of Civil Procedure provide for amendment of pleadings. Fla. R. Civ. P. 1.190(a) states:

> **Amendments.** A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, may so amend it at any time within 20 days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave of court shall be given freely when justice so requires. A party shall plead in response to an amended pleading within 10 days after service of the amended pleading unless the court otherwise orders.

Fla. R. Crim. P. 3.850 permits a responsive pleading. Fla. R. Crim. P. 3.850(d). The State did not respond to Mr. Groover's

motion before Mr. Groover filed his amendment on February 2, 1995; therefore Mr. Groover was not required to seek leave of court before amending his motion.

The case cited by the lower court as authority for the proposition that Mr. Groover must seek leave of court to amend is inapposite. Smith v. State, 636 So. 2d 171 (Fla. 2d DCA 1994), holds **that** the district court of appeal has no authority to review the order of a trial court denying a defendant's motion to amend his or her Rule 3.850 motion. The lower court did not cite to Brown v. State, 596 So. 2d 1026 (Fla. 1992), wherein this Court did not disapprove the filing of an amendment to a Rule 3.850 motion after the limitation period has run. The Fourth District Court of Appeal has specifically held that a defendant may amend **a** motion for post-conviction relief. Lee v. State, 217 so. 2d 861, 863 (Fla. 4th DCA 1969). Likewise the Fifth District Court of Appeal **has** approved amendment of a timely-filed motion for post-conviction relief. Rozier v. State, 603 So. 2d 120 (Fla. 5th DCA 1992)(citing Brown). See also Rivet v. State, 618 So. 2d 377 (Fla. 5th DCA 1993). The weight of authority indicates that the lower court erred in holding that Mr. Groover was not entitled to amend.

As for the verification requirement of Fla. R. Crim. P. 3.850, Mr. **Groover's** original motion, filed on December 4, 1994, was verified. Any amendment filed should be considered verified because the original motion was verified. Amendments relate back to the date of the original pleading. Fla. R. Civ. P. 1.190(c).

Therefore, the oath sworn to in the original pleading should also cover the amended'motion.

Moreover, the amended motion added no new claims for relief, no new facts, and no new legal bases for relief.[8] The amended motion notified the court that certain state agencies had not complied with Chapter 119, Florida Statutes, and requested leave to amend the motion once the state agencies had complied. A claim in a Rule 3.850 motion regarding Chapter 119 public records is not a separate claim for relief; a movant cannot win a new trial or new sentencing proceeding because a state agency has not complied with Chapter 119. The purpose of pleading a Chapter 119 claim in a Rule 3.850 motion is to put the court on notice that the claims are outstanding, and to provide the post-conviction defendant with a forum in which to litigate his 119 issue without suing in civil court. See Hoffman v. State, 613 So. 2d 405 (Fla. 1992).

Even if this Court finds that an amendment adding a Chapter 119 claim to a pending, verified Rule 3.850 motion must

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[8] Compare Morais v. State, 640 So. 2d 1227 (Fla. 2d DCA 1994)(affirming dismissal without prejudice of unsworn memorandum of law); Freeman v. State, 629 So. 2d 276 (Fla. 2d DCA 1993) (affirming dismissal without prejudice of unsworn supplemental motion raising new claim for relief); Peavy v. State, 599 So. 2d 234 (Fla. 1st DCA 1992) (affirming dismissal without prejudice of unsworn memorandum of law containing factual allegations forming basis for relief). See also Price v. State, 487 So. 2d 34 (Fla. 1st DCA 1986)(holding that defendant cured defect in unsworn motion by filing sworn affidavit supporting grounds for his motion); Meagher v. Dugger, 861 F.2d 1242 (11th Cir. 1988) (finding defendant substantially complied with Rule 3.850 by filing sworn motion and sworn supporting affidavit that was not incorporated by reference into the motion).

nonetheless be verified, the appropriate remedy is to dismiss without prejudice for Mr. Groover to file a verified, amended motion raising his Chapter 119 claim. Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993); Gorham v. State, 494 So. 2d 211 (Fla. 1986); Scott (Paul) v. State, 464 So. 2d 1171 (Fla. 1985).

As for the lower court's suggestion that Mr. Groover's public records issue is time-barred, this Court has never held that public records issues can be time-barred in post-conviction litigation. See Atkins v. State, Nos. 86,893 & 86,882, (Fla. Dec. 1, 1995)(public records issue considered on the merits in successor post-conviction litigation).

CONCLUSION

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, Appellant respectfully submits that he is entitled to relief from his unconstitutional death sentences, to an evidentiary hearing, and to all other relief which the court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 1, 1996.

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