

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-412

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TOMMY SANDS GROOVER,

Petitioner,

v.

JAMES V. CROSBY, JR.,  
Secretary, Florida Department of Corrections,

Respondent.

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PETITION FOR WRIT OF HABEAS CORPUS

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*Pro Bono Counsel for Mr. Groover*

**INTRODUCTION**

Mr. Groover is under a sentence of death. This petition for habeas corpus relief is being filed in order to raise claims of error in light of recent jurisprudence as explained herein that establishes Mr. Groover's entitlement to relief.

**JURISDICTION**

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

**REQUEST FOR ORAL ARGUMENT**

Mr. Groover requests oral argument on this petition.

**STATEMENT OF THE CASE AND FACTS**

Mr. Groover was indicted on two counts of first degree murder on February 25, 1982 (R. 2). Mr. Groover was housed in the Duval County Jail. Without the knowledge of his counsel<sup>1</sup>

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<sup>1</sup>Mr. Groover's counsel at the time, Richard Nichols, testified in 1986 that he was unaware that the jail was administering Mellaril to Mr. Groover (PC-T. 535).

or the knowledge of the prosecuting attorney,<sup>2</sup> his jailers treated Mr. Groover with large daily doses of Mellaril during his pre-trial incarceration. 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, the plea agreement fell apart when the prosecutor found a new witness, concluded that some of Mr. Groover's testimony may have been untruthful, and confronted Mr. Groover who then ceased cooperating with the State (PC-T. 499-500). The prosecutor, Mr. Greene, then contacted Mr. Nichols and advised him that he would have to withdraw because the State would be calling him to testify to the voluntariness of the statements that Mr. Groover had made pursuant to the plea agreement. Thereupon, Mr. Nichols withdrew as Mr. Groover's counsel. Subsequently, the guilty plea was formally withdrawn. Mr. Groover was re-indicted, 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 outside the presence of counsel.

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<sup>2</sup>Ralph Greene testified in 1986 that he was totally unaware that the jail was administering Mellaril to Mr. Groover ((PC-T. 484).

During Mr. Groover's trial, Mr. Greene called a number of lay witnesses, some of whom testified that they had been permitted to plead to lesser charges. None of the witnesses revealed that the prosecutor was providing them with cash.<sup>3</sup> In his closing argument, Mr. Greene stated that the witnesses were not getting any deals for their testimony.<sup>4</sup>

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 Counts I and II. 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. 268-270).

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<sup>3</sup>For example, Billy Long testified that he was not promised anything other than pleading guilty to second degree murder (R. 765). Joan Bennett was asked, "Do you expect benefit from your testimony and cooperation with the State here today?" (R. 1051). She responded, "No sir, I don't." (R. 1051).

<sup>4</sup>For example, Mr. Greene discussed the witness Billy Long saying, "He hasn't made any deals, he laid it out the day after he was arrested. And I submit to you he's telling the truth right down the line." (R. 1520). Mr. Greene discussed Joan Bennett saying, "Joan Bennett was telling the truth and that she wasn't guilty of first degree murder. And the truth came out. She was guilty of nothing more than accessory after the fact, that is, not reporting it. And she had good reason not to do that, she wasn't guilty of first degree murder. She pled guilty to what she was guilty of, I think you will find, and nothing more and nothing less. She didn't get any deal at all." (R. 1530).

After Mr. Groover's trial was over, an FBI investigation of Ralph Greene was made public when he was federally indicted for misuse of public money. In the federal investigation of Ralph Greene, FBI agents discovered that Ralph Greene had made cash payments to several of the State's witnesses in Mr. Groover's trial. Specifically, the FBI reported:

a. Spencer Hance, a witness against Tommy Groover, was given \$20 by Ralph Greene before he gave any testimony. Ralph Greene later gave Hance \$60 in cash to pay a traffic fine after the trials of Tommy Groover and co-defendant Robert Parker were completed.

b. Hance also observed Ralph Greene give an undetermined amount of cash to star witness Joan Bennett on two occasions.

c. Jane Sheppard, the mother of Nancy Sheppard, who also testified for the State, reported that she overheard Joan Bennett say that she came to the courthouse "to get money from Uncle Ralph," and that she had to "get some Easter money."

d. Bennett acknowledged that she received \$20 from Ralph Greene.

e. Carl Barton, another State witness, reported that on his first appearance in court Ralph Greene gave him \$20, and gave \$20 each to Joan Bennett and Spencer Hance.

f. Mike Green, a State witness in the trial of Robert Parker, said that he received a total of \$100 in \$20 bills from Ralph Greene.

g. Morris Johnson, another State witness against Tommy Groover, said that he received \$20 from Ralph Greene on five or six occasions.

h. Walter Wayne Johnson, another State witness, said that Ralph Greene paid him \$30 on six different occasions.

i. Jack Austin, the chief investigator for the Office of the State Attorney, recalled cashing two checks for \$300 each for Ralph Greene during the Robert Parker murder trial. Austin believed that key State witness Billy Long "received

regular amounts of monies from the State Attorney's Office for lunches and on at least one occasion Austin observed Greene provide Long with what appeared to be several cash bills, denominations unknown."

j. Two other State witnesses, Robert Collier and Kenneth Appleton, also confirmed that they had received cash from Ralph Greene during the prosecutions following the Padgett, Sheppard and Dalton homicides.

(Appendix P to the 6/1/86 Motion to Vacate).<sup>5</sup>

This Court affirmed Mr. Groover's convictions and sentences on direct appeal. Groover v. State, 458 So. 2d 226 (Fla. 1984).

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. During the proceedings on this motion, Mr. Groover was represented by counsel with the Office of the Capital Collateral Representative (CCR). An appeal from the summary denial of Rule 3.850 relief was taken to this Court. This Court remanded for an evidentiary hearing on the issue arising from "the explicit record evidence that prison officials administered large doses of Mellaril, a powerful anti-psychotic drug, throughout his pretrial and

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<sup>5</sup>According to the FBI reports regarding these payments to State witnesses in Mr. Groover's case, John Bradley, the lead detective on the case, was an important player "who would know if such payments were made." (Appendix P to the 6/1/86 Motion to Vacate). Mr. Bradley was a witness against Mr. Groover at his trial (R. 640).

trial incarceration." Groover v. State, 489 So. 2d 15, 17 (Fla. 1986). As to Mr. Groover's claim arising from the undisclosed consideration provided to the State witnesses which was contrary to their testimony, this Court stated, "evidence is 'material' for Brady purposes 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.'" Id. at 17. This Court then concluded, "[w]e find that under this test, appellant's claim must fail." Id.

Subsequently, an evidentiary hearing was conducted. Though the principle issue concerned Mr. Groover's competency in 1983, a wealth of evidence regarding Mr. Groover's mental retardation was presented. Dr. Harry Krop, clinical psychologist, testified for the defense that Mr. Groover had a verbal IQ of 64 and an overall IQ of 60 (PC-T. 168). Dr. Krop testified that it was obvious that Mr. Groover was retarded when he interviewed him (PC-T. 168). Mr. Groover's IQ score corroborated Dr. Krop's observations of his mental retardation, as did historical documentation and reports from Mr. Groover's family. Likewise, Dr. Francis S. Smith, an audiologist and speech language pathologist called by the defense, testified that Mr. Groover had generalized brain dysfunction that should be classified as mental retardation

(PC-T. 91). Dr. Smith stated that Mr. Groover responded with language at the nine-year old level (PC-T. 76). Dr. James R. Merikangas, an M.D. specializing in neurology and psychiatry, testified that Mr. Groover fell in the mild to moderate mental retardation range, with a verbal IQ of about 64 (PC-T. 116, 127). In discussing Mr. Groover's functioning, Dr. Merikangas testified that Mr. Groover's mental retardation:

was quite apparent to all of his school teachers and in his performance and apparent to his peers who teased him about being retarded, and talking to him for two or three minutes you will find out that there is an - almost a vacuum of information behind this normal appearing person.

He simply does not comprehend what is said to him and tends to answer questions with social responses like yes, uh-huh, that's right and generally agreeing with the speaker, but try to get something specific out of him and you will determine in five minutes that he is suffering from mental retardation.

(PC-T. 136). Dr. Samuel I. Greenburg, a psychiatrist, testified that Mr. Groover was mentally retarded (PC-T. 228). Dr. Greenburg specifically assessed Mr. Groover's adaptive functioning and found that Mr. Groover was "at the bottom, between six and seven, and that's very poor to grossly impaired, and that's at the bottom of the list, the most severely disturbed." (PC-T. 228).

This diagnosis was supported by documentary evidence of significant medical and legally recognized indicia of mental

retardation. School records documented Mr. Groover's very poor performance in school. In fact, these records and medical records described him as "mentally retarded" (Appendix M to the 6/1/86 Motion to Vacate).

However, the circuit court concluded that Mr. Groover was not rendered incompetent by the administration of Mellaril and denied relief. On appeal, this Court affirmed the trial court's order. Groover v. State, 574 So. 2d 97 (Fla. 1991). Throughout the evidentiary hearing and ensuing appeal, Mr. Groover was represented by the CCR.

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.<sup>6</sup> On November 15, 1991, the trial court summarily denied the second motion for post-conviction relief. On appeal, this Court affirmed the denial of post-conviction relief. Groover v. State, 640 So. 2d 1077 (Fla. 1994). In these proceedings, Mr. Groover was represented by CCR.

Mr. Groover filed a third Motion to Vacate Judgment and

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<sup>6</sup>This 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 on December 2, 1994, raising newly discovered mitigation evidence that Mr. Groover's co-defendant, Robert Lacy Parker, received a life sentence.<sup>7</sup> On January 30, 1995, Mr. Groover made a request to amend the motion, adding a claim that counsel for Mr. Groover has not received public records pursuant to Chapter 119.<sup>8</sup> On May 30, 1995, the court denied the third motion for post-conviction relief. On appeal, this Court affirmed the denial of post-conviction relief. Groover v. State, 703 So. 2d 1035 (Fla. 1997). In these proceedings, Mr. Groover was still represented by CCR.

On December 2, 1994, when he filed his third motion for post-conviction relief, Mr. Groover filed a habeas corpus petition in this Court. On April 6, 1995, this Court denied state habeas relief. Groover v. Singletary, 656 So. 2d 424 (Fla. 1995).

On October 17, 1994, a habeas corpus petition was filed

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<sup>7</sup>The life sentence was imposed after the United States Supreme Court's decision in Parker v. Dugger, 498 U.S. 308 (1991), vacating Mr. Parker's sentence of death.

<sup>8</sup>Prior to this Court's decision in State v. Kokal, 562 So. 2d 324 (Fla. 1990), the Duval County State Attorney's Office and the Jacksonville Police Department refused to provide capital defendant's access to public records in collateral proceedings. As a result, Mr. Groover has never been provided the public records in his case despite repeated requests even though anyone else off the street can obtain access to Mr. Groover's public records that are in the State's possession.

in the U.S. District Court for the Middle District of Florida. On January 10, 1995, the federal proceedings were held in abeyance pending the result of state habeas proceedings. In 1998, Mr. Groover sought to amend his habeas corpus petition in the U.S. District Court for the Middle District of Florida. Mr. Groover filed a second amended habeas corpus petition in the same court. Subsequently, the federal district court denied leave to amend without prejudice as to Mr. Groover's incompetent to be executed claim. Thereafter, Mr. Groover was permitted to file a traverse on July 13, 1999. Following the stays of execution granted by this Court to Amos King and Linroy Bottoson in July of 2002, the federal district court sua sponte held federal proceedings in abeyance.

On June 10, 2002, Mr. Groover filed a fourth Rule 3.850 motion. In this motion, Mr. Groover argued that his mental retardation precluded the imposition of a sentence of death and that his death sentence violated the principle discussed in Apprendi v. New Jersey, 530 U.S. 466 (2000). On July 19, 2002, the State filed a response arguing that the claims were procedurally barred. On August 14, 2002, Mr. Groover filed an amended fourth Rule 3.850 motion in which he relied upon Atkins v. Virginia, 122 S.Ct. 2242 (2002), as establishing that his sentence of death must be vacated due to his mental

retardation, and upon Ring v. Arizona, 122 S.Ct. 2428 (2002), as establishing that his sentence of death violated the Sixth Amendment. In the preparation and filing of the motion and its amendment, Mr. Groover was represented by the successor agency to CCR, CCRC-North.

On May 8, 2003, the circuit court scheduled an evidentiary hearing on Mr. Groover's motion to vacate for October 23, 2003. In June of 2003, Heidi Brewer, an Assistant CCC-NR was the designated counsel for Mr. Groover, representing him in both state and federal proceedings. Ms. Brewer had been Mr. Groover's counsel for several years. However on June 30, 2003, with the defunding of CCC-NR, the State of Florida effectively removed Ms. Brewer from Mr. Groover's case. In June of 2003 after the announcement that CCC-NR had been defunded, Ms. Brewer notified the circuit court that Mr. Groover would be losing his collateral counsel effective June 30, 2003.

On July 3, 2003, Judge Arnold appointed Dale Westling as state registry counsel to represent Mr. Groover in state proceedings. Upon Mr. Westling's appointment, the state officials overseeing the disbursement of the attorney-client privileged case files decided to immediately provide all of Mr. Groover's files to Mr. Westling. On July 24, 2003, Mr.

Westling sent John Bradley, who Mr. Westling has described as "my investigator" to Tallahassee to retrieve the 40 boxes of case material in Mr. Groover's case. While at the CCC-NR office, Mr. Bradley informed those overseeing the transition that he had been the lead investigator on Mr. Groover's case and that "Mr. Groover was where he needed to be." Due to an oversight by those handling the disbursement of the attorney-client privileged materials, only 36 of the boxes were actually provided to Mr. Bradley.

On July 29, 2003, Mr. Westling wrote Mr. Groover and stated, "please allow me to report that my investigator, John Bradley, recently secured numerous boxes of materials from the Capitol Collateral Counsel." Mr. Westling further represented that, "[a]t the present time, my investigator is organizing boxes of materials."

On July 30, 2003, the federal district court granted undersigned counsel's application to be appointed as CJA counsel for Mr. Groover for purposed of Mr. Groover's pending federal habeas petition; the federal district court had reactivated the case in late June. Upon receipt of the appointment, undersigned counsel (McClain) immediately sought to contact Mr. Westling. On August 4, 2003, undersigned counsel (McClain) was advised that Mr. Westling was on

vacation, but could be reached through email. Undersigned counsel (McClain) thereupon contacted Mr. Westling via email, explained the circumstances, and asked for access to the case files in order to be able to appropriately advise this court on Mr. Groover's behalf.

Mr. Westling responded by informing undersigned counsel (McClain) to contact "my investigator," John Bradley who would provide him with access to Mr. Groover's case files.

Meanwhile, undersigned counsel learned that four boxes of case material remained in Tallahassee in the custody of state officials who were trying to distribute all remaining case files in order to empty the building formerly housing CCC-NR.

Ultimately, arrangements were made for undersigned counsel to obtain the files that remained in Tallahassee. Counsel (McClain) then drove on August 14, 2003, to Jacksonville where he met John Bradley. Mr. Bradley took undersigned counsel (McClain) to a storage facility and accessed the 36 boxes of Mr. Groover's case files. Counsel (McClain) offered to review the files and leave any duplicate copies of records for Mr. Westling. However, Mr. Bradley opined that he would prefer that all of the records remain together. Accordingly, counsel (McClain) took possession of the 36 boxes of material which were condensed by one to 35

boxes in order to fit them in a rental van.

During this transaction, Mr. Bradley informed counsel (McClain) that he had been the lead detective investigating Mr. Groover's crime for the Duval County Sheriff's Office in 1983. Thus, it was apparent that Mr. Bradley was the same "John Bradley" referred to in the FBI investigation of Ralph Green as someone who had assisted Mr. Greene during the prosecution and who would be familiar with his handling of the witnesses against Mr. Groover.

In September of 2003, undersigned counsel asked the federal district court for a period of time to file supplemental briefing regarding the pending federal habeas petition. While preparing this motion, undersigned counsel learned for the first time that Judge Arnold had been the attorney who represented the trial prosecutor, Mr. Greene, in the federal criminal proceedings that resulted following the FBI investigation of his conduct in Mr. Groover's case and others. The federal court granted the motion in part and gave undersigned counsel ninety days until late December to submit the requested brief limited to two issues, those arising under Atkins and Ring.

During late 2003 while preparing the federal brief, undersigned counsel (McClain) met with Mr. Groover on a

regular basis at Union Correctional Institution. An illiterate Mr. Groover asked undersigned counsel to read to him letters received from Mr. Westling. Mr. Groover expressed extreme dissatisfaction with Mr. Westling regarding the letter he received from Mr. Westling indicating that his investigator was John Bradley who had been the lead detective for the Jacksonville Police Department at the time of Mr. Groover's prosecution. When a letter written in December of 2003 informed Mr. Groover that two mental health experts would soon be arriving at death row to conduct mental evaluations of him, a frightened Mr. Groover asked undersigned counsel (McClain) if he and his partner would help in the state court proceedings.<sup>9</sup> Undersigned counsel agreed to represent Mr. Groover on a *pro bono* basis in the state court proceedings. Accordingly, undersigned counsel served their notice of appearance as *pro bono* counsel for Mr. Groover in state circuit court on December 24, 2003.

With the notice of appearance as *pro bono* counsel, undersigned counsel also filed a verified motion to disqualify Judge Arnold on the basis of his representation of Mr.

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<sup>9</sup>This letter confirmed what Mr. Groover indicated, i.e. that Mr. Westling had not ever traveled from Jacksonville to UCI to meet with Mr. Groover.

Groover's trial prosecutor, Ralph Greene.

Subsequently, undersigned counsel also served a motion to hold proceedings in abeyance. On January 24, 2003, undersigned counsel received Judge Arnold's order striking the motion to hold proceedings in abeyance on the grounds that "Martin J. McClain and Linda McDermott are not counsel of record."

### CLAIMS FOR RELIEF

#### CLAIM I

**MR. GROOVER WAS DEPRIVED OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE PROSECUTION INTENTIONALLY PERMITTED FALSE AND/OR MISLEADING EVIDENCE TO BE PRESENTED TO MR. GROOVER'S JURY AND USED IT TO OBTAIN A CONVICTION.**

Mr. Groover presented a claim in his 1986 motion to vacate judgment and sentence that he was deprived of his due process rights when the State concealed its payment of cash to its witnesses at Mr. Groover's trial. As Mr. Groover explained in his brief to this Court in 1986, "disclosure of these payments would have undermined the prosecution's use of his own credibility to bolster that of his witnesses. If the jury had known that Ralph Greene was passing bundles of cash to his witnesses, it would have given little credence to his promises that the witnesses were all telling the truth."

Summary Initial Brief in Case No. 68,845, at 54-55.<sup>10</sup>

This Court affirmed the summary denial of this claim without the benefit of an evidentiary hearing. This Court based its ruling upon whether the undisclosed evidence was "material." This Court stated, "evidence is 'material' for Brady purposes, 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.'" Groover v. State, 489 So.2d 15, 17 (Fla. 1986).

However, this Court has recently discussed its historical misunderstanding of the materiality standard required when the prosecutor knowingly deceives the jury and the defense, "we conclude that our precedent in this area has lacked clarity, resulting in some confusion and improper merging of the Giglio and Brady materiality standards." Guzman v. State, 28 Fla. L. Weekly S829, 2003 Fla. LEXIS 1993 \*16 (Fla. 2003). When a prosecutor engages in intentional deception, "[t]he State as beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Guzman v. State, 2003 Fla. LEXIS

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<sup>10</sup>This brief was filed on June 2, 1986, under the exigency of a death warrant the day after the Rule 3.850 motion was filed and denied in circuit court on June 1, 1986. The execution was scheduled for June 4, 1986.

1993 \*18. This Court described this standard as a "more defense friendly standard" than the one used in connection with a Brady violation. Id. at \*19.

In Giglio v. United States, 405 U.S. 150, 153 (1972), the Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" The Supreme Court has further recognized that a prosecutor is:

the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). Accordingly, the Court "forbade the prosecution to engage in 'a deliberate deception of court and jury.'" Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). This Court has stated, "[t]ruth is critical in the operation of our judicial system." Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000); Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001). If the prosecutor intentionally or knowingly presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death sentence must be set aside unless the error is harmless beyond a reasonable

doubt. Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995). The prosecution not only has the constitutional duty to fully disclose any deals it may make with its witnesses, United States v. Bagley, 473 U.S. 667 (1985), but also has a duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959), and to refrain from deception of either the court or the jury. Mooney v. Holohan. A prosecutor must not knowingly rely on false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957)(principles of Mooney violated where prosecutor deliberately "gave the jury the false impression that [witness's] relationship with [defendant's] wife was nothing more than casual friendship"). The State "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So.2d 1325, 1331 (Fla. 1993).

Where the prosecution violates Giglio and knowingly presents either false evidence or false argument in order to secure a conviction, a reversal is **required** unless the error is proven harmless beyond a reasonable doubt. Bagley, 473 U.S. at 679 n.9. This Court failed to apply this standard to Mr. Groover's case.

In the federal investigation of Ralph Greene following Mr. Groover's trial, FBI agents discovered that Ralph Greene had made cash payments to several of the State's witnesses in Mr. Groover's trial. Specifically, the FBI reported:

a. Spencer Hance, a witness against Tommy Groover, was given \$20 by Ralph Greene before he gave any testimony. Ralph Greene later gave Hance \$60 in cash to pay a traffic fine after the trials of Tommy Groover and co-defendant Robert Parker were completed.

b. Hance also **observed Ralph Greene give an undetermined amount of cash to star witness Joan Bennett on two occasions.**

c. Jane Sheppard, the mother of Nancy Sheppard, who also testified for the State, reported that she **overheard Joan Bennett say that she came to the courthouse "to get money from Uncle Ralph," and that she had to "get some Easter money."**

d. Bennett acknowledged that she received \$20 from Ralph Greene.

e. Carl Barton, another State witness, reported that on his first appearance in court Ralph Greene gave him \$20, and gave \$20 each to Joan Bennett and Spencer Hance.

f. Mike Green, a State witness in the trial of Robert Parker, said that he received a total of \$100 in \$20 bills from Ralph Greene.

g. Morris Johnson, another State witness against Tommy Groover, said that he received \$20 from Ralph Greene on five or six occasions.

h. Walter Wayne Johnson, another State witness, said that Ralph Greene paid him \$30 on six different occasions.

i. Jack Austin, the chief investigator for the Office of the State Attorney, recalled cashing two checks for \$300 each for Ralph Greene during the Robert Parker murder trial. **Austin believed that key State witness Billy Long "received regular amounts of monies from the State Attorney's Office for lunches and on at least one occasion Austin observed Greene provide Long with what**

**appeared to be several cash bills, denominations unknown."**

j. Two other State witnesses, Robert Collier and Kenneth Appleton, also confirmed that they had received cash from Ralph Greene during the prosecutions following the Padgett, Sheppard and Dalton homicides.

(Appendix P to the 6/1/86 Motion to Vacate)(emphasis added).<sup>11</sup>

When Billy Long was interviewed by the FBI on June 13, 1984, Mr. Long denied receiving any money from Ralph Greene (Appendix P to the 6/1/86 Motion to Vacate). However, by that time Ralph Greene had left the State Attorney's Office and gone in private practice, and was representing Mr. Long. According to a letter written by Mr. Greene on June 27, 1984, Mr. Greene had written a previous letter dated April 23, 1984, on Mr. Long's behalf. Mr. Greene as Mr. Long's counsel was seeking consideration from the Florida Probation & Parole Commission (Appendix W to the 6/1/86 Motion to Vacate). So at the time of his June 13, 1984, interview, Mr. Long was being represented by Mr. Greene before the Florida Probation &

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<sup>11</sup>According to Mr. Long's trial testimony he was housed at a county jail facility. It is unclear why Mr. Long would be receiving money "for lunches." However when asked by the FBI, Mr. Long offered as an explanation, "[o]ccasionally as the trial went on, the inmates who were jailed locally would miss their meal and a meal would be bought for him." Appendix P to the 6/1/86 Motion to Vacate).

Parole Commission.<sup>12</sup>

Mr. Greene stated in his June 27, 1984, letter written on behalf of Mr. Long:

This letter is a request to reschedule this interview to an earlier date, along with justification thereof. Mr. Long plead guilty and was convicted on April 23, 1983, and was not sentenced until May 9, 1983. If he had plead guilty four days earlier, he would have been entitled to an initial interview within ten months of May 1983.

Mr. Long testified for the State of Florida in two First Degree Murder trials and was primarily responsible for the conviction of Robert Parker and Tommy Groover, both of whom were sentenced to death. At his sentencing hearing, both myself and Mr. T. Edward Austin, the State Attorney, urged that the Court sentence Mr. Long to no more than ten (10) years.

(Appendix W to the 6/1/86 Motion to Vacate).<sup>13</sup> Mr. Long had received a 30 year sentence at his sentencing.

However on January 5, 1983, during Mr. Groover's trial, Billy Long testified that he was not promised anything other than pleading guilty to second degree murder for which he

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<sup>12</sup>There is no indication in the FBI reports that the FBI investigators knew that Mr. Greene was counsel for Mr. Long at the time of their interview of Mr. Long concerning whether Mr. Greene had provided Mr. Long with money during or before Mr. Groover's trial.

<sup>13</sup>In the letter, the date of the guilty plea is typed as "April 23, 1984." However, it appears that a "3" was written over the "4". However, Mr. Long's testimony at Mr. Groover's trial is that he entered a guilty plea in "April or May" of 1982 (R. 853).

expected a life sentence (R. 765). Mr. Long explained his circumstances:

Q What's your present address?

A County Prison Farm.

Q Why are you there?

A On behalf of the deal I made with the State to testify.

Q All right. And what was that arrangement?

A The arrangement was I pleaded guilty to second degree murder in behalf to testify for the State they would drop my charge from first.

Q Let you plead guilty to second degree murder?

A Yes, sir.

Q Okay. Were you promised anything other than you pleading guilty to second degree murder?

A No, sir.

Q What were you charge with?

A First degree murder?

Q How many counts?

A One.

Q Have you been sentenced?

A No, sir.

Q And what are you facing as a potential sentence?

A Life sentence.

(R. 764-65).

In cross-examination, Mr. Long acknowledged that some additional drug charges were also dropped "when I pleaded guilty to second degree to testify for the state" (R. 853). However, Mr. Long did not know what the potential penalties for the drug charges were (R. 854).

During his redirect, Mr. Greene elicited the following testimony:

Q You are facing life imprisonment on a second degree murder, aren't you?

A Yes, sir.

Q Mr. Shore asked you what the penalty was for drugs; the penalty for second degree murder is a lot more than it is for those drugs, isn't it?

A Yes, sir.

(R. 915).

During re-cross, Mr. Long testified as follows:

Q Okay. Have you been sentenced yet?

A No, sir, I haven't.

Q Why not?

A I don't know.

Q Well, let me ask you this: do you expect that maybe your sentence might depend on what you say here today?

A No, sir.

Q Do you expect any better treatment?

A No, sir.

Q Or better sentence for your testimony?

A No, sir, I don't.

Q Not at all?

A No, sir.

(R. 923).

In his closing arguments, Mr. Greene discussed Billy Long saying, "[Mr. Long's initial statement to the police] hasn't varied since and he hasn't talked to me or anybody else. **He hasn't made any deals**, he laid it out the day after he was arrested. And I submit to you he's telling the truth right down the line." (R. 1520)(emphasis added).

As for Joan Bennett who the FBI was advised by witnesses also received money, she was asked at Mr. Groover's trial, "Do you expect benefit from your testimony and cooperation with the State here today?" (R. 1051). She responded, "No sir, I don't." (R. 1051).

Mr. Greene discussed Joan Bennett saying, "Joan Bennett was telling the truth and that she wasn't guilty of first degree murder. And the truth came out. She was guilty of nothing more than accessory after the fact, that is, not reporting it. And she had good reason not to do that, she wasn't guilty of first degree murder. She pled guilty to what

she was guilty of, I think you will find, and nothing more and nothing less. **She didn't get any deal at all.**" (R. 1530)(emphasis added).

Mr. Greene anticipating defense counsel's closing argument told the jury:

Mr. Shore wants you to disbelieve Barton and Hance because they know Tinker and Elaine's parents. And he will want you to disbelieve Denise because she was once married to Billy. And he will want you to disbelieve Billy and Joanie because he will argue they received preferential treatment and since they haven't been sentenced and, therefore, have an interest in lying, and also because they are accomplices. And he will read you the accomplice testimony, accomplice instruction, that is, the Judge will give dealing with accomplices.

Well, I submit to you and I think you will find that Billy Long is telling the truth and that Joanie Bennett is telling the truth. But that even without their testimony, we have got the guilty of first degree murder on three counts, period. By his own testimony, for that matter.

**But they are telling the truth. And, number two, Joanie Bennett, I submit to you, didn't get any preferential treatment. And, three, I submit to you they were telling the truth, absolutely the truth.**

\* \* \*

Mr. Shore has done a good job, he really has. He's got a good job. He's made the State meet its burden and that's the job as a defense lawyer, making us meet our burden, jump the hoops as it were, meet our job, prove him guilty beyond the exclusion of every reasonable doubt. Have the judge rule on the evidence and that's what we've done, I submit to you, ladies and gentlemen. **We've dotted every i and we've crossed every t and we've jumped**

**those hoops** and we've proved his client guilty.

(R. 1551-52)(emphasis added).

In light of this Court's opinion in Guzman v. State, this Court should revisit Mr. Groover's previously presented claim that the State knowingly presented false or misleading evidence and argument at Mr. Groover's trial. Pursuant to Guzman v. State, it is the State's burden to prove that the knowing presentation of false or misleading evidence and argument was harmless beyond a reasonable doubt. At the very least, this Court should vacate its prior determination affirming the summary denial of this claim without the benefit of evidentiary hearing and order that an evidentiary hearing be conducted in the circuit court.

#### CLAIM II

**MR. GROOVER WAS DEPRIVED OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THROUGHOUT THE PRE-TRIAL AND TRIAL PROCEEDINGS THE COUNTY JAIL ADMINISTERED MR. GROOVER LARGE DOSES OF MELLARIL WITHOUT ADVISING THE COURT OR COUNSEL.**

After the circuit court denied Mr. Groover's initial Rule 3.850 motion without an evidentiary hearing, this Court remanded for an evidentiary hearing on the issue arising from "the explicit record evidence that prison officials

administered large doses of Mellaril, a powerful anti-psychotic drug, throughout his pretrial and trial incarceration." Groover v. State, 489 So. 2d 15, 17 (Fla. 1986). At the resulting evidentiary hearing, the prosecutor, Ralph Greene, testified that he was totally unaware that the jail was medicating Mr. Groover (PC-T. 484).<sup>14</sup> Mr. Groover's original defense counsel, Richard Nichols, testified that never had any indication that Mr. Groover was being medicated during the time that he represented Mr. Groover (PC-T. 535). Brent Shore, who replaced Nichols as counsel for Mr. Groover after the plea agreement fell through, testified that he did read Mr. Groover's July 9, 1982, deposition wherein Mr. Groover told his co-defendant's counsel that he was taking Mellaril in order to help him sleep at night (R. 497-99). Mr. Shore testified that he did not know if Mr. Groover was still taking Mellaril after Mr. Nichols withdrew as counsel on

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<sup>14</sup>Mark Arnold also testified at the evidentiary hearing. He had been with State Attorney's Office in July of 1982, and had represented the State at a July 9, 1982, deposition of Mr. Groover conduct by Robert Link who was representing Mr. Groover's co-defendant, Robert Lacy Parker (PC-T. 570). Mr. Greene was not present for the deposition, nor was any counsel for Mr. Groover present. At the time of the deposition, Mr. Groover had entered a guilty plea and was cooperating with the State in its prosecution of Mr. Parker. During a recess in the midst of the deposition, Mr. Groover was given medication. Mr. Link inquired of Mr. Groover, "what kind of medication are you taking." Mr. Groover advised, "Mellaril" (R. 497-98).

August 12, 1982, or if he was taking Mellaril during trial in January of 1983 (PC-T. 391-94).<sup>15</sup>

At the conclusion of the evidentiary hearing conducted in 1986, the circuit court found that Mr. Groover was not rendered incompetent by the administration of Mellaril and denied relief. On appeal, this Court affirmed the trial court's order finding it supported by "competent and substantial evidence." Groover v. State, 574 So. 2d at 100.

Since this Court's decision, the United States Supreme Court has issued opinion in Sell v. United States, 539 U.S. 166, 123 S.Ct. 2174 (2003), and Riggins v. Nevada, 504 U.S. 127 (1992). In Riggins, the Court stated, "It is clearly possible that such side effects had an impact not just on Riggins' outward appearance, but also the content of his testimony on direct and cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." 504 U.S. at 137. However, the Supreme Court

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<sup>15</sup>Also called at the evidentiary hearing were Dr. Antoine Innocent and Dr. Steve Murray. Dr. Innocent testified that he original prescribed the Mellaril because Mr. Groover was "agitated and [being] complaining of unable to sleep and he was also depressed at the time." Groover v. State, 574 So. 2d at 99. Dr. Murray testified that he "put Groover back on Mellaril after the medication had been discontinued" at one point. Id. Dr. Murray explained the effects of the Mellaril on Mr. Groover, "he was less agitated, more calm, and he even said he felt a higher dose would make him feel more effective." Id. at 100.

did not reach Mr. Riggins Eighth Amendment argument "that administration of Mellaril denied him an opportunity to show jurors his true mental condition at the sentencing hearing." 504 U.S at 133.

In Sell, the Court expanded upon Riggins saying, "the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mental ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking into account less obtrusive alternatives, is necessary significantly to further important government trial-related interests." 123 S.Ct. 2185. Accordingly, the Court held a criminal defendant may not be forcibly medicated to restore competency unless the State carried a heavy burden to establish that medicating the defendant will significantly further a state interest, that it is necessary to further the state's interest, and that the medication being administered is medically appropriate. 123 S.Ct. at 2185.

In evaluating Mr. Groover's claim, this Court did not take these matters into consideration. The jail administered the Mellaril without advising the prosecutor, without advising

the court, and without advising defense counsel. The drugs were administered to Mr. Groover, who had a history of drug abuse. His readiness to take the medication cannot obscure the fact that by administering Mellaril without advising counsel and the court, counsel was precluded from advising Mr. Groover of his right to refuse the medication, the dangers of appearing in court and testifying while under the influence of anti-psychotic medication, and the likelihood the medication would mask his true mental condition denied him an opportunity to have jurors his mental limitations. In light of Sell, this Court should revisit its decision finding no due process violation when the jail administered Mellaril with advising the court and/or counsel.

### CLAIM III

#### **MR. GROOVER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL AT HIS PENALTY PHASE PROCEEDINGS.**

After the circuit court summarily denied Mr. Groover's first Rule 3.850 motion, this Court addressed Mr. Groover's penalty phase ineffective assistance of counsel claim saying, "[t]his claim is meritless as the evidence now claimed to have been omitted centered on appellant's history of drug use and troubled family background. This evidence is largely

cumulative to that presented by appellant at trial" Groover, 489 So. 2d at 16.<sup>16</sup>

In fact at Mr. Groover's penalty phase proceeding, the defense called one witness, Mr. Groover's mother. Her testimony is contained in five pages of the transcript (R. 1623-27). She gave his date of birth and testified that Mr. Groover live with her "on and off all his life" (R. 1624). She indicated that Mr. Groover lost interest in school when he was "in the second or third grade" right after his grandmother died (R. 1625). He dropped out of school, "it was maybe ninth grade or something like that" (R. 1625). She never knew Mr. Groover to be violent or to have a gun (R. 1625-26). She indicated that Mr. Groover had one son, two brothers and three sisters (R. 1626). She indicated that Mr. Groover was "a very loving person" who would try to help out anybody who needs him. As an example, she described how after his sister's "mobile home, burnt down, I would say three years ago," Mr. Groover "knocked the door down and he got everyone up and out because everybody knows a mobile home can burn up in three to seven minutes" (R. 1627).

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<sup>16</sup>In affirming the override of the jury's life recommendation as to Count I, this Court stated, "[n]o mitigating circumstances were found concerning Groover's participation in any of the homicides." Groover v. State, 458 So. 2d at 229.

In his initial Rule 3.850 motion, Mr. Groover presented four affidavits from Mr. Groover's siblings, an affidavit from a family friend who knew Mr. Groover's family circumstances his entire life, and an affidavit from Mr. Groover's mother providing information not contained in her brief trial testimony.<sup>17</sup> In her affidavit, Mr. Groover's mother explained the problems that occurred with Mr. Groover's birth, his problems in school and with learning, the abuse he suffered at the hands of his step-father, and his history of drug abuse. His siblings discussed Mr. Groover's history of sniffing glue beginning when he was 8 or 9, his subsequent sniffing of paint and paint thinner ("Tommy did that every day, at least three or four times a day until he was 13 or 14" Appendix F), his later use of "cocaine, PCP, heroin, quaaludes, uppers, downs, whiskey, beer, mushrooms, LSD, Delaudid, hash, whatever he could get his hands on" (Appendix F), Mr. Groover's abandonment by his real father, the psychological and physical abuse from his mother (Appendices G and H), the physical abuse from his step-father (Appendix G), his mental retardation (Appendix H) and difficulties in school ("[l]ots of times other people would tease him and call him 'dummy,' 'stupid,'

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<sup>17</sup>Filed with the Rule 3.850 motion was an Appendix that included Appendices A through T. These appendices are cited herein as "Appendix \_".

or 'retarded.'" Appendix G), how he lost custody of his son because his ex-wife tricked an illiterate Mr. Groover into signing papers permitting her new husband to adopt his son (Appendix H), and how "the evening before the day of the killings, Tommy Groover took a syringe, U-100 I think, and injected what looked like between 35 and 40 cc's of rocket fuel into his left arm" (Appendix K).<sup>18</sup> The 80 year-old family friend described the extreme poverty that Mr. Groover was born into, the physical beatings Mr. Groover's mother endured while she was pregnant with him (she was "thrown down the entire flight of outside stairs that led down from their second-story apartment to the ground below" Appendix J), and how Mr. Groover seemed retarded even as a toddler.

In his initial Rule 3.850 motion, Mr. Groover presented his school records that document his abysmal performance in school, that he received "social promotions," that he was diagnosed as "borderline mentally retarded" in 1971 at the age of 13 (Appendix L). He also presented hospital records from 1978 when he was examined in an emergency room because he was experiencing vision problems in sunlight. These records noted that Mr. Groover was "mentally retarded" (Appendix M). In his

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<sup>18</sup>As was explained in the affidavit, "rocket fuel is like a synthetic heroin, that I understand is used as a horse tranquilizer. It is called T or PCP" (Affidavit K).

initial Rule 3.850 motion, Mr. Groover also presented affidavits from four experts concluding that Mr. Groover was mentally retarded.

Mr. Groover alleged in his Rule 3.850 motion that due to trial counsel's failure to conduct a reasonable investigation into mitigating circumstances, Mr. Groover was prejudiced by the failure to present the wealth of mitigating circumstances to his jury and to the sentencing judge. Counsel did not obtain school records. Trial counsel did not interview Mr. Groover's siblings regarding potential mitigating circumstances, as they indicated in their affidavits. Trial counsel's interview of Mr. Groover's mother was very short and failed to discover the wealth of additional mitigation of which she was aware. Trial counsel did not interview family friends to learn of potential mitigation. As a result, no evidence of Mr. Groover's mental retardation was presented. The jury did not learn of Mr. Groover's history of family poverty, of abandonment, of abuse (both psychological and physical), of his extensive drug abuse, of his difficulties in school, of the ridicule he endured from his peers for his slow intellect, and of use of drugs at the time of the crimes.

This Court's decision affirming the summary denial of Mr. Groover's claim that he received ineffective assistance at the

penalty proceedings is in error in light of the recent decision by the United States Supreme Court in Wiggins v. Smith, 123 S.Ct. 2527 (2003).<sup>19</sup> According to the Wiggins mitigation **must** be investigated in a capital case before an attorney turns to some other line of defense. And it must be investigated well. Wiggins, 122 S.Ct. at 2536-37. Wiggins makes clear that counsel may not abandon mitigation investigation and preparation and "choose" a different strategy before completing a reasonable investigation. Using the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, the Court in Wiggins held that counsel's minimal investigation into the defendant's background (only reviewing the defendant's PSI report and a DSS file), and abandonment of that investigation in order to focus on lingering doubt, fell short of reasonable professional standards:

Counsel's conduct...fell short of the standards for capital defense work articulated by the American Bar Association...standards to which we have long referred as guides to determining what is reasonable. The ABA Guidelines provide that investigations into mitigating evidence "should

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<sup>19</sup>In affirming the summary denial of Mr. Groover's claim that he received ineffective assistance of counsel at the penalty phase, this Court stated, "[t]his evidence is largely cumulative to that presented by appellant at trial." Groover, 489 So. 2d at 16.

comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Id. (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty 11.4.1(C), p. 93 (1989)).

Id. at 2537. Investigation relating to guilt-innocence **and** sentencing phase issues "should begin **immediately** upon counsel's entry into the case and should be pursued expeditiously." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 11.4.1 (A) (emphasis supplied).

According to the United States Supreme Court in Wiggins, evaluation of the prejudice resulting from deficient performance requires a particular methodology. **First**, to determine prejudice from the unreasonable failure to investigate and present mitigating evidence, "we reweigh the evidence in aggravation against the **totality** of available mitigating evidence." Wiggins, 123 S.Ct at 2542 (emphasis added); see also Williams v. Taylor, 120 S.Ct at 1495 (court is required to conduct an "assessment of the totality of the omitted evidence" and then to "evaluate the totality of the available mitigation evidence-**both** that adduced at trial, **and** the evidence adduced in the habeas proceeding")(emphasis added). If "the available mitigating evidence, taken as a

whole, 'might well have influenced the jury's appraisal' of [the defendant's] moral culpability," Wiggins, 123 S.Ct. at 2544 (quoting Williams, 120 S.Ct. at 1495, then prejudice has been shown.<sup>20</sup> **Second**, Petitioner need only show that the available mitigation creates "a reasonable probability" that enough jurors would have struck a different balance to alter the sentencing recommendation. Id. **Third**, every defendant has "a right—indeed a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer," Williams, 120 S.Ct. at 1513, regardless of the strength of the state's case, the heinous nature of the offense, or the severity of the aggravators. Williams, 120 S.Ct. at 1515. **Fourth**, for a fact to be mitigating it does not have to be relevant to the crime—any of "the diverse frailties of humankind," Woodson v. North Carolina, 428 U.S. 280, 304

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<sup>20</sup>The United States Supreme Court has granted certiorari in Banks v. Cockrell, No. 02-8286, which presents, *inter alia*, the following question:

"2. Did the Fifth Circuit act contrary to Strickland v. Washington, 466 U.S. 668 (1984) and Williams v. Taylor, 529 U.S. 362 (2000), where it weighed each item of mitigating evidence separately and concluded that no single category would have brought a different result at sentencing without weighing the impact of the evidence collectively?"

(1976), which might counsel in favor of a sentence less than death, Lockett v. Ohio, 438 U.S. 586 (1978), are mitigating. Williams, 120 S.Ct at 1495.

In rejecting Mr. Groover's penalty phase ineffective assistance of counsel claim, this Court failed to conduct the proper prejudice analysis. This Court merely said that the uninvestigated and unrepresented mitigating evidence was "largely cumulative to that presented by appellant at trial." Groover, 489 So. 2d at 16.<sup>21</sup> That analysis simply does not comport with Wiggins.

In light of the United States Supreme Court's pronouncement in Wiggins this Court must revisit its decision to affirm the summary denial of Mr. Groover's penalty phase ineffective assistance of counsel claim. At the very least, this Court should vacate its prior determination affirming the summary denial of this claim without the benefit of evidentiary hearing and order that an evidentiary hearing be conducted in the circuit court.

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<sup>21</sup>This Court did not explain how the evidence could be cumulative when as this Court indicated in its direct appeal opinion while finding no reasonable basis for the life recommendation, "[n]o mitigating circumstances were found concerning Groover's participation in any of the homicides." Groover v. State, 458 So. 2d at 229 ("we find nothing in the facts of this case upon which the jury could have rationally have based the recommendation of a life sentence").

#### CLAIM IV

**MR. GROOVER HAS PRESENTED A PRIMA FACIE DEMONSTRATION OF HIS MENTAL RETARDATION AND THUS HE IS ENTITLED TO A TRIAL COMPORTING WITH THE SIXTH AMENDMENT FOR THE PURPOSE OF A FACTUAL RESOLUTION OF HIS CLAIM THAT HIS IS NOT ELIGIBLE FOR A SENTENCE OF DEATH IN LIGHT OF THE EIGHTH AMENDMENT PROHIBITION OUTLINED IN ATKINS V. VIRGINIA.**

When this Court remanded for an evidentiary hearing on Mr. Groover's competency to stand trial, a wealth of evidence was presented that demonstrated Mr. Groover was and is mentally retarded. Several experts testified at that hearing. Dr. Harry Krop, a clinical psychologist, testified for the defense that Mr. Groover had a verbal IQ of 64 and an overall IQ of 60 (PC-T. 168). Dr. Krop testified that it was obvious that Mr. Groover was retarded when he interviewed him (PC-T. 168). Mr. Groover's IQ score corroborated Dr. Krop's observations of his mental retardation, as did historical documentation and reports from Mr. Groover's family. Likewise, Dr. Francis S. Smith, an audiologist and speech language pathologist called by the defense, testified that Mr. Groover had generalized brain dysfunction that should be classified as mental retardation (PC-T. 91). Dr. Smith stated that Mr. Groover responded with language at the nine-year old level (PC-T. 76). Dr. James R. Merikangas, an M.D.

specializing in neurology and psychiatry, testified that Mr. Groover fell in the mild to moderate mental retardation range, with a verbal IQ of about 64 (PC-T. 116, 127). In discussing Mr. Groover's functioning, Dr. Merikangas testified that Mr. Groover's mental retardation:

was quite apparent to all of his school teachers and in his performance and apparent to his peers who teased him about being retarded, and talking to him for two or three minutes you will find out that there is an - almost a vacuum of information behind this normal appearing person.

He simply does not comprehend what is said to him and tends to answer questions with social responses like yes, uh-huh, that's right and generally agreeing with the speaker, but try to get something specific out of him and you will determine in five minutes that he is suffering from mental retardation.

(PC-T. 136). Dr. Samuel I. Greenburg, a psychiatrist, testified that Mr. Groover was mentally retarded (PC-T. 228). Dr. Greenburg specifically assessed Mr. Groover's adaptive functioning and found that Mr. Groover was "at the bottom, between six and seven, and that's very poor to grossly impaired, and that's at the bottom of the list, the most severely disturbed." (PC-T. 228).

This mental retardation diagnosis was supported by documentary evidence of significant medical and legally recognized indicia of mental retardation. School records documented Mr. Groover's very poor performance in school. In

fact, these records and medical records described him as "mentally retarded" (Appendix M to the 6/1/86 Motion to Vacate).

The diagnosis was also supported by the testimony of numerous family members and family friends. They provided evidence of Mr. Groover's mental retardation well before his eighteenth birthday.

Given the well evidence presented in the record of this case that demonstrates that Mr. Groover is mentally retarded, Mr. Groover is entitled to a Sixth Amendment trial of his mental retardation. This trial must include the right to the effective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). This trial must include the right of confrontation. This trial must include the right to a jury. This trial must include the right to appeal an adverse verdict to this Court in a direct appeal.

In Johnson v. State, 102 S.W.3d 535 (Mo. 2003), the Missouri Supreme Court was presented with an appeal from the denial of a motion for post-conviction relief in which substantial evidence of mental retardation had been developed and pled. The evidence of mental retardation had not been presented to the jury that imposed the sentence of death. The Missouri Supreme Court concluded that:

[t]he evidence necessary in light of Atkins was not presented adequately to a finder of fact, nor was the constitutional right to be free from the death penalty where mental retardation exists. Because it is cruel and unusual to inflict the death penalty on those who are mentally retarded, because incomplete evidence of Movant's mental capacity was presented, and because Movant's mental capabilities are questionable, the cause is reversed and the cases is remanded. On remand, the court shall set aside Movant's sentence and order a new penalty phase hearing.

Johnson, 102 S.w.3d at 541. Similarly, the Oklahoma Court of Criminal Appeals granted post-conviction relief on a successive petition and ordered a jury trial on the capital defendant's claim of mental retardation. Lambert v. State, 71 P.3d 30, 31 (Okla Crim. 2003)("Lambert has raised sufficient evidence to create a question of fact on the issue of mental retardation"). Similarly in Atkins v. Commonwealth, 581 S.E. 2d 514, 517 (Va. 2003), the Virginia Supreme Court on remand from the United States Supreme Court found the "claim of mental retardation is not frivolous," and ordered a new jury empaneled "for the sole purpose of making a determination of mental retardation."<sup>22</sup>

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<sup>22</sup>In State v. Grell, 66 P.3d 1234, 1241 (Ariz. 2003), and State v. Williams, 831 So. 2d 835, 861 (La. 2002), remands of direct appeals were ordered for judicial resolution of the factual question of the capital defendant's mental retardation. In both of these cases, even though the appellate court did not determine a jury was required, directions were given to the trial level court to employ pre-trial procedures to resolving the issue.

The Sixth Amendment applies to the resolution of any factual determination necessary to render the defendant eligible for a sentence of death. Ring v. Arizona, 122 S. Ct. 2428 (2002). Under Ring, the question is not whether death is an authorized punishment in a first-degree murder case, but whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone." 122 S. Ct. at 2441. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." Ring, 122 S. Ct. at 2439. A State may not avoid the Sixth Amendment by "specif[ying] 'death or life imprisonment' as the only sentencing options" because "the relevant inquiry is one not of form, but of effect." Id. at 2440 (quoting Apprendi, 530 U.S. at 494). If the effect of finding a particular fact "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict," Apprendi, 530 U.S. at 494, the process by which that fact is found is subject to the Sixth Amendment rights during a criminal trial. Ring, 122 S. Ct. at 2440-41.

Justice Scalia's explained in his concurring opinion, "All facts essential to the imposition of the level of

punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be made by the jury beyond a reasonable doubt." 122 S.Ct. at 2444 (Scalia, J. concurring). Most recently, Justice Scalia explained that Apprendi "clarified what constitutes an 'element' of an offense for purposes of the Sixth Amendment. Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact--no matter how the State labels it--constitutes an element, and must be found by a jury beyond a reasonable doubt." Sattazahn v. Pennsylvania, 123 S. Ct. 732, 739 (2003) (Scalia, J., joined by Rehnquist, C.J. and Thomas, J.).

Given that this Court has held that the Sixth Amendment guarantee of effective representation by adequate counsel does not extend into post-conviction proceedings, a collateral proceeding under Rule 3.850 does not provide the constitutional safeguards mandated by the Sixth Amendment. This Court should hold that any pending death sentence must be vacated where the a prima facie showing of mental retardation is made, and a criminal trial that comports with the Sixth Amendment must be ordered to determine whether the defendant is in fact retarded.

Here, there is abundant evidence in the record that Mr. Groover is mental retarded. Accordingly, this Court must issue the writ, vacate the sentence of death, and order the circuit court to conduct a criminal trial on the issue of Mr. Groover's mental retardation.<sup>23</sup>

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<sup>23</sup>Before the Sixth Amendment trial of Mr. Groover's mental retardation, he is entitled to know the standards for resolution of the factual issue. Currently, it is unknown who bears the burden of proof to prove mental retardation, and what is the standard by which mental retardation is to be measured. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." Ford v. Wainwright, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and concurring in the judgment).

The United States Supreme Court recognized the critical need for procedural rules to govern the process by which substantive rights are vindicated:

[T]he lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination. The stakes are high, and the "evidence" will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible. Also essential is that the manner of selecting and using experts responsible for producing that "evidence" be conducive to the formulation of neutral, sound, and professional judgments as to the prisoner's ability to comprehend the nature of the penalty. Fidelity to these principles is the solemn obligation of a civilized society.

CLAIM V

MR. GROOVER'S SENTENCES OF DEATH VIOLATE  
THE SIXTH AMENDMENT FOR THE REASONS  
EXPLAINED IN RING V. ARIZONA.

On January 11, 1983, Mr. Groover was convicted on three counts of first degree murder (R. 255). At the penalty phase, Mr. Groover's jury was given a special verdict as to each count. This special verdict provided:

We, a majority of the jury, rendering an advisory sentence to the Court as to whether the defendant should be sentenced to death or to life imprisonment, find:

1. Sufficient aggravating circumstance

\_\_\_\_\_ do

\_\_\_\_\_ do not

exist to justify a sentence of death.

2. Sufficient mitigating circumstances

\_\_\_\_\_ do

\_\_\_\_\_ do not

exist, which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.

3. Based upon those considerations, the defendant should be sentenced to

\_\_\_\_\_ life imprisonment without

\_\_\_\_\_

Ford v. Wainwright, 477 U.S. at 417.

Without a determination of the standards to be used at a mental retardation trial, there can be no due process.

parole for 25 years

\_\_\_\_\_ death

DATED \_\_\_\_\_, 1983.

(R. 252-54)(Attachments 1, 2, and 3).

As to Counts I and II, the jury marked the special verdict form indicating that sufficient aggravating circumstances did not exist to justify a sentence of death. Accordingly, the jury recommended advisory sentences of life on Counts I and II. (R. 252-53). As to Count III, the jury indicated that a majority of the jury found sufficient aggravating circumstances did exist to justify a sentence of death. The jury further indicated that sufficient mitigating circumstances did not exist to outweigh any aggravating circumstances, to justify a life sentence. The jury recommended a death sentence on Count III (R. 254).

On February 18, 1983, the trial court overrode the jury's life recommendation and sentenced Mr. Groover to death on Count I (R. 268). As to Count II, the trial court followed the jury's life recommendation and sentenced Mr. Groover to life imprisonment (R. 269). As to Count III, the trial court followed the jury's death recommendation and imposed a sentence of death (R. 270). In Mr. Groover's direct appeal, this Court affirmed both death sentences. Groover v. State,

458 So. 2d at 226.

In Ring v. Arizona, 122 S. Ct. 2428 (2002), the United States Supreme Court held that Apprendi v. New Jersey, 530 U.S. 466 (2000), applies to capital sentencing proceedings. Ring overruled Walton v. Arizona, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring, 122 S. Ct. at 2443. Under Ring, "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' Apprendi, 530 U.S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury." 122 S. Ct. at 2443.

Here, the jury received a special verdict requiring it to make two findings of fact by a majority vote before the jury could consider whether to recommend a sentence of death. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." Ring, 122 S. Ct. at 2439. A State may not avoid the Sixth Amendment by "specif[ying] 'death or life imprisonment' as the only sentencing options" because "the relevant inquiry is one not of form, but of effect." Id. at

2440 (quoting Apprendi, 530 U.S. at 494). If the effect of finding an aggravating circumstance "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict," Apprendi, 530 U.S. at 494, the circumstance is an element which must be found by a jury beyond a reasonable doubt. Ring, 122 S. Ct. at 2440-41.

Section 921.141, Fla. Stat., requires the trial judge to make three factual determinations before a death sentence may be imposed. The trial judge (1) must find the existence of at least one aggravating circumstance, (2) must find that "sufficient aggravating circumstances exist" to justify imposition of death, and (3) must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Section 921.141(3), Fla. Stat. (emphasis added). If the judge does not make these findings, "the court shall impose sentence of life imprisonment in accordance with [sec.]775.082." Id. (emphasis added). Here, the jury was asked to return a special verdict indicating whether "sufficient aggravating circumstances" were present and whether "sufficient mitigating circumstances" were present which outweighed the aggravating. These factual findings were in conformity with the statutory requirement.

Under Ring, aggravating factors are elements of capital

murder. Under the Florida capital sentencing statute, the elements of capital murder are the three factual determinations the statute requires before a death sentence may be imposed. In Mr. Groover's case, unlike most other capital cases in Florida, the jury was asked to render a verdict regarding whether "sufficient" aggravating circumstances exist, and regarding whether mitigating circumstances exist which outweigh the aggravating circumstances. The jury was instructed to reach its verdict by a majority vote.

As to Count I, the jury specifically returned a verdict finding "sufficient aggravating circumstances do not exist to justify a sentence of death" (R. 252). In making this finding, the jury found that the fact necessary for consideration of a death sentence did not exist.

Recently, this Court has address the effect of a specific factual determination in a special verdict. In Lebron v. State, 799 So. 2d 997 (Fla. 2001), the jury returned a special verdict when it convicted Mr. Lebron finding that the victim "was killed by someone other than Lebron." Lebron v. State, 799 So. 2d at 1004. When imposing a sentence of death following a 7-5 death recommendation, the sentencing court found "the evidence established beyond a reasonable doubt that

the defendant murdered Larry Neal Oliver, Jr." Lebron v. State, 799 So. 2d at 1021. This Court expressly held that it was error for the sentencing court to premise a sentence of death upon findings that were "contrary to the jury's express findings." Id. Accordingly, the death sentence was vacated and the matter remanded for a new sentencing proceeding.

In light of Lebron v. State, the jury's specific finding that "sufficient aggravating circumstances do not exist" as to Count I, cannot be ignored. Under Ring v. Arizona, the special verdict constituted an acquittal of the element separating first degree murder from the crime of capital first degree murder. The override of the life recommendation on Count I cannot stand. The death sentence of that count violates the Sixth Amendment as explained in Ring v. Arizona.

As to Count III, the jury did find that "sufficient aggravating circumstances do exist" and that "sufficient mitigating do not exist" (R. 254). However, this express finding was not made by a unanimous jury. It was made as the verdict form indicated, by "a majority of the jury" (R. 254).<sup>24</sup>

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<sup>24</sup>As to elements of an offense, this Court has recognized that a judge may not make factfindings "on matters associated with the criminal episode" because that "would be an invasion of the jury's historical function." State v. Overfelt, 457 So. 2d 1385, 1387 (Fla. 1984). Under Fla. R. Crim. P. 3.440, a jury verdict on the elements of a criminal charge must be unanimous. Since jury unanimity has long been the practice in

Two of the elements required to be established in order for Mr. Groover to be sentenced to death were that "sufficient aggravating circumstances d[id] exist to justify a sentence of death" and that "sufficient mitigating circumstances d[id] not exist to outweigh any aggravating circumstances" (R. 254). Mr. Groover's jury was not instructed that these elements were required to be proved beyond a reasonable doubt.<sup>25</sup> Such an error can never be harmless, "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). When the jury has not been instructed on the reasonable doubt standard, "there has been no jury verdict

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Florida, "It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." Flanning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So. 2d 261 (Fla. 1956). Taken together, Ring and Florida law, establish that the penalty phase jury's vote on the factual determinations set forth in the special verdict in Mr. Groover's case was required to be unanimous. The failure to require unanimity violated the Sixth Amendment.

<sup>25</sup>Mr. Groover's jury was also provided with unconstitutionally vague and overbroad instructions on the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors. Under Ring, these aggravating factors were elements of capital first-degree murder and were required to be proved beyond a reasonable doubt. Thus, the unconstitutional instructions provided to Mr. Groover's jury violated not only the Eighth Amendment, but also the Sixth Amendment's jury trial guarantee.

within the meaning of the Sixth Amendment," and therefore, "[t]here is no object, so to speak, upon which harmless-error scrutiny can operate." Id. at 280.

In Mr. Groover's case, the jury was asked to and did make fact findings on the factual determinations required by the statute before a death sentence may be considered. The jury's determination, however, was not required to be unanimous, and the jury was not instructed on the reasonable doubt standard as to these factual determinations required by the statute. Mr. Groover's death sentence violates the Sixth Amendment.

**CONCLUSION**

For all of the reasons discussed herein, Mr. Groover respectfully urges the Court to grant briefing of the issues presented herein, oral argument before this Court, and habeas corpus relief.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing  
Petition for Writ of Habeas Corpus has been furnished by  
United States Mail, first class postage prepaid, to Curtis M.  
French, Esq., Office of the Attorney General, The Capitol, PL-  
01, Tallahassee, Florida 32300-1050, on March \_\_\_\_, 2004.

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MARTIN J. MCCLAIN  
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing petition has been reproduced in a 12 point Courier type, a font which is not proportionately spaced.

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MARTIN J. MCCLAIN  
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