IN THE

SUPREME COURT OF FLORIDA

No. 67,831

JAMES AGAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

MAY
CLERK
By Chief Deputy Clerk

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT, IN AND FOR BRADFORD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State shall rely exclusively upon the following statement of the case and facts:

The Appellant, James Agan, stands convicted of murder in the first degree for the death of Dana De Witt. Mr. Agan is under a sentence of death upheld by this Honorable Court in Agan v. State 445So.2d 326 (Fla. 1983). The murder is Mr. Agan's second.

FACTS: POINT ONE

Mr. Agan was convicted of murder and sentenced to death in a 1974 case, but successfully challenged his death sentence years later. The guilty plea entered (and challenged) by Mr. Agan was never vacated or set aside.

When Mr. Agan committed the murder at bar, he undertook the same strategy which worked for him in the 1974 case. (R 381-389). Mr. Agan admitted his guilt, figuring he could escape any death sentence. (R 390-412).

Mr. Agan testified before the grand jury, stating:

(1) The precise details regarding where, when and how he came to meet, and dislike, Mr. De Witt. (R 392-396).

(2) The gory details of the murder, including the fact (which only the murderer would know) that his knife became jammed (lodged) in Mr. De Witt's vertebrae - a fact confirmed by autopsy. (R 396-402).

(3) A full awareness of his legal rights, noting in particular that his lawyer had written him a letter advising him not to testify. (R 381-389).

(4) That he felt that the best way to avoid the electric chair was to confess guilt (R 390, 412) and rely upon the tactics used in his other murder case. (R 390, 412).

When Mr. Agan came before the Circuit Court for entry of his plea (and imposition of sentence) he was rational and lucid. Mr. Agan acknowledged his written waivers (R 421-431) and responded to the Court's inquiry as follows:

(1) Mr. Agan stated that he had conferred with his attorney and was fully aware of his rights. (R 422-423).

(2) Mr. Agan understood he was facing the death penalty. (R 423).

(3) Mr. Agan identified himself as the person referred to in the FBI "Rap Sheet". (R 425).

(4) Mr. Agan swore he was not currently suffering from any mental or emotional illness or physical problem. (R 426).

(5) Mr. Agan testified to having valid strategic reasons for pleading guilty. (R 427).

(6) Mr. Agan was satisfied with counsel, who had done "all he could". (R 428).

(7) Mr. Agan did not want a presentence investigation or a sentencing jury. (R 443-444).

(8) Mr. Agan stated he had "beaten" the chair before and would do so again. (R 448-449).

Mr. Agan told the Court that he would murder Mr. De Witt's partner upon returning to prison, apparently placing the outrageous comment on the record for future use. After being sentenced to death, Agan boasted to the prosecutor "I am still going to beat you." (R 463).

Mr. Agan never sought leave to withdraw his plea, choosing instead to let his appeal run its course and to let the state destroy the physical evidence. (R 613-6). Finally, on the week he was to be executed, Agan (as he had in his other murder case) challenged the propriety of his plea and sentence (R-21 et seq.) by motion filed pursuant to Fla. R. Cr. P. 3.850.

The Appellant, relying upon ancient documents, selectively quoted, contended that he was mentally ill and therefore incompetent to render an intelligent or voluntary decision. The records, while diagnosing physical or personality disorders or even some mental illness, contained information which hurt Mr. Agan's case; to wit:

(1) The letter from Major Molitch appended to the petition described Agan as "immature" and "unable to adapt" to military life, but concluded that Agan had "no condition which warrants a medical discharge." (R 582).

(2) Agan, after surrendering himself following a robbery and going first to prison and then a prison hospital, saw a Dr. Carl Smith. Smith was aware of Agan's claims regarding "hallucinations," "hearing voices" and "delusions," but called these claims false. Dr. Smith said:

> "There is a history of delusions and hallucinations, but I can find nothing from what the patient says that indicates to me that he has ever had any kind of delusion or hallucination or any abnormal thing of that nature. He is [a] hypochondriac." (R 592-593).

and:

> "Patient says when he was a child that he heard voices especially at night and he would raise up in bed and look around... I do not feel he heard any such voices or anything of that nature. (R 593).

and:

> "Orientation as to time, place, person and [obscured by stamp] to reality is normal. Memory is good for remote, past and recent events." (R 593).

(3) Based upon his expert findings, Dr. Smith was not willing to accept the prison diagnosis repeated (in bold type) in Appellant's brief. Smith did observe that Agan could be faking his "mental" problems for the purpose of serving his sentence in the hospital rather than regular prison. (R 592-593).

(4) Whatever Agan's condition upon entering Milledgeville Hospital, he was released later as fully "restored." (R 595).

Mr. Agan's history, of course, includes a finding that he was competent to enter a plea to first degree murder in 1974. Thus, even though he was resentenced, his plea was competently entered, just as the plea at bar was.[1]

Absent even a prima facie basis for relief, the petition was properly and summarily denied.

FACTS: POINT TWO

As is his absolute right under the law, Mr. Agan controlled his defense. Agan decided the strategy to be employed and set the course, going against the advice of counsel. (R 387). At the sentencing, Agan agreed counsel "did all he could" (R 428) and told the court he did not want counsel to argue. (R 448-449). Now Agan has the audacity to challenge the "competence of counsel".

FACTS: POINT THREE

Agan's third point raises claims of error which have been waived.

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[1] It is interesting to note that the allegedly "incompetent" Mr. Agan filed a sworn affidavit verifying the contents of his petition. (R 59). Was Agan competent to so swear?

FACTS: POINT FOUR

The State of Florida believed Mr. Agan to be guilty and prosecuted him. One State investigator, Mr. Bell (who did not head the investigation and did not have all the facts) testified to following up alternate leads and suspects. Bell was unequivocal in stating his belief that Agan was (and is) guilty of this murder. (R 600, 616-617).

SUMMARY OF ARGUMENT

This case marks the second time Mr. Agan has pled guilty in a capital case, waited until the State could no longer try him, and then challenged the "incompetence" of his plea. Last time his plea was affirmed but he escaped the death penalty. In this case, after announcing he would use the same strategy, he promised the state "I am still going to beat you". The irony of this case is that Mr. Agan's battle plan, if successful, will prove that he was absolutely sane, lucid and committed to a sound legal strategy all along.

Mr. Agan fails to support his claims with record evidence or supporting legal authority. Indeed, his claims fail not only for lack of factual support, but as legally untenable and, in some instances, waived.

Mr. Agan's non record, proferred materials do not support his position even if they could be relied upon.

The bottom line is that the trial court did not err in summarily rejecting Agan's claim on the records and pleadings before it.

ARGUMENT: POINT ONE

THE COURT DID NOT ERR IN SUMMARILY DENYING THE MOTION FOR POST CONVICTION RELIEF.

Before addressing Mr. Agan's arguments, the State of Florida would respectfully object to his reliance upon non-record materials and cryptic references to "mandatory rules" which do not exist and "other cases" which are not identified. The State realizes that Mr. Agan desperately wants a hearing and, in doing so has decided not to move to strike his brief, but it cannot and will not forfeit the right of the people to a determination of this cause on the record before this court. Therefore, if specific assertions of "fact" buried in Mr. Agan's brief are not specifically addressed, this Honorable Court should not assume that the State accepts the assertion as true. The State is simply not in a position to address matters _de hors_ the record.

(A) Summary Denial of Agan's Petition was Proper.

Mr. Agan contends that the "only" proper method by which the Circuit Court could dispose of his petition was by evidentiary hearing. This is not a correct statement of the law. A motion for post conviction relief filed pursuant to Fla. R. Cr. P. 3.850 may be summarily rejected, regardless of the

claim presented or nature of the case, if the allegations contained therein are not supported by the record. Lightbourne v. State 10 FLW 303 (Fla. 1985); Riley v. State 433 So.2d 976 (Fla. 1983); State v. Williams 447 So.2d 356 (Fla. 1st DCA 1984).[2]

The Florida rule comports fully with federal standards in this regard. Blackledge v. Allison 431 U.S. 63 (1977); Thomas v. Estelle 550 F2d 1014 (5th Cir. 1977); Williams v. Wainwright 604 F2d 404 (5th Cir. 1979).

The court sub judice was confronted with, of all things, a claim that Agan was incompetent "supported" by Agan's sworn affidavit! The facial absurdity of this aside, the Court had transcripts which reflected a clear, sane and lucid defendant conducting his own defense according to a tested and proven plan that had worked for Agan in the past.

Against this record was posed a bundle of records which antedated Agan's last adjudication of competence (not incompetence) and which characterized Agan as a hypochondriac and a fraud who feigned "delusions" and "voices" to escape an unpleasant military life and normal imprisonment.

Mr. Agan contends that his so called "bizarre" conduct before the trial court should compel a full hearing. This "bizarre" behavior included:

(1) Telling the Court he would kill again.

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[2]The cited case of Hill v. State 473 So.2d 1253 (Fla. 1985) declined to follow Williams due to its facts, but did not reverse Williams.

(2) Refusing to accept the advice of his attorney regarding strategy.

(3) Uncooperativeness.

(4) Admitting guilt.

This behavior, while melodramatically portrayed in Agan's brief, was not indicative of incompetence to enter a plea, especially when viewed against the medical reports Mr. Agan has provided.

Mr. Agan, of course, has pled guilty to capital murder before and his plea has withstood legal challenges. The record, however, is not as illuminating as the candid observations of Dr. Smith. Smith described Agan as a faker and a fraud. He said Agan never suffered from any (claimed) hallucinations or delusions. Agan, said Smith, feigned his physical and mental problems to draw a better prison assignment (the hospital rather than a cell).

So, Mr. Agan has connected feigned illness with personal benefit. He faked insanity and got out of the army, he faked it again and got a better prison assignment. He faked it again and at least avoided a death sentence. (He also probably learned that he failed to act oddly enough at the plea hearing to escape liability altogether). With all this experience, Agan:

(1) Claimed he would kill again, knowing such an outrageous statement could be useful later.

(2) Refused to permit his lawyers to bring in impeachable psychiatric "evidence" or to permit state psychiatrists to examine him and find him sane.

(3) Admitted his guilt.

Mr. Agan tries to compare his case to that of Hill v. State, 473 So.2d 1253(Fla. 1985). As noted above, Mr. Hill's mental problems were much greater than Agan's. Unlike Agan, Hill had no memory and no capacity to make plans or formulate action.

Mr. Agan is not the first competent capital defendant to confess guilt, refuse to cooperate with counsel, refuse to allow development of an insanity defense or refuse to resist a death sentence. Foster v. State,400 So.2d 1(Fla. 1981); Goode v. Wainwright, 704 F2d 593(11 Cir. 1983). Such conduct has never proven incompetence to stand trial; nor does it compel an evidentiary hearing. Foster states:

> "Even though it may appear, upon examination, that a motion for post conviction relief is sufficient, it should be summarily denied if the files and records refute the allegations or otherwise conclusively preclude relief." supra, at 3.

Since evidence of past personality or mental disorders does not establish "incompetence" under Stone v. State, 10 F.L.W. 621(Fla. 1985) and given the fact that Agan had a clear and well defined strategy (indeed, after being sentenced he boasted to the prosecutor "I am still going to beat you"), and given the record at bar, the trial court was clearly justified in summarily rejecting Agan's claim.

(B) Agan's "competence" Is Not Properly Before This Court.

Mr. Agan, relying upon facts not in evidence, offers a protracted argument regarding his alleged "incompetence". While noting that Agan's proffered "evidence" does not support his claim, the fact remains that this issue is one of fact, and cannot be reargued (or have the evidence reweighed) on appeal. Tibbs v. State 397 So.2d 1120 (Fla. 1981) affd. 457 U.S. 31 (1982).

(C) Plea Procedures

Mr. Agan contends that the trial court erred in accepting his guilty plea without protecting some nebulous "due process" right to be free from the consequences of his strategic decisions.

The fact that a defendant does something a lawyer would not, causing his conviction as a result, does not compel court intervention. This is true even when, mid-trial, a defendant blurts out that he is guilty, as in Foster, supra, or when a pro se defendant conducts his defense in such a manner as to help the state convict him, as in Goode, supra.

Mr. Agan, not the court or his lawyers, controlled his defense according to his absolute right. In Faretta v. California 422 U.S. 806 (1975) the Supreme Court ruled against a trial court which tried to "save Faretta from himself", stating that no one may force counsel, or a defense, on a defendant. The Court held that Faretta's "poor" legal work would not save him later and that Faretta, not society, would have to suffer the consequences of unsound legal strategy, see e.g. Strickland v. Washington

80 L. Ed.2d 674 (1984); Wainwright v. Sykes 433 U.S. 72 (1977).

Thus, while none of us, as lawyers, would agree on the best defense in any case, that disagreement cannot compel reversal of Agan's conviction. At least Agan, unlike Foster or Goode, had a plan.

Given that, the Court undertook a plea colloquoy with Mr. Agan which completely satisfied the requirements of Boykin v. Alabama 395 U.S. 238 (1969) and Davis v. Wainwright 547 F.2d 261 (5th Cir. 1977).

Mr. Agan's position, if accepted, would require this Honorable Court to overrule the United States Supreme Court's decisions on his "due process" claim on nothing more than the word of a diagnosed faker, malingerer and fraud. This would fulfill Agan's prophecy to the State Attorney ("I am still going to beat you.") and it would gravely undermine the entire process of accepting guilty pleas, as forewarned in Bryan v. United States 492 F.2d 775,80 (5 Cir. 1974):

> "[to] say that a district judge must accord an evidentiary hearing to a petition which advances... the utterly incredible assertion that all the former official proceedings in his cause were no more than a stultifying charade in which justice was mocked by every participant-even the judge himself. No proceeding, not a single conceivable one, would enjoy the finality that decisional law must have to maintain its credence. Indeed, the number of hearings which a willful affiant could provoke as to a single conviction would be limitless."

Again, our record shows that Agan, based on past experience, felt he could escape a death sentence by pleading guilty to a murder he committed. see North Carolina v. Alford, 400 U.S. 25 (1970). He had the absolute right to dictate his plan of defense, Strickland, Sykes, supra, and he cannot be insulated from his own strategic mistakes. Faretta, supra. Indeed, it would be a "perversion of justice" to allow Agan to use one strategy and, upon its failure, repudiate it. Curry v. Wilson, 405 F2d 110 (9 Cir. 1968).

Agan is not entitled to an evidentiary hearing.

ARGUMENT: POINT TWO

THE LOWER COURT DID NOT ERR IN SUMMARILY DENYING AGAN'S PETITION ALLEGING IN EFFECTIVE ASSISTANCE OF COUNSEL.

The record at bar contains more than sufficient facts to support the action of the trial court. While Mr. Agan wishes to obfuscate the truth with a smokescreen of irrelevant "facts", erroneous statement's of "fact" and false accusations, he cannot overcome the truth. Indeed, his argument is remarkable not for what it says, but for what it refuses to say; that Mr. Agan prevented his lawyers from preparing his defense.

Before dismantling Agan's argument, the State will strenuously object to a continuing accusation of "bad faith prosecution" in Agan's brief. The Fla. Bar Code of Prof. Resp. EC 7-13 and DR 7-103 proscribes the conduct of which the prosecutor stands falsely accused. Mr. Agan should either "put up" by filing a grievance with the Florida Bar against the State Attorney or he should "shut up". Before doing anything, however, Mr. Agan should recall that Investigator Ball, whom he selectively quotes, swore under oath that he is convinced, despite initial doubts, that Agan is guilty. Oddly enough, Mr. Ball's comment does not seem to appear in Agan's brief, although that comment would assuredly preclude competant counsel, like Mr. Futch or Mr. Stinson, from bringing Ball before the Court as a witness.

The State agrees with Mr. Agan that the issue of attorney competence is controlled by Strickland v. Washington, -U.S.-, 80 L Ed 2d 674(1984). That case sets forth a standard of representation, however, which does not require a lawyer to do that which is legally or ethically impossible; i.e., wrest ultimate control of the case from his client.

The record at bar is clear. Mr. Stinson wanted to defend Agan, but Agan refused to allow him to do so. Mr. Stinson told Agan not to talk to the police or the Grand Jury, but Agan talked anyway. Mr. Futch tried to prepare a defense, but Agan told him not to. Mr. Futch tried to argue on Agan's behalf at sentencing, and Agan told the Court he did not want Mr. Futch to say anything. Finally, Agan told the Court, under oath, that Stinson and Futch "did all they could" for him.

Referring again to our code of ethics, Fla. Bar Code of Prof. Resp. EC 7-7 states in relevant part:

> "A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered..." (emphasis added).

The section also states:

> "In certain areas of legal representation not affecting the merits of the case or substantially prejudicing the rights of the client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make

> decisions is exclusively that of
> the client and, if made within
> the framework of the law, such
> decisions are binding on his lawyer".

Mr. Stinson and Mr. Futch were legally and ethically bound by the decisions of Mr. Agan. They were not empowered with unilateral authority to file motions, claims, pleas or defenses that Mr. Agan did not want. Nor were they to be faulted for not interviewing or locating witnesses whom Agan did not want them to see or whom Agan did not name.

As noted by the court in Foster v. Strickland, 707 F2d 1339, 43(11 Cir. 1983).

> "In light of Foster's adamance, Mayo had an ethical obligation to comply with his client's wishes and was thus unable to present an insanity defense. The petitioner who pre-empted his attorney's strategy choice, cannot now claim as erroneous the very defense he demanded Mayo present".

No difference exists in Agan's and Foster's decisions to forego any "insanity" defense. Ultimate control of the case rested with Agan, not with Mr. Futch or Mr. Stinson. Indeed, it is grossly unfair to these fine lawyers that Agan, in one breath, can override their decisions and then publicly defame them as "ineffective" for following a strategy which he, not they, dictated!

As noted in Strickland v. Washington:

> "Judicial scrutiny of counsel's

> performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of an attoreny's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, or to evaluate the conduct from counsel's perspective at the time.
>
> supra, at 693.

and

> "The reasonableness of counsel's actions may be determined or substantially influenced by the <u>defendant's own statement or actions</u>. <u>Counsel's</u> actions are usually based, quite properly, on informed <u>strategic choices made by the defendant</u>. In particular, what investigative decisions are reasonable depends critically upon such information".(emphasis added).
>
> supra, at 696.

In <u>Mitchell v. Kemp</u>, 762 F2d 886, 89(11 Cir. 1985) the court again held that counsel cannot be declared ineffective for "failing" to conduct an investigation when the client prohibited counsel from summoning or interviewing the "ignored" witnesses; stating:

> "When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made".

There can be no doubt from reading our record that Agan preempted counsel and elected to handle his own defense. It is grossly unfair to deny counsel permission to work and then charge counsel with "failure" to perform.

Mr. Agan contends that counsel, after speaking with him, should have immediately concluded he was insane and had his competency tested. In reply, the State submits that nothing of record indicates that Agan displayed symptoms of insanity. Indeed, Agan was lucid and rational before the Grand Jury and in the presence of the court. While he did make an incriminating comment about intending to kill De Witt's partner, we cannot tell from the record how this phrase was uttered (a wisecrack, an almost facetious remark, or a deliberate comment intended to taint the record). In any event, the comment was no more "irrational" than any made by Arthur Goode (who publicly vowed to kill again) or Charles "I want to walk or burn" Foster.

It is to be noted that Mr. Agan has rationally pled guilty in the past. He also came across to an expert, Dr. Smith, as a faker who was not mentally ill. Indeed, the lawyers who <u>now</u> represent Mr. Agan are comfortable enough with his competence to tender Agan's sworn affidavit in support of his motion! Are we to fault Mr. Stinson or Mr. Futch for reaching the same results?

We would repeat that a plea of guilty is not proof of incompetence, even in a capital case. In <u>Hill v. Lockhart</u>, 38 Cr.L. 1029(1986) one presumption <u>was</u> held to attach, however. That

presumption was that any defendant who enters a guilty plea would have been convicted anyway had he gone to trial. Thus, we are not to assume that Agan had a defense or that he was innocent. All we can do is recall that Agan had final control of his own case Strickland, supra; Foster, supra; and Hill, supra; all combine to establish two things:

> (1) Agan, not society and not defense counsel, was ultimately responsible for the conduct and consequences of his own defense, and
>
> (2) Agan has no legal right to attack his lawyers for abiding by his demands.

The record on this point being perfectly clear, Agan was not entitled to a hearing. Blackledge v. Allison, 431 U.S. 63(1977); Ailstock v. State, 11 F.L.W. 189(Fla. 1st DCA 1986); Roth v. State, 435 So.2d 274(Fla. 3rd DCA 1983); Roth v. State, 11 F.L.W 20 (Fla. 3rd DCA 1985); Ables v. State, 404 So.2d 137(Fla. 5th DCA 1981).

ARGUMENT: POINT THREE

THE ALLEGED TECHNICAL AND PROCEDURAL ERRORS INVOLVED IN AGAN'S PLEA HEARING COULD AND SHOULD HAVE BEEN ARGUED ON DIRECT APPEAL OR PRESERVED AT THE HEARING

Mr. Agan was convicted and sentenced on the basis of stipulated facts, as any defendant is who pleads guilty. Unlike other defendants who pled guilty and cannot appeal, Mr. Agan, by virtue of this being a capital case, had an absolute right to a full appeal of his conviction and his sentence.

We begin, therefore, by noting that Mr. Agan entered into the stipulations at bar freely, voluntarily and without objection. Now, absent any objection, Agan wants to litigate the procedural niceties attendant to the announcement of the stipulations. Absent record objections, Agan had (and has) no right to appeal any procedural errors. Clark v. State, 363 So.2d 339(Fla. 1978); State v. Cumbie, 380 So.2d 1031(Fla. 1980); Taylor v. State, 401 So.2d 877(Fla. 3rd DCA 1981).

Without supporting his position with legal authority, Agan states that his plea and sentencing hearings were not hearings at all but, rather, were "rurminations [sic] of Counsel". Agan goes on to state that these hearings were "not what the legislature intended".

The requirements of a proper change of plea hearing were established in Boykin v. Alabama, 395 U.S. 238(1969), which

is conspicuously absent from Agan's brief. Also absent is any reference to Fla. R. Cr. P. 3.171, which codifies the hearing requirements dictated in Boykin. Agan obviously cannot justify his arguments so he simply does not cite the law.

Regarding the "rurminations" of the State Attorney, the rule states that the prosecutor shall:

> (b) (2) (i) "Apprise the trial judge of all material facts known to him regarding the offense and the defendant's background prior to acceptance of a plea by the trial judge;"

While Agan's argument that prosecutors and defendants cannot offer factual stipulations (without dragging all evidence into court anyway) is too ridiculous to warrant any response, the rules clearly allow the state to make an announcement regarding known facts. Mr. Agan does not have the right to "approve" Boykin or Rule 3.171. If Agan disliked the plea or disagreed with the stipulations, he could have objected, withdrawn his plea or spoken up for himself. He did none of these things.

Mr. Agan makes several claims which do not enjoy record support, such as not being warned that his statements could be used against him or the consequences of his plea. These comments are so patently wrong as to merit no additional denial.

Mr. Agan testified that the FBI "Rap Sheet" was his own and that he was the man named in it. Agan did not give the same testimony twice, but he did not have to. Agan cannot contend

in good faith that, if asked to testify again, he would not tell the truth and give the same response. If he _would_ argue that point, the claim assuredly would not stand as a basis for relief. (i.e. "The Defendant should get a new hearing so he can go back and lie to the court.").

Please bear in mind that Agan has never challenged the contents of the "Rap Sheet" as apparently required by _Eutsey v. State_, 383 So.2d 219(Fla. 1980). Therefore, the state was never under any obligation to supply "corroborating evidence" as Agan alleges. _Eutsey_, of course, involved allegations in a "PSI", which in our case Mr. Agan waived. Nevertheless, this Court specifically held that if Mr. Eutsey disputed any facts contained in his PSI he had an affirmative duty to "speak up" and "timely say so", citing _Nukapigak v. State_, 576 P2d 982(Al. 1978); _State v. Wells_, 265 NW2d 239(N.O. 1978) and (see also) _U.S. v. Warme_, 572 F2d 57(2 Vit. 1978) cert. den 435 U.S. 1011(1978).

The procedure here should be no different, especially since Agan does not and cannot deny the accuracy of his "Rap Sheet".

Again, referring to _Curry v. Wilson_, 405 R2d 110(9Cir. 1969), it would indeed be a "perversion of justice" to allow Mr. Agan to freely plead, enter into stipulations and enjoy all the protections afforded by _Boykin_ and the rules, sit back six years, let the state destroy the physical evidence, and then challenge the "manner" in which his stipulations and plea were taken.

ARGUMENT: POINT FOUR

THE APPELLANT IS NOT
ENTITLED TO RELIEF

The Appellant's final point on appeal raises additional claims which are not supported by the record, including the falsehood at page 80 that "The State believed that James Agan was not guilty".

Mr. Agan controlled his defense from its inception. Agan, not the state, precipitated the charges against himself. Agan, not the state or defense counsel, decided to enter into various stipulations.

The State will not rehash the above argued law regarding Agan's responsibility for his conduct. We will submit, however, that the fourth point on appeal seems to be an effort to challenge the sufficiency of the evidence the state "could have" presented had Agan gone to trial. This argument, if it is the one intended, is not properly raised by petition for post conviction relief.

To the extent Agan alleges a violation of Brady v. Maryland, 373 U.S. 83(1963) and United States v. Bagley, 53 U.S.L.W. 5084 (1985), the argument must be rejected as specious. The government can hardly be accused of "withholding" exculpatory evidence when Agan told his lawyers not to investigate or prepare any defense! Is the State to be sandbagged in this manner?

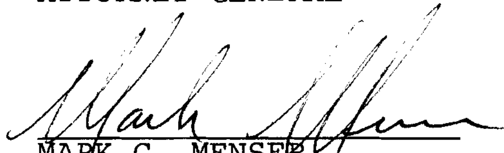
This argument should be rejected summarily as having been raised by Mr. Agan in bad faith.

CONCLUSION

The appeal at bar is devoid of legal or factual merit. The lower court should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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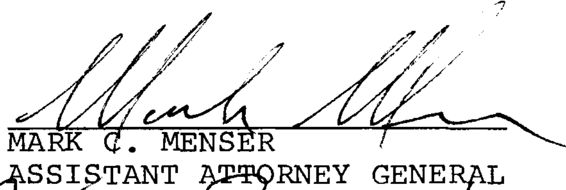
CERTIFICATE OF SERVICES

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished to Jack Goldberger, 1655 Palm Beach Lakes Boulevard, Suite 802, West Palm Beach, Florida 33402, Mark E. Olive, 225 West Jefferson Street, Tallahassee, Florida 32301 on this 7th day of May, 1986.



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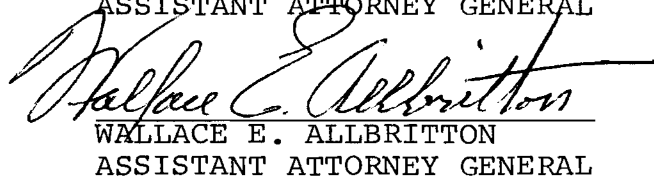

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