

IN THE
SUPREME COURT OF FLORIDA

No. 67,831

JAMES AGAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

FILED
SID J. WHITE

AUG 13 1986

CLERK, SUPREME COURT
By *[Signature]*
Deputy Clerk

REPLY BRIEF OF APPELLANT

JACK GOLDBERGER
1655 Palm Beach Lakes Boulevard
Suite 802
West Palm Beach, FL 33402
(305) 686-2996

LARRY HELM SPALDING
Capital Collateral Representative

Office of the Capital
Collateral Representative
225 West Jefferson Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR APPELLANT

IN THE
SUPREME COURT OF FLORIDA

JAMES AGAN,

Appellant,

vs.

NO. 67-831

STATE OF FLORIDA,

Appellee.

INTRODUCTION

By a separately filed motion, Appellant, JAMES AGAN, has today requested that the Court strike and disregard those portions of the State's Answer Brief filed May 8, 1986, which are not substantiated by the record on this appeal from the summary denial of Mr. Agan's motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. Mr. Agan has requested that the Court strike and disregard both the following specific non-record statements set forth in the motion as well as all arguments, conclusions and other statements in the State's brief which flow from or are premised upon these unsubstantiated statements (references are to the page number of the State's brief where the statement is found):

Page

- 1 Mr. Agan was convicted of murder and sentenced to death in a 1974 case, but successfully challenged his death sentence years later. [no record citation given]

- 1 The guilty plea entered (and challenged) by Mr. Agan was never vacated or set aside. [no record citation given]
- 1 When Mr. Agan committed the murder at bar, he undertook the same strategy which worked for him in the 1974 case (R 381-89) [the record citation given to a portion of Mr. Agan's grand jury testimony in this case where, although he states that he has "been down this road before," there is no reference to a 1974 proceeding or any mention of the nature or course of those proceedings]
- 1 Mr. Agan testified before the grand jury, stating: . . . (2) the gory details of the murder, including the fact (which only the murderer would know) that his knife became jammed (lodged) in Mr. DeWitt's vertebrae -- a fact confirmed by autopsy (R. 396-402). [the citation given is to Mr. Agan's grand jury testimony; there is no record support for the references to the murderer's exclusive knowledge or the autopsy]
- 2 Mr. Agan testified before the grand jury, stating: . . . That he felt that the best way to avoid the electric chair was to confess guilt ((R. 390, 412) and rely upon the tactics used in his other murder case (R. 390, 412). [The citation given is to a portion of Mr. Agan's grand jury testimony in which he states his belief that he is less likely to get death if he enters a plea rather than going to trial, then later explains why he might think so -- that "on the last murder conviction, the one I got the chair off of, I pled guilty;" there is no specific mention of the 1974 proceedings or any "tactics" employed.]
- 3 Mr. Agan stated he had "beaten" the chair before and would do so again (R. 448-49). [The citation given is to the transcript of Mr. Agan's "sentencing proceeding;" there is no such statement by Mr. Agan]
- 3 Finally, on the week he was to be executed, Agan (as he had in his other

murder case) challenged the propriety of his plea and sentence (R. 21 et seq.) by motion filed pursuant to Fla. R. Crim. P. 3.850. [the citation given is to Mr. Agan's 3.850 motion in this case; otherwise no citation given; no evidence in record that Mr. Agan reached "as he had in his other murder case"]

7 This case marks the second time Mr. Agan has pled guilty in a capital case, waited until the State could no longer try him, and then challenged the "incompetence" of his plea. Last time his plea was affirmed but he escaped the death penalty. In this case, after announcing he would use the same strategy, he promised the state "I am still going to beat you." [no citation given; [previous plea never in fact challenged]

10 Mr. Agan, of course, has pled guilty to capital murder before and his plea has withstood legal challenges. [no citation given; previous plan never challenged]

The portions of the State's Answer Brief which Mr. Agan has requested be stricken and disregarded are primarily misstatements regarding Mr. Agan's purported challenge of the plea entered and death sentence initially imposed in 1974 when Mr. Agan was convicted of murder in Tampa, Florida, for the killing of his wife's lover. That death sentence was changed to life by the trial judge and Mr. Agan was serving that life sentence at Florida State Prison in 1980 when he was sentenced to death for the instant offense. In its Answer Brief, the State repeatedly and persistently relies on non-record statements regarding the 1974 proceedings and Mr. Agan's supposed post-conviction challenges of that guilty plea and sentence. In fact, neither the guilty plea entered nor the death sentence initially imposed

was ever challenged by or on behalf of Mr. Agan. These incorrect non-record statements form the basis of the State's theory that Mr. Agan's bizarre and self-destructive behavior prior to trial and at the entry of plea and imposition of the death sentence herein was in fact a sophisticated trial strategy drawn from Mr. Agan's prior experiences.

The Motion to Strike filed today by Mr. Agan is incorporated herein in its entirety by specific reference, and, as stated in that Motion, notwithstanding his response herein to Appellee's Answer Brief, Mr. Agan respectfully requests that all non-record statements contained in Appellee's Answer Brief be stricken, and that those statements as well as all arguments based on such statements be disregarded by the Court in its consideration of this appeal. In a contemporaneously filed Request for Oral Argument, Mr. Agan notes that rebriefing may be required upon the Court's Order on the Motion to Strike.

The question before this Court is simply whether Mr. Agan is entitled to an evidentiary hearing on the claims raised in his Rule 3.850 Motion for Post-Conviction Relief, or whether the records and files in this matter conclusively demonstrate that Mr. Agan is entitled to no relief. Mr. Agan has shown in his initial brief that the record of his behavior prior to and at the entry of the guilty plea and sentencing in this case, as well as the record of his counsel's complete abdication of responsibility, and the nature of the proceedings themselves, raise issues of fact requiring an evidentiary hearing. Moreover, in support of his motion for post-conviction relief, Mr. Agan

proffered substantial evidence in support of his claims which Mr. Agan would prove if provided an evidentiary hearing.

Significantly, in its Answer Brief the State does not dispute the bizarre nature of Mr. Agan's behavior in these proceedings, the highly unusual nature of the proceedings, nor the limited scope of the assistance given Mr. Agan by counsel. Rather, the State employs non-record "facts" regarding Mr. Agan's 1974 conviction and the purported challenges by Mr. Agan to the 1974 guilty plea and sentence, in an effort by the State to characterize and interpret the records and files in this case to support a State "theory" of the meaning of those records and facts. The State's "theory" is that Mr. Agan acted in accordance with an involved and intricate tactical design based on his alleged (but non-record) 1974 experiences -- a "theory" which itself demonstrates that there are clear issues of fact as to the conclusions to be drawn regarding the meaning of Mr. Agan's bizarre, self-destructive behavior and the complete abdication of responsibility by his counsel. The State would ask this Court to simply adopt the State's construction of these matters, without affording Mr. Agan an evidentiary hearing on these factual issues, and treating Mr. Agan's post-conviction claims in the same summary manner in which he was convicted and sentenced to die. Far from proving that the records and files in this case conclusively demonstrate that Mr. Agan is entitled to no relief, the State has "joined" the factual issues presented and demonstrated instead that there are disputed issues of fact as to Mr. Agan's competence to stand trial and the validity of his

pervasive constitutional waivers as to the effectiveness of Mr. Agan's counsel, and as to the constitutional sufficiency of the proceedings by which Mr. Agan was sentenced to die.

Appellant will not reiterate here the facts and argument presented in his Initial Brief filed with this Court, but in addition to the non-record matters dealt with in Appellant's Motion to Strike, certain other factual and legal issues raised in the State's Answer Brief call for a response.

STATEMENT OF THE CASE AND FACTS

In its Answer Brief the State takes issue with a number of factual matters found in the records of the proceedings against Mr. Agan and in the proffered evidence presented by Mr. Agan in support of his Motion for Post-Conviction Relief. As Appellant has noted, the mere existence of these factual disputes of course demonstrates that there are issues going to the merits of Mr. Agan's claims for relief which can only be resolved by means of an evidentiary hearing. However, Appellant will take this opportunity to respond to at least some of the State's assertions in an effort to avoid distortion and confusion as to these matters.

First, although the State specifically addresses and attempts to refute various portions of the evidence proffered by Mr. Agan in support of his motion for post-conviction relief, the State seems to take the position that these materials are "de hors," "non-record" matters which cannot be relied upon by Mr. Agan on this appeal (Answer Brief of Appellee, pp. 7, 8, 12).

Surely, the State is not asserting that this court may not consider materials reviewed by the trial court on appellant's motion for relief and explicitly made a part of the record on appeal in this matter. (Post-Conviction Record on Appeal (hereafter P.C.) 736-37). Regardless of the State's characterization of Mr. Agan's proffered evidence, it is properly before the Court on this appeal of summary denial of Mr. Agan's motion for post-conviction relief.

Appellant has already discussed the State's pervasive reliance on the matter covered by his Motion to Strike -- misstatements as to the 1974 murder conviction of Mr. Agan and supposed subsequent challenges of that guilty plea and death sentence. It is important to note, however, that the State's unfounded premise that Mr. Agan had previously attempted to challenge a guilty plea and had successfully challenged a death sentence results in the persistent use of statements of "fact" which are merely the State's characterization of Mr. Agan's actions. For example, the State asserts at page 3 of its answer brief that "Mr. Agan told the Court that he would murder Mr. DeWitt's partner upon returning to prison, apparently placing the outrageous comment on the record for future use." This is a characterization which the State asks the Court to adopt without the benefit of judicial findings of fact following an evidentiary hearing. There simply is no record showing of the "strategy" or "tactics" attributed to Mr. Agan by the State -- much less the sort of conclusive showing required in order to obviate the requirement for an evidentiary hearing.

Similarly, the State's Answer Brief confirms the existence of factual questions raised by Mr. Agan's proffered evidence on competency to stand trial. At page 3 of its brief, the State concedes that the records proffered by Mr. Agan contain evidence as to "some mental illness," but the State takes issue with the weight to be given this evidence. The State itself "selectively quotes" the evidence of Mr. Agan's prior history of mental incapacity, quoting the letter from Major Molitch as stating that in his opinion Mr. Agan had "no condition which warrants a medical discharge," but failing to note Major Molitch's opinion that Mr. Agan is "very dull mentally" or his conclusion that Mr. Agan should be discharged from the military in light of his "mental deficiency, low moron level." (P.C. 582).

Similarly, in quoting extensively from the mental examination conducted by Dr. Carl Smith while Mr. Agan was a patient at Milledgeville State Mental Hospital in Georgia, the State does not address Dr. Smith's stated belief that Mr. Agan was discharged from the military due to mental problems -- "a diagnosis of perhaps psychopathic personality or some sort of psychoneurosis." (P.C. 589). The State asserts that Dr. Smith rejected the prison diagnosis that Mr. Agan was Psychotic (emphasis in the original), yet the State provides no citation for that assertion. In fact, Dr. Smith does not address that or any other diagnosis. Dr. Smith states his own "feeling" that Mr. Agan is "a low grade psychopathic personality bordering on a high grade mental deficiency" and expresses his opinion that Mr. Agan needs further examination. (P.C. 594). The State then again

asserts as fact its own interpretation of Dr. Smith's observation that Mr. Agan is concerned to remain in treatment rather than returning to a Georgia state prison -- by characterizing it as a conclusion by the doctor that Mr. Agan is "faking" a mental condition to serve his own ends. (Appellee's brief at p. 4). Appellant asserts that this is a finding reserved for the courts after a proper evidentiary hearing and is not a fact contained in the present record.

At page 4 of its answer brief, the State contends that Mr. Agan's "history" includes a finding that he was competent to enter a plea of guilty in 1974. Notably, there is no citation to the record on this appeal to support this statement. As discussed by appellant in his Initial Brief at pages 40 to 42, the absence of anything in the record regarding a prior competency hearing is significant due to the fact that the trial court's summary denial of Mr. Agan's motion rested in part on findings regarding that determination of competency to stand trial. Appellant notes that despite reference in its answer brief, the State has not attempted to amend or supplement the record on appeal to include record support for statements regarding the purported 1974 competency hearing. However, as stated by Appellant in his initial brief, if anything, prior questions regarding competency concerns buttress this competency claim and support the need for an evidentiary hearing.

Finally, appellant would address the factual dispute surrounding the existing exculpatory evidence which was in the hands of the State at the time Mr. Agan was sentenced to die for

the murder of Mr. DeWitt. The State has asserted that Investigator Ball's testimony on this matter can be characterized as an "unequivocal" statement that he believed Mr. Agan was and is guilty. (Appellee's Brief, p. 6). What Sgt. Ball stated, in fact, was that he had "no conviction about the case whatsoever" (P.C. 618); that "the question of whether Agan did it or not is answered by himself, he said he did" (P.C. 616); "I just say that there was questions in his ... his statement or confession of how he committed the crime; what weapon he used in the crime and et cetera; that as an investigator I felt should be answered." (P.C. 616). In fact, contrary to the State's assertion that Mr. Agan testified to aspects of the murder that "only the murderer would know," Sgt. Ball made the following statement in response to a question on that point:

Q: How do you feel about inmate AGAN ability to a .. describe the wound and all and the fact that he had to pull the knife after it became stuck which was verified by the Coroner's Office I believe?

A: OK. Well, um .. like I said, in AGAN's confession a .. since he reiterated it so much, that each time it came closer and closer to what my viewpoint as an investigator with the incident would occur. Um .. at the beginning he told Mr. Turner, I believe that he used a paring knife type instrument. We then found a, at the crime scene, we found a knife, flat metal knife which had a wooden handle on it, which had blood on it, matching the victim's. A .. he did not describe that weapon; he then later, on the 23rd, when he decided he would tell me the elements of the case, or how he went about doing the crime, um .. he then identified a flat piece of metal in the shape of a homemade knife which had been found earlier that morning as being the one that he committed the murder with. So, as I said before, there's questions in the case itself

that should be answered. . . .

(P.C. 617).

ARGUMENT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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

As Mr. Agan demonstrated in his initial brief, both the record of the 1980 proceedings against Mr. Agan and the facts proffered in support of his motion for post-conviction relief provide substantial support 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. This proffer required an evidentiary hearing, and the trial court improperly resolved these issues without conducting one.

In answer to this compelling information, the State advances its "theory" that Mr. Agan's bizarre, self-destructive behavior was his second calculated attempt at sophisticated trial strategy, the first being his successful challenge of the death sentence imposed on him in 1974. As Appellant has demonstrated, this "theory" is premised on a non-record misstatement of fact -- Mr. Agan never challenged either the 1974 guilty plea or the sentence imposed. Appellant has therefore requested, by separate motion filed today, that the State's argument be stricken in its entirety and disregarded by the Court.

Appellant would point out, however, that in any event the

State's argument on this point simply underscores the necessity of an evidentiary hearing. The State does not refute the peculiarity of Mr. Agan's behavior prior to and during the entry of plea and sentencing. The State concedes that Mr. Agan's statements that he wanted to kill again were "outrageous," and the State asserts that Mr. Agan was attempting to "act oddly enough" at the plea hearing to escape liability altogether. (Appellee's Brief, p. 10). The State simply makes its own factual determination regarding the meaning of Mr. Agan's behavior and then draws conclusions regarding the evidence proffered by Mr. Agan in support of his motion for post-conviction relief which credits Mr. Agan with a history of manipulative behavior (Appellee's Brief, pp. 9-11), despite repeated contrary consistent and independent assessments of psychosis, mental deficiency, and neurosis. (See Appellant's Initial Brief, pp. 24-35). Thus, the State recognizes that a capital defendant's statement that he plans to kill again is "outrageous," but would have the Court summarily find that the files and records in this case conclusively demonstrate "a clear, sane and lucid defendant conducting his own defense according to a tested and proven plan that had worked for Agan in the past." (Appellee's Brief, p. 9). Appellant has shown that this position is based on the mistaken premise that Mr. Agan had formerly conducted a successful challenge of a capital sentence. Appellant further asserts that factual determinations going to the merits of Mr. Agan's claim for post-conviction relief be left to the courts after a full and fair evidentiary hearing.

As to the appropriate legal standard for the determination of whether an evidentiary hearing is required, contrary to the implication of the State's arguments, Mr. Agan need not "prove" or "establish" incompetence to stand trial in order to be entitled to an evidentiary hearing on this issue. Mr. Agan's motion for post-conviction relief may be summarily denied only if the records and pleadings conclusively demonstrate he is not entitled to relief. Notably, in both Foster v. State, 400 So. 2d 1 (Fla. 1981), and Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983), cited by the State as support for the summary denial of this claim, the capital defendants had each been examined for competency by three mental experts prior to trial. There was no investigation, inquiry, or examination of Mr. Agan to determine his competency to face the proceedings and make the decisions that resulted in his death sentence, despite his "outrageous" behavior and the existence of readily available, ample historical evidence of severe mental illness. Under controlling law, it is clear that Mr. Agan is entitled to an evidentiary hearing. See e.g., Groover v. State, No. 68,845 (Fla. June 3, 1986); Jineu v. State, 478 So. 2d 346 (Fla. 1985); Hill v. State, 473 So. 2d 1253 (Fla. 1985).

ARGUMENTS II, III, AND IV

THE STATE HAS FAILED TO DEMONSTRATE THAT THE
APPELLANT IS NOT ENTITLED TO AN EVIDENTIARY
HEARING

The State's answer to Mr. Agan's remaining claims for post-conviction relief is essentially the same as its answer to the

competency claim. The State portrays Mr. Agan as the knowing and intelligent architect of his conviction and sentence to death. Thus, the State would have this Court summarily deny Mr. Agan's claim that his counsel's total abdication of any responsibility to conduct any investigation or research in preparation for Mr. Agan's capital trial constituted ineffective assistance of counsel on the basis that Mr. Stinson and Mr. Futch were bound by Mr. Agan's self-destructive behavior. As Appellant has amply demonstrated in his Initial Brief, counsel is so bound only if the appellant was competent, and even then only as to certain issues, and in no event is counsel absolved of an independent duty to investigate. (See Appellant's Initial Brief, pp. 43-65).

Similarly, the State would have this Court find that the gross constitutional deficiencies of the guilt and sentencing proceedings against Mr. Agan were waived by the failure of Mr. Agan or counsel to object to the conduct of the hearings. This claim has been raised by Mr. Agan on post-conviction as, inter alia, a Sixth Amendment violation, due to the ineffectiveness of trial counsel in failing to raise these meritorious claims contemporaneously, (P.C. 24, 45), and the State's reliance on its "theory" of Mr. Agan's "tactical" decisions does not refute the claim. (See Appellant's Initial Brief, pp. 66-79).

Finally, the State would have this Court summarily deny Mr. Agan's claim on the basis that Mr. Agan told his lawyers not to investigate the case. A defendant may not through such self-defeating instructions to counsel absolve both counsel and the State of their obligation to investigate existing evidence of

innocence. The State urged Mr. Agan to "put up" or "shut up" on this issue. Mr. Agan would simply direct the Court to Mr. Ball's recorded doubts about guilt.

Upon the Court's action on the Memorandum of Law and Motion to Strike Portions of Appellee's brief, Appellant requests the following relief: 1) if the motion is granted, after oral argument, Appellant requests the opportunity to reply to any newly submitted Answer Brief, or 2) if the motion is denied, Appellant request the opportunity to file a new Reply Brief.

RESPECTFULLY SUBMITTED,

LARRY HELM SPALDING
Capital Collateral Representative

OFFICE OF CAPITAL COLLATERAL
REPRESENTATIVE
Independent Life Building
225 West Jefferson Street
Tallahassee, FL 32301
(904) 487-4376

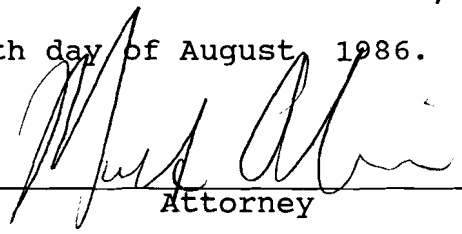
BY: 

Attorney

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been delivered by (mail) (~~hand~~) to Wallace Albritton, Assistant Attorney General, Department of Legal Affairs, The Elliot Building, 401 South Monroe Street, Tallahassee, FL 32301, this 13th day of August, 1986.


Attorney