IN THE

SUPREME COURT OF FLORIDA

No._____

JAMES AGAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules:

STATEMENT OF THE CASE

This is an appeal of the trial court's summary denial of Mr. Agan's motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. James Agan was convicted of murder and sentenced to death for the killing of a fellow prison inmate at Florida State Prison. The facts, as known to this Court in 1983, are contained in this Court's opinion on direct appeal affirming Appellant's conviction and sentence. Agan v. State, 445 So. 2d 326 (Fla. 1983).

STATEMENT OF THE FACTS

This is a unique capital case: Mr. Agan purportedly waived every single constitutional and statutory right available to him pretrial and trial, including the right to jury trial and an advisory capital sentencing jury. The only evidence to support the guilty plea and death sentence came from Mr. Agan's lips; however, unknown to the plea judge, defense counsel, and this Court, the State investigators believed Mr. Agan was innocent of the charge, and that he was inexplicably "taking the rap" because he was afraid of the actual killers. Also unknown to the trial court, defense counsel and this Court on direct appeal, Mr. Agan had a significantly crippling life-long history of serious mental illness. The constitutional impact of this mental illness on Mr. Agan's innumerable purported waivers has not to date been properly assessed, even though it was properly raised in Mr.

Agan's 3.850 motion. Not one person has taken the witness stand in this death penalty case, pre-trial, trial or post trial. The summary denial of the 3.850 motion was improper, and is the subject of this appeal.

A. MYRIAD PURPORTED WAIVERS

Mr. Agan was the deluded instrument of his own demise: he quiet literally convicted himself and sentenced himself to death. As will be explained in far greater detail in Arguments II and III, infra, Mr. Agan, who prison officials did not even suspect in the crime, allegedly waived the following fundamental constitutional rights:

> 1. His fifth, sixth, and fourteenth amendment rights to silence and to counsel during the taking of at least three pre-trial "confessions;"
>
> 2. His fifth, sixth, and fourteenth amendment rights to silence and to counsel when he was interrogated by the state attorney during proceedings before the grand jury which indicted him;
>
> 3. His fifth, sixth, eighth, and fourteenth amendment rights to trial by a 12-person jury with regard to the issue of guilt/innocence;
>
> 4. His fifth, sixth, eighth, and fourteenth amendment rights to silence during his guilt/innocence and sentencing proceedings;
>
> 5. His constitutional and statutory rights in Florida to an advisory jury at sentencing;
>
> 6. His fifth, sixth, eighth and fourteenth amendment rights to know the purpose and meaning of "stipulations" which effect the sentence he is to receive.

In short, Mr. Agan "confessed," testified before the grand jury that he was guilty, waived jury trial, told the trial judge he was guilty, waived a sentencing advisory jury, and stipulated guilt and aggravating circumstances. A judgment of guilt of first-degree murder was consequently foregone, as was the imposition of death.

B. FACTS NOT PREVIOUSLY BEFORE THIS COURT.

The incomplete "facts" of this offense, as revealed through the plea and sentencing proceeding previously before this Court on appeal, are stated in Agan v. Florida, 445 So. 2d 326 (Fla. 1983). These facts will be restated below, but, for now it is sufficient to state that the offense purportedly was committed in revenge for a prison robbery committed against Mr. Agan by the victim. Mr. Agan "confessed" and "waived rights," and convicted himself. The 100 page record on appeal in this case contains many of the facts supporting the claims for relief raised in the 3.850 motion. In this section, Appellant will outline the relevant facts not contained in the record on appeal, and upon which an evidentiary hearing was required.

The following facts were not before this Court on appeal, and were not allowed to be proven at an evidentiary hearing during the 3.850 proceeding. If provided an evidentiary hearing, Mr. Agan would have proven the following facts:

1. Facts Supporting Incompetency Claim, and Invalidity of "Waivers."

a. Pre-offense mental condition.

James Agan was born October 13, 1927, in Alabama City, Alabama. His father died five months before Mr. Agan was born. After James Agan was born, his mother's parents, Susie and Al Agan, raised him and his older brother Tom who was born April 29, 1926. Exhibit 22 to 3.850 Motion; Post-Conviction Record on Appeal (hereinafter P.C.) 576. A few years after James Agan's birth, he, his brother and his grandparents moved to the Atlanta, Georgia, area, between Cartersville, Rome and Atlanta. His mother married Mr. Charles Hunter and they also moved to Atlanta. All report that as a child, James suffered from night terrors, and had black out spells. He had extreme headaches that preceded his black out spells. At age 17, when he was in the Army, he reported that during these "crazy spells" "he do[oesn't] know what he is doing." Exhibit 23 to 3.850 Motion; P.C. 581.

Everyone believed James Agan's "mind was bad." According to James's aunt, from the day he was born, "James never seemed to be all there. He just ever seemed normal. He'd run away and hide for 2 or 3 days and then come back and not say where he'd been. I truly think he really didn't know where he'd been or what he'd been doing . . . . All his life James has been confused. His mind was always wandering. One minute he'd seem perfectly normal and the next he'd be confused and not know what to do."

Exhibit 22 to 3.850 Motion; P.C. 577.

According to Army records, James lied about his age and joined the army when he was 16 years old. He was stationed at Fort Knox, Kentucky. He adjusted very poorly and was discharged in 1945 at age 17, due to "inaptness [sic] and lack of adaptability." As described by Major Mathew Molitch, Army Neuropsychiatric Consultant, in a certification of examination, James was "unable to adjust to the service because of mental deficiency and unstable behavior . . . . He has retained very little instruction . . ." "He complains of pains in various parts of his body and claims that he is subject to frequent 'black out' spells . . . A psychological examination indicates that he is very dull mentally." The report concludes:

"Diagnosis: Mental Deficiency, low moron level."

Defendant was discharged March 27, 1945. Exhibit 24 to 3.850 Motion; P.C. 582.

Ten months later, in January, 1946, James enlisted in the Army again. This time he was in the Army for 16 months. The Army did not know he had been previously discharged. Upon being constantly AWOL, an inquiry occurred, whereupon James gave conflicting statements about his Army history, was found to be "not very intelligent," and was discharged in April, 1977. This was apparently a "Section 8" discharge. Exhibit 25 to 3.850 Motion; P.C. 584.

James again successfully enlisted in the Army in 1950.

After two years, the Army discovered its three errors and court-martialled James for fooling them; he was dishonorably discharged after serving time in the stockade for the fraudulent enlistments. He was discharged effective August 21, 1952. Exhibit 26 to Rule 3.850 Motion P.C. 585. Upon release from the Army in 1952, James returned to Georgia. He was convicted of robbery (2 counts) and sentenced to 8-12 years on June 17, 1953. Forty days later, James was evaluated at Reidsville Prison by three psychiatrists who unanimously concluded that Defendant was:

PSYCHOTIC

(boldface in original, attached to 3.850 Motion as Exhibit 27, P.C. 586. Upon this determination, James was transferred to Milledgeville State Hospital for treatment. While he was at Milledgeville he received extensive electric shock therapy and he continued to make repeated complaints about headaches. He was placed on drugs for these mental problems. Exhibit 28 to 3.850 Motion; P.C. 587.

Psychiatric disorders were also prevalent in James' family: two of James' cousins were "mental cases," and one of them committed suicide and one died while at the same Milledgeville Hospital. See Exhibit 29 to 3.850 Motion, P.C. 588. James also attempted suicide while in Reidsville Prison. Records at Milledgeville reveal reports by James that as a child he "heard voices, especially at night and he would raise up in the bed and look around and thought he heard somebody call his name." One

physician at Milledgeville diagnosed James as suffering from a serious mental disorder:

> **[P]sychoneurosis, anxiety reaction, with psychotic episodes.**

Exhibit 30 to 3.850 Motion, P.C. 595.

In 1974, Mr. Agan was convicted of murder in Tampa, Florida, the killing of his wife's lover. While awaiting trial, he was being treated with Thorazine, a powerful psychotropic drug, four times a day. After his conviction for murder and sentence of death in 1974, the death sentence was changed to life by the trial court. While serving time at F.S.P. from 1974 until the time of the offense herein in 1980, he continued to suffer from marked mental disease. The following information about his psychiatric condition during these years is unrefuted. Exhibit 31 to 3.850 Motion, P.C. 596.

a.) In a September 10, 1975, psychiatric contact note, Dr. Britton writes that Mr. Agan "tried to hang himself with a cord on September 7, 1975, in his cell but denied any parnoid [sic] projection." The physician's diagnosis was:

> **1. Anti social personality, 2. History of drug abuse: psycho-stimuli: opium alkaloids, cocaine 3. Schizophrenic, residual type.**

On a chart described as Medical Report Outpatient for September 10, 1975, Mr. Agan admitted to auditory hallucinations: voices telling him to end it all. He was required to begin Thorazine medication.

b.) Mr. Agan continued on Thorazine through 1976 at F.S.P., and on January 1, 1976, he "ran out of medication and feels that he needs it to maintain his present level of functioning."

c.) In December of 1977, Mr. Agan was again "hearing voices that attack him." It was reported earlier in 1977 that Mr. Agan suffered from **anxiety neurosis**, contributing to insomnia.

d.) In 1978, an incident between Mr. Agan and inmate DeWitt occurred (robbery), which was later used by the State as a "motive" for the 1980 stabbing. After the 1978 incident, and unrevealed to this or any other Court, Mr. Agan requested to be locked down in segregation because "he stated he was starting to 'bug out.'" He was termed a danger to himself, and remained in confinement much longer than the punishment imposed required. The clinical notes after the incident report that Mr. Agan:

> [C]omplains of insomnia, auditory hallucinations at night. Approximately two and one half months duration. Does not recognize voices. Blank spaces in between where he cannot account for periods of time. Subject states he has assaulted man with knife on his wing but cannot recall why.

e.) During October 1978, Mr. Agan complained that Thorazine was not helping him, and in December 1980, he began taking Haldol, another powerful psychotropic drug.

f.) In 1979 and 1980, while prison conditions at F.S.P. were particularly violent; (P.C. 60), Mr. Agan experienced growing but fluctuating psychiatric problems and fear for his safety:

1. In March, 1979, Mr. Agan requested a transfer from F.S.P., was refused, but was informed it would be reconsidered.

2. In 1979-80, Mr. Agan was in constant ill health, with chronic back pain, pain in his joints and legs, and he was required to walk with crutches. He was 53 years old, and practically disabled, and still suffered from his life-long psychiatric illness.

3. In May, 1979, Mr. Agan suffered from paranoid delusions, could not sleep, and felt very nervous.

4. In February, 1980, his progress report indicated severe pain in back, legs, and hips, and he was moved off close security. He was transferred to U.C.I. due to his severe medical handicaps.

5. In March, 1980, Mr. Agan was placed in segregation because of "protection at his own request."

6. In May, 1980, it was reported in medical records that Mr. Agan sometimes got highstrung, and hallucinated.

Inmates like Mr. Agan were constantly in fear for their lives. He was particularly frail, due to his age and physical infirmities. The safest place in the prison for him was death row. See Appendix, Section H, on Prison Conditions, P.C. 60.

b. Post-Offense Mental Condition.

The facts before this Court in 1983 were (a) those facts contained in the minutes of the grand jury proceeding where Mr. Agan testified, and (b) those "facts" appearing at the plea and

sentencing proceeding. In both those proceedings, Mr. Agan acted in a bizarre and self-defeating manner.

Unknown to the trial court and this Court, Mr. Agan acted bizarrely at all times between the date of the crime and his appearances in official proceedings. Attorneys and correctional officials knew this, but it did not appear "of record" until the Rule 3.850 proceeding. The following post-offense actions by Mr. Agan demonstrate that he was continuing to operate under the throes of a disabling mental condition:

1. On September 19, 1980, at approximately 3:25 p.m., F.S.P. inmate Dana Dewitt was found lying on the floor of his cell, U-2 South-4 (Tr. 17) P.C. 435. There were no suspects in the killing of inmate Dewitt until Mr. Agan made statements about the killing (Tr. 18) P.C. 436. While Thomas Elwell, Assistant State Attorney, stated as stipulated evidence that at the plea and sentencing, Mr. Agan's confession to the crime occurred on September 23, 1980, P.C. 436, in fact the following sequence of events is correct:

a). According to an investigation by the State in October, 1980, Mr. Agan told Lt. A. D. Thornton at 8:15 on September 19, 1980, that he had killed Dewitt. Exhibit 3 to 3.850 Motion; P.C. 468.

b). After his first "confession," an investigator from the State Attorney's office was telephoned, and that investigator came to the prison. Id. That night (the 19th), a "confession"

was tape recorded. Exhibit 4, P.C. 470.

c). During the taking of his recorded statement in the presence of the state investigator, Mr. Agan spoke by telephone with a public defender, who told him to give no more statements. Mr. Agan thereupon terminated the police interview. Id. He had again said he killed the victim, but he would not or could not provide details.

d). The public defender who spoke with Mr. Agan set up an appointment to interview him, 10/7/80, seventeen (17) days after the telephone call.

e). The next day, September 20, 1980, Mr. Agan had a first appearance upon a Department of Corrections Criminal Complaint and Affidavit, in which he was charged with first-degree murder. Sergeant Leonard H. Ball was listed as the complainant. According to the complaint and affidavit, Mr. Agan indicated that he would obtain private counsel, see Exhibit 5 to 3.850 Motion, P.C. 477, he was not there adjudged insolvent, and no-one was appointed to represent him. See Order on First Appearance dated September 20, 1980, signed by Judge Elzie Sanders, but not filed with the Court until September 24, 1980, at 9:35 a.m., Exhibit 6 to 3.850 Motion, P.C. 482. He was, in fact, fully insolvent and completely without means to obtain private counsel. Thomas Elwell was listed as the State Attorney prosecuting the case at the first appearance. Exhibit 5 to 3.850 Motion, P.C. 477.

f). An autopsy was performed September 20, 1980, revealing

the victim's death was caused by a knife-like wound to the throat. Exhibit 1 to 3.850 Motion. On September 22, 1980, an Order was signed by County Court Judge Elzie S. Sanders, upon a hearing in Chambers, Order finding Probable Cause to detain Mr. Agan. Exhibit 7 to 3.850 Motion, P.C. 483. This Order also was not filed with the Court until September 24, 1980, at 12:42 p.m. Id.

g.) At some point after his first two "court appearances," but before counsel was appointed to represent him, he gave another tape recorded statement to Sergeant Leonard Ball. Exhibit 8 to 3.850 Motion; P.C. 478. This statement was more detailed than the September 19, 1980, recorded statement contained in Exhibit 4 to 3.850 Motion; P.C. 470. This is the first statement referred to by State Attorney Elwell at "trial" (Tr. 18) P.C. 436.

h.) On October 10, 1980, Mr. Agan apparently made additional inculpatory statements, giving more details, to a Mr. Clark and Inspector Turner. These statements occurred after the appointment of counsel, Exhibit 3 to 3.850 Motion, P.C. 468, but without the presence of counsel.

4. Mr. Agan was not represented by counsel during any statements given before October 6, 1980.

5. By letter dated October 2, 1980, Mr. Agan informed the trial court that he had no attorney, that he had told Sergeant Ball this at least a week before the letter, that he had asked

that Ball ask the Court for an attorney for him, "to tell me some things I need to know." The letter was filed with the trial court at 3:46 p.m., October 6, 1980. Appendix, Section G, Exhibit 9, 3.850 Motion, P.C. 465.

6. By Order entered October 6, 1980, the trial court, in chambers, entered an Order Adjudging Defendant Insolvent and Appointing Public Defender. Exhibit 10 to 3.850 Motion, P.C. 484.

7. On October 7, 1980, John Stinson, public defender, met with Mr. Agan at F.S.P. Mr. Stinson also spoke with Sgt. Ball, the investigator on the case, on October 7, 1980, and learned that Ball believed Agan was innocent, and Ball believed three other inmates under investigation committed the offense. This information is contained in a Memorandum to Mr. Stinson's file, dated October 7, 1980, which is reproduced below in its entirety:

> I spoke with the above-named inmate today who is charged with the first degree murder of Inmate Dewitt on 9/18/80. Agan's statements to me are the same as the statements he made to Tom Farkash over the phone and he backs up the theory that the [sic] voluntarily confessed to the murder.
>
> However, after interviewing the inmate, I spoke with Sgt. Ball about this case and Ball advised me that Agan is lying to save his life in the prison. In fact, there are three other inmates who are under investigation by Sands and Turner about the murder who Ball feels did it. Furthermore, Ball advises me that Agan did give a statement to Ball after his first appearance to Judge Sanders on the 20th of September, that Saturday or Sunday and that Agan's story did not hold water and

> that is why, although he has been charged, Ball does not think the case will go against him.
>
> In addition, Agan denied that he made such a statement after meeting with the Judge, which is one lie and furthermore, there appears to be no motive for him to do it other than to get the chair and the whole scene leaves a bad taste in one's mouth in that it does not seem to fit together. I need to advise Judge Sanders to appoint the Public Defender's Office so that we have a conflict with the other people charged in the case.

Exhibit 11, 3.850 Motion; P.C. 485.

8. Apparently after Attorney Stinson's meeting with Mr. Agan on October 7, 1980, Mr. Agan gave incriminating statements to officials, previously referred to, on October 10, 1980.

9. By letter from Attorney Stinson to Mr. Agan dated October 13, 1980, Attorney Stinson complained to Mr. Agan about his uncooperativeness with counsel, and urged Mr. Agan not to testify before the grand jury. Exhibit 11a to 3.850 Motion; P.C. 486. According to the letter Mr. Agan ignored Stinson's advice of October 7 to not speak with investigators, did speak with investigators on October 10, and on that date it was decided that he would go before the grand jury and testify. The October 13 letter informed Mr. Agan that a Motion to Withdraw had been filed, and that a copy of the Motion was enclosed with the letter. Id.

10. On October 15, the day before Mr. Agan testified before the grand jury, Attorney Stinson served State Attorney

Elwell with a copy of the Motion to Withdraw, which stated:

> 1. The undersigned has interviewed the above-named Defendant and found him to be uncooperative in the preparation of his defense.
>
> 2. During said interview with Defendant, the undersigned is of the opinion that the Defendant either lied or distorted factual matters involving his statements to law enforcement officers concerning the incident leading to the charge in this case.
>
> 3. The instant case, being first degree murder with a possible capital penalty, is of such a degree that the Defendant must cooperate or the Public Defender cannot prepare any defense on Defendant's behalf.
>
> 4. Defendant after being advised by the undersigned not to make any further statements to law enforcement officers, did in fact again waive his rights to the presence of counsel and make incriminating statements to the investigator for the State Attorney's Office and the Department of Corrections and advise him verbally that he wished to give a verbal statement to the Bradford County Grand Jury on or about October 16, 1980.
>
> 5. The undersigned, by letter, has specifically objected to the Defendant's position in so doing and at this point, the undersigned does not feel his representation is being accepted or it can be or is effective to the above-named Defendant.
>
> I HEREBY CERTIFY that a true copy of the foregoing Motion has been furnished to Thomas M. Elwell, Assistant State Attorney, Bradford County Courthouse, Starke, Florida, this 15th day of October, 1980.
>
> Respectfully submitted,
>
> /s/Richard D. Fultz
> (for) JOHN G. STINSON

Assistant Public Defender

Exhibit 12, 3.850 Motion; P.C. 488.

11. Mr. Agan appeared before the grand jury and testified the next day, October 16, and gave outlandish and inflammatory inculpatory statements to the grand jurors. Exhibit 1 to 3.850 Motion; P.C. 381. As was known before the 3.850 proceeding, Assistant State Attorney Thomas Elwell conducted the examination of Mr. Agan before the grand jury, and stated that he was represented by counsel, even though the Certificate of Service on the Motion to Withdraw indicated Elwell was served with the Motion to Withdraw the day before the Grand Jury testimony.

12. After Mr. Agan's testimony, the grand jury indicted him for first-degree murder on October 16, 1980. On October 19, 1980, Mr. Agan wrote Attorney Stinson a letter stating that he thought Stinson was not his lawyer, "now you come off the wall and tell me you are my lawyer. Well, that would be alright . . . ." Then he expressed displeasure with being called a liar, told Stinson "you don't even talk like a lawyer that I would want," and closed with "P. S. if this wasn't a free letter I wouldn't waste a stamp writing to you." Exhibit 13a to 3.850 Motion; P.C. 492.

13. On October 20, 1980, the trial court, in chambers, signed an Order allowing Mr. Stinson to withdraw due to "an irreconciliable conflict between the above-mentioned individual (defendant) and another individual presently represented by the

Public Defender's Office. . ." Exhibit 13b to 3.850 Motion; P.C. 493. Mack S. Futch, Esq., was then appointed to represent Mr. Agan, as a Special Public Defender. Id.

14. The Order allowing withdrawal was not based on the Motion to Withdraw quoted in numbered paragraph 10, supra. Instead, Mr. Stinson withdrew the first Motion to Withdraw, which does not now appear in the trial court's file, and filed a Second Motion to Withdraw. See Letter dated October 21, 1980, Exhibit 14 to 3.850 Motion; P.C. 494. The second Motion to Withdraw cited that the Public Defender "cannot adequately provide the representation, rather than "conflict" or "uncooperative client" as the basis for the Motion. Exhibit 15 to 3.850 Motion; P.C. 496.

15. As will be outlined more completely in Argument II, infra, attorney Mack Futch, like Attorney Stinson, did no or grossly inadequate investigation and preparation and rendered grossly ineffective assistance. What Mr. Futch did reveal to the trial court was that Mr. Agan continued his self-defeating uncooperative attitude with counsel.

Other pertinent and relevant facts will be stated within each individual claim.

SUMMARY OF ARGUMENT

ARGUMENT I: Mr. Agan was incompetent to be proceeded against at capital trial and sentencing, and the resulting conviction and death sentence violate the eighth and fourteenth amendments. Unknown to trial counsel and the trial court, Mr. Agan has a significant history of crippling mental disease, and, unknown to the trial court, Mr. Agan's out-of-court actions between the time of the offense and plea/sentencing were erratic and bizarre. He quite literally and inexplicable became the psychotic architect of his own conviction and execution. The plenary evidence of incompetence presented to the post-conviction court required an evidentiary hearing, and the court improperly resolved the issue without conducting one.

ARGUMENT II: Pretrial and trial counsel were woefully ineffective. No investigation was conducted. The attorneys had no idea that Mr. Agan had been repeatedly diagnosed as severely mentally ill, and failed to look for readily available evidence that Mr. Agan was absolutely innocent. A minimal investigation would have revealed that, without a guilty plea, Mr. Agan could not have been convicted. The failure to investigate left dormant compelling evidence of incompetency, insanity, and mental mitigating circumstances. Had the attorneys possessed a reasonable knowledge of the law regarding competency, criminal procedure, and capital sentencing, no conviction or sentence would have been possible. The pleadings satisfy the requirements

of Strickland v. Washington, 104 S. Ct. 2052 (1984), and the trial judge's refusal to conduct an evidentiary hearing is reversible error. O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984).

ARGUMENT III: Mr. Agan was sentenced to death on nothing but argument, and a few stipulated facts. He never stipulated to anything, did not know what a stipulation was, and had never heard of a statutory aggravating circumstance and what it does. No evidence at all was taken, and the aggravating circumstances were only supported (like the guilty plea) by Mr. Agan's words. He did not know, and was never told before speaking, that his own words would support something called an aggravating circumstance. He sat ignorantly by while the State "proved" important facts through argument, not testimony or evidence. Mr. Agan, and his lawyer, knew no better. This fundamentally unreliable procedure violated the fifth, sixth, eighth and fourteenth amendments. The trial court did not rule on this claim.

ARGUMENT IV: There was copious evidence of Mr. Agan's innocence in the hands of the State. Neither the trial court nor defense counsel was apprised of the compellingly exculpatory evidence. Had disclosure occurred, the guilty plea would have been exposed as having a completely insufficient factual basis, and no conviction or sentence could have resulted.

ARGUMENT I

MR. AGAN WAS CONVICTED AND SENTENCED TO DEATH AT A TIME WHEN HE WAS INCOMPETENT TO STAND TRIAL, ENTER A PLEA, OR WAIVE HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, AND AN EVIDENTIARY HEARING ON THE COMPETENCY CLAIM IS NECESSARY.

In the Rule 3.850 pleadings and proceedings in the trial court, Mr. Agan alleged and proffered sufficient facts to prove that "he was not competent to be tried, nor was he competent to enter a plea of guilty." P.C. 10, 24-41, 44-45, 49-51, 56-57. The trial court incorrectly denied an evidentiary hearing on this claim. This argument encompasses many of the claims raised in the 3.850 motion: that Mr. Agan was incompetent to be tried, incompetent to waive his constitutional rights and plead guilty, incompetent to be sentenced, and that his plea was not knowingly, intelligently and voluntarily made. Mr. Agan's conviction and sentence must be vacated and a competency hearing must be conducted before retrial can occur.

A. THE CONVICTION AND SENTENCE OF MR. AGAN WHILE HE WAS INCOMPETENT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

"A person accused of a crime who is mentally incompetent to stand trial shall not be proceeded against while he is incompetent." Fla. R. Crim. P. 3.210. It is simply unfair to try someone or allow a guilty plea when the person has no ability to

meaningfully participate in proceedings which will subject him to a loss of liberty or, as here, life. This fundamental unfairness is prohibited by the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and by parallel state constitutional provisions.

The constitutional test for incompetency is articulated in Dusky v. United States, 362 U.S. 402 (1960), and is well known to, and oft quoted by, this Court:

> [T]he "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him."

Id. at ___. See also Drope v. Mississippi, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Bishop v. United States, 350 U.S. 961 (1956). Florida decisions regularly analyze and apply this test, and, if anything, decisions from this Court reflect an especially vigilant concern for protecting the rights of incompetents. See, e.g., Florida v. W.S.L., No. 67,282 (Fla. March 27, 1986); Jones v. State, 478 So. 2d 346 (Fla. 1985); Hill v. State, 473 So. 2d 1253 (Fla. 1985); Gibson v. State, 474 So. 2d 1183 (Fla. 1985); Christopher v. State, 416 So. 2d 450 (Fla. 1982); Lane v. State, 388 So. 2d 1022 (Fla. 1980). Cf. Johnson v. Feder, No. 66,554 (Fla. March 20, 1986) (judicial hearing required for continued commitment of one found not guilty by reason of insanity).

The Dusky test is applied by evaluating numerous subjective

and objective criteria, many (but not all) of which have been incorporated into statutes and rules. See A.B.A. Mental Health Standard 7-4.1 and Commentary. Such nonexclusive criteria are contained in Florida Rules of Criminal Procedure 3.210 and 3.211:

> In considering the issue of competence to stand trial, the examining experts should consider and include in their report, but are not limited to, an analysis of the mental condition of the defendant as it affects each of the following factors:
>
> (i) Defendant's appreciation of the charges;
>
> (ii) Defendant's appreciation of the range and nature of possible penalties;
>
> (iii) Defendant's understanding of the adversary nature of the legal process;
>
> (iv) Defendant's capacity to disclose to attorney pertinent facts surrounding the alleged offense;
>
> (v) Defendant's ability to relate to attorney;
>
> (vi) Defendant's ability to assist attorney in planning defense;
>
> (vii) Defendant's capacity to realistically challenge prosecution witnesses;
>
> (viii) Defendant's ability to manifest appropriate courtroom behavior;
>
> (ix) Defendant's capacity to testify relevantly;
>
> (x) Defendant's motivation to help himself in the legal process;
>
> (xi) Defendant's capacity to cope with the stress of incarceration prior to trial.

In Lane, this Court discussed other relevant factors, based upon Pate v. Robinson:

> Evidence of a defendant's mental behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some

circumstances, be sufficient.

388 So. 2d at 1025.

If a defendant is found to be incompetent, then no further criminal proceedings are permitted unless competency can be restored. A fortiori, a person unable to face trial meaningfully is unable to plead guilty to the charges: if one cannot consult with counsel with a rational understanding, and if one has no rational and factual understanding of the proceedings, it is impossible to constitutionally waive the multiple constitutional rights inherent in a criminal proceeding i.e., right to jury trial, right to compel the attendance of witnesses, right to cross-examination, right to testify or remain silent, etc. See A.B.A. Mental Health Standard 7-5.1 and Commentary.

Finally, no one, and especially not an incompetent, can waive a capital sentencing proceeding in Florida upon conviction of first-degree murder.

B. PROCEDURE REQUIRED FOR DETERMINING COMPETENCY.

State procedures which fail to provide adequate resolution of competency issues violate the due process clause of the fourteenth amendment. Pate v. Robinson, 383 U.S. 375 (1966). If an incompetency issue, which has not been adequately resolved, is properly raised, an evidentiary hearing is mandatory. Hill, supra.

This Court has held that retroactive determinations of

incompetency are impractical, as they fail to adequately protect a defendant's due process rights. "Such a hearing should be conducted contemporaneously with the trial." Hill, 473 So. 2d at 1259. Thus, whether the procedural failure is found on direct appeal, State v. W.S.L.; Gibson v. State, or in post-conviction, Hill, the remedy is to "vacate the conviction and sentence and remand with directions that the State may proceed to re-prosecute the defendant after it has been determined that he is competent to stand trial." Hill, 473 So. 2d at 1260; see also W.S.L., slip op. at 2 ("Such a hearing must be conducted contemporaneously with the trial."); Gibson, 474 So. 2d at 1184.

This is true because competency is flatly nonwaivable: "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Pate, 383 U.S. at 384. For whatever reason competency is not adequately resolved pretrial, if a bona fide question of competency is raised later, an adequate Pate hearing must occur.

C. THE QUESTION OF MR. AGAN'S INCOMPETENCY HAS BEEN PROPERLY RAISED BUT UNCONSTITUTIONALLY RESOLVED.

1. Mr. Agan Has Raised A Bona Fide Doubt Regarding His Incompetency.

While there are "no final or immutable signs which invariably indicate the need for further inquiry" on incompetency, Drope, 420 U.S. at 162, certain common sense

criteria are identifiable. These criteria were outlined in subsection A, supra. The record before this Court, and before the trial court, is rife with indicia of incompetency.

a. Prior history of mental disease or defect: psychotic

Mr. Agan is seriously mentally ill, and he has been virtually his entire life. He has consistently been diagnosed by expert physicians as suffering from a debilitating mental disease or defect, with black outs, hallucinations and delusions as undeniable symptoms. A history of mental illness is not necessarily a litmus test proving incompetency, but it is one of the most relevant factors in the incompetency equation.

The evidence of mental illness is outlined beginning at page 4, supra, but the salient history should be repeated. Mr. Agan's family has reported that throughout his life, Mr. Agan "just never seemed normal." He would have black out spells, and often he would not know what had happened or where he had been, sometimes for two or three days beforehand. "James never seemed to be all there."

The army agreed. Mr. Agan enlisted three times in the army, each time illegally. The army kept discharging him, based exclusively on his "Section 8" mental deficiencies. The army doctor experts were consistent in their findings that Mr. Agan was verifiably mentally deficient. An army neuropsychiatric consultant concluded that Mr. Agan was "unable to adjust to the service because of mental deficiency and unstable behavior . . .

. He has retained very little instruction . . . ." "He complains of pains in various parts of his body and claims he is subject to frequent 'black out' spells . . . A psychological examination indicates that he is very dull mentally." The report concludes:

Diagnosis: Mental Deficiency, low moron level

Subsequent enlistments and evaluations resulted in the same types of discharges, based on Mr. Agan's mental deficiencies.

Upon Mr. Agan's last discharge from the army, he was convicted in Georgia for robbery. At Reidsville Prison he was evaluated by three psychiatrists who concluded unanimously that Mr. Agan was

PSYCHOTIC

(Boldface in original, P.C. 586). He was then transferred to Milledgeville State Hospital, Milledgeville, Georgia (P.C. 586-87). There he received extensive electroshock therapy, and received drugs and medication for his mental condition. He reported delusions and hallucinations to one prison physician, who noted that Mr. Agan suffered from tremors, and that he was an excessive alcoholic. This doctor believed that Mr. Agan had a history of "psychoneurosis," but he was unconvinced of any mental illness, and asked for another expert opinion. A second doctor did evaluate and diagnose Mr. Agan, and determined:

DIAGNOSIS: Psychoneurosis, anxiety reaction with Psychotic Episodes

P.C. 575. Several members of Mr. Agan's family suffered from mental illness, including two cousins, and his brother. Mr. Agan, like his cousin, attempted suicide while at Reidsville Prison.

Many years later, in 1974, Mr. Agan was convicted of murder in Tampa, Florida. His records in Florida are as stark as the Georgia records: Mr. Agan is documented as being disabled by a mental illness only controllable upon proper medication and treatment.

As the record reveals, there were serious questions about Mr. Agan's mental competence at the time of his 1974 trial. A competency hearing was in fact conducted, and the Court found Mr. Agan competent, whereupon a guilty plea was entered. No participant in the 1980 proceeding had any knowledge about these serious competency questions addressed six years earlier. The six years in Florida State Prison preceding the plea under attack herein underlined that which was necessary in 1974 (a competency hearing) was even more essential in 1980: throughout his years in prison, Mr. Agan was constantly maintained on psychotropic drugs, and was suffering from growing and fluctuating mental disorders.

For example, in 1975, psychiatrists noted that Mr. Agan "tried to hang himself in his cell but denied any parnoid[sic] projection." The prison diagnosis was:

1. Anti social personality,
2. History of drug abuse; psychostimuli;

opium cykaloids, cocaine
3. Schizophrenia, residual type

Mr. Agan reported auditory hallucinations, voices telling him to end it all. He was required to begin taking thorazime, a powerful psychotropic medication. He continued on thorazime through 1976, and required the drug "to maintain his present level of functioning.

In 1977, Mr. Agan was diagnosed by prison personnel as suffering from anxiety neurosis, and he was "hearing voices that attack him." Then, in 1978, came the incident between Mr. Agan and the 1980 victim in this case--DeWitt. After the problems with Mr. DeWitt, and unknown to any Court before post-conviction proceedings began, Mr. Agan requested to be "locked down" in segregation because "he was starting to bug out." He was deemed a danger to himself (a classic "incompetency" indicia), and he remained in confinement for longer than required by the incident. Clinical notes revealed:

> "[c]omplains of insomnia, auditory hallucinations at night. Approximately two and one half months duration. Does not recognize voices. Blank spaces in between where he cannot account for periods of time. Subject state he has assaulted man with knife on his wing, but cannot recall why.

These symptoms were consistent with his lifelong history of mental disorders, and there was no reason to report his infraction--it simply resulted in his being "locked down" longer than required.

Mr. Agan's mental problems continued up until approximately

the time of the offense. Family visitors report that he was frequently confused. In May of 1979, records indicate that he was very nervous, and suffered from paranoid delusions. In May 1980, it was reported in prison records that Mr. Agan was highstrung, and hallucinated. Throughout this period of time, conditions at the prison were incredibly violent, with stabbings occurring every day. This jungle environment complicated and compounded Mr. Agan's inherent and documented schizophrenia and psychotic proclivitions, as he frantically sought transfer from the prison to a hospital facility. In May 1980, he was placed in segregation for "protection at his own request."

Despite the fact that he had been taking thorazime throughout his six years in Florida State Prison, and taking holdol as well, in the months before the incident herein, and the ten days between the offense and conviction, there is no report of medication.

This prior psychiatric history was not presented to demonstrate that Mr. Agan was incompetent in 1980. But, as the case law makes manifestly clear, a history of psychiatric disorders, together with the prior opinions of experts relative to the disorders, provide a reliable indicia of incompetency, and may, even standing alone, provide the bona fide showing required to trigger an evidentiary hearing.

b. Bizarre Out of Court Actions

Mr. Agan's actions in this case would lead any rational

individual to question his competence. The out of court actions were not a part of the record on appeal and no evidentiary hearing was allowed in 3.850. However, Mr. Agan did act ill, and important participants know it. His first attorney, Mr. Stinson, believed Mr. Agan was acting a bit strange:

> I spoke with Sgt. Ball about his case and Ball advised me that Agan is lying to save his life in the prison. In fact, there are three other inmates who are under investigation by Sands and Turner about the murder who Ball feels did it . . . [Ball says] that Agan's story did not hold water and that is why, although he has been charged, Ball does not think the case will go against him.
>
> * * *
>
> [T]here appears to be no motive for him to do it other than to get the chair and the whole scene leaves a bad taste in one's mouth in that it does not seen to fit together.

Indeed, Mr. Agan consitently acted against his best interest, under any test. Mr. Agan was not even a suspect until he went to the investigators. There, the investigators did not believe him. Mr. Agan "convinced" them by amending his story to match the facts the investigators needed.

The objective criteria for incompetency contained in Florida Rule of Criminal Procedure 3.211(a)(1) could not be more clearly met. Mr. Agan did not appreciate the charges or the nature of the penalty, and operated with a fundamental misunderstanding of "the adversary nature of the legal process." Rule 2.3119a)(1)(i-iii). Mr. Agan had absolutely no capacity to deal with his

attorney Mr. Stinson, and later Mr. Futch. He could not assist in a defense or disclose pertinent facts to his lawyer, as he instead apparently believed the best defense was confession to hatred, murder, torture, and the desire to torture and kill again, as soon as possible. In Mr. Stinson's rush to shed himself of this troublesome client, he made several observations that are relevant to Rule 3.211(a)(1)(iv-vi): in a Motion to Withdraw, counsel (by revealing confidences and secrets) informed the Court and the State that his client was completely uncooperative in the preparation of the defense, that he lied or distorted the facts given to the investigator so as to appear more culpable, and that he ignored counsel's advice to quit giving stories for the investigators. This Motion to Withdraw was later taken from the court file by Mr. Stinson, and another was substituted. The trial court did not see the first motion.

Attorney observations are important in assessing the incompetency question. See Jones v. State, _____ So. 2d _____ (Fla. 1985). See also Reese v. Wainwright, 600 F.2d 1085, 1092 (5th Cir. 1979), cert. denied, 444 U.S. 983 (1979). The failure of defense counsel to suggest that a defendant "had difficulty understanding the proceedings against him or that . . . [the defendant] . . . lacked the ability to cooperate or consult with him rationally," is persuasive evidence of competence, Pedrero v. Wainwright, 590 F.2d 1383, 1388 (5th Cir. 1979), cert. denied, 444 U.S. 943 (1979), and vice versa. Attorney Stinson had "a bad

taste in his mouth" as a result of his client's incomprehensible self-defeating actions, and his inability to "cooperate" in order to "prepare any defense" to "a possible capital penalty." Stinson's own failure to request a competency determination is challenged in claim _____, but the knowledge he had provides a relevant indicia of his client's incompetence. The information known to attorney Futch, including that his client's actions were against his advice, lend further support to Mr. Agan's incompetence.

c. In Court (of record) Bizarre Conduct

Simply in the abstract, a person should not be allowed to waive every single right and effectively sentence him or herself to death without a court making an inquiry into their mental condition. Whenever the State makes mental condition relevant to guilt or sentencing, due process entitles a defendant to expert psychiatric assistance. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). Such assistance is even more important in a competency setting since (a) an incompetent cannot assert the issue him or herself, because of the incompetence, and (b) expert assistance is critical in isolating the "elusive and often deceptive" symptoms of psychiatric disorders, frequently indiscernable by lay judges. Ake, 105 S.Ct. at 1095. See also Fla. R. Crim. P. 3.210(a) (requiring examination by at least two experts, and a subsequent hearing).

But we need not deal in the abstract--"evidence of a

defendant's mental behavior, [and] his demeanor at trial" can provide irrefutable indicia of incompetence, and demonstrate the need for an evaluation and hearing. Lane, 388 So. 2d at 1025. Mr. Agan's record actions demonstrate his misunderstanding of his situation and the significance of what he was doing and what was being done to him.

You simply do not tell a capital sentencing judge that the reason you are pleading guilty and requesting a life sentence is that you want to get back to prison as soon as possible so that you can torture or kill another inmate. All but the most basically addled individuals would think this "strategy" at least counterproductive. Yet, the trial court, defense counsel, and of course the State, did not raise an eyebrow, and now the State characterizes such "strategy" as "an intelligent choice," P.C. 733; the state argues "that this defendant has made his bed, but now he does not wish to sleep in it." (P.C. 717).

The proof that it is not that simple is in the record. It must be stressed that all the proof against Mr. Agan came from his own lips, and the investigators did not believe he had committed the crime. Mr. Agan's inculpatory statements made no sense to either the investigators or defense attorney Stinson, and the plea and sentencing transcript reveal an unsettling fact: Mr. Agan inexplicably protested too much. This is what he told the sentencing judge:

> That he regretted the fact that Mr. Dana

> DeWitt became unconscious and immediately appeared to almost die because he had desired, this is Mr. Agan's own statement [before the grand jury] to torture him to some degree. He was disappointed that the man had immediately died.

(P.C. 439, State Attorney explaining grand jury statements to judge). After this statement, the Court addressed Mr. Agan:

> THE COURT: I believe that you did testify before the Grand Jury and admitted guilt previously, according to that transcript.
>
> THE DEFENDANT: Yes, sir. Like I said in there, and I will say it again, I just hate that he is dead. I just wish I could bring him back so that I could make him suffer a little bit more.
>
> THE COURT: You didn't think much of him, did you.
>
> THE DEFENDANT: No, sir, and I don't think nothing of his partner. That is why I am pleading guilty so I can get a life sentence so that I can get back and get him."

P.C. 442.

> "I wish I could torture him and make him suffer. If I had the power to bring him back, I would just peel his skin off a little bit at a time. I wasn't really going to make him suffer if I hadn't killed him. I didn't intend to kill him that shortly. I just wanted to paralyze him a bit." And then Mr. Agan, in conclusion, says that, if he gets back in population, as I think he has even reflected today, that he is going to take the life of the other person that was somehow involved with Dana DeWitt.

P.C. 458, State urging the death penalty by quoting testimony before grand jury, and during plea.

The Court was moved by these expressions: in sentencing Mr.

Agan to death, the Court noted "[t]he Defendant shows no remorse but seeks rather a chance to kill again." (P.C. 621). The non-sequitor request to sentence him to life so he could kill again was logically used to sentence Mr. Agan to death, but lost on the Court was the mental instability such a non-sequitor illustrated.

But there was more. This defendant who the State now claims was being logical and tactical, told his attorney to not say anything in mitigation (the desire to kill again apparently being thought sufficient mitigation), and then told the Court:

> Yes, sir. I didn't even want him to say anything because I don't ask for mercy for no other body, not even for myself.

Case law stresses that in court behavior is an important part of the incompetency resolution. The record here is certainly odd, and, in combination with other factors, requires a competency hearing. It is Mr. Agan's contention that the record before the trial court was sufficient at the time of plea to require a hearing on competency, and the failure to have conducted that hearing violated due process. Pate v. Robinson, supra. Clearly, given the facts presented in the 3.850 proceeding, in combination with the plea record, a hearing is now required.

D. THE TRIAL COURT ERRONEOUSLY RULED ON THE INCOMPETENCY CLAIM WITHOUT CONDUCTING AN EVIDENTIARY HEARING, IN VIOLATION OF MR. AGAN'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Incompetency is a classic post-conviction issue, resolved only upon an evidentiary hearing, once properly raised. Hill, Jones, Gibson, supra. As explained above, the indicia of incompetency presented to the Court in the 3.850 motion and other pleadings presented a bona fide issue of incompetency.

The trial court explained that the 3.850 motion and appendices, and the State's response with attachments, were "part of the record in Case 82-312, upon which this Court should base in part a ruling of entitlement to an evidentiary hearing on the question of competence of the defendant at the time of the entry of the plea . . . ." (P.C. 740). The court then denied an evidentiary hearing, based upon (1) the court's observations at the plea and sentencing hearing in 1980, and (2) the court's reliance on attachments to pleadings filed by the State in post-conviction, which never became a part of the post conviction record, and which are not contained in the record on appeal of the denial of the 3.850 motion. Neither basis is sufficient, and an evidentiary hearing is required.

1. Court's reliance on observation at the plea and sentencing hearing in 1980

At the time of the plea and sentencing in 1980, Mr. Agan was before the trial court for about 30-45 minutes. The record does not reveal how long the proceeding lasted, but the entire capital

proceeding, from plea of guilty to imposition of death penalty, is contained in a forty-five (45) page transcript. The judge had never seen Mr. Agan before.

This 45 page hearing contained the important or "salient" facts upon which the trial court refused to conduct an evidentiary hearing on incompetence:

> The salient facts to this Court are that this Court was the Court who accepted the plea of James Agan at the time of his arraignment on 80-312.
>
> This Court observed the demeanor and the conduct of James Agan at that time, listened carefully to the responses he made to questions both from the Court and statements and questions of his attorney, Mr. Futch.
>
> And there's just no doubt in my mind, listening to that and having heard it, and my recollection of this matter is buttressed by reexamining the plea charge transcript, that James Agan pled guilty to the offense of murder in the first degree over the advice to the contrary by his counsel, after having testified to the contrary over advice of prior counsel before the Grand Jurors.
>
> The records reflect that he had also made other confessions over advice of counsel. The plea colloquy indicates, or transcript indicates, that he indicated his plea and statements were made voluntarily.
>
> Based upon all of that, and the responses of James Agan at the time of the plea concerning his prior psychological and mental history, the representations made to the Court by Mr. Futch at the time of the change of the plea on direct questioning of this Court, that Mr. Agan indeed was a competent individual to know what he was doing, and had the ability to consult with counsel and had done so at the time of his plea.

> And there's just no doubt in my mind, again looking back upon that, that Mr. Agan knew exactly what Mr. Agan was doing at the time he changed his plea. He knew it because I told what he was doing, and he answered he knew.
>
> There's just no doubt in my mind that James Agan elected knowingly and voluntarily, while mentally competent, to change his plea of not guilty to guilty to murder in the first degree in an effort to obtain a life sentence so, by his own statement, he would be able to kill the partner of the man whom he had killed, Dana DeWitt, while in the Department of Corrections.

(P.C. 763-65).

This "looking back" and deciding that someone knew what they were doing because "I told [him] what he was doing and he answered he knew," is untenable. How someone may have appeared in 1980 during a forty minute proceeding is irrelevant, when new facts and circumstances, previously unknown, are properly plead and presented. Many a defendant far more literate, coherent, and apparently rational during an entire trial than Mr. Agan was, was nevertheless pitifully incompetent, notwithstanding trial court praise for the person's apparent expertise and lucidity. Constitutional competency law recognizes faint trial court praise for potentially incompetent litigants for what it is -- condemnation. Pate is tellingly on point. As discussed in Hill, apparent defendant understanding is not controlling:

> The Court rejected the reasoning of the Illinois Supreme Court that the evidence "was not sufficient to require a hearing in light of the mental alertness and understanding displayed in Robinson's 'colloquies' with the

> trial judge." In its opinion, the Court state that, although "Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue."

Hill, 473 So. 2d at 1257-58, discussing Pate v. Robinson.

An even stronger case of competence crumbled to due process requirements in Bishop v. United States, 350 U.S. 961 (1956). Again, Hill offers the best perspective:

> The trial court found that Bishop testified coherently and was adroit in explaining eye-witness testimony; that he withstood severe and long cross-examination, and that approximately one month before the trial a psychiatric evaluation determined that Bishop had no mental disorder. On the basis of this evidence, the court of appeals held that there was substantial evidence upon which the trial court could find that Bishop was competent to stand trial. The United States Supreme Court, however, found this evidence insufficient . . . . This decision stands for the principle that the trial court must conduct a hearing on the issue of a defendant's competency to stand trial where there are reasonable grounds to suggest incompetency.

Hill, 473 So. 2d at 1256. Thus, even though the trial judge below "told [him] what he was doing, and he answered he knew," incompetency is legitimately raised now, else it is a claim which can be waived, which it is not.

The second basis for extracting competence from the 1980 plea and sentencing transcript was the trial court's recollection of "the representations made to the Court by Mr. Futch . . . that Mr. Agan indeed was a competent individual . . ." (P.C. 764) Of

course, as plead in post-conviction, Mr. Futch had no idea whether his client was competent, inasmuch as he conducted no investigation to find out. To credit defense counsel's single statement that his client is competent, and to thereby bar post-conviction relief, is as untenable as allowing a judge to "remember" and thereby bar relief. We can only hope that no judge or lawyer would allow a plea, if he or she had "a doubt in his or her mind" about competency. The trial court's logic here would completely bar post-conviction relief on competency claims because it is based upon faith that lawyers and judges know incompetency when they see it. That is not the law. Later lawyers and judges can determine that defendant's previously apparently fine, were indeed incompetent.

2. Court's reliance to attachments to pleadings filed by the state, not a part of this record

Five months after the 3.850 motion was filed, and on the day of the hearing to determine whether an evidentiary hearing was required, the State filed a State's Response to Defendant's Motion for Post Conviction Relief. (P.C. 688). The response was a one-page, three paragraph, boilerplate denial that Mr. Agan was entitled to relief. A Memorandum in Support of State's Response to Defendant's Motion for Post Conviction Relief was filed the same day [hereinafter "Memorandum"].

In the Memorandum, the State referred to "State Exhibit 38," (P.C. 696), in the following manner: trial counsel was not

ineffective for not requesting a P.S.I., because, by so doing, counsel kept (that which he did not know) from the trial judge, that Mr. Agan "previously asked to be sentenced to death after having been adjudged competent and not insane, that defendant's disciplinary record in prison was rife with violence and that defendant's mental or emotional condition was not such that it approached the level of insanity." See State Exhibit 38 to 3.850 Motion; P. C. 696..

There is no Exhibit 38, or any such set of records, in the record on appeal. At the hearing below, counsel discussed the significance of whether Mr. Agan had undergone a previous competency hearing or not (State, P.C. 730; Defense, P.C. 736), and defense counsel expressed no objection to the state's attachments. P.C. 737. The record does not contain the attachments to the State's Memorandum or Response, and defense counsel has no way of ascertaining whether they were ever filed with the Court and exist in the Clerk's Office, and/or what the Court actually saw and considered.

This is important, because these "attachments," which are not a part of this record, formed a basis for the trial court's denial of an evidentiary hearing. As the Court held:

> The record reflects that James Agan, in 1976, was charged in Hillsborough County with the offense of murder in the first degree; at that time, tendered a plea of guilty thereto and was sentenced to die by electrocution.
>
> In the findings of fact made by Judge Harry Coe in that case, it was apparent that the issue of competency and insanity had been

> raised and laid to rest against the contentions of incompetency or insanity prior to the time of the entry of that guilty plea. This is reflected in the copy of the judgment and sentence of the Hillsborough County case attached to the memorandum in the cause.
>
> Secondly, it was shown that as late as 1975 or '76, institutional mental-health experts had examined the defendant for other purposes -- and I will not speculate upon what purposes except to say that it's not clear in there whether they were in furtherance of the Hillsborough County case or for institutional purposes within the Department of Corrections -- and made no finding of incompetency or insanity.

(P.C. 761-62).

Since what the Court is referring to is not a part of the record, counsel cannot discuss it here. However, if a court in 1974 believed that a bona fide claim of incompetency had been raised regarding James Agan, sufficient to require an evidentiary hearing then, that hardly "laid to rest" the need for a hearing in 1980: if anything, prior questions regarding competency concerns buttress this competency claim and support the need for an evidentiary hearing. Dusky.

The "1975 or '76" examination, the purpose of which the court "would not speculate upon," (P.C. 762) is at most a factor to be verified at a hearing, and is assuredly not a factor creating a per se bar to a hearing. Whatever it says, it is one piece of paper among many filed in the Court, and all the others show serious and consistent symptoms of mental disorders.

ARGUMENT II

PRE-TRIAL AND TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY CONDUCTING NO OR GROSSLY INADEQUATE INVESTIGATION INTO INNOCENCE, INSANITY, INCOMPETENCY, SENTENCING, AND CONSTITUTIONAL VIOLATIONS BY THE STATE AND TRIAL COURT, TO MR. AGAN'S SUBSTANTIAL PREJUDICE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THE TRIAL COURT ERRED BY NOT CONDUCTING AN EVIDENTIARY HEARING ON THIS CLAIM.

The only "facts" known to this Court and the trial court in 1980 were the ones contained in the transcript of Mr. Agan's grand jury testimony and in the plea colloquy and sentencing hearing. In stark contrast to the 1980 facts are the facts offered to be proven below: that Mr. Agan is innocent or at least certainly not guilty beyond a reasonable doubt. Mr. Agan pled in the Rule 3.850 Motion that Attorneys Stinson and Futch committed specific unreasonable omissions which were constitutionally prejudicial, in that they failed to learn the facts independent of their client and made no attempt to meaningfully counsel Mr. Agan. The state countered with an affidavit from Mr. Futch (P.C. 698-701). The trial judge would not allow the affidavit to be admitted and could not and would not consider it when the evidentiary hearing was denied (P.C. 738-39).

Before the trial court could legally deny an evidentiary hearing on this claim, the pleadings and record must have conclu-

sively shown neither 1) that counsel's performance was deficient, nor 2) that prejudice resulted from counsel's deficiency, such that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, ___ U.S. ___, 104 S. Ct. 2052 (1984); O'Callahgan v. State. 461 So. 2d 1354 (Fla. 1984). An evidentiary hearing was requested. P.C. 678.

Mr. Agan has pled specific omissions of counsel which were unreasonable: the attorneys failed to, inter alia, a) effectively investigate the law and facts; b) interview witnesses about the crime; c) interview any family members; d) file proper pre-trial motions; e) correct procedural errors committed by the state and the court; f) check Mr. Agan's criminal record or speak with people outside of prison who knew Mr. Agan; g) obtain psychiatric and psychological reports of examinations containing diagnosis and listing treatment of Mr. Agan; and h) properly review Mr. Agan's prison records. Reasonably competent counsel would have investigated, but counsel here did not. Since prejudice must be proven, as well as unreasonable omissions, the prejudice issue will be addressed first. The purpose of the following outline of prejudice is to demonstrate the constitutional violations, as well as to show that the trial could erred in failing to grant an evidentiary hearing on the claim.

A. PREJUDICE TO MR. AGAN.

1. Innocence/Exculpatory Information

A prompt and thorough investigation by either Stinson or Futch would have revealed a wealth of information relevant to pre-trial motions, innocence, and sentencing, and would have greatly assisted counsel in advising Mr. Agan. Mr. Stinson was told that something very wrong was up, but he and Mr. Futch did no investigation, despite the numerous red flags.

Sergeant Ball, the complainant on Mr. Agan's warrant, told Mr. Agan's first attorney, Mr. Stinson, that Ball thought Agan was innocent, that his story "did not hold water," and that he was lying "to save his life in the prison." Mr. Agan made a series of statements to correctional officers and investigators about the case, and the statements became more and more consistent with the physical facts as more knowledge about the physical facts surfaced and were provided to Mr. Agan by the officers. Mr. Agan was not even a suspect in the DeWitt killing until he implicated himself, but three or four other white males were suspects. See Exhibit 3 to 3.850 Motion, P.C. 466; Exhibit 11, P.C. 485; Exhibit 32, P.C. 599.

According to Mr. Agan's first tape-recorded statement, he believed a confession would not hurt him -- "See, I'm 52 years old. I'm 52 years old and it doesn't make that much difference." Ex. 4, 3.850 hearing, P.C. 470. He was then pressured to give details of the offense, particularly to describe the knife used

and the manner of killing. He refused to do so, with the following responses:

Q. Describe the knife to me.

A. I'm not going to do that. When I told Lt. Thornton -- see, a long time ago, I told Lt. Thornton he didn't stop nothing; he prolonged it. He'll tell you the same thing I told him.

Q. Who did you tell this, now, to?

A. Lt. Thornton.

Q. Okay. Same one you talked to today?

A. Yes, sir. I told him he didn't stop nothing, he just prolonged it.

Q. Where were you at when you told him that?

A. Walking back down the hall. You know, they carried me up to the clinic. I wasn't hurt or anything, I don't know why they carried me to the clinic, but, they carried me up to the clinic and when they brought me back they had P. Willie in the cage at the t____. I told Lt. Thornton -- he said, "what happened?" and I told him, I said, "You didn't stop nothing, you just prolonged it a while." He'll tell you the same thing.

Q. Over two years ago?

A. '77.

Mr. Clark:(Q) How long does it take to go from one side to the other?

Colonel Barton: (Q) About thirty minutes.

Mr. Clark: (Q) You've got me confused a little bit, Mr. Agan. If you don't want to answer my questions, that's okay. You know you can stop, don't you?

A. Yes, sir.

Q. I don't understand why you won't describe the knife because you know that will be evidence against you when you admit killing the man and that's evidence against you.

A. Well, see --

Q. I'm not trying to trick you, but that makes me wonder if you really killed the man.

A. See --

Q. Do you know where I'm coming from?

A. Yeah.

Q. Okay.

A. But when I get in court, see, it's a different matter.

Q. I don't understand that.

A. See, just like that man I got the death sentence on;

Q. Yeah.

A. When the police pulled up, I said I killed him and then I didn't answer no more questions.

Q. Well, I don't understand what the difference is.

A. I just don't want to talk.

Q. Oh.

A. It's just something I don't want to talk about.

Q. I'm not asking you to describe the knife. I'm asking you to tell me why it is, if you did kill the man that you --

A. If -- if -- if I didn't kill the man, why should I go to all the trouble and -- and, uh, admit something like this here and take a

chance at setting back there on death row?

Q. [T]here are four other people in the room here to witness this and you won't tell us what the knife looked like.

A. I'm not going to tell you.

Q. Well, I understand that you won't do it. I understand that; I don't understand why.

A. I'm not going to tell you.

Q. I don't want you to tell me. I just want you to tell me why. I can't figure that out.

A. Well, I -- I didn't even want to talk about it.

Q. Well, why did you?

A. Well, what's the use of talking about it -- all them people you got back there, some of them is going to say something.

Q. Well, they probably will.

A. So why prolong it, you know?

Q. I'm not trying to tell you how --

A. Oh -- I realize that.

Q. I'm not thoroughly convinced you killed him, to be honest/

A. You don't think I killed him?

Q. No, I didn't say I didn't think you killed him. I said I wasn't convinced that you did. You are the best suspect we've got today.

(Laughter, several voices, including AGAN).

A. I wouldn't -- I wouldn't set here and take up your time.

Q. Okay.

MR. TURNER: (Q) (On phone) Hello? Yeah, Tom, we had a homicide out here this afternoon. Yeah. And we had an inmate come up a whole ago who approached one of our Lieutenants and confessed to doing it and he's here in the office now. We need to notify your office and we need an attorney. (Pause). That's right, and he didn't come up and admit to this until later -- about an hour ago. AGAN, A-G-A-N, James Calvin. James Calvin. That's right, about three or so this afternoon. All he's told us so far is that he did it. And why. Inmate by the name of Dana DeWitt. Stabbed in the neck.

A. Hit the jugular vein.

MR. CLARK: (Q) Sir?

A. Hit the jugular vein.

MR. TURNER: (Q) (On phone, continuing) You want to talk to him on the phone. Okay.

COLONEL BARTON: (Q) James, you say it hit the jugular vein?

AGAN: (A) (On phone). Hello. That's me. Yes, sir. Yes, sir. First Degree Murder, yes, sir. Out of Hillsborough County. Uh, yes, sir, I'm doing a life sentence, Mandatory 25. Life sentence. I come off death row. I got first degree out of Hillsborough County. Hillsborough County. Yes, sir. No, I got off death row, I believe it was June 24th, of '76. Yes, sir. Sir? Uh, that's right. Yes, sir. That's true. That's true, it was between, let's see -- yes, sir. Yes, sir. Yes, sir, I had two lawyers. I had one named Benny Lazaro and Tony Garcia, out of Tampa. Sir? No, not -- not too much. See, I'm 52 years old. I'm 52 years old and it doesn't make that much difference. Yes, sir. I realize that, yes, sir. All right. Yes, sir, I understand. That's true. Oh, I guess, uh, Lieutenant come in about -- I been -- I guess I been here about fifteen, twenty minutes.

MR. TURNER: (Q) Since 9:41.

AGAN: (A) (On phone, continuing). Since 9:41. Well, see, that's what I tried to tell -- I -- I don't even want to talk about it. I see -- see, I just want to go ahead and get -- all right. Yes, sir. Yes, sir. All right. All right. Yes, sir. Yes, sir. Yes, sir, I done been down that road before. Yeah, I guess that's -- I can't keep my big mouth shut. Yes, sir. All right, sir. Yes, sir. No, uh, FSP, Florida State Prison, Starke. No, Main Unit. Yes, sir. All right, sir. No, I'm going to have my own private lawyer. Yes, sir. Yes, sir. Yes, sir. Yes, sir, two of them. I said I would have two of them, yes, sir. Yes, sir. I'm hiring Tony Garcia and Benny Lazaro, out of Tampa, Hillsborough County.

MR. CLARK: (Q) Gonzalez.

AGAN: (A) (On phone, continuing). Gonzalez, I beg your pardon, the name Gonzalez. I get the names mixed up. Uh, Benny Lazaro -- Laz -- Yes, sir, yes. Yes, sir. Uh, I was sentenced to -- Judge, uh, Judge Cole, out of Tampa, and I stayed back there a couple of years and they got me off death row. Yes, sir. All right, sir. I will do that. It's been nice talking to you. No, I have nothing to say. No, no. No, sir. No, sir, I don't. No, sir, no thank you. Yes, sir. Well, I appreciate your interest. Thank you very much, hear? Okay. All right, thank you. (Hang up.).

MR. CLARK: (Q) Mr. Agan, you said that you might want to talk to us after you talk to your lawyer? Do you want to talk to us now?

A. No, I don't want to talk.

Q. Okay, that's it.

A. I might talk to you after I'm booked.

Q. Sir?

A. After I'm booked.

Q. They are going to do that right here. Whatever, that's up to you.

MR. TURNER: (Q) If you do decide you want to talk to somebody, do you know how to contact us?

A. I don't have anything to say right now.

Q. I can understand that.

MR. CLARK: (Q) If you want to talk to them, you're going to have to ask to talk to them. They're not going to be able to, you know, get you out to talk to you. Understand that?

AGAN: (A) No, I know that.

MR. TURNER: (Q) Show the interview concluded at 10:06 PM, same date, same persons present.

(END OF TAPE)

See Ex. 4, P.C. 472-476.

Neither attorney investigated this statement, and the obvious fifth, sixth, and fourteenth amendment implications of the officers continuing to interrogate after Mr. Agan indicated he did not wish to speak with the officers. Mr. Agan had a first appearance the day after the first recorded statement, and three days after he terminated the first statement, September 22, 1985, he had a probable cause hearing. Then Officer Ball reinterrogated Mr. Agan and obtained a much more detailed account of the alleged killing. See Exhibit 8, P.C. 478. There is no indication that Mr. Agan initiated this recontact with the officers, and the resulting statement was thus taken in violation of his fifth, sixth, and fourteenth amendment rights. Neither

attorney investigated the taking of this second statement, and its legal ramifications. Neither the trial court nor this court were presented with these two illegally taken statements, which, once "out of the bag," inevitably led to the subsequent grand jury and guilty plea admissions.

The second statement reveals that Mr. Agan was questioned before a tape recorder was activated. In the statement he gives the officers what they requested the first time -- 1.) he (incorrectly) identifies the murder weapon, and 2.) describes the alleged assault. He had earlier refused to be further questioned regarding the killing. Investigators reinterrogated him. Counsel had no strategic or tactical reason to fail to investigate and reveal this violation of the fifth, sixth, eighth and fourteenth amendments.

Mr. Agan's first appointed attorney. Mr. Stinson, believed that Mr. Agan was lying about guilt and thought that "the whole scene leaves a bad taste in one's mouth in that it does not seem to fit together." Attorney Futch was unaware of Stinson's information and opinion, due to inexcusable neglect. After Mr. Stinson was appointed to represent Mr. Agan, officers approached Mr. Agan a third time, without counsel being present, on October 10, 1980. Mr. Agan provided them with more statements. The trial court and this court were not made aware of this third statement, taken in the absence of already appointed counsel. It was at this interview that Mr. Agan agreed to go before the grand

jury. As alleged in the verified petition, reasonably competent investigation would have revealed that the third interrogation was a violation of Mr. Agan's fifth, sixth, eighth and fourteenth amendment rights.

In 1982, the Department of Corrections investigated itself to determine whether Mr. Agan had been offered a concurrent life sentence and transfer from Florida State Prison in return for pleading guilty to the murder herein, which the state could not prove otherwise. The Department of Corrections determined that the Department of Corrections was innocent of any wrongdoings. See Department of Corrections Special Investigation Entry #82-2502.

What was admitted by Department of Corrections personnel was the following:

a. Inspector Ball, the person who took Mr. Agan's second and very detailed recorded statement, admitted he had "problems" with the case and "questions" about Mr. Agans' guilt.

b. Four other men were reported to Ball as the offenders, and one of the accused inmates -- Mr. Gross -- had been seen jumping off the secong floor from the victim's cell area, running down the walk, turning around and running into his cell. Ball was told that around the time of the assault, inmates saw another inmate named Reed leave his cell on the floor above the victim's with a knife in his hand, and that Reed continued to the second floor -- the victim's floor.

c. Ball has destroyed all evidence in this case -- a knife, bloody clothing, and other compelling evidence.

d. Investigator Ball knew in 1980 that Mr. Agan was reluctant to talk much about the crime, and as the investigators learned more and spoke with Mr. Agan about their knowledge, the closer Mr. Agan's confessions came to the known facts. See Exhibit 32, attached to 3.850 Motion, P.C. 599.

Defense counsel was inexcusably and completely ignorant of any of this information. An attorney's unreasonable failure to know not only that his client is very likely innocent, but also that the state thinks so, is thoroughly prejudicial, prejudice which permeates all aspects of the criminal proceeding. The Washington prejudice test is whether the error creates a reasonable probability that the result would have been different. Counsel's independent investigation which demonstrates that the state has no case can go far, if proper counseling follows. Prompt advise to Mr. Agan that the state could not prove him guilty would undoubtedly have changed the result.

The only evidence was Mr. Agan's statements, which were readily and easily challengeable under the fifth, sixth, and fourteenth amendments. The investigators continued to interrogate Mr. Agan after he had clearly refused to answer questions about the murder weapon and the manner of killing. "If the individual indicates in any manner, at any time prior to or during questioning, that he wants to remain silent, the

interrogation must cease." Miranda v. Arizona, 384 U.S. 436 (1966). Miranda-poor statements cannot be admitted against a defendant "even though the statement may in fact be wholly voluntary." Michigan v. Mosely, 423 U.S. 96, 101 (1975).

This first statement was in fact not mentioned to the trial court. However, the information the investigators obtained during this illegal questioning session was used to interrogate Mr. Agan a second time. The second interrogation shows no indication of having been initiated by Mr. Agan. Mr. Agan had spoken to counsel at the conclusion of the first interview, and terminated the interview. No more questioning was proper at all:

> [A]n accused, such as [the defendant], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards v. Arizona, 451 U.S. 477, 485 (1981) (emphasis added).

After counsel was appointed, Mr. Agan was again interrogated, and at that session he agreed to testify before the grand jury. Mr. Agan's sworn Rule 3.850 motion alleges that the conversation leading to the grand jury testimony was conducted in violation of Mr. Agan's sixth amendment right to counsel.

Mr. Agan convicted himself and sentenced himself to die, as the deluded instrument of his own demise. There were fundamental constitutional problems with all his "confessions," as they snowballed to the grand jury/guilty plea crescendo. Counsel did

nothing to discover or blunt these constitutional shortcomings.

Perhaps most egregious of all was counsel's failure to realize the effect of Mr. Agan's incompetence on his ability to waive his fifth, sixth, eighth, and fourteenth amendment rights. A court examining the voluntariness of a confession on intelligence of a waiver "must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will." Jurek v. Estelle, 623 F.2d at 929 (en banc). It is "settled that statements made during a time of mental incapacity or insanity are involuntary and, consequently, inadmissable ..." Sullivan v. Alabama, 666 F.2d at 482. One "fundamental concern is a mentally deficient accused's vulnerability to suggestion." Henry v. Dees, 658 F.2d at 406. See also Sims v. Georgia, 389 U.S. 404, 407 (1967); Culombe v. Connecticut, 367 U.S. at 624-25; Townsend v. Sain, 372 U.S. 293 (1963); Blackburn v. Alabama, 361 U.S. 167, 207 (1960); Fikes v. Alabama, 352 U.S. 191, 196 (1957). Counsel did nothing to attack the voluntariness of the statements, or the validity of waivers. Since the state's entire case came from Mr. Agan's lips, the prejudice is patent.

The utter failure of counsel to conduct any meaningful investigation into guilt/innocence and defenses was made unmistakeably clear before the trial court:

THE COURT: Mr. Futch, do you have

exculpatory information?

MR. FUTCH: I have no exculpatory information.

P. C. 447-48.

2. Incompetency/insanity/mental mitigating circumstances

As discussed in Argument I, upon any proper investigation, reasonably effective counsel would have uncovered incredible evidence of Mr. Agan's serious mental illness and incompetence. The evidence would have prevented trial, so prejudice is evident. Furthermore, counsel could readily and easily have obtained the assistance of psychiatric experts pursuant to Florida Rule of Criminal Procedure 3.210. A defendant is entitled to expert psychiatric assistance when the state makes his mental state relevant to guilt/innocence or sentencing. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). A defendant is entitled to an "adequate psychiatric evaluation of his state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). Counsel must assume responsibility for obtaining the assistance of such experts.

There is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). "[W]hen it appears to counsel that the accused is mentally ill and that he cannot afford to consult a psychiatrist, it is counsel's duty to inform the court of this situation and move for a psychiatric examination." Proffitt v.

United States, 582 F.2d 854, 859 (4th Cir. 1979). Counsel cannot ignore the ravages of mental disease as revealed through client contact and/or independent investigation, and refuse to have appropriate evaluations conducted because the client who so desperately needs the evaluation may not wish to submit to it. Brennan v. Blankenship, 472 F.Supp. 149, 157 (D.C.W.D.Va. 1979).

Such a psychiatric evaluation is especially critical in capital proceedings, and it was unreasonably not pursued. Blake, supra. In fact, without any investigation at all, defense counsel nervily asserted to the trial court that "I am satisfied and certify that, in my opinion, he is mentally ... competent." (P.C. 432). Any investigation at all would have revealed substantial evidence of mental illness to counter waivers, establish incompetence, support insanity, and mitigate punishment. Prejudice is apparent, and the denial of an evidentiary hearing is reversible error.

3. Sentencing

A glance at Mr. Futch's sentencing presentation leaves no doubt that he did nothing in preparation. Exculpatory evidence was abundant, and mental mitigating circumstances were rampant. Prejudice is crystal clear:

> It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness.

Blake, 758 F.2d at 533. As in Blake, no favorable evidence was sought, but some was available. A sixth amendment violation occurred.

This mental incompetent apparently was allowed to control the course of capital litigation and seal his fate. Counsel cannot fail "to properly advise their client as to his legal alternatives and then allow[] themselves to be blindly guided by [defendant's] uninformed direction." Brennan v. Blankenship, 472 F.Supp. 149, 157 (U.S.D.C. W.D.Va. 1979). "[U]ncounseled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better informed advise." Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983). The trial court erred by denying the requested evidentiary hearing.

B. UNREASONABLE OMISSIONS: COUNSEL DID NOTHING.

As outlined in Argument I, attorney Stinson did nothing to assist his client. The offense occurred September 19, 1980. The public defender's office spoke with Mr. Agan that very night, advised him, and was well aware of his situation. The public defender's office was not officially appointed until October 6, 1980. On October 7, 1980, Stinson met with Mr. Agan, was informed by investigator Ball that Mr. Agan was probably innocent, and concluded that "the whole scene leaves a bad taste in one's mouth in that it does not seem to fit together." (P.C. 27).

Stinson did nothing to remove the bad taste. Three days after the visit, Mr. Agan met with investigators and agreed to testify at the grand jury. On October 13, 1980, Stinson filed the Motion to Withdraw previously discussed, P.C. 28, and revealed confidences and secrets about his clients "uncooperativeness." On October 16, 1980, Mr. Agan appeared before the grand jury and was indicted. Stinson did no investigation or person to person counseling at all during this time, even though no court had allowed him to withdraw, and he was 20 minutes from the prison. Stinson removed the confidence-revealing motion to withdraw from the Court file, and substituted another motion to withdraw claiming "workload" problems.

Between September 19, 1980, and October 7, 1980, the Public Defender's office did no or grossly inadequate investigation regarding Mr. Agan's charge of murder. This lack of investigation was not premised on any reasonable tactic or strategy.

After Attorney Stinson discovered that Mr. Agan had not followed his advice, had untruthfully implicated himself to authorities regarding a first-degree capital murder, and intended to testify before the grand jury, Attorney Stinson did no or grossly inadequate investigation, and did nothing other than complain to Mr. Agan to protect his rights. At no time did Mr. Stinson request a psychiatric or psychological evaluation of Mr. Agan to determine competency or sanity, even after Mr. Agan

presented incredible and inflammatory testimony to the grand jury. Mr. Stinson had no reasonable trial strategy for allowing Defendant to proceed unprotected in this manner.

A reasonably competent attorney would seek the assistance of expert psychiatrists and psychologists when confronted by a client who proceeded in the bizarre manner followed by Mr. Agan. Mr. Stinson attempted to change Mr. Agan's conduct, and, failing that, simply withdrew. Florida Rule of Criminal Procedure 3.210 specifically provides for a competency determination, upon Motion of the Court or counsel, but none was requested.

As of October 20, 1980, Mack Futch represented Mr. Agan. As indicated by his fee request, Mr. Futch spent 15.25 hours working on Mr. Agan's case between October 20, 1980, when he was appointed, and November 24, 1980, 35 days later, the date of arraignment, plea and sentencing. See Exhibit 16 to 3.850 motion, P. C. 498. Mr. Futch's preparations included no legal research, and no independent investigation of facts. He filed one two paragraph request for discovery, seven days before arraignment of plea, and no other pre-trial pleadings.

The day after he was appointed, Mr. Futch stated he spent 1.5 hours speaking with the State Attorney and investigator, before speaking with his client. He then spent 1.5 hours reviewing Defendant's "inmate jacket." Two days later, he went to F.S.P. and spoke with Inspector Pete Turner, but did not speak with his client. One week after being appointed as Mr.

Agan's counsel, Mr. Futch met with him. Mr. Futch did no work on Mr. Agan's first-degree capital case for the next twenty (20) days. Then, 6 days before trial, he spoke with Mr. Agan again. Four days before plea and sentencing, he again spoke with Mr. Agan. The day after the death sentence was imposed, Mr. Futch, indicating "Defendant no longer require[s] the services of Movant," filed his fee request.

Mr. Futch did not speak with Mr. Stinson in preparation for Mr. Agan's trial, plea, or sentencing, even though Mr. Stinson had crucial information regarding Mr. Agan's abnormal behavior, and regarding Sergeant Ball's information that Defendant was innocent. On November 7, 1980, Assistant State Attorney Thomas M. Elwell requested subpoenas for 15 witnesses, Ball included. Mr. Futch spoke with only one of these witnesses, L. E. Turner, before trial.

Mr. Futch filled in the blanks of a form Petition to Enter Plea of Guilty or Nolo Contendere on November 21, 1980, and Mr. Agan signed it. This document confirmed the following innocuous statement: "I (defendant) have been convicted of one or more felonies in the past as follows: See FBI Record." While Mr. Agan did not know and was not told, this "admission" led to the finding of two aggravating circumstances at sentencing. See Argument III, infra.

Mr. Futch also prepared and signed a Certificate of Counsel on November 20, 1980, also a fill-in-the-blank form, and at plea,

struck from the form that Mr. Agan's actions in pleading guilty were consistent with his advice. Mr. Futch joined in the Defendant's Waiver of Jury's Rendition of Advisory Sentence. See Exhibit 20 to 3.850 motion, P.C. 505.

Mr. Futch made no attempt to obtain a psychiatric or psychological examination of Mr. Agan. This was not a reasonably competent tactic or strategy. He made no attempt to investigate the law, and his independent factual investigation was patently inadequate. As a result, at sentencing, Mr. Futch conceded his inadequate representation, by saying that there was no exculpatory evidence (in fact there were four other suspects).

Mr. Agan specifically pled, without denial by the state, that Mr. Futch's actions were consistent with his regular unprofessional actions at and around the time of this plea. Expert opinions were proffered, and Mr. Agan offered to prove that "Futch's virtually habitual failure to conduct even the most minimal investigation, to interview witnesses, to communicate with his client, and in general to prepare a defense illustrates a pattern of practice that clearly has no basis in anything other than counsel's incompetence." (P.C. 519). Mr. Futch had a particular inexpertise in capital cases, P.C. 528-534, and an expert's appraisal of Mr. Futch's "performance" in this specific case was damning: "Mr. Futch was woefully inadequate in his representation of Agan." (P.C. 525).

C. THE TRIAL COURT IMPROPERLY DENIED THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

An evidentiary hearing is required, and was requested. The court below made no finding at all with respect to the first prong of Washington: unreasonable attorney omissions. It simply was not mentioned. In fact, the court never stated that counsel was effective. The entire order is geared toward denying the incompetency claim, and only once did the court refer even obliquely to ineffectiveness: the Court simply says that none of the proffered evidence would have changed the sentence imposed. This finding is not a finding on the many claims of ineffectiveness presented in the motion, and wholly inadequately resolves the sixth, eighth and fourteenth amendment claims.

The one prejudice question the court did address sheds much light on a claim raised on direct appeal. The sentencing order in this case recited that the court looked only to "statutory mitigating factors" to balance against aggravation. P.C. 621. Appellant counsel claimed that this restriction on consideration of mitigating circumstances violated the eighth and fourteenth amendments. See initial brief of Appellant, Agan v. State, No. 60,476, p.15. This Court held otherwise. Agan v. State, 445 So. 2d 326, 329 (Fla. 1983). The court's action on the Rule 3.850 motion belies this Court's interpretation of the trial court's sentencing actions, and consideration of nonstatutory mitigating circumstances.

The trial court, with all the new non-statutory evidence before it in post-conviction, said in post-conviction simply that it would have mad no difference. (P.C. 753, 754). The trial court has shown a total indifference, indeed hostility, toward non-statutory mitigating circumstances, a position which violates the eighth and fourteenth amendments. Harvard v. State, ___ So. 2d ___ (1985).

The court's failure to make any findings at all on virtually all the ineffective assistance of counsel claims is reversible error. The refusal to conduct an evidentiary hearing was in conflict with this Court's axiomatic teachings. O'Callaghan. Reversal is proper.

ARGUMENT III

THE GUILT DETERMINATION AND "SENTENCING HEARING" WERE ILLEGALLY AND UNCONSTITUTIONALLY CONDUCTED, AND THE USE OF MR. AGAN'S UNINFORMED STATEMENTS AGAINST HIM AT PLEA AND SENTENCING VIOLATED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The plea and capital sentencing hearing conducted in 1980 bore no resemblance to that kind of proceeding contemplated by the legislature, and resulted in the unreliability in sentencing condemned by the eighth and fourteenth amendments. In fact, it was not a hearing at all, but simply argument of counsel. No one informed Mr. Agan about what a capital sentencing proceeding was, or inquired about whether he knew what an aggravating or a mitigating circumstance was. The "evidence" at the "hearing" was nothing more than Mr. Agan's statements and de facto stipulations. The entire procedure was illegal, and trial counsel was ineffective for sitting by. The Rule 3.850 court did not rule on those claims.

A. THE GUILT DETERMINATION AND "SENTENCING HEARING" WAS NOT A LEGITIMATE PROCEEDING OR HEARING AT ALL, BUT AN UNDISCIPLINED EXERCISE IN ATTORNEY MUSINGS AND RURMINATIONS, WITHOUT THE INTRODUCTION OF ANY EVIDENCE.

Mr. Agan was convicted and sentenced to death on the basis of nothing but stipulated facts. There was no inquiry of Mr. Agan by the Court, the State, or counsel, concerning whether he agreed to stipulated testimony, understood what a stipulation

was, or knew the effect it would have.

For instance, Mr. Agan, in a pleading entitled "Petition to Enter Plea of Guilty," signed his name acknowledging "I have(x) have not( ) been convicted of one or more felonies in the past as follows: See FBI Record." In court, the following occurred, while the trial court was trying to determine whether Defendant was knowingly and voluntarily waiving jury trial:

> THE COURT: It says further that you have been convicted of one or more felonies in the past, see FBI record. There is no record attached.
> Mr. Elwell, have you that record?
>
> MR. ELWELL: Your honor, I do. I can announce to the Court that the present sentence that the defendant is now serving at Florida State Prison is a sentence for murder in the first degree, a mandatory 25 year sentence.
> I can provide the Court at this time, and will so provide, a copy of the FBI Rap Sheet that is referred to.
>
> THE COURT: I am referring to an FBI record bearing the date of 11/4/74 732EMS, which is some four pages long, which I will mark in the file as Exhibit "A" which will be appended to the plea form; that indicates that you are presently serving a sentence for first degree murder.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Mr. Agan, I am going to hand you these four pages. Please look over them and tell me whether that record is your record.
>
> THE DEFENDANT: Yes, sir, that is mine. I have already saw it.
>
> THE COURT: You have seen it?

THE DEFENDANT: Yes, sir.

MR. FUTCH: He was furnished a copy of that Friday, Your Honor.

THE COURT: So that I may be sure that I understand, you have been furnished a copy of FBI Record No. 4735417, which is the one just handed to you.

THE DEFENDANT: Yes, sir.

THE COURT: And it is of your record?

THE DEFENDANT: Yes, sir.

Mr. Agan was not informed by anyone what significance his record had, was not asked to stipulate the rap sheet, and was not informed that it was the state's responsibility to prove his record, if relevant, beyond a resonable doubt. The FBI "rap sheet" was not a certified court document, which is legally necessary for proof of a relevant conviction under the capital sentencing scheme. See Provence v. State, 337 So. 2d 783 (Fla. 1976).

The State Attorney was asked by the Court: "what is the factual basis of the plea" (Tr. 14). The State Attorney then spoke at will about his opinion of what witnesses would say. Mr. Agan was not asked if this procedure was acceptable, or told its effect--he was only asked if the statements were true, without any warning that the stipulation was relevant to statutory aggravating circumstances.

Mr. Agan was never informed pre-trial or at trial that his statements in and out of court could be used against him at a

sentencing hearing. He had no idea, and was not informed even what a statutory aggravating circumstance or a mitigating circumstance was.

After the plea was accepted, the sentencing hearing began, but it is not clear exactly when. Under Florida's capital sentencing scheme, upon a conviction of first degree murder, a sentencing hearing is conducted at which evidence is introduced with regard to statutory aggravating and statutory and non-statutory mitigating circumstances. The state must prove the aggravating circumstances beyond a reasonable doubt.

Mr. Agan's sentencing hearing proceeded in the following piecemeal fashion:

a.) He was asked if he wanted a presentence investigation, and he said no;

b.) He was asked if he wished to waive an advisory jury recommendation on sentence:

> THE COURT: Mr. Agan, you understand that, under the law, you are entitled not only to a jury to try you as to whether you are guilty --
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: -- but also a jury to recommend whether you should receive death or life?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: By signing that waiver, you are waiving your right to a jury to recommend the sentence.
>
> THE DEFENDANT: Yes, sir.

THE COURT: Did you do that knowingly and voluntarily?

THE DEFENDANT: Yes, sir.

This was the total inquiry on jury recommendation. Mr. Agan was not informed that a jury recommendation is entitled to great weight under Florida law, and he had no notion of what he was waiving. Tedder v. State, 322 So. 2d 908 (Fla. 1975).

c.) The state had indicated it had a comment to make on mitigation, and after the jury-"waiver," the Court asked the state about the "mitigating." The state then said, without introducing evidence, that Mr. Agan could not identify the murder weapon. Apparently at this point the sentencing proceeding required by statute had begun.

d.) Defense counsel was then asked whether he had any exculpatory information to provide, and counsel responded that he had none.

e.) Thereupon, defense counsel inquired "Is it the Court's intention to impose sentence at this time," and the Court responded, "Unless there is a motion to continue, yes sir."

f.) Defense counsel then began a closing argument regarding whether the killing was heinous or cruel.

g.) The state told the Court that it had fifteen minutes of argument to make, if the Court intended to impose sentence. The Court responded: "I do not wish to rush to judgment but I am prepared to dispose of this case now."

h.) The state responded it would "be prepared to present those things in aggravation at the present time."

i.) Statements by the prosecutor, not evidence, were then presented, as the prosecutor argued that things had been proved, rather than trying to prove them. The only "proof" was the plea stipulation.

j.) The prosecutor read extensively from the grand jury testimony, as if that transcript was "in evidence," although it never was introduced as evidence in the case. The Court merely stated that the transcript "will be and is a part of the Court record," (Tr. 23) not that it was "evidence" in the case.

k.) The state had actually underlined selected pages from the grand jury testimony, and presented only those underlined portions to the Court at sentencing, thereby altering the transcript and removing context, on a document which should have been afforded no evidentiary value ab initio.

l.) The state argued, without ever proving, and without introducing any evidence, that Defendant had been previously convicted for violent felonies.

m.) Without Mr. Agan ever being asked about stipulated evidence, and without Defendant ever being told that stipulated evidence would cause the death sentence to be imposed, the State Attorney used the previously mentioned "rap sheet" to "prove" statutory aggravation:

> [W]hether or not the defendant was presently serving any sentence under a capital felony.

> The record would reflect that this defendant is now serving the crime of guilty or, rather, for the crime of murder in the first degree, having killed another individual by shooting him and is now serving a lawful judgment and sentence for that. So, the first aggravating criteria of 921.141 is:
>
> Does this defendant had to serve for a prior capital felony:
>
> The answer is yes, he has.
>
> The second one would be whether or not the defendant has a criminal record, which would be supportive for crimes of violence.
>
> I would reflect the Court to the FBI Rap Sheet, that was provided, for answer to any of those particular factors.
>
> So that Factor 5(a) that the capital felony was committed by a person under sentence of imprisonment, that has been established.
>
> The second factor, Your Honor, that the defendant was previously convicted of another capital felony or felony involving the use or threat of violence to the person has also been established.
>
> The factual basis for that offense would be that this defendant, James Agan, in Hillsborough County had been employed as, I believe, a Wackenhut Security guard or a guard of similar security company;
>
> That there was an individual that he shot and that that individual then died;
>
> That Mr. Agan, immediately after the shooting of the individual, as he has somehow reflected in his statement already to the Court, called the police and then entered a plea of guilty to that charge. He did not receive the death sentence in that particular case but he received a sentence of life imprisonment, serving a mandatory 25 years."

(Tr. 33-34)

n.) Mr. Agan was not informed that he was conceding aggravating circumstances, he never agreed to stipulate facts in aggravation, and he certainly never was asked if it was acceptable for the State to state the facts of an earlier crime.

o.) The "stipulation" was in fact factually false: defendant did receive the death penalty on the 1974 conviction--it was later vacated.

p.) The State's referral to "medical evidence" demonstrates the heinousness of the offense, but never introduced it. The State said there was a significant amount of blood and blood loss, and argued about the appearance of the crime scene, without producing any evidence. The State argued that incident separate from prison proved the cold and calculated manner of the killing, without producing the reports or witnesses. The State informed the court that institutional people did not know who the other person was who Mr. Agan said he wanted to kill, and they were concerned. No evidence of this was presented. The State concluded the nonevidencing ramblings with ramblings and opinions about Mr. Agan's desire to kill again.

q.) Mr. Agan was never warned pre-trial that his statements would be used to prove aggravating circumstances. The prosecutor at trial introduced defendant's grand jury testimony to prove the "cold and calculated" aggravating circumstances. (Tr. 36-40). Defendant's understanding was that his testimony would obtain a life sentence, not that it would be used to impose a death sentence.

r.) Trial counsel did not advise Mr. Agan that stipulated testimony would be entered, or of the legal effect it would have.

s.) The defense counsel argued for awhile, and the judge

imposed the death penalty.

t.) The trial court found two aggravating circumstances at sentencing: cold and calculated killing, and that Mr. Agan was serving a term of imprisonment at the time of the offense. In the sentencing order, however, the court stated there were two statutory aggravating circumstances, but not the same two: 1) sentence of imprisonment, and 2) the defendant had previously been convicted of first-degree murder and of robbery. The state was required to prove these aggravating circumstances.

While Mr. Agan did tell the court that the "rap sheet" was his record, he was "testifying" during a colloquy intended to determine whether his plea was voluntary. No evidence reflecting other crimes was ever admitted other than the rap sheet, and the State's statement regarding the circumstances of a 1974 murder.

The State provided no evidence in aggravation, and Mr. Agan at no time agreed to stipulate that which the state said in aggravation. The result is that there were no facts established allowing the judge to impose the death penalty.

The judge relied on all of this stipulated and unwarned "evidence" in imposing sentence. The court attached Mr. Agan's rap sheet to the judgment and sentence, a rap sheet containing 32 charges, many without dispositions, some of which were misdemeanors, 24 of which clearly did not involve violence, and none of which were proven. The court, from argument, found that "the record shows this was a merciless

revenge killing; planned over a period of two years; coldly executed and cruel. The defendant shows no remorse but seeks rather a chance to kill again." (P.C. 621).

B. THE SENTENCING PROCEDURE WAS TOTALLY UNRELIABLE.

To begin with, Mr. Agan's plea was not knowingly and intelligently entered. He was incompetent, and he was never informed regarding what type of hearing, if any, would follow the "plea". He was not informed that his statements at plea would be used to establish aggravation. The plea itself violated the fifth, sixth, eighth and fourteenth amendments, and counsel was ineffective for allowing such unknowing fundamental trial waivers. The guilt determination was so fundamentally unreliable as to be an improper and unconstitutional predicate for the death penalty. See Beck v. Alabama, 447 U.S. 625 (1980).

But this was only the beginning of what proved to be a completely void proceeding. No sense of reliability can attach to a proceeding at which no evidence is introduced, only argument is heard, and aggravating circumstances float in and out of the sentencing order, arbitrarily substitutable and interchangeable at whim. To ensure eighth amendment accuracy, a somewhat finer tuned proceeding is mandatory. Counsels' failure to ensure a reliable proceeding violated the sixth, eighth, and fourteenth amendments. Twenty minutes of uninformed stipulations, argument about facts not in the record, misinformation about previous

convictions and sentences, and reading from pre-trial statements not given with any understanding that they would be used to support discrete statutory aggaravating circumstances, does not a reliable sentencing hearing make.

C. THE SENTENCE OF DEATH WAS PREDICATED ON STIPULATIONS MR. AGAN DID NOT MAKE, AND THE EFFECT OF WHICH HE DID NOT KNOW.

The United States Supreme Court has held that a capital sentencing proceeding is a "critical stage" of trial, Gardner v. Florida, 430 U.S. 349, 358 (1977), and has concluded that at the penalty phase a defendant is entitled to the sixth amendment right to the effective assistance of counsel, Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984), to confront evidence and cross-examine witnesses, Gardner, see also Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), and to be free from self-incrimination. Estelle v. Smith, 451 U.S. 454 (1981).

There is no question that a stipulatin to facts which are sufficient to impose a sentence of death is the equivalent of a guilty plea and its corresponding waiver of rights, and stipulations must correspondingly be intelligently made. In a similar circumstance, the Eight Circuit held such a stipulation without the record consent or knowing and voluntary waiver of the defendant was rendered void, in Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979), In Cox, defense counsel stipulated to two prior convictions which were then relied upon to enhance his sentence

under the State'as habitual offender statute. The Court held:

> The stipulation by Cox's counsel, like the admission in Wright, amounted to a waiver of Cox's right to have the state prove the prior offenses and of his right to rebut the state's evidence. As with a plea of guilty, "nothing remains but to give judgment and determine the punishment." Boykin v. Alabama, 395 U.S. 238 (1969). Thus, the stipulation was the functional equivalent of a guilty plea, and the state trial court was required to question Cox to determine whether he knowingly and voluntarily agreed to the stipulation. Id at 244, 89 S.Ct. 1709. The admission into evidence of the stipulation, without inquiry into Cox's knowledge and consent, amounted to constitutional error.

Cox, 589 F.2d at 396.

Mr. Agan did not know he was stipulating himself right into the electric chair. No one explained what a stipulation was, and what effect it had here: death. This is plain eighth amendment error.

Counsel's failure to consult with his client, explain the stipulations to him, or obtain his consent to the stipulations, is a classic case of ineffectiveness. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most precious, for it affects his ability to assert any other right he might have." United States v. Cronic, 104 S.Ct. 2039, 2044 (1984). In some circumstances, ineffectiveness is presumed, such as where counsel actively represents conflicting interests, Cuyler v. Sullivan, 446 U.S. 335 (1980), or where the state interferes with the assistance of counsel, United States v.

Cronic, 104 S. Ct. 2039, 2047 n.25 (1985); Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984). In Strickland, 80 L. Ed. 2d 674 at 696, the Supreme Court held that "in certain sixth amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel . . . is legally presumed to result in prejudice." This is such a circumstance. In this case, counsel did not consult with Mr. Agan about the stipulation of facts which resulted in his death sentence, or determine whether Mr. Agan knew the effect of the stipulation. While certainly counsel is permitted to make reasonable tactical decisions in the course of the trial and in hisrepresentation of a defendant, it is clear that the entering of stipulations of fact is one of those areas in which the participation of a defendantGn is constitutionally required. See United States v. Pinkney, 551 F.2d 1241, 1251 n.60 (D.C. Cir. 1976). The failure of counsel to obtain his client's consent to enter the stipulation and the resulting waiver of the several constitutional rights implicated by that stipulation amounts to ineffective assistance of counsel in which prejudice is presumed.

Even under the traditional analysis of ineffective assistance of counsel, the representation provided at the sentencing proceeding amounted to ineffective assistance. Under the requirements of Strickland and Knight v. State, 394 So. 2d 997 (Fla. 1981), Mr. Agan has identified specific acts or omissions of counsel which resulted in the significant prejudice

of depriving him of every constitutional right he should have had in his sentencing proceeding. These allegations are sufficient to require an evidentiary hearing for their resolutions. O'Callaghan v. State, 451 So.2d 1354 (Fla. 1984); Vaught v. State, 442 So. 2d 217 (Fla. 1983). The trial court did not address this issue in the order denying an evidentiary hearing.

D. MR. AGAN DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS WHEN MAKING THE STATEMENTS THAT WERE USED AGAINST HIM AT SENTENCING.

Grand jury testimony coaxed by a state attorney and plea colloquy responses elicited by a trial judge formed the primary basis for the death sentence herein. It is undisputed that neither the state attorney nor the trial judge, much less the defense attorney, informed Mr. Agan about statutory aggravating circumstances, that the proof of one creates a presumption of death, and that they were being established solely through his statements. This violated the fifth, sixth, eighth, and fourteenth amendments, and counsel failed to protect Mr. Agan.

The fifth amendment privilege is "as broad as the mischief against which it seeks to guard." Counselman v. Hitchcock, 142 U.S. 547 (1982). Unknown to Mr. Agan, the results of the state's and the court's inquiries "were used ... for a much broader objective" than was explained. Estelle v. Smith, 451 U.S. 454, 465 (1981).

ARGUMENT IV

THE STATE IMPROPERLY MISINFORMED AND MISLED THE TRIAL COURT AND DEFENSE COUNSEL REGARDING THE PLENARY EXCULPATORY EVIDENCE IN THE STATE'S POSSESSION, AND THE RESULTING PLEA AND SENTENCE VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

A trial judge may not accept a guilty plea unless "the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea of guilty." Florida Rule of Criminal Procedure 3.170(j). Providing the court with the factual basis assists the court in determining whether the plea is voluntary and intelligent, and in determining whether the defendant is competent. Obviously, a plea of guilty when there is no evidence of guilt cannot be accepted; a plea where the only evidence is a confession, and all other evidence is exculpatory, is equally suspect.

The State believed that James Agan was not guilty. The chief investigator believed he was innocent, that his story did not hold water, and that he was pleaing out of fear of other inmates. Four other white suspects, who were in custody, were the prime suspects. One of the four had been seen jumping off the second floor from the victim's cell area, running down the walk and turning around and running into his cell. Investigators knew that at the time of the assault, another inmate, with a

knife in his hand, left his cell on the floor above the victim, and proceeded to the victim's floor. No-one placed Mr. Agan at the scene, and he was not even a suspect, until he spoke with the officers.

Even then, the State thought Mr. Agan was innocent. Investigator Ball said Mr. Agan was lying, that his story did not hold water, and that "although he had been charged, Ball does not think the case will go against him." (P.C. 27). The trial court did not know this at the time of plea and sentencing. The State buried it.

The State quickly realized that there was no evidence, and that the pretrial statements were probably inadmissible. The State thus got Mr. Agan, in the absence of his counsel, to testify before the grand jury. He performed in a bizarre, counterproductive manner there. This was the evidence offered at trial.

The State did tell the trial judge that the murder weapon could not be identified by Mr. Agan. The State continued:

> That is the only information that I can consider, in this case, to be exculpatory in some sense or fashion. I do, however, stand on what has already been indicted in the factual basis which, in my opinion, would be those facts which would support the trial of this case as well as supporting the indictment in the prosecution of this defendant.

P.C. 447.

There was much, much more. The confessions were not true

and did not hold water according to the State attorney, investigators, but the judge was not told. The State simply quickly moved to sole a prison killing in the midst of rampant prison violence at F.S.P., and basic rights were brushed aside.

The evidence of innocence should have been presented. The haunting spectre of the State railroading an incompetent into the electric chair through his own words is untenable. Upon proper disclosure to the Court, the plea could not have been accepted. At the very least, in light of probable innocence, the court would have been required to more carefully assess competence, voluntariness and knowledge of consequences. The exculpatory information was unconstitutionally withheld, to Mr. Agan's substantial prejudice, in violation of the eighth and fourteenth amendments. United States v. Bagley, 53 U.S.L.W. 5084 (1985); Brady v. Maryland, 373 U.S. 83 (1963).

Defense counsel could have productively used this exculpatory evidence, in preparing himself and preparing Mr. Agan for trial. Its impact on trial and sentencing would have been significant, and the proceedings, were robbed of any pretense of reliability by the suppression.

CONCLUSION

For the foregoing reasons, Mr. Agan respectfully requests that this Honorable Court vacate the conviction and sentence of death or, in the alternative, remand the cause for an evidentiary hearing and findings of facts.

Respectfully Submitted,

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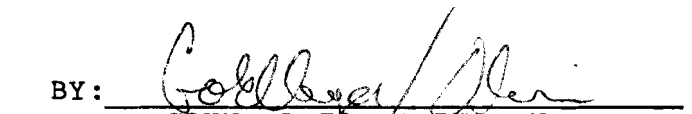
BY: 
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 31st day of March, 1986, to Wallace Albritton, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32301.

Attorney