No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN GROSSMAN
Petitioner,

vs.

STATE OF FLORIDA
Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI
CAPITAL CASE
EXECUTION SCHEDULED
FEBRUARY 16, 2010 6:00 pm

JOHN W. JENNINGS
Capital Collateral Regional Counsel
-Middle Region

Richard Kiley*
Florida Bar No. 0558893
Assistant CCRC
*Counsel of Record
Capital Collateral Regional Counsel-
Middle Region
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619-1136
(813) 740-3544

CAPITAL CASE

QUESTIONS PRESENTED

(1) Whether a state court's successive rejection of a federal claim bars review such that a capital defendant is unable to present to a court evidence of mental mitigation in support of a claim in avoidance of the death penalty.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Other Cites:

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN GROSSMAN
Petitioner,

vs.

STATE OF FLORIDA,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the Florida Supreme Court is reported at Grossman v. State, –So.3d–, 2010 WL 424912 Fla., 2010.

JURISDICTION

Jurisdiction of this Court is sought pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. This case involves the Fourteenth Amendment to the United States Constitution, which applies portions of the Fifth, Sixth, and Eighth Amendments to the states and provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States deprive and person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

Mr. Grossman was convicted of First Degree Murder as charged after a trial held October 22-31, 1985. Following the penalty phase, a jury recommended the death penalty. On March 19, 1986, the trial judge entered his written order in support of the death sentence. Mr. Grossman appealed his conviction to the Florida Supreme Court which affirmed his conviction and sentence in Grossman v. State, 525 So.2d 833 (Fla. 1988). Included in Mr. Grossman's direct appeal for review was the denial of the motion to sever. Mr. Grossman sought review in the United States Supreme Court which denied the petition for writ of certiorari. Grossman v. Florida, 489 U.S. 1071 (1989).

A death warrant was signed on March 8, 1990. The execution was stayed by the Florida Supreme Court on April 5, 1990. Mr. Grossman filed his Rule 3.850 Motion to Vacate Judgment of Conviction and Sentence in state court. Included in the motion were claims of ineffective assistance of counsel in penalty phase and the failure of the state to disclose exculpatory, material evidence. After an evidentiary hearing on May 31 - June 2, 1994, the state trial court denied the Rule 3.850 motion on October 2, 1995.

Mr. Grossman appealed the state court denial of Rule 3.850 post-conviction relief motion to the Florida Supreme Court. The Florida Supreme Court affirmed the denial of Rule 3.850 relief. Grossman v. Dugger, 708 So.2d 249 (Fla. 1997).

Mr. Grossman then timely filed a federal Petition for Writ of Habeas Corpus on September 18, 1998. That petition was stricken and returned to Mr. Grossman. The order striking the petition was modified and Mr. Grossman filed a petition in response to that modified order. Respondent filed a response to that petition on February 25, 2002, and Mr. Grossman filed a reply on March 21, 2002.

On July 22, 2002, the case was administratively closed pending the outcome of two Florida cases that raised Ring v. Arizona, 536 U.S. 584 (2002) issues. On August 14, 2003, Mr. Grossman filed a successive state habeas petition. The Florida Supreme Court rejected the petition in a one-sentence order issued May 7, 2004. Mr. Grossman filed a motion for rehearing on May 19, 2004. The motion was denied on July 15, 2004.

On July 26, 2004, Mr. Grossman's federal proceeding was reopened, and he filed his amended petition on August 25, 2004. The petition was denied by the Federal District Court on January 31, 2005. Mr. Grossman made application for a certificate of appealability which was denied by the Federal District Court on February 28, 2005. Mr. Grossman filed a renewed application for a certificate of appealability. The Eleventh Circuit Court of Appeals denied relief by affirming the district court's decision on October 16, 2006. A copy of the opinion is attached as a part of this petition.

Mr. Grossman filed a Second Successive Motion to vacate Judgments of Conviction and Sentences on September 12, 2007. The circuit court denied the motion on February 26, 2008. Mr.

Grossman appealed on March 20, 2008 and the Florida Supreme Court affirmed the lower court on February 26, 2009.

On January 12, 2010, the Governor signed a death warrant on Martin Grossman. Mr. Gossman filed his Third Successive Motion to vacate Judgments of Conviction and Sentences on January 18, 2010. The circuit court denied the request for an evidentiary hearing in an order signed on January 21, 2010. Mr. Grossman appealed to the Florida Supreme Court. The Court affirmed the trial court's summary denial of Mr. Grossman's third successive motion for post conviction relief. A copy of the opinion is attached as a part of this petition.

STATEMENT OF NECESSARY FACTS

Facts regarding the denial of an evidentiary hearing to present claim of newly discovered mental mitigation.

In violation of his Due Process rights pursuant to the 14th Amendment of the United States Constitution, some of Mr. Grossman's claims were never heard by a court. Mr. Grossman was denied his constitutional rights because he was not granted an evidentiary hearing on his claim of ineffective assistance of counsel during the penalty phase of his trial. Trial counsel was ineffective because Mr. Grossman was not examined by a competent mental health professional.

In a 3.850 motion filed on August 13, 1990 by prior post conviction counsel, Mr. Grossman claimed he was denied a competent mental health examination and that counsel was ineffective for failing to investigate and arrange for such an evaluation.

In the trial court's order issued on October 16, 1991, the court denied Mr. Grossman an evidentiary hearing on his claim of ineffective assistance of counsel based on failure to provide for, or arrange an examination by a competent mental health professional. The post conviction court, relying on Medina v. State, 573 So.2d 293, 295 (Fla. 1990), ruled that Mr. Grossman's claim was

procedurally barred due to the claim allegedly being "used as a second appeal, or to use a different argument to relitigate the same issue, or to circumvent the rule against second appeals." Order dated October 16, 1991 page 7 (V) (A).

Had a hearing been granted, Dr. Henry Dee would have been able and willing to testify. Since no hearing was granted on the claim, Dr. Dee never testified as to his findings.

Present post conviction counsel, in preparing a successive motion for post conviction relief, retained Dr. Dee to conduct a mental health evaluation of Martin Grossman. Post conviction counsel had no knowledge that before the initial post conviction motion was filed, Dr. Dee had already evaluated Mr. Grossman. Present post conviction counsel did not know of the evaluation as no report had been generated. Present post conviction counsel only learned of the evaluation when Dr. Dee advised counsel that an evaluation was already done. Dr. Dee was still in possession of his raw data.

During the preparation of the successive motion for post conviction relief, Dr. Dee became ill and died. Present postconviction counsel then retained Dr. Michael Maher M.D. to review the raw data of Dr. Dee and to evaluate Mr. Grossman.

The analysis of the raw data obtained from the files of the late Dr. Dee were not a part of the appellate record. Additionally, a report of Dr. Brad Fischer, who did evaluate Mr. Grossman, was also not in the appellate record.

Present post conviction counsel was preparing a successive post conviction motion when Governor Crist signed a death warrant on January 12, 2020 scheduling Mr. Grossman's execution date for February 16, 2010 at 6:00 p.m. Present post conviction counsel then filed Mr. Grossman's successive post conviction motion raising the claim that he was denied the effective assistance of

counsel at the penalty phase of his trial. A hearing was held on January 20, 2010 where arguments were presented to determine if an evidentiary hearing would be held.

Counsel argued that based on the late Dr. Henry Dee's findings, which would have shown that trial counsel was ineffective during the penalty phase, Mr. Grossman should be granted a hearing. Dr. Michael Maher interpreted the findings on the late Dr. Dee, and was ready and able to evaluate Mr. Grossman and testify at an evidentiary hearing about trial counsel's ineffectiveness.

In the order of January 21, 2010 denying relief on this claim, the state circuit court held:

> Nevertheless, the Defendant contends that he should be granted an evidentiary hearing on this claim based upon Massaro v. United States; 538 U.S. 500 (2003), Allen v. Butterworth; 756 So.2d 52 (Fla. 2000); and Porter v. McCollum, 130 S.Ct. 447 (U.S. 2009). This court is not bound to grant an evidentiary hearing based on these cases. The court notes that Massaro deals with an initial claim and holds that allegations of ineffective assistance of counsel may be brought in collateral proceedings – not that evidentiary hearings should always be held on such claims. See Massaro, 538 U.S. at 502-503, 504. Additionally, Allen suggested proposed amendments to the Florida Rules of Criminal Procedure that would require an evidentiary hearing "in respect to the *initial* motion in every case." (See Court order of Jan. 21, 2010 page 6).

Mr. Grossman then appealed the denial of the successive post conviction motion to the Florida Supreme Court on January 25, 2010. The Florida Supreme Court affirmed the circuit court's denial of the successive post conviction motion on February 8, 2010. Grossman v. State, SC 10-118. The opinion is attached to this application.

ARGUMENT AND CITATIONS OF AUTHORITIES

ARGUMENT I

Mr. Grossman was denied the right and was barred from presenting to a state court evidence of mental mitigation in support of his claim in avoidance of the death penalty in violation of the Sixth and Fourteenth Amendment rights under the U.S. Constitution.

This Supreme Court of the United States in Cone v. Bell, 129 S.Ct. 1769 (2009) held:

> When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review. In *Ylst v. Nunnemaker*, 501 U.S. 797, 804,n. 3,111 S.Ct. 2590, 115 L.Ed 2d 706 (1991), we observed in passing that when a state court declines to revisit a claim it has already adjudicated, the effect of the later decision upon the availability of federal habeas is "nil" because "a later state decision based upon ineligibility for further state review neither rests upon procedural default nor lifts a pre-existing procedural default." FN 12 When a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted. To the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts and thus is *ripe* for federal adjudication. See 28 U.S.C. § 2254 (b)(1)(A) (permitting issuance of a writ of habeas corpus only after "the applicant has exhausted the remedies available in the courts of the State").
>
> FN 12. With the exception of the Sixth Circuit, all Courts of Appeals to have directly confronted the question both before and after *Ylst*, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706, have agreed that a state court's successive rejection of a federal claim does not bar federal habeas review. *See, e.g., Page v. Frank*, 343 F.3d 901, 907 (C.A.7 2003); *Brechen v. Reynolds*, 41 F.3d 1343, 1358 (C.A.10 1994); *Bennett v. Whitley*, 41 F.3d 1581, 1582 (C.A.5 1994); *Silerstein v. Henderson*, 706 F.2d 361, 368 (C.A.2 1983). See also *Lambright v. Stewart*, 241 F.3d 1201, 1206 (C.A.9 2001).

> A claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration - not when the claim has been presented more than once.

This Supreme Court of the United States in Wellons v. Hall, 558 U.S. __ (2010) held that "when a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to habeas review."

Both Cone and Wellons have direct application to Mr. Grossman's case. In Mr. Grossman's case, the court, in denying the initial 3.850 post conviction motion, stated:

> V. The sixth claim presented by the Defendant is that he was denied a competent mental health examination and that counsel was ineffective for failing to investigate and arrange for such an examination in violation of Defendant's constitutional rights under the federal and state constitutions.
>
> A. Defendant's claims here are procedurally barred as a Fla. R. Crim. Proc. 3.850 motion can not be used as a second appeal, or to use a different argument to relitigate the same issue, or to circumvent the rule against second appeals. Medina v. State, 573 So.2d 293, 295 (Fla. 1990) (summary denial of similar claims of whether the mental health exam was competently performed, and defendant's competency at sentencing, proper by trial court).

The trial court, in Mr. Grossman's case, by denying his claim without an evidentiary hearing committed a similar error that would be proscribed by Cone and Wellons. The only avenue that Mr. Grossman could take to present his claim that he was denied a competent mental health examination and that counsel was ineffective was through a collateral challenge in post conviction. As held in Cone, "[w]hen a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted. Id at 1781. That is exactly what the trial court did - it refused to hear the claim while erroneously

concluding that it was relitigating the same issue. The new rule of law in Cone and Wellons makes clear that Mr. Grossman was denied an opportunity to be heard when the lower courts incorrectly applied a procedural default to his claim.

New case law shows Mr. Grossman's argument to be timely based on newly discovered evidence.

The standard for summary denial of an evidentiary hearing on Defendant's 3.850 claims is detailed in Gaskin v. State, 737 So.2d 509 (Fla. 1999):

> Under rule 3.850, a post-conviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. *See* Fla. R. Crim.P. 3.850 (d);*Rivera v. State,* 717 So.2d 477 (Fla. 1998); *Valle,* 705 So.2d at 1333; *Roberts v. State,* 568 So.2d 1255, 1256 (Fla. !990). The movant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific "facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." *Id.* At 1259, *See Mendyk v. State,* 592 So.2d 1076, 1079 (Fla. 1992); *Kennedy v. State,* 547 So.2d 912, 913 (Fla. 1989). Upon review of a trial court's summary denial of post-conviction relief without an evidentiary hearing, we must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. *Valle,* 705 So.2d at 1333.
> FOOTNOTE OMITTED
>
> While the postconviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a *conclusive* demonstration that the defendant is entitled to no relief. In essence, the burden is upon the State to demonstrate that the motion is legally flawed or that the record conclusively demonstrates no entitlement to relief. The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion. To the contrary, the "rule was promulgated to establish an effective procedure in the courts best equipped to adjudicate the rights of those originally tried in those courts."
> *Roy v. Wainwright,* 151 So.2d 825, 828 (Fla. 1963). Its purpose was to provide a simplified but "complete and efficacious postconviction

> remedy to correct convictions on any grounds which subject them to collateral attack." *Id.* It is especially important that initial motions in capital cases predicated upon a claim of ineffective assistance of counsel be carefully reviewed to determine the need for a hearing. *Cf. Rivera* 717 So.2d at 487 (reversing for evidentiary hearing on claim of ineffective assistance of counsel where defendant alleged extensive evidence of mitigation in 3.850 motion compared to limited mitigation actually presented at trial); *Ragsdale v. State,* 720 So.2d 203 (Fla. 1998) (same holding) Id. at 516-517.

Case law is clear that the defendant has an absolute right to attack this ineffective assistance of counsel claim in a collateral proceeding. Massaro v. U.S., 538 U.S. 500 (2003) holds in part:

> An ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal. Requiring a criminal defendant to bring ineffective-assistance claims on direct appeal does not promote the procedural default rules objectives: conserving judicial resources and respecting the law's important interest in the finality of judgements. Applying that rule to ineffective-assistance claims would create a risk that defendants would feel compelled to raise the issue before there has been opportunity fully to develop the claims factual predicate, and would raise the issue for the first time in a forum not best suited to assess those facts,... Id. At 504.

The reasoning for granting an evidentiary hearing is further detailed in Allen v Butterworth, 756 So.2d 52 (Fla. 2000):

> In addition to the unnecessary delay and litigation concerning the disclosure of public records, we have identified another major cause of delay in post-conviction cases as the failure of the circuit courts to grant evidentiary hearings when they are required. This failure can result in years of delay. This Court has been compelled to reverse a significant number of cases due to this failure. When a case gets reversed for this reason, the entire system is put on hold, as the hearing on remand takes many months to be scheduled and completed, and the appeal therefrom takes many additional months in order for the record on appeal to be prepared and the briefs to be filed in this Court. In order to alleviate this problem, our proposed rules require that an evidentiary hearing be held in respect to the initial motion in every case. This single change will eliminate a

substantial amount of the delay that is present in the current system
Id. At 66,67.

This claim was improperly denied because the record did not show that the defendant was entitled to no relief pursuant to Gaskins, Massaro, and Allen v. Butterworth.

The Florida Supreme Court frequently relies on procedural defaults to preclude consideration of meritorious issues that go to the reliability of the conviction and sentence of death. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002); Jones v. State, 709 So. 2d 512, 519-20, 525 (Fla. 1998). The refusal to consider such issues increases the risk that the innocent or the legally undeserving will be executed. It diminishes a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not" Furman, at 313 (White, J., concurring).

The ABA Report recommended that "State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid." ABA Report at 241. The ABA Report on page 232 also states:

> Florida post-conviction courts, including the circuit court hearing the 3.851 motion and the Florida Supreme Court hearing an appeal from the denial of the motion, do not use the "knowing, understanding, and voluntary" standard for overcoming procedural default of constitutional errors not properly preserved at trial or raised on appeal.....the Florida Supreme Court hearing an appeal from the motion, does not use the "knowing, understanding and voluntary" standard for overcoming procedural default of state law errors not properly preserved at trial or raised on appeal. If the constitutional error claimed for the first time in a post-conviction could have been, but was not raised on appeal, the claim of error is procedurally barred during post conviction proceedings. In order to obtain post-conviction consideration of such claim, rule 3.851 requires the movant to give reasons why the claim was not raised on direct appeal. Other than ineffective assistance of counsel, it is

> unclear what other reasons for not raising the claim on direct appeal would justify consideration of a procedurally barred claim.

The Florida Supreme Court denied five of Mr. Grossman's claims, including the conflict of interest claim, and in footnote 6 said that the claims were procedurally barred but without explanation. Grossman at 708 So.2d 250. (Fla. 1997). The court did not explain how or why the procedural bar was applicable. A paltry declaration concerning an issue of constitutional importance should not deny Mr. Grossman federal habeas review.

The Florida Supreme Court dismissed numerous claims in Mr. Grossman's appeals because they were purportedly procedurally defaulted. Had the merits been reached, Mr. Grossman would have obtained relief.

Regarding the issue of whether or not Mr. Grossman was entitled to an evidentiary hearing on the successor motion, Mr. Grossman cites for authority Lemon v. State, 498 So.2d 923 (Fla. 1986). The Lemon Court held:

> George Lemon, a state prisoner for whom a death warrant has been signed, appeals the circuit court's denial of his motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. Art. V.§ 3(b)(1), Fla. Const. We granted a stay of execution and now reverse the trial court's order and remand for an evidentiary hearing. We previously affirmed appellant's conviction for first-degree murder and sentence of death. *See Lemon v. State*, 456 So.2d 885 (Fla. 1984), *cert. denied*, 469 U.S. 1230 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985).
>
> It is clear that appellant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief" Fla. R. Crim. P. 3.850; *State v. Crews*, 477 So.2d 984 (Fla. 1985); *O'Callaghan v. State*, 461 So.2d 1354 (Fla. 1984). Having reviewed appellant's motion, files and record, we find that his allegations are sufficient to require an evidentiary hearing. Accordingly, we remand to the circuit court for further proceedings consistent herewith. The stay of execution issued November 4, 1986, is hereby dissolved
> It is so ordered. Id. at 923.

Before the hearing on January 20, 2010, a conversation took place between present post conviction counsel and his retained expert, Dr. Maher. Dr. Maher said that since he did not get a chance to conduct a complete clinical evaluation of Mr. Grossman, he was unable to opine whether or not statutory mitigation was present. However, he did opine that non-statutory mental mitigation was present.

In Porter v. McCollum, 130 S.Ct. 447, 454-455 (2009), the United States Supreme Court held:

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - or even cursory- investigation is unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing. Under Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating. *See, e.g., Hoskins v. State*, 965 So.2d 1, 17-18 (Fla. 2007) *(per curiam)*. Indeed, the Constitution requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 711 L.Ed. 1 (1982), Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge. Id. at 454-5

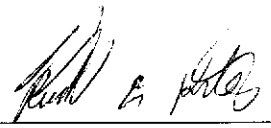
Prior to Porter, Florida Courts did not consider non-statutory mental mitigation *as* mitigation. Dr. Maher's anticipated testimony regarding non-statutory mental mitigation - and possibly statutory mental mitigation pending a clinical evaluation - would have swayed a penalty phase jury to vote for life. Since the evidence of non-statutory mitigation could not have been used prior to Porter, this evidence should be considered newly discovered evidence in light of Porter.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that the Court enter an order granting certiorari.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for certiorari has been electronically filed with the Clerk of Court and furnished by United States Mail, first class postage prepaid, to all counsel of record on the 11th day of February, 2010.



RICHARD KILEY
Florida Bar No. 0558893
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
(813) 740-3544
Counsel for Appellant