

No. 09-8975

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IN THE  
SUPREME COURT OF THE UNITED STATES

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MARTIN GROSSMAN

Petitioner,

vs.

STATE OF FLORIDA

Respondent,

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

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PETITIONER'S REPLY BRIEF  
CAPITAL CASE  
EXECUTION SCHEDULED  
FEBRUARY 16, 2010 6:00 pm

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## **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.

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**CITATION TO OPINION BELOW**

The opinion of the Florida Supreme Court is reported as Grossman v. State, SC 10-118, 2010 WL 424912 (Fla. Feb. 8, 2010).

**REBUTTAL ARGUMENT**

Mr. Grossman, by counsel, respectfully submits this reply to the State of Florida's brief in opposition.

The State of Florida in its brief in opposition asserts that Mr. Grossman's should be denied certiorari because his successive petition is procedurally barred. The State of Florida argues that where a state court judgment rests on non-federal grounds, the non-federal grounds are an adequate basis for the ruling independent of the federal grounds. The State of Florida also asserts that the Florida Supreme Court's rejection of his claim was correct because the court concluded that the claim was procedurally barred. The State of Florida is incorrect on both of these points.

This claim is a federal claim. Mr. Grossman relies on the Court's opinions in Cone v. Bell, 129 S.Ct. 1769 (2009), Wellons v. Hall, 558 U.S. \_\_\_, 2010 WL 154825 (Jan. 19, 2010) (applying Cone, and Porter v. McCollum, 130 S.Ct 447 (2009)). The question raised is whether a state procedural bar precludes federal review of a claim where that claim was erroneously denied in the state courts. This Court in Wellons 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."

Mr. Grossman attempted to raise his claim of ineffective of assistance of counsel for failure to present evidence of mental health mitigation in avoidance of the death penalty in state court. He was denied the opportunity to present the evidence in mitigation. The state court 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). Collateral appeals are the appropriate vehicle to raise ineffective assistance of counsel claims. The trial court erred in denying Mr. Grossman the opportunity to present the claim. The error was compounded when the Florida Supreme Court affirmed the trial courts order denying Mr. Grossman a hearing on his successive post conviction motion.

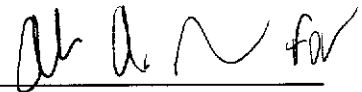
The State of Florida argues that Cone does not apply because Mr. Grossman's claim was not argued on the merits where the claim in Cone was. The State relies on the Florida Supreme Court's holding in 1997 that the claim was not raised on direct appeal, although it should have been.

This also is wrong. This claim could not have been raised on direct appeal because it was a claim of ineffective assistance of counsel properly raised on collateral attack. The point is that Mr. Grossman never had the opportunity to fully litigate this claim because the lower courts, each time it was raised, denied him because of the procedural bar. Mr. Grossman could not fully litigate the claim precisely because each time he raised the claim he could not get to the merits of the claim.

**CONCLUSION**

Based on the foregoing and the arguments presented in Petitioner's petition for writ, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,



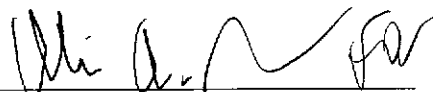
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**CERTIFICATE OF SERVICE**

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 15<sup>th</sup> day of February, 2010.



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