IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,623

TOMMY SANDS OROOVER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY BTATEMENT

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.

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ARGUMENT IN RESPONSE AND REBUTTAL TO ARGUMENT IN ANSWER BRIEF

In its Answer Brief, the State concedes that Mr. Groover has stated a legally sufficient claim for relief under this Court's decision in Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). The State suggests that Mr. Groover is not entitled to relief, however, because Mr. Groover and codefendant Parker were not equally culpable. Answer Brief at 8.

The State contends that, in order to prevail, Mr. Groover must establish that Parker's life sentence would "probably produce an acquittal on retrial." Answer Brief at 9. This is not the standard used by this Court in Scott. In Scott, this Court held:

> Based upon this record, this Court probably would have found Scott's death sentence inappropriate had Robinson's life sentence been factored into our review on direct appeal.

Scott, 604 So. 2d at 469. Thus the standard is not what a jury would do on retrial, but what the Supreme Court would have done on direct appeal, had it known of Parker's life sentence. Mr. Groover must establish that this Court would have found Mr. Groover's death sentence inappropriate had Parker's life sentence been factored into its review on direct appeal.

Further, in conducting its analysis under Scott, this Court is not limited to the record of Mr. Groover's case on direct appeal. In Scott, this Court considered Judge Schaeffer's statements at a Rule 3.850 hearing and Judge Schaeffer's letter to the Clemency Board. Id. at 468-69. Therefore, this Court may

consider Mr. Groover's direct appeal record and the records on appeal from his Rule 3.850 denials in determining whether consideration of Parker's life sentence would have caused this Court to hold that Mr. Groover's death sentence was inappropriate.

In its Answer Brief, the State suggests that Mr. Groover is more culpable than Parker because the Florida Supreme Court upheld all aggravating factors found in Mr. Groover's case, but struck two of the six aggravating circumstances found in Parker's case. Answer Brief at 10-11. This argument is meaningless: both Mr. Groover and Parker were left with four aggravating circumstances.

In its Answer Brief, the State alleges that Mr. Groover and **Parker** were not equally culpable codefendants. Answer Brief at 12. The State ignores the trial court's sentencing order in Parker, relevant portions of which were set forth in Mr. Groover's Rule 3.850 motion and his Initial Brief:

> **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.
>
> * * * *
>
> [T]he homicidal events started when defendant [Parker] made threats of death to enforce payment of drug debts.
>
> * * * *
>
> 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); Initial Brief at 9.

The State also ignores the fact that it has consistently taken the position that 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 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); Initial Brief at 9-10. In its Answer, the State fails to address how consideration of this information, not known to this Court when it considered Mr. Groover's death sentence on direct appeal, would have affected this Court's consideration of the appropriateness of Mr. Groover's death sentence in light of Parker's life sentence. Scott, 604 So. 2d at 469. As in Scott, had this Court considered

the extra-record material of Judge Olliff's sentencing order in Parker, the State's position that Parker was the dominant actor, and Parker's life sentence, this Court would have found Mr. Groover's death sentence inappropriate. **See** Scott, 604 So. 2d at 468-69.

In its Answer Brief, the State argues that Parker maintained at trial that Mr. Groover's threats against Parker's family forced him to cooperate in the murders. Answer Brief at 13. However, in its sentencing order in Parker, the trial court found that Parker had not been threatened by Groover (PT. 476-508); Initial Brief at 9.

The State directs this Court to the trial court's sentencing order in Groover, wherein the court rejected Mr. Groover's claim of duress or domination by Parker. Answer Brief at 14. What the State fails to address is that the trial court's orders in Groover and Parker are wholly inconsistent with each other.[1] In Mr. Parker's sentencing order, the court found that Parker dominated Mr. Groover. "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); Initial Brief at 9. Yet in its order sentencing Mr. Groover to death, the same trial court found that:

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[1]Mr. Groover and Parker were tried by the same circuit court judge.

> The defendant claimed that he acted under extreme duress and domination of Robert **Parker** -- but other than his own testimony -- the evidence was to the contrary. Witnesses stated that defendant and Mr. Parker were friends of long standing and both dealers in drugs. 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 and weapons with which to escape or to defend himself.

(PC-R2. 72). The findings of fact in Parker's sentencing order -- that Parker repeatedly **threatened** and dominated Mr. Groover, and in Mr. Groover's sentencing order -- that the evidence was contrary to Mr. Groover's claim that Parker threatened him -- are inconsistent. The trial court cannot rule, and the State cannot **argue,** any version **of** the facts that is necessary to obtain a death sentence against a particular defendant. By so doing, the lower court has rendered Mr. Groover's death sentence arbitrary and capricious in light of Parker's **life** sentence.

Further, when this Court reviewed Mr. Groover's death sentence on direct appeal, it did not have before it the facts from the <u>Parker</u> case that Mr. Groover pled in his Rule 3.850 motion. Reaching inconsistent results on the same facts is acceptable on direct appeal when the Court is limited to considering only the facts in the record before it. <u>Jackson v. State</u>, 575 So. 2d 181, 193 (Fla. 1991). In postconviction, however, it is proper for this Court to consider matters outside the record on direct appeal, including the record on the postconviction appeals in this case and the record in <u>Parker</u>. By so doing, this Court may conclude that Mr. Groover and Parker

were equally culpable, which is all that is required by Scott; indeed the facts here establish that it is Parker who was the more culpable codefendant. As such, Mr. Groover's death sentence is arbitrary and capricious in light of Parker's life sentence.

The State asserts that it had no duty to inform the trial court that it took an inconsistent position in Groover's and Parker's trials. Answer Brief at 15. That is not the issue presented to this Court. Given that both the State and the Court took inconsistent positions, blaming Groover for everything when litigating Mr. Groover's postconviction motions and blaming Parker for everything when litigating Parker's postconviction motions, the issue before this Court is whether it is unfair and arbitrary to punish with disparate sentences what are at most equally culpable codefendants (and more accurately what are codefendants of unequal culpability, with Mr. Groover having been dominated by Parker).

The State relies on the assertion that "Groover, not Parker, was the actual killer," to justify their disparate sentences. Answer Brief at 16. Florida case law has never held that being the triggerman is, as a matter of law, evidence that the defendant is more culpable than his codefendants. In Williams v. State, 622 So. 2d 456 (Fla.), cert. denied, 114 S. Ct. 570 (1993), Williams was convicted of ordering the murders of some employees in his drug organization. Four other men were convicted of carrying out the murder in Pensacola, while Williams never left Miami. Nonetheless, Williams was sentenced to death.

This Court rejected Williams' claim that his death sentence was disparate compared to the actual triggermen, who were sentenced to death.[2] As such, non-triggerman status does not guarantee a life sentence, just as triggerman status does not guarantee a death sentence. What is important to an analysis of relative culpability is who instigated the events leading to murder.

In Antone v. State, 382 So. 2d 1205 (Fla. 1980), Antone was convicted of ordering the execution of a potential witness. This Court affirmed Antone's death sentence, finding that:

> Antone was the mastermind of this operation. He supplied the gun, paid the money from his pocket, and pressured Haskew to complete the task. His participation cannot under any view of this record, be termed minor. Without Antone's participation, the murder would not have come to fruition.

Id. at 1216. Thus, despite the fact that Antone was not the triggerman and was not present for the murder, this Court upheld Antone's death sentence.[3] See also Archer v. State, 613 So. 2d 446, 448 (Fla. 1993)(in contract killing arranged by Archer, this Court found: "Archer created the situation, and the victim's death was a natural and foreseeable result of Archer's actions"), cert. denied, 114 S. Ct. 570 (1993).[4]

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[2]Two other codefendants, who were at the scene of the murders but whom the State never contended were triggermen, received sentences less than death.

[3]The triggerman was sentenced to thirty-five years, with parole eligibility in seven to eight years. Antone, 382 So. 2d at 1210.

[4]Archer's death sentence was reversed because of erroneous application of heinous, atrocious and cruel aggravating circumstance. Archer, 613 So. 2d at 448.

In Bedford v. State, 589 So. 2d 245 (Fla. 1991), cert. denied, 112 S. Ct. 1773 (1992), this Court reversed Bedford's death sentence even though Bedford was the actual killer, finding that the jury could reasonably have concluded that the codefendant had instigated the entire incident including the murder, and that Bedford was merely "taking a fall" for the codefendant, who had threatened to harm Bedford's family. Id. at 253. Thus, where it was the codefendant who instigated the murder and where the codefendant had threatened Bedford, this Court reversed Bedford's death sentence even though he was the actual killer.

Likewise, in Dolinsky v. State, 576 So. 2d 271 (Fla. 1991), this Court reversed Dolinsky's death sentence even though he actually shot the victim. This Court held:

> While Dolinsky participated willingly in these crimes, it is apparent that Bowes masterminded the operation and played the primary role.
>
> * * * *
>
> Bowes was later apprehended, tried, and convicted of, among other things, first-degree murder. His trial court sentenced him to life imprisonment.

Id. at 274 & n.2. Thus, while Dolinsky's jury was unable to consider Bowes' life sentence, this Court was able to do so and did so, reversing Dolinsky's death sentence and imposing a life sentence.

In Pentecost v. State, 545 So. 2d 861 (Fla. 1989), the victim's children plotted to kill her. Pentecost, a friend of

the victim's son, accompanied the victim's son to her home, where Pentecost stabbed her. Despite being the actual killer, this Court reversed Pentecost's death sentence in part because the victim's son was not sentenced to death and because the victim's daughter had fled the country and never been tried. **Id.** at 863.

Similarly, in Brookings v. **State,** 495 So. **2d** 135 (Fla. **1986),** Brookings had been hired by Murray to kill Sadler. Brookings was sentenced to death. Despite being the actual killer, this Court reversed Brookings' death sentence in part because Murray and co-defendant Lowery escaped the death penalty.

The conclusion from these cases is that being the actual triggerman does not necessarily mean a defendant is the more culpable of the codefendants. In **Antone,** this Court upheld the death sentence for a non-triggerman who masterminded the events leading to the murder. In Bedford, Dolinskv, Pentecost and Brookinss, this Court reversed death sentences for the triggermen, in part because the codefendants who instigated the murders escaped death.

This Court's precedent establishes that the fact that Mr. Groover is alleged to be the triggerman is not dispositive of the issue of relative culpability. The case law establishes that it is the instigator of a murder rather than the triggerman who is often found to be more culpable, or at least equally culpable with the triggerman. The record establishes that Parker was the instigator of the murders in this case. **See** Sentencing Order in State v. Parker (PT. 476-508): Initial Brief at 9.

The State again mis-states the standard by which this Court must judge Mr. Groover's claim under Scott. The standard is not whether Parker's life sentence, if known at trial, would probably have prevented Mr. Groover from being sentenced to death. Answer Brief at 16. The standard is whether "this Court probably would have found [Groover]'s death sentence inappropriate had [Parker]'s life sentence been factored into [its] review on direct appeal," Scott, 604 So. 2d at 469, and in light of extra-record evidence produced in postconviction proceedings. Id. at 468-69.

The State's argument that this Court need not conduct a harmless error analysis on Mr. Groover's Abron Scott claim, Answer Brief at 16, is not the issue. The issue is whether Mr. Groover and Parker are equally culpable, making Mr. Groover's death sentence arbitrary and capricious in light of Parker's life sentence.

The State next argues that Mr. Groover was not entitled to oral argument on his Rule 3.850 motion because oral argument is required only on an initial Rule 3.850 motion. Answer Brief at 17. This argument defies logic. Mr. Groover's Rule 3.850 motion was based on newly discovered evidence. See Fla. R. Crim. P. 3.850(b)(1). Because it is based on newly discovered evidence, this claim could not have been presented in Mr. Groover's first Rule 3.850 motion. As such, it is governed by the same standard as an initial Rule 3.850 motion. Cf. Fla. R. Crim. P. 3.850(f)

(successive motions not based on newly discovered evidence governed by more stringent standard).

Further, in arguing it was not error for the trial court to deny Mr. **Groover's** motion without permitting oral argument, the State disputes the facts Mr. Groover pled in his motion. Answer Brief at 18. Because the State disputes the facts in the motion, an evidentiary hearing is required. **McClain** v. State, 629 So. 2d 320 (Fla. 1st DCA 1993); Younsblood v. State, 261 So. 2d 867 (Fla. 2d DCA 1972). See also Roberts v. State, 21 Fla. L. Weekly S245, S246 (Fla. June 6, 1996).

The State argues that **"the** record conclusively shows that Groover and Robert Parker were not equally culpable." Answer Brief at 19. This statement disputes the facts pled in Mr. **Groover's** Rule 3.850 motion. As such, Mr. Groover was entitled to an evidentiary hearing on his claims. **McClain;** Younsblood.

The State next argues that Fla. R. Civ. P. **1.190(a)** does not apply to postconviction proceedings, therefore Mr. Groover was required to seek leave of court before amending. Answer Brief at 22. The State cites to Steinhorst v. State, 636 So. 2d 498 (Fla. **1994),** for the proposition that Fla. R. Civ. P. 1.540 does not apply to postconviction proceedings under Fla. R. Crim. P. 3.850. Mr. Groover has no argument with the State's reading of Steinhorst, except to note that Fla. R. Civ. P. 1.540 has nothing to do with the case at issue here. Mr. Groover pled that **"Except** where there is a contradictory provision in Rule 3.850, postconviction proceedings are governed by the rules of civil

procedure." Initial Brief at 27. Steinhorst is inapposite because there is a rule of criminal procedure that contradicts Rule of Civil Procedure 1.540 (procedure to correct judgments based on, among other things, newly discovered evidence). Fla. R. Crim. P. **3.850(b)** specifically countenances motions for postconviction relief based on newly discovered evidence, therefore that rule applies in postconviction proceedings, not Fla. R. Civ. P. 1.540. Steinhorst, 636 So. 2d at 500. It should also be noted that, despite the fact that Steinhorst pled his newly discovered evidence claim under the civil procedure rules rather than under Fla. R. Crim. P. 3.850, this Court remanded his case to the trial court for an evidentiary hearing on his newly discovered evidence claim. **Id.** at 500-01. The same result is required here.

The State mis-states this Court's holding in Anderson v. State, 627 So. 2d 1170 (Fla. **1993),** when it asserts **"There** is no error in summarily denying unverified **motions."** Answer Brief at 23. In Anderson, this Court held, **"We** agree that this kind of omission from a rule 3.850 motion warrants dismissal without prejudice." **Id.** at 1171 (emphasis added). Therefore, it was error to summarily deny Mr. **Groover's** amended Rule 3.850 motion rather than dismiss it without prejudice. The unpublished order in Cruse v. State, which the State cited and attached to its motion to dismiss **(PC-R2. 50),** likewise instructs that it was error to deny Mr. **Groover's** amended motion instead of dismissing it without prejudice:

> If the amended motion for postconviction relief filed on June 8, 1994, was timely filed had it been verified, this order is without prejudice to appellant's filing of a properly verified amended motion for postconviction relief within thirty (30) days of this order.

(PC-R2. 50).

The State suggests that a public records claim is a claim for relief, therefore it must be verified. Answer Brief at 24. The State misapprehends Mr. **Groover's** point here. Initial Brief at 29. Public records requests of postconviction litigants are raised and heard in 3.850 proceedings for administrative convenience and to avoid two separate actions in the same circuit. Provenzano v. **Dugger**, 561 So. 2d 541, 547 (Fla. 1990). However, if records are sought from an agency outside the judicial circuit in which a defendant's 3.850 motion is **pending,** the defendant must seek those records in a civil action. Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992). If a postconviction litigant pursues records under Hoffman, the civil complaint does not have to be verified by the litigant. Fla. R. Civ. P. 1.030. As such, it was error to summarily deny Mr. **Groover's** unverified amended motion that raised only a public records claim.

The State alleges that Mr. Groover was time-barred from bringing his public records complaint. Answer Brief at 24. That a public records complaint can be time-barred has been repeatedly rejected by this Court, at least until the defendant has had an opportunity to establish due diligence at an evidentiary hearing. Most recently in Roberts v. State, 21 Fla. L. Weekly S245 (Fla.

June 6, 1996), this Court remanded the public records issue to the trial court, notwithstanding that Mr. Roberts had raised his public records issue in a second Rule 3.850 motion filed ten years after his conviction and sentence. See also Ventura v. State, 673 So. 2d 479 (Fla. 1996), where despite the State's argument that Ventura's public records complaint was time-barred, this Court held it was error for the trial court to dismiss Ventura's Rule 3.850 motion with prejudice when his claims were based on public records non-compliance. Id. at 481.[5]

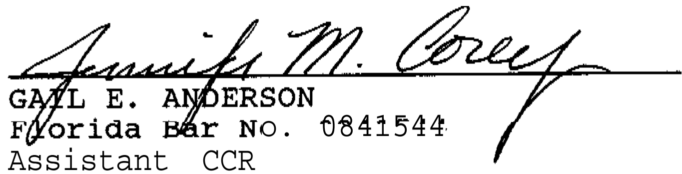
Finally, the State asserts that "If and when the records requested from the State Attorney's Office and the Attorney General's Office are examined and a cognizable issue is discovered, such could be raised in another motion with leave of court." Answer Brief at 25. The State is in error. If Mr. Groover discovers public records that lead to a cognizable claim, such can be raised in a Rule 3.850 motion based on newly discovered evidence, which does not require leave of court to file. All that is required is that Mr. Groover file his Rule 3.850 motion within one year of the discovery of the new evidence. Fla. R. Crim. P. 3.850(b)(1).

CONCLUSION

[5] Mr. Groover concedes that, since the filing of his Rule 3.850 motion, this Court's holding that records of the Parole Commission are not public records became final. Asay v. Florida Parole Commission, 649 So. 2d 859 (Fla. 1994), cert. denied, 116 S. Ct. 591 (1995). This claim is raised here only to preserve it for federal review.

Based on the foregoing and on the facts and law raised in his Initial Brief and in the proceedings below, Mr. Groover respectfully requests that this Court reverse the order of the lower court and remand for imposition of a sentence of life imprisonment without parole for twenty-five years; or in the alternative, remand this action to the lower court for an evidentiary hearing on Mr. **Groover's** claims.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 22, 1996.



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