

**ORIGINAL**

IN THE  
SEVENTH JUDICIAL CIRCUIT COURT  
FLAGLER COUNTY, FLORIDA

<p>STATE OF FLORIDA,  Plaintiff,  v.  BRUCE GROVE,  Defendant.</p>	<p>FILED IN THE OFFICE OF THE CLERK OF CIRCUIT COURT Flagler County, Florida Case No. 03-546-CR-1A APR 04 2012 By <u>[Signature]</u> Deputy Clerk Paper No. <u>153</u></p>
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**MOTION FOR POSTCONVICTION RELIEF**

The Defendant, by and through undersigned counsel, and pursuant to Florida Rule of Criminal Procedure 3.850, respectfully moves this Honorable Court to vacate his judgment, and in support of said motion alleges:

1. Name and location of the court that entered the judgment of conviction under attack: Seventh Judicial Circuit Court in and for Flagler County
2. Date of judgment: December 13, 2004
3. Length of sentence: Thirty-five years' imprisonment
4. Nature of offenses involved: Manslaughter of a law enforcement officer, DUI manslaughter, aggravated fleeing and eluding, grand theft auto, DWLS,<sup>1</sup> and battery
5. What was your plea? (check only one)
  - (a) Not Guilty X
  - (b) Guilty
  - (c) Nolo Contendere

<sup>1</sup> Driving while license suspended.

If you entered one plea to one count, and a different plea to another count, give details: N/A

6. Kind of trial: Jury

7. Did you testify at the trial or at any pre-trial hearing?

Yes X No \_\_\_

If yes, list each such occasion: Trial

8. Did you appeal from the judgment?

Yes X No \_\_\_

9. If you did appeal, answer the following:

(a) Name of court: Florida Fifth District Court of Appeal

(b) Result: Convictions and sentence affirmed

(c) Date of result: May 30, 2006<sup>2</sup>

(d) Citation (if known): Grove v. State, 930 So. 2d 630 (Fla. 5th DCA 2006)

10. Other than a direct appeal from the judgment, have you previously filed any petitions, applications, motions, etc. with respect to this judgment in this court?

Yes X No \_\_\_

11. If your answer to number 10 was "yes," give the following information (applies only to proceedings in this court):

(a) (1) Nature of the proceeding: Postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850

(2) Grounds raised: Ineffective assistance of trial counsel

(3) Did you receive an evidentiary hearing on your petition or motion, etc? No

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<sup>2</sup> Because the state appellate court issued a *per curiam* affirmed opinion (i.e., no written opinion), Petitioner Grove was not entitled to seek review in the Florida Supreme Court. *See Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980); *St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304, 1304-05 (Fla. 1980).

(4) Result: Motion denied

(5) Date of result: April 3, 2007

If you did appeal, answer the following:

(1) Name of court: Fifth District Court of Appeal

(2) Result: Denial affirmed

(3) Date of result: September 4, 2007

(4) Citation (if known): Grove v. State, 966 So. 2d 403 (Fla. 5th DCA 2007)

(b) As to any second petition, application, motion, etc., give the same information:

(1) Nature of the proceeding: Postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850

(2) Grounds raised: Illegal sentence

(3) Did you receive an evidentiary hearing on your petition or motion, etc? No

(4) Result: Motion denied

(5) Date of result: December 16, 2008

If you did appeal, answer the following:

(1) Name of court: Fifth District Court of Appeal

(2) Result: Denial affirmed

(3) Date of result: November 17, 2009

(4) Citation (if known): Grove v. State, 23 So. 3d 1194 (Fla. 5th DCA 2009)

(c) As to any third petition, application, motion, etc., give the same information:

(1) Nature of the proceeding: Postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850

(2) Grounds raised: Illegal sentence

(3) Did you receive an evidentiary hearing on your petition or motion, etc? No

(4) Result: Motion denied

(5) Date of result: July 22, 2010

If you did appeal, answer the following:

(1) Name of court: Fifth District Court of Appeal

(2) Result: Denial affirmed

(3) Date of result: September 20, 2011

(4) Citation (if known): Grove v. State, 75 So. 3d 293 (Fla. 5th DCA 2011)

12. Other than a direct appeal from the judgment, have you previously filed any petitions, applications, motions, etc. with respect to this judgment in any other court?

Yes X No \_\_\_

13. If your answer to number 12 was "yes," give the following information:

(a) (1) Name of court: Fifth District Court of Appeal

(2) Nature of proceeding: Florida Rule of Appellate Procedure 9.141 petition

(3) Grounds raised: Ineffective assistance of appellate counsel

(4) Did you receive an evidentiary hearing on your petition or motion, etc.? No

(5) Result: Petition denied

(6) Date of result: July 29, 2008

(b) As to any second petition, application, motion, etc., give the same information:

(1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition or motion, etc.? N/A

(5) Result: N/A

(6) Date of result: N/A

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14. State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and the facts supporting them.

For your information, the following is a list of the most frequently raised grounds for postconviction relief. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds that you may have other than those listed. However, you should raise in this motion all available grounds (relating to this judgment) on which you base your allegations that your judgment is unlawful.

DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The motion will not be accepted by the Court if you merely check (a) through (i).

- (a) Judgment obtained by plea of guilty or nolo contendere which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Judgment obtained by the unconstitutional failure of the prosecution to disclose to defendant evidence favorable to the defendant.
- (c) Judgment obtained by a violation of the protection against double jeopardy.
- (d) Denial of effective assistance of counsel.
- (e) Denial of right of appeal.
- (f) Lack of jurisdiction of the court to enter the judgment or impose sentence (such as an unconstitutional statute).
- (g) Sentence in excess of the maximum authorized by law.
- (h) Newly discovered evidence.
- (i) Changes in the law that would be retroactive.

**A. Ground 1: The Defendant's right to a fair sentencing proceeding was denied due to the presence of a large number of law enforcement personnel in the courtroom and/or defense counsel was ineffective for failing to object on this basis, and this error resulted in a manifest injustice.**

Supporting FACTS:

A jury found the Defendant guilty of both DUI manslaughter and manslaughter of a law enforcement officer. However, realizing that the Defendant could not be sentenced for both of these offenses, the sentencing judge (acting as factfinder) was required to set aside one of the guilty verdicts and impose a sentence on the other. At the time that the sentencing judge made this decision, there were a large number of law enforcement personnel in the courtroom.<sup>3</sup> The Defendant's right to a fair sentencing proceeding (and a fair decision regarding which verdict should be set aside) was denied due to the presence of a large number of law enforcement personnel in the courtroom at the time of the sentencing hearing.

In the instant case, the alleged victim was a law enforcement officer. During the sentencing hearing, there were numerous uniformed law enforcement officers in the audience. An affidavit from Rebecca Heinsohn is attached to this motion. Ms. Heinsohn attended the sentencing hearing in this case and she has verified that there were a substantial number of uniformed law enforcement officers in the audience. In *Shootes v. State*, 20 So. 3d 434 (Fla. 1st DCA 2009), the First District Court of Appeal held that defendant's fundamental right to a fair and impartial proceeding was prejudiced by the presence of a large number of law enforcement personnel in the courtroom. Pursuant to *Shootes*, in the instant case the Defendant's fundamental right to a fair and impartial

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<sup>3</sup> The sentencing judge ultimately sentenced the Defendant only on the manslaughter of a law enforcement officer – the offense that was greater in degree and potential punishment.

sentencing proceeding was prejudiced by the presence of a large number of law enforcement personnel in the courtroom.

Alternatively, defense counsel rendered ineffective assistance of counsel by failing to object and failing to argue that the Defendant's right to a fair sentencing proceeding (and a fair decision regarding which verdict should be set aside) was denied due to the presence of a large number of law enforcement personnel in the courtroom at the time of the sentencing hearing. As a result, the Defendant was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of article I, section 16 of the Florida Constitution. But for defense counsel's failure to object, the result of the proceeding would have been different (i.e., the Defendant's objection would have been sustained (and the error would have been corrected) or the issue would have been preserved for appeal and the appellate court would have granted relief).

The Sixth Amendment right to counsel implicitly includes the right to the effective assistance of counsel. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Chatom v. White*, 858 F.2d 1479, 1484 (11th Cir. 1988). "The test to be applied by the trial court when evaluating an ineffectiveness claim is two-pronged: The defendant must show both that trial counsel's performance was deficient and that the defendant was prejudiced by the deficiency." *Bruno v. State*, 807 So. 2d 55, 61 (Fla. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Defense counsel was ineffective for failing to object and failing to argue that the Defendant's right to a fair sentencing proceeding (and a fair decision regarding which verdict should be set aside) was denied due to the presence of a large number of law enforcement personnel in the courtroom at the time of the sentencing hearing. Counsel's failure fell below the applicable standard of

performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome. *See Johnson v. State*, 921 So. 2d 490, 511-12 (Fla. 2005) (Pariente, C.J., specially concurring).

The Defendant acknowledges that the instant motion is successive and he is raising this claim beyond the two-year time period set forth in Florida Rule of Criminal Procedure 3.850. However, the Defendant submits that the error in this case amounts to a manifest injustice and is therefore subject to review. *See Deras v. State*, 54 So. 3d 1023, 1024 (Fla. 3d DCA 2011) ("We acknowledge that the defendant has made this argument in a previous postconviction motion, and that relief was denied. Nonetheless, if what the defendant claims is true, his claim should be revisited under the manifest injustice exception articulated in *State v. McBride*, 848 So. 2d 287, 291-92 (Fla. 2003).")<sup>4</sup>

15. If the ground listed in 14 was not previously presented on your direct appeal, give your reason it was not so presented: A claim of ineffective assistance of counsel is generally not cognizable on direct appeal and is properly raised for the first time in a motion for postconviction relief, pursuant to Florida Rule of Criminal Procedure 3.850. See Kelly v. State, 486 So. 2d 578, 585 (Fla. 1986). Pursuant to Deras v. State, 54 So. 3d 1023, 1024 (Fla. 3d DCA 2011), a manifest injustice claim can be raised at any time.

16. Do you have any petition, application, appeal, motion, etc., now pending in any court, either state or federal, as to the judgment under attack?

Yes X No    

17. If your answer to number 16 was "yes," give the following information:

(a) Name of Court: United States District Court/Middle District of Florida

(b) Nature of the proceeding: federal habeas petition pursuant to 28 U.S.C. § 2254

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<sup>4</sup> *Deras* is pending review in the Florida Supreme Court. *See State v. Deras*, case number SC11-793.



(c) Grounds raised: Several of the claims that have been raised by the Defendant in his previously filed state court pleadings (i.e., violation of constitutional right to a jury trial, ineffective assistance of counsel, etc.)

(d) Status of the proceedings: The case is pending

18. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein.

(a) At suppression hearing: N/A

(b) At arraignment and plea: N/A

(c) At trial: Raymond M. Warren, 101 North Alabama Avenue # B304, Deland, Florida 32724-4316

(d) At sentencing: Mr. Warren

(e) On appeal: James Dickson Crock, 444 Seabreeze Boulevard, Suite 650, Daytona Beach, Florida 32118-3952

(f) In any postconviction proceeding: Mary Elizabeth Fitzgibbons, 21 South Clyde Avenue, Suite 3, Kissimmee, Florida 34741-5491

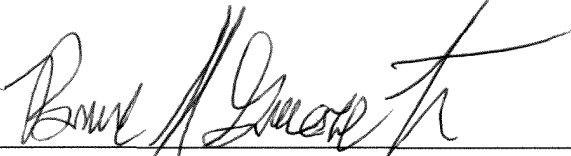
(g) On appeal from any adverse ruling in a post-conviction proceeding: Ms. Fitzgibbons

WHEREFORE, Movant requests that the Court grant all relief to which the movant may be entitled in this proceeding, including but not limited to (here list the nature of the relief sought):

1. An evidentiary hearing to determine the merits of this motion for postconviction relief.
2. Such other and further relief as the Court deems just and proper.

OATH

Under penalties of perjury, I declare that I have read the foregoing motion and that the facts stated in it are true.

  
\_\_\_\_\_  
BRUCE GROVE

**CERTIFICATE OF SERVICE**

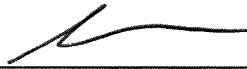
I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished

to:

Office of the State Attorney  
1769 East Moody Boulevard  
Building 1  
3rd Floor  
Bunnell, Florida 32110

by U.S. mail delivery this 2<sup>nd</sup> day of April, 2012.

Respectfully submitted,



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MICHAEL UFFERMAN  
Michael Ufferman Law Firm, P.A.  
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(850) 386-2345/fax (850) 224-2340  
FL Bar No. 114227

Counsel for Defendant **GROVE**

xc: Bruce Grove

IN THE  
SEVENTH JUDICIAL CIRCUIT COURT  
FLAGLER COUNTY, FLORIDA

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STATE OF FLORIDA,

Plaintiff,

v.

BRUCE GROVE,

Defendant.

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Case No. 03-546-CFFA

**ATTACHMENT TO  
MOTION FOR POSTCONVICTION RELIEF**

SWORN WITNESS STATEMENT

Date: 3-12-12

Name: Rebecca Heinsohn Date of Birth: 9-19-38

Home (Work) Telephone: (931)-987-9457

Contact Person: Douglas Heinsohn

I, REBECCA HEINSOHN (print name), hereby make the following statement under penalty of perjury.

Day one of the trial for Bruce Grove in Flagler County, FL, eight years ago, remains as vivid in my memory as if it were yesterday.

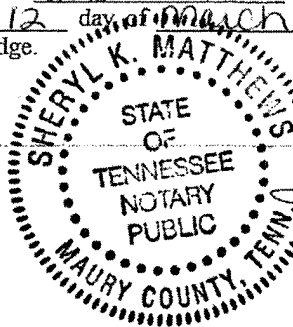
The police presence was overwhelming. Entering the court room we sat in several rows from the front on the right side. We being Michelle, Bruce's mother, Jack, Bruce's step father, Nicole, Bruce's sister, and I, Rebecca, a friend. Just the four of us.

Excluding the family of the officer who was accidentally killed and the press

Signed: Rebecca Heinsohn

STATE OF Tennessee  
COUNTY OF Maury

BEFORE ME, the undersigned authority, appeared Rebecca Heinsohn, who is personally known to me or has produced TNDL as identification, who did take an oath and who acknowledged before me this 12 day of March, 2012, that the above affidavit is true and correct to the best of his knowledge.



Sheryl K Matthews  
Print Name

Sheryl K Matthews  
NOTARY PUBLIC

Exp: April 22, 2014

SWORN WITNESS STATEMENT  
(continued)

Name: Rebecca Thompson

The court room was packed with policemen both in and out of uniform, seated and standing in the back of the room. Throughout the day when possible some would leave, others would come in. In my mind this contingent was 99.9% of who was in the court room. Of this number I estimate 50% in uniform, 50% in plain clothes.

Each day of the trial the repetitive and cumulative effect of their presence was dispiriting and undeniable.

Initials: R. T.