

IN THE SUPREME COURT OF FLORIDA

TOMMY SANDS GROOVER,

Petitioner,

v.

CASE NO. SC04-412

JAMES V. CROSBY, JR.,
Secretary, Fla. Dept.
of Corrections

Respondent.

_____ /

(ON PETITION FOR WRIT OF HABEAS CORPUS)

ANSWER BRIEF OF APPELLEE AS TO WHETHER GROOVER'S SUCCESSIVE
PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DISMISSED

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PRELIMINARY STATEMENT

By order dated April 29, 2004, this Court requested the parties to this action to brief the issue of whether Groover's successive habeas petition should be dismissed for failure to comply with Rule 3.851(d)(2)(B) or Rule 3.851(d)(3). Groover has filed his initial brief on this issue; the instant pleading is the response of James V. Crosby, Jr., who, for convenience, will be hereafter referred to as "the State."

RESPONSE TO REQUEST FOR ORAL ARGUMENT

Groover has requested oral argument. Initial Brief at i. The State neither seeks nor objects to oral argument.

OBJECTION TO GROOVER'S STATEMENT OF THE CASE AND FACTS

Groover's Statement of the Case and Facts is argumentative, largely unsupported by record evidence, and for the most part irrelevant to the issue at hand.¹ Previous filings lodged by

¹ Counsel for Mr. Groover has once again burdened us with his tale of his rental van and the delivery 40 or 36 or 35 or however many boxes of files there are in this case, and his communications with Dale Westling and Westling's supposed investigator; counsel additionally asserts - as fact - various supposed communications between him and an "illiterate" and "frightened" Mr. Groover concerning Groover's "dissatisfaction" with Mr. Westling's representation. There is no record support for any of these assertions. Groover's counsel makes additional inappropriate factual averments in his argument. For example, he contends that, "[i]n the course of preparing federal pleadings" on Groover's behalf, he "discovered that a number of Mr. Groover's constitutional claims had been erroneously denied by this Court in prior proceedings." Initial Brief at 18. The State disputes that this Court erroneously denied any of

Groover's counsel in this Court have included these same unsupported and irrelevant ramblings, and have previously been objected to by the State. Once again, the State objects. The State will not file a separate motion to strike this improper pleading, but will invite the Court to do so on its own initiative; further, the State would urge the Court to give no credit or weight to these improper, irrelevant and unsupported allegations. The State rejects Groover's statement of the case and facts in its entirety, and will present its own.

STATEMENT OF THE CASE AND RELEVANT FACTS

Groover is a death-sentenced inmate. The facts of his triple murder are set out in Groover v. State, 458 So.2d 226 (Fla. 1984). The procedural history of this case through 1997 is recounted in Groover v. State, 703 So.2d 1035 (Fla. 1997), and includes a trial, direct appeal, three motions to vacate judgment and sentence, and a petition for habeas relief. On June 10, 2002, Groover filed yet another state motion to vacate

Groover's constitutional claims in prior proceedings, but in all events there is no record support for when or how Mr. McClain "discovered" any such error. McClain also makes disparaging remarks about Groover's registry counsel's understanding (or lack of understanding) of various constitutional issues, as well as registry counsel's planned strategy, that are likewise unsupported by any record. Initial Brief at 18-19. The State strenuously objects to these improper and unsupported allegations.

judgment and sentence (which he amended on August 14, 2002)² and, on March 9, 2004, the instant successive habeas petition. In addition, a federal habeas petition Groover filed on October 17, 1994, remains pending.

In this successive habeas petition, Groover raises five claims, alleging: (1) he was deprived of due process by the state's failure to disclose that it had made cash payments to certain of its witnesses at trial; (2) he was deprived of due process when the jail doctor prescribed Mellaril for Groover without advising the court or defense counsel; (3) he was deprived of effective assistance of counsel at his penalty phase proceedings; (4) he is ineligible for a death sentence because he is mentally retarded; and (5) Florida's capital sentencing procedures violate the Sixth Amendment.

By motion dated March 11, 2004, the State moved to dismiss Groover's successive habeas petition as unauthorized. By order dated April 29, 2004, this Court directed the parties to submit briefs "as to whether the petition for writ of habeas corpus

² See Case No. SC04-86, Emergency Petition for Extraordinary Relief, for a Writ of Prohibition, and/or a Writ of Mandamus, in which Groover's habeas counsel complained about the trial court's failure to acknowledge counsel's notice of appearance or to rule on counsel's motion to disqualify the trial judge. This Court denied relief without prejudice to refile after full compliance with the rules, and the motion to vacate remains pending in the circuit court.

should be dismissed for failure to comply with Rule 3.851(d)(2)(B) or Rule 3.851(d)(3)."

SUMMARY OF THE ARGUMENT

Groover has filed an out-of-time, successive habeas petition raising claims which are inappropriate for habeas. Two of the claims duplicate claims he has pending in circuit court, while the other three clearly have been filed in this Court in an improper attempt to circumvent procedural and time bars on their being filed in circuit court. None of the claims are appropriate for habeas relief. Further, under the rules now applicable to capital postconviction relief, a capital defendant may not file a successive habeas petition, and may not file an out-of-time motion for postconviction relief in circuit court based on "new law" unless that "new law" has been held to apply retroactively. Groover's habeas is an unauthorized pleading and should be dismissed.

ARGUMENT

This Court has requested the parties to brief the issue of "whether the petition for writ of habeas corpus should be dismissed for failure to comply with Rule 3.851(d)(2)(B) or Rule 3.851(d)(3). The State's position is that the cited rules no longer allow capital defendants to file successive state habeas petitions, and, additionally, allow capital defendants to file out-of-time 3.850 motions based upon new case law *only* when the alleged "new law" has established a new fundamental

constitutional right *and* that new right has been held to apply retroactively.

The current version of Rule 3.851, in effect since 2001, applies "to all ***motions*** and ***petitions*** for any type of *postconviction or collateral relief* brought by a prisoner in state custody *who has been sentenced to death.*" (Emphasis supplied.) Rule 3.851(d)(1) requires that, subject to certain exceptions, a motion to vacate judgment of conviction and sentence must be filed within one year after the judgment and sentence become final. Rule 3.851(d)(2) delineates the exceptions to this time limit:

(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges that

(A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

Besides setting time limits for filing motions to vacate judgments of conviction and sentence, Rule 3.851 additionally distinguishes between initial and successive motions, setting

forth more restrictive page limits and establishing more rigorous pleading requirements for successive motions. See Rule 3.851(e). Finally, Rule 3.851(d)(3) also establishes a schedule for filing petitions for writ of habeas corpus:

(3) All petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, *including petitions for writ of habeas corpus*, shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the initial motion for postconviction relief filed under this rule.

It cannot be disputed that the present version of 3.851, adopted three years before Groover filed the instant successive habeas petition, applies to Groover's successive habeas petition. See Mann v. Moore, 794 So.2d 595 (Fla. 2001)(declining to apply former Rule 9.140(b)(6)(E) to Mann because of some confusion in the effective dates of the rules, but announcing that, effective January 1, 2002, "all petitions for extraordinary relief, including habeas corpus petitions, must be filed simultaneously with the initial brief appealing the denial of a rule 3.850 motion").³ The plain language of Rules 3.851 requires the dismissal of Groover's successive habeas petition. Rule

³ The substance of former Rule 9.140(b)(6) is now contained in Rule 9.142(a)(5), and essentially "mirrors" (Mann) the filing requirements for habeas petitions as set out in Rule 3.851(d)(3).

3.851(d)(3) requires that *all* petitions for writ of habeas corpus be filed simultaneously with the initial brief on appeal from the circuit court's order on the defendant's *initial* motion for postconviction relief. The rule makes no provision for successive habeas corpus petitions filed long after the appeal on a defendant's initial motion for postconviction relief, and Groover's successive habeas petition must be dismissed as unauthorized.

Even if the rule did not prohibit successive habeas petitions, Groover's habeas petition is inappropriate and should be dismissed.

Groover argues that he must be allowed to file this habeas petition because: (1) he cannot raise his habeas issues in circuit court because at least some of them would be procedurally barred; (2) he cannot raise his habeas issues in circuit court because the registry counsel who represents him there is unwilling to present at least some of these issues; and (3) he is in effect attacking this Court's erroneous prior decisions based on recently-decided law, and only this Court can correct its errors. Thus, he asserts, his only avenue for relief on these issues is habeas corpus, and it would be an unconstitutional "suspension" of the writ of habeas corpus to dismiss his petition.

The right to habeas relief, however, "like any other constitutional right, is subject to certain reasonable limitations consistent with the full and fair exercise of the right." Haag v. State, 591 So.2d 614, 616 (Fla. 1992). Groover has made no demonstration that any of the limitations on out-of-time and successive motions for relief contained in Rule 3.851 are constitutionally unreasonable.⁴ Habeas corpus is not a substitute for an appropriate motion for postconviction relief in the trial court, and is not "a means to circumvent the limitations provided in the rule for seeking collateral postconviction relief" in the original trial court. Baker v. State, 29 Fla.L.Weekly S105 (Fla., decided March 11, 2004).⁵

⁴ Capital defendants in federal court face similar time limits for filing habeas petitions and their right to file successive habeas petitions is likewise limited. Further, the restrictions on out-of-time motions contained in Rule 3.851(d)(2)(B) are very similar to the restrictions on successive federal habeas petitions contained in 28 USC Section 2244 (b)(2), which provides, in part:

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

⁵ Nor can Groover's alleged dissatisfaction with his postconviction counsel justify his filing an unauthorized habeas

Groover argues, however, that his grievance is with this Court's prior rulings in this case, and that his challenges to these prior rulings should be raised in this Court, and not in the trial court. The initial shortcoming of this argument is that most of the constitutional claims in his latest successive habeas petition have *not* been raised, litigated, or ruled on by this Court previously.⁶ More importantly, Groover's claims all relate to issues arising out of, and errors allegedly occurring during, the original trial.⁷ The fact that the trial court's rulings may have been affirmed on appeal by this Court cannot

petition.

⁶ For example, in his first habeas claim, Groover argues that this Court previously applied a Brady harmless error standard to a Giglio claim. See Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972). But Groover's claim was a Brady claim; this Court was not asked to address any Giglio claim. Likewise, Groover raised no issue of being forcibly medicated at his original trial, and the cases he now cites regarding forcible medication address an issue he did not raise. Finally, Groover did not argue to this Court previously that his mental retardation rendered him ineligible for execution, or that Florida's capital sentencing procedures violate the Sixth Amendment.

⁷ In Claim I, Groover contends the prosecutor intentionally permitted the presentation of false evidence; in Claim II, Groover complains about the administration of drugs to him prior to and during trial; in Claim III, Groover contends his trial counsel was ineffective at the penalty phase; in Claim IV, he contends that he is ineligible for a death sentence because he is mentally retarded; and in Claim V, he contends the trial procedures by which his death sentence was imposed were constitutionally insufficient under the Sixth Amendment.

convert these issues into appellate issues which only this Court may address. Thus, habeas corpus does not lie for redress of these claimed grievances. Breedlove v. Singletary, 595 So.2d 8 (Fla. 1992); Mills v. Dugger, 574 So.2d 63 (Fla. 1990). On the contrary, they are issues which may be raised by Groover, if at all, only by way of a motion for postconviction relief filed in the original trial court, and not by way of a habeas petition in this Court, as subsections (d)(2)(B) and (d)(3) of Rule 3.851 clearly contemplate.

Groover argues that this Court has, in the past, sanctioned habeas corpus as a vehicle to challenge prior decisions of this Court rendered either on direct or collateral appeal. He acknowledges, however, that this Court has experienced practical difficulties with this approach. See Hall v. State, 541 So.2d 1125 (Fla. 1989)(directing that, in the future, claims under the then recently decided case of Hitchcock v. Dugger, 481 U.S. 393 (1987), would not be cognizable in habeas proceedings, and should be presented in a Rule 3.850 motion). Moreover, regardless of past history, this Court recently adopted a new approach, which limits a capital defendant to one habeas proceeding, and places severe limits on successive, out-of-time motions for postconviction relief. Thus, Groover may not seek out-of-time relief via a successive petition for writ of habeas corpus, and

he may not file an out-of-time, successive motion for postconviction relief in the circuit court based upon alleged new law unless he can demonstrate *both* that the "fundamental constitutional right asserted was not established" previously, *and* that the newly-created right "has been held to apply retroactively." Rule 3.851 (d)(2)(B).⁸

⁸ The rules contemplate that issues of retroactivity may be litigated in initial motions for postconviction relief, but may not be litigated in the first instance in out-of-time successive motions. See Dixon v. State, 730 So.2d 265 (Fla. 1999) (noting that retroactive application of new law is a "relatively rare occurrence," and that the time limit for filing a successive 3.850 motion based on new law is calculated from the date of the mandate of the case determining that a new right is fundamental and retroactive).

CONCLUSION

For all the foregoing reasons, Groover's successive habeas petition should be dismissed as unauthorized.

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 Martin J. McClain and Linda McDermott, 141 N.E. 30th Street, Wilton Manors, Florida 33334, this 14th day of June, 2004.

CURTIS M. FRENCH
Senior Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

This brief was produced using Courier New 12 point, a font which is not proportionately spaced.

CURTIS M. FRENCH
Senior Assistant Attorney General

