IN THE SUPREME COURT OF FLORIDA

NO. 70589

JAMES AGAN,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondents.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

DEP
EAC on appeal

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I. INTRODUCTION

This case presents a claim under Hitchcock v. Dugger, No. 85-6756 (U.S. S. Ct. April 22, 1987), which has been previously presented to and ruled upon by this Court upon direct appeal. Agan v. State, 445 So. 2d 326, 328-29 (Fla. 1984). The recent Hitchcock decision sheds significant light on the constitutionality of this Court's prior resolution of the claim, and affords a proper basis for this Court in this action to stay Mr. Agan's execution and grant the writ. See Riley v. Wainwright, No. 69,563 (Fla. 1986).

Petitioner also presents a claim of ineffective assistance of appellant counsel. In capital guilty plea cases, as here, this Court will entertain issues on appeal notwithstanding the guilty plea. Muehleman v. State, 12 F.L.W. 39 (Fla. January 8, 1987). Petitioner contends in Claim II that appellate counsel unreasonably failed to raise certain issues on appeal that were apparent from the record and that involved prejudicial error, and that this Court would have considered the claims had the claims been raised.

II. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the judgment of this Court on appeal and hence jurisdiction lies in this Court. See, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981). Petitioner requests that this Court revisit claims previously ruled upon in light of errors of constitutional magnitude in the Court's prior treatment of the claims: "[I]n the case of error that prejudicially denies fundamental constitutional rights . . . this Court will revisit a matter previously settled. . . ."

Kennedy v. Wainwright, No. 68,264 (Fla. February 12, 1986). See also Riley v. Wainwright, No. 69,563 (Fla. 1986)(stay ordered and subsequent briefing conducted regarding Hitchcock/Lockett error). In addition, Mr. Agan presents issues of ineffective assistance of appellate counsel. Since the claim of ineffective assistance of counsel stems from acts and omissions before this Court, this Court has jurisdiction. Knight v. State, 394 So. 2d 997, 999 (Fla. 1981). As discussed, the extraordinary writ of habeas corpus may not be used as a routine vehicle for a second or substitute appeal. Nevertheless, this and other Florida courts have consistently recognized that the writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), aff'd, 290 So. 2d 30 (Fla. 1974). The proper means of securing a belated hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968). Petitioner will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the writ.

Furthermore, this Court has consistently maintained an especially vigilant control over capital cases. The Court does not hesitate to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings before this Court. Wilson. This Court must and does have the power to do justice. Fundamental error is presented, and this Court should correct the error pursuant to

its inherent habeas corpus jurisdiction.

III. FACTS UPON WHICH PETITIONER RELIES

Mr. Agan confessed to, testified to the grand jury about, pled guilty to, purportedly waived a jury trial for, and purportedly waived an advisory sentencing jury recommendation concerning killing another inmate at Florida State Prison. This all produced a sixty-six (66) page record on appeal in a capital case, and this Court affirmed the conviction and death sentence. Agan v. State, 445 So. 2d 326 (Fla. 1983) (Agan I). In state post-conviction, Mr. Agan challenged the proceedings that led to his conviction and sentence, but the summary denial of his motion pursuant to Rule 3.850 was affirmed by this Court. Agan v. Wainwright, 503 So. 2d 1254 (Fla. 1987). Agan II. Before this Court's decision became final, the Governor of Florida scheduled Mr. Agan for execution. Mr. Agan timely requested that the mandate in Agan II be stayed pending the filing of his petition for writ of certiorari in the United States Supreme Court. This Court denied the request, and the mandate issued. This petition is being filed now because of Rule 3.851. CCR has expressed to this Court its opinion regarding the unconstitutionality of the rule, and this petition specifically incorporates all those objections and claims. See In Re: Florida Rules of Criminal Procedure, Rule 3.851, Comments and Recommendations by the Office of the Capital Collateral Representative (March 30, 1987).

CLAIM I

MR. AGAN WAS DENIED A MEANINGFUL AND INDIVIDUALIZED CAPITAL SENTENCING PROCEEDING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In Agan II, petitioner challenged on a number of grounds the legality of the capital sentencing proceedings. The Court

responded that these complaints should have been raised on direct appeal. Because appellate counsel failed to raise the matters, and because the failure was unreasonable, non-tactical, and prejudicial, those issues are raised under Claim II, infra -- ineffective assistance of appellate counsel. This claim, however, was raised on direct appeal, and was incorrectly resolved by this Court.

Plain Lockett Error

The United States Supreme Court recently unanimously recognized that "which could not be clearer" -- when a sentencing judge says he or she has restricted himself or herself to consideration of the statutory mitigating circumstances, then indeed he or she did, and violated the eighth and fourteenth amendments to the United States Constitution. Hitchcock v. Dugger, No. 85-6756, slip op. at 5 (April 22, 1987). The full Court wrote:

> After receiving the advisory jury's recommendation (by majority vote) of death, and despite the argument of petitioner's counsel that the court should take into account the testimony concerning petitioner's family background and his capacity for rehabilitation, the sentencing judge found that "there [were] insufficient mitigating circumstances as enumerated in Florida Statute 921.141(6) to outweigh the aggravating circumstances." Tr. of Sentencing Proceedings 7 (emphasis added). He described the process by which he reached his sentencing judgment as follows: "In determining whether the defendant should be sentenced to death or life imprisonment, this Court is mandated to apply the facts to certain enumerated 'aggravating' and 'mitigating' circumstances." 10 Record 195 (emphasis added). The only mitigating circumstance he found was petitioner's youth. Id., at 197.
>
> We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South Carolina, 476 U.S. ____ (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion).

Slip opinion, pp. 5-6 (emphasis added).

The record in this case is equally clear.

1. The actual sentencing proceedings

As argued in Agan II, the sentencing proceedings herein involved the taking of no evidence whatsoever. Everything was either stipulated, or the trial court was asked to take judicial notice of facts. This Court held in Agan I and Agan II that this method of taking evidence of aggravation was proper, and the method of taking mitigating evidence was proper. Whatever the merits of that decision may be, it is clear that this Court has approved of, and validated, the manner in which the proceeding was conducted.

The record was replete with nonstatutory mitigating circumstances. Confession and waiver of all formalities, including any participation by a jury, is mitigating (R. 45-46). Testifying to culpability before the grand jury "without subpoena, without immunity, and without any intimidation" is mitigating (R. 38-39). Having only an eighth grade education is mitigating (R. 27). Beyond these nonstatutory mitigating circumstances, defense counsel argued that the court should take into account the most obvious of nonstatutory mitigating circumstances in an inmate prison killing situation -- the dangers and pressures of prison life:

> The Court knows of its own knowledge, and can take judicial notice of the fact, of what goes on inside of that prison. The Court probably is in a better position to appreciate the circumstances out there than anyone else in this courtroom, Your Honor, by virtue of other things that have gone on before in this courtroom and elsewhere.
>
> The Court can appreciate the stresses and strains that go on among the inmates of that institution.
>
> I suggest to the Court that the State share its responsibility in this situation for allowing this situation to come about, for giving Mr. Agan the opportunity that he had told them that he wanted to have two years ago.

> I suggest that the burden is not just Mr. Agan's but is likewise the State of Florida's.
>
> Now, he did not cause this man to suffer, regardless of whatever statements may be made or may have been made to the Grand Jury or to other persons. He obviously died and he died because of Mr. Agan's confinement, the stresses and strains under which he existed for who knows how long, that this man had stolen money from him, which agreeably, which I agree does not give the right to take a human life, but it is a matter for the Court to consider in determining whether to impose death or life imprisonment.
>
> Likewise, Mr. Agan was given access to the victim by the very people who were confining Mr. Agan and the deceased.
>
> I suggest that, in view of all of these circumstances, that the Court, in its infinite wisdom, should impose a sentence of life imprisonment with the mandatory minimum sentence and not impose the death sentence.

(R. 63-64).

The trial court immediately responded:

> THE COURT: Mr. Agan, having adjudged you to be guilty of the offense of murder in the first degree, and you having said nothing sufficient, noting that the statutory mitigating factors are not present, noting that two of the aggravating factors that the statute requires are present, to-wit: That the murder was done in a cold and calculating manner and that you were serving a term of imprisonment for murder at the time, it is the order, judgment, and sentence of this Court that you delivered to the proper official of the Department of Corrections, there to be safely contained and confined until the Governor of this state shall execute a warrant for your death, and then to be electrocuted by the passage of current through your body until you are dead.

(R. 64-65). This is what the State had urged: "Your Honor, in conclusion, I know of no statutory mitigating factors in this case" (R. 59).

To make it even clearer, the court's actual "written findings" were limited to the statute. The findings contain only fourteen lines regarding the propriety of the death penalty:

> The question of penalty was addressed. The Court finds the following statutory aggravating factors apply in this case:

> 1. The Defendant was under sentence of imprisonment -- for murder -- when this crime was committed.
>
> 2. The Defendant had previously been convicted of First Degree Murder and of Robbery (See FBI Record 4-795-417 attached).
>
> There are no other applicable statutory aggravating factors.
>
> There are no applicable statutory mitigating factors. 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.

(R. 9-10) (emphasis added).

2. Direct Appeal

Appellate counsel in Agan I did not quote the record, but did contend that "[t]he transcript and sentencing order of the lower court expressly state that only statutory mitigating circumstances have been considered." Appellant's brief, p. 15. Appellant also noted that four months after Mr. Agan's sentencing, the same sentencing judge in another capital case "used the same format for the sentencing order, but omitted 'statutory' in finding no mitigating factors. . . ." Id.

Appellate counsel urged only Mr. Agan's confession and guilty plea as "nonstatutory circumstance[s] which the lower court failed to consider. . . ." Id., p. 17. Of course, much more was presented and available for consideration, as argued in subsection 1, supra. This Court's response was:

> Finally, appellant argues that the trial court erred by failing to consider any nonstatutory mitigating circumstances. Appellant claims that his willingness to cooperate by confessing, appearing before the grand jury, and pleading guilty should have been considered as a mitigating circumstance. See Washington v. State, 362 So.2d 658 (Fla. 1975), cert. denied, 441 U.S. 937 (1979). As was stated above, however, it is apparent that the trial judge did consider and reject this willingness to cooperate as a mitigating circumstance by finding that Agan was not remorseful, but was rather seeking a chance to kill again. No evidence was offered or arguments made as to the applicability of any other non-statutory mitigating factors. Thus

> we conclude that the trial court did not consider all the non-statutory mitigating factors there were to be considered.

Agan I, 445 So. 2d at 329. In fact, other nonstatutory mitigation was presented (i.e., eighth grade education) and argued (i.e., prison conditions), but not considered. The Court had first written:

> Appellant's second argument is that the trial court improperly considered the lack of remorse as an aggravating circumstance. This Court recently held that lack of remorse may not be considered as an aggravating circumstance or in the enhancement of a proper statutory aggravating circumstance. Pope v. State, No. 62,064 (Fla. Oct. 27, 1983) [8 FLW 425]. However, as the above-quoted findings indicate, the trial court mentioned lack of remorse not in connection with aggravating factors but rather in connection with the finding that there were no mitigating circumstances. The judge referred to the absence of remorse in support of his rejection of defense counsel's argument for mitigation on the ground of mental or emotional disturbance and on the ground of appellant's prompt confession and plea of guilty. Thus the evidence was used not in aggravation but only to negate mitigation. There was no error in this limited consideration of the absence of remorse for his crime on the part of appellant.

Id., p. 328. Petitioner contends that this Court was mistaken, and that the language about lack of remorse and a calculated killing had nothing to do with finding the absence of nonstatutory mitigation (i.e., eighth grade education, and prison conditions). The written order itself says nothing about nonstatutory mitigation.

More importantly, at sentencing in court, the judge stated "that the statutory mitigating factors are not present" (R. 63) and made no mention of lack of remorse, or anything else (R. 63). The sentencing order does differ from what was said in court, but it is a difference without constitutional distinction, the trial court did not consider nonstatutory mitigating circumstances.

CLAIM II

MR. AGAN RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

In Agan II, petitioner raised a series of claims regarding his contention that his plea and sentencing proceedings were unconstitutionally conducted. This Court addressed those claims in the following language:

> Appellant's third argument is that his statements to investigative officers and to the grand jury should not have been used against him and that the plea acceptance proceeding and the sentencing proceeding did not comport with due process principles. Appellant also argues that the aggravating circumstances found in support of the death sentence were based on stipulated facts rather than evidence and appellant was not adequately informed of the meaning and effect of the stipulations. These are arguments which would have been raised by objection in the trial court and presentation to this Court on appeal. Thus they are not cognizable under rule 3.850. E.g., Raulerson v. State 462 So. 2d 1085 (Fla. 1985). Appellant did not object at trial or dispute any of the state attorney's arguments or statements or the court's findings. As this Court found in deciding the appeal, the trial court questioned appellant extensively about the voluntariness of his plea of guilty and his knowledge of its consequences. The suggestion made now that there should have been detailed consequences of the factual stipulations he made is completely without merit. It is not to be assumed that counsel did not advise his client on these matters. Indeed the record conclusively shows that appellant knew he was facing a possible death sentence. Appellant's own actions, relieving the state of the burden of proving aggravating circumstances by competent evidence, by admitting their existence, did not deprive the proceeding of all legality as is argued now. The arguments are improper and completely without merit.

Agan II, 503 So. 2d at 1256.

It is petitioner's contention that the claims so ruled upon are claims that appellate counsel should have raised on direct appeal, for this Court's consideration in Agan I. Certain of the claims were preserved at trial, at least through motion for new trial (e.g., R. 8, "the Court erred in swearing the Defendant and

then asking him prejudicial questions without first advising Defendant of his constitutional rights."), and so were ready proper appellate review. Other of the claims could have been presented by appellate counsel and addressed by this Court under this Court's recognized duty to review the entire record for constitutional error. Davis v. State, 461 So. 2d 67 (fla. 1984); Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981); Jacobs v. State, 396 So. 2d 713 (Fla. 1981), especially in guilty plea cases. Muehleman, supra. In any event, it is petitioner's claim that these issues are issues which should have been presented and/or addressed in Agan I, and that they are cognizable here either because appellate counsel was ineffective for not presenting them earlier, in violation of the sixth eighth, and fourteenth amendments, or because this Court erred by not discovering the errors during its independent direct appeal process.

However, in Agan II, this Court expressed the belief that the issues were without merit. Mr. Agan wishes to, and does, include the claims in this petition, for the reasons, and under the jurisdiction, heretofore stated. This Court recently admonished counsel not to duplicate claims in Rule 3.850 motions and state habeas actions. Blanco v. State, Nos. 68,263; 68,839 (May 7, 1987). While it is Mr. Agan's position that claims that are held to be foreclosed on Rule 3.850 because not raised on appeal can properly be raised as ineffective assistance of appellate counsel claims in a state habeas action, he certainly does not wish to "unnecessarily burden this Court with redundant material." Id., slip op. at 9.

Consequently, he simply states that those claims which are contained in Agan II which this Court held not cognizable for not having been raised on direct appeal are hereby raised. With regard to those claims, it is petitioner's contention that appellate counsel unreasonably failed to raise the claims, and

that there is a reasonable probability that the result would have been different. Petitioner also contends that the issues should have been addressed through this Court's independent review function.

IV. LEGAL BASES FOR RELIEF

CLAIM I

MR. AGAN WAS DENIED A RELIABLE INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Florida Supreme Court has of late written much, and much differently, about Mr. Agan's Lockett claim. For example:

> In Harvard v. State, 486 So.2d 537 (Fla. 1986), we remanded for a new sentencing hearing in a post-conviction relief proceeding because Harvard's trial court believed that the mitigating factors were restricted to those listed in the statute. Lucas' trial, as well as Harvard's, took place prior to the filing of this Court's opinion in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). Although Lucas' original judge cannot now say what he thought section 921.141 required, the record shows that he instructed the jury only on the statutory mitigating circumstances. Our review of the record shows a scant twelve pages devoted to the presentation of evidence by both the state and the defense at the sentencing proceeding. Moreover, in arguing to the jury defense counsel stated:
>
> > As the judge will explain to you, the law is very specific in spelling out what you may consider in making your decision. You may not go outside the aggravating and mitigating circumstances in reaching your decision. . . . But you may not go outside the specifically enumerated aggravating and mitigating factors.
>
> Because we would rather have this case straightened out now rather than, possibly, in the far future in a post-conviction proceeding, we remand for a complete new sentencing proceeding before a newly empanelled jury.

Lucas v. State, 490 So.2d 943 (Fla. 1986). As demonstrated in

this section, Harvard and Lucas present examples of recent and correct resolutions of issues earlier raised by Petitioner but rejected, and Petitioner is entitled to unhurried and studied resolution of his claim within the parameters of Florida's changing law. This Court's resolution of Mr. Agan's claim is controlled by the United States Supreme Court's decision in Hitchcock v. Wainwright, No. 85-6756, which resolved the precise constitutional issue presented here. In order to make plain that Mr. Agan presents the same claim which Mr. Hitchcock presented for review, much of what follows comes directly and verbatim from Mr. Hitchcock's United States Supreme Court brief, with the permission of Mr. Hitchcock's counsel.

A. THE EMERGENCE OF LOCKETT IN FLORIDA'S STATUTE

1. Introduction: The Lockett Mandate Of Individualized Capital Sentencing

Since Lockett, it has become plain that the most fundamental eighth amendment requirement applicable to capital sentencing is that the process for selecting those who will die must provide for reliable individualization. Lockett invalidated a statute that restricted the independent consideration of mitigating factors to a narrow statutory list, because the failure to weigh all relevant individuating circumstances concerning the defendant and his crime created the constitutionally "unacceptable risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. at 605 (plurality opinion). The Court has consistently demanded adherence to the Lockett principles.

Therefore, today "[t]here is no disputing," Skipper v. South Carolina, 106 S. Ct. at 1670 (1986), the force of the constitutional mandate. "What is important at the selection stage is an individualized determination on the basis of the

character of the individual offender and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983).

2. Florida's Response to Furman: Limiting Mitigation By Statute

The constitutional necessity of individualized sentencing in capital cases was not, however, initially so clear. The nine separate opinions in Furman v. Georgia, 408 U.S. 238 (1972), "[p]redictably . . . engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." Lockett, 438 U.S. at 599. States responded differently. Those that chose "guided discretion" statutes were "[c]onfronted with what reasonably appeared to be the questionable constitutionality of permitting discretionary weighing of mitigating factors after Furman," Lockett, 438 U.S. at 599 n.7, and as a consequence some included provisions to limit the mitigating factors that could be considered. See, e.g., Lockett, id.; State v. Richmond, 144 Ariz. 186, 560 P.2d 41, 50 (1976), cert. denied, 433 U.S. 915 (1977); State v. Simants, 197 Neb. 549, 250 N.W.2d 881, 889, cert. denied, 434 U.S. 878 (1977); People v. District Court, 586 P.2d 31, 33 (Colo. 1978).

a. The 1972 Florida Statute

Florida was among those states that followed the "reasonable" view that Furman required restriction of the mitigating factors. Prior to Furman, in March, 1972, the Florida Legislature had enacted a new capital sentencing statute which provided a bifurcated trial and "contained lists of aggravating and mitigating circumstances, but only as guidelines for matters to be considered during the sentencing proceeding." Ehrhardt and Levinson, Florida's Legislative Response to Furman: An Exercise in Futility?, 64 J. Crim. L. & Criminology 10 (1973). Furman supervened and this statute was never used. In the months after Furman, a mandatory sentencing scheme was seriously considered, but after intense debate over the meaning of Furman, the Florida

Legislature chose the Governor's proposal, consisting of a modified version of the Model Penal Code. The statute that emerged restricted discretion by listing certain exclusive aggravating and mitigating factors. The statute's plain terms mandated that the jury and judge determine first whether "sufficient aggravating circumstances exist as enumerated in subsection [(5)]" and whether "sufficient mitigating circumstances exist as enumerated in subsection [(6)]"; then, "[b]ased on these considerations, whether the defendant should be sentenced to life or death." Sections 921.141 (2) and (3), Fla. Stat. (1973) (emphasis supplied). In listing the aggravating and mitigating factors that could be considered, the Legislature said that both were "limited to" those listed in the statute. Through an undetected transcription error in the hurried special session, the words "limited to" were inadvertently dropped from the separate subsection listing mitigating factors. See Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Calif. L. Rev. at 358 n.199. Nevertheless, the statute's embodiment of the "reasonable" view that Furman required mitigation to be limited was clear, for in actually determining the sentence the jury and judge were explicitly restricted to consideration of the factors "as enumerated" in the statute. "Thus the enumerated circumstances are intended to be the exhaustive list of sentencing considerations." Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 Fla. St. U. L. Rev. 108, 139 (1974).

b. Implementation Of The Statute By The Florida Court

The statute was first construed in the seminal case of State v. Dixon, 283 So. 2d 1 (Fla. 1973), which emphasized that its primary mechanism for satisfying Furman was the itemization of specific aggravating and mitigating circumstances so as to

restrain sentencing discretion. The opinion referred frequently and invariably to "the" mitigating circumstances citing the statutorily enumerated factors. For example, the court spoke of "the mitigating circumstances provided in Fla. Stat. 921.141(7), F.S.A." in describing how the sentence was to be decided. 283 So.2d at 9. The dissent likewise specifically noted the limitation on consideration of mitigating circumstances to those contained in the statute. Id. at 17 (Ervin, J., dissenting). Dixon's understanding of the exclusive nature of the statutory mitigating circumstances continued to be reflected in the court's opinions.

The Florida court's next express pronouncement on the subject came in 1976. A few days after Proffitt it squarely faced the question whether the statute permitted consideration of evidence of nonstatutory mitigating factors and said with uncommon clarity that the statute strictly barred such consideration. Cooper v. State, 336 So. 2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), In Cooper the Florida court affirmed the exclusion of mitigating evidence (stable employment record) because: "the Legislature chose to list the mitigating circumstances which it judged to be reliable . . . and we are not free to expand that list." Id. at 1139. It stressed the clarity of the statutory language restricting consideration of mitigating factors to those "as enumerated" in the statute's list, emphasizing that these were "words of mandatory limitation." Id. at 1139 n.7. It explained, consistent with the legislature's "reasonable" view, that such a result was required by Furman: "This [holding] may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty." Id. (emphasis in original). Accordingly, "[t]he sole issue in a sentencing hearing under section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances.

Evidence concerning other matters have (sic) no place in that proceeding." Id. at 1139 (emphasis supplied).

Thereafter, the Florida Supreme Court's opinions continued to reflect this "narrowly harsh" "mandatory limitation" confining consideration of mitigating factors to the statutory "list." It was not until after Lockett that another view was recognized.

c. The Florida Supreme Court And Lockett

There was, at the very least, tension between Cooper and Lockett. After Lockett, the Florida Supreme Court decided Songer v. State, 365 So. 2d 696 (Fla. 1978). Said Songer: "Obviously, our construction of section 921.141 (6) has been that all relevant circumstances may be considered in mitigation." Id. at 700. Both the holding of Cooper affirming the preclusion of nonstatutory mitigating character evidence, and its rationale that the nonexpandable "list" of mitigating factors was a "mandatory limitation" required by Furman, was said to be "not apropos to the problems addressed in Lockett." Id. Cooper was said to have been concerned only with whether the mitigating evidence was "probative," not whether the evidence fell outside the statutory list of mitigating factors. Id.

3. The Pre-Lockett Florida Statute (and, as here, post-Lockett application) Was Unconstitutional

A state court is, of course, free to interpret state statutes as it pleases. Its interpretation, once rendered, is binding upon the federal courts. E.g., Wainwright v. Stone, 414 U.S. 21 (1973). A state court may change its interpretation of statutes to meet constitutional demands, id., and by such reconstruction save the facial constitutionality of an otherwise unconstitutional statute. Id.; Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965). But all of this speaks to the future. A state court cannot unmake history by rewriting it. Thus, the "remarkable job of plastic surgery" that the Songer court

performed on the statute and on its own prior construction of the statute does not "serve[] to restore constitutional validity" to sentences imposed under the earlier, unconstitutional procedure. Shuttlesworth v. Birmingham, 394 U.S. 147, 153, 155 (1969).

Commentators have noted that the Songer decision represents an attempt to do just this: to evade the mandate of Lockett and save the constitutionality of prior Florida death sentences by a shift having no "fair and substantial support" in state law. See Hertz & Weisberg, supra at 351. Their view is confirmed, implicitly but consistently, by judicial decisions which leave no legitimate doubt that the pre-Songer statute was applied restrictively to preclude any consideration of any mitigating circumstances not expressly enumerated in it. The Eleventh Circuit has recognized the exclusion of nonstatutory mitigating circumstances decreed by Cooper. See, e.g., Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc); Proffitt v. Wainwright, 685 F.2d 1227, 1238 n.19 (11th Cir. 1982); Ford v. Wainwright, 696 F.2d 804, 812 (11th Cir. 1983) (en banc); Foster v. Strickland, 707 F.2d 1339, 1346 (11th Cir. 1983). The United States Supreme Court has noted the change in Florida law that removed restrictions on consideration of mitigating factors in 1978 after Lockett. And courts in other states that had viewed their statutes as identical to Florida's before Lockett had also read those statutes as limiting mitigating consistently with Cooper.

For a time, Florida Supreme Court decisions in post-conviction cases raising Lockett claims were consistent only in denying relief under all circumstances: the Court held on a case-by-case basis that Lockett either had or had not changed Florida's law depending upon the results that would flow from these respective conclusions. It is only within the last year, after the Eleventh Circuit's en banc decisions in Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) and Songer v.

Wainwright, 769 F.2d 1488 (11th Cir. 1985), that the Florida court has directly addressed the problem.

In Harvard v. State, 486 So.2d 537 (Fla. 1986), the trial judge (who also heard Harvard's post-conviction motion) "expressly found that 'reasonable lawyers and judges . . . could have mistakenly believed that nonstatutory mitigating circumstances could not be considered,'" and that "'[t]he court certainly carried out its responsibility on the basis of that premise at time of Mr. Harvard's trial.'" Id. at 539. A divided Florida Supreme Court agreed and found Harvard's death sentence to have been "imposed in violation of Lockett." Id. In Harvard, the Florida court further found "no factual dispute" concerning the allegation that Harvard's trial lawyer had also believed that Florida law precluded consideration of nonstatutory mitigating circumstances and so had failed to develop and present mitigating evidence at the sentencing hearing. It rejected a claim of ineffective assistance of counsel on these facts because, "given the state of the law at the time," counsel's conduct "reflects reasonable professional judgment." Id. at 540.

Thus, "[a]lthough the Florida statute approved in Proffitt [may not have] . . . clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," Lockett, 438 U.S. at 606-607 (emphasis supplied), it is no longer disputable that the statute did operate in precisely that manner, at least between the dates of Cooper and Songer. The United States Supreme Court's "assum[ption] . . . [in Proffitt] that the range of mitigating factors listed in the statute was not exclusive," id. at 606, was undercut only a few days later by the unmistakable holding in Cooper. And Cooper's authoritative construction of the statute -- which, of course, "fixes the meaning of the statute" for federal constitutional purposes "as definitely as if it had been so

amended by the legislature," Winters v. New York, 333 U.S. 507, 514 (1949); see, e.g., Wainwright v. Stone, supra -- rendered that statute unconstitutional under Lockett.

The execution of a death sentence imposed pursuant to a federally unconstitutional statute would be inconceivable. This is why, having invalidated the Ohio death penalty statute in Lockett, the United States Supreme Court vacated all death sentences imposed under it in cases pending there, Roberts v. Ohio, 438 U.S. 910 (1978), and companion cases, id. at 910-11; Adams v. Ohio, 439 U.S. 811 (1978), and the Ohio Supreme Court subsequently ordered them all to be set aside, and the condemned inmates resentenced to imprisonment.

This makes sound practical sense. Picking and choosing among inmates sentenced to die under the same unconstitutional statutory regime -- upsetting the death sentences of some but not of others, as the Florida Supreme Court is now doing -- makes no sense at all. As one Justice of the Florida court has pointed out:

> [I]t seems fundamentally unfair to me for one person to go to the gallows when nonstatutory mitigating circumstances were not considered, while others may not be going because those circumstances were considered.

Jackson v. State, 438 So.2d at 7 (McDonald, J., dissenting).

The uncorrected application of the pre-Songer Florida statute is indeed "fundamentally unfair," for it calls into question the accuracy of sentencing decisions made during its tenure. In many cases its effect may have been subtle or invisible on the face of the record, though it operated powerfully at many levels, constraining the lawyers, the jury, the judge, and even review by the Florida Supreme Court. Given the radical inconsistency of the then-prevailing Florida law, with the basic mandate of the eighth amendment as construed in Lockett, it is impossible to deny that "the risk that the death penalty will be [inflicted upon James Agan and others

similarly situated] . . . in spite of factors which may call for a less severe penalty" is very high. Lockett v. Ohio, 438 U.S. at 605. The United States Supreme Court has emphasized that such a risk "is unacceptable and incompatible with the . . . Eighth Amendment[]." Id. Considering the consequences of erroneous decisions on a matter so grave as the imposition of society's ultimate punishment, the price of rectifying the risk of error by vacating Mr. Riley's death sentence and others of like vintage "would surely be well spent." Gardner v. Florida, 430 U.S. 349, 360 (1977) (plurality opinion).

D. Hitchcock v. Dugger

In Hitchcock, the Court noted the history of the Florida statute, and the interpretation that it restricted sentencers to consideration of only statutory mitigating circumstances. Regardless of whether Mr. Hitchcock was correct in general, the Court found him to be correct in his case:

> Petitioner claims that the advisory jury and the sentencing judge were precluded by law from considering some off the evidence of mitigating circumstances before them. The Florid death-penalty statute in effect at the time (which has since been amended in various respects) provided for separate post-conviction proceedings to determine whether those convicted of capital felonies should be sentenced to death or to life imprisonment. Those proceedings were typically held before the trial jury, which heard evidence "as to any matter that the court deem[ed] relevant sentence." Fla. Stat. sec. 921.141(1) (1975). After hearing that evidence, the jury was to render an advisory verdict by determining "(a) [w]hether sufficient aggravating circumstances exist as enumerated in [sec. 921.141(5)]; (b) [w]hether sufficient mitigating circumstances exist as enumerated in [sec. 921.141(6)], which outweigh the aggravating circumstances found to exist; and (c) [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." Sec. 921.141(2). The trial court then was to weigh the aggravating and mitigating circumstances itself and enter a sentence of life imprisonment or death. If it imposed a sentence of death, it was required to set forth in writing its findings "(a) [t]hat sufficient aggravating circumstances exist as enumerated in [sec. 921.141(5)], and (b) [t]hat there are

> insufficient mitigating circumstances, as enumerated in [sec. 921.141(6)], to outweigh the aggravating circumstances." Sec. 921.141(3).
>
> Petitioner argues that, at the time he was sentenced, these provisions had been authoritatively interpreted by the Florida Supreme Court to prohibit the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute. See, e.g., Cooper v. State, 336 So. 2d 1133, 1139 (1976) ("The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding. . ."), cert. denied, 431 U.S. 925 (1977). Respondent contends that petitioner has misconstrued Cooper, pointing to the Florida Supreme Court's subsequent decision in Songer v. State, 365 So. 2d 696 91978) (per curiam, which expressed the view that Cooper had not prohibited sentencers from considering mitigating circumstances not enumerated in the statute. Because our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was in fact the requirement of Florida law. We do note, however, that other Florida judges conducting sentencing proceedings during roughly the same period believed that Florida law precluded consideration of nonstatutory mitigating circumstances. At least three death sentences have been overturned for this reason. See Songer v. Wainwright, 769 F.2d 1488 (CA11 1985) (en banc) (per curiam), cert. pending, No. 85-567; Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986); Harvard v. State, 486 So. 2d 537 (Fla.) (per curiam), cert. denied, 479 U.S. ___ (1986). We also note that the Florida Legislature has since removed the phrase "as enumerated [in the statutory list]" from the provisions requiring the advisory jury and the sentencing judge to consider mitigation circumstances. See Fla. Stat. sec. 921.141(2)(b), (3)(b) (1985).

Slip opinion. The record in Mr. Agan's case is no less clear than the record in Mr. Hitchcock's case. The Hitchcock court explained:

> [P]etitioner's counsel introduced before the advisory jury evidence that as a child petitioner had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that

petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle to the children of one of his brothers. Tr. of Advisory Sentence 7-10. In argument to the advisory jury, petitioner's counsel referred to various considerations, some of which were the subject of factual dispute, making a sentence of death inappropriate: petitioner's youth (he was 20 at the time of the murder), his innocence of significant prior criminal activity or violent behavior, the difficult circumstances of his upbringing, his potential for rehabilitation, and his voluntary surrender to authorities. Id., at 13-17, 21-26. Although petitioner's counsel stressed the first two considerations, which related to mitigating circumstances specifically enumerated in the statute, he told the jury that in reaching its sentencing decision it was to "look at the overall picture . . . . consider everything together . . . . consider the whole picture, the whole ball of wax." Id., at 50-52. In contrast, the prosecutor told the jury that it was "to consider the mitigating circumstances and consider those by number," id., at 28, and then went down the statutory list item by item, arguing that only one (petitioner's youth) was applicable. Before proceeding to their deliberations, the members of the jury were told by the trial judge that he would instruct them "on the factors in aggravation and mitigation that you may consider under our law." Id., at 5. He then instructed them that "[t]he mitigating circumstances which you may consider shall be the following . . ." (listing the statutory mitigating circumstances). Id., at 56.

After receiving the advisory jury's recommendation (by majority vote) of death, and despite the argument of petitioner's counsel that the court should take into account the testimony concerning petitioner's family background and his capacity for rehabilitation, the sentencing judge found that "there [were] insufficient mitigating circumstances as enumerated in Florida Statute 921.141(6) to outweigh the aggravating circumstances." Tr. of Sentencing Proceedings 7 (emphasis added). He described the process by which he reached his sentencing judgment as follows: "In determining whether the defendant should be sentenced to death or life imprisonment, this Court is mandated to apply the facts to certain enumerated 'aggravating' and 'mitigating' circumstances. 10 Record 195 (emphasis added). The only mitigating circumstance he found was petitioner's youth. Id., at 197.

We think it could not be clearer that

> the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South Carolina, 476 U.S. ____ (1986); Eddings v. Oklahoma, 476 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion).

This Court had a different, but we now know constitutionally incorrect, view of Mr. Hitchcock's claim. See Hitchcock v. Florida, 413 So. 2d 741 (Fla. 1982). When the claim was raised in post-conviction, the Court found "the limitations on mitigating evidence issue" has been raised, has been fully considered, and has been found to be without merit." Hitchcock v. Florida, 432 So. 2d 42, 43 (Fla. 1983). In special concurrence, now Chief Justice McDonald wrote that "[t]he record refutes the contention that Hitchcock was deprived of presentation or consideration of nonstatutory mitigating circumstances. . . . I am firmly convinced that Hitchcock's penalty was legally imposed and that he has been provided his full constitutional rights." Id. (emphasis added).

A unanimous United States Supreme Court has held that this Court's former view of the issue here presented was incorrect. As this Court has recently noted in Harvard, Lucas and other cases, this Court's view of the law has changed. This is precisely the type of issue properly reviewed by habeas corpus.

CLAIM II

> MR. AGAN RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

This Court is especially vigilant in its policing of counsel's performance on appeal. When this Court learns of unreasonable attorney omissions, it does not hesitate to act:

> [T]he role of an advocate in appellate procedures should not be denigrated. Counsel for the state asserted at oral argument on this petition that any deficiency of appellate counsel was cured by our own independent review of the record. She went on to argue

> that our disapproval of two of the aggravating factors and the eloquent dissents of two justices proved that all meritorious issues had been considered by this Court. It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of the advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged derivations from due process.

Wilson v. Wainwright, Nos. 67,190, 67,204, slip op. at 5 (Fla. August 15, 1985).

Wilson places this Court in the forefront of appellate court scrutiny of attorney advocacy. As noted by all, the appellate-level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, __ U.S. ___, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate on behalf of his client," Anders v. California, 386 U.S. 738 (1967), who must receive 'expert professional . . . assistance . . . [which is] necessary in a legal system governed by complex rules and procedure. . . ." Lucey, 105 S. Ct. 830 n.6. An indigent, as well as "the rich man, who appeals as of right, [must] enjoy[] the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf. . . ." Douglas v. California, 372 U.S. 353, 358 (1965) (equal protection right to counsel on appeal).

The process due appellant is not simply an appeal with representation by "a person who happens to be a lawyer. . . ." Lucey, 105 S. Ct. at 835 (quoting Strickland v. Washington, 104 S. Ct. 2052 (1984)). The attorney must act as a "champion on appeal," Douglas, 372 U.S. at 356, not "amicus curiae." Anders, 386 U.S. at 744.

These are not merely arcane jurisprudential precepts:

"Lawyers in criminal cases are necessities, not luxuries." United States v. Cronic, 80 L. Ed. 657, 664 (1984). Counsel is crucial, not just to spew the legalese unavailable to the layperson, but also to "meet the adversary presentation of the prosecution." Lucey, 105 S. Ct. 830, 835 n. 6. Thus, effective counsel does not leave an appellate court with "the cold record which it must review without the help of an advocate." Anders, 386 U.S. at 745. Neither may counsel play the role of "a mere friend of the court assisting in a detached evaluation of the appellant's claim." Lucey, 105 S. Ct. at 835. Counsel must "affirmatively promote his client's position before the court . . . to induce the court to pursue all the more vigorously on its own but also to the legal authorities as furnished it by counsel." Anders, 386 U.S. at 745; see also Mylar v. Alabama, 671 F.2d 1299, 1301 (11th Cir. 1982) ("unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case.").

As alleged in Section III, Claim II, appellate counsel unreasonably failed to raise fundamental constitutional claims before this Court, and this Court failed independently to address the claims.

CONCLUSION

Petitioner respectfully requests that this Court enter a stay of his execution scheduled Thursday, June 25, 1987, and grant the writ so as to allow a new direct appeal. In the alternative, Petitioner requests that his conviction and sentence

of death be vacated. If fact resolution is necessary for the decision of this Court, Petitioner requests that a magistrate be appointed to take evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mark Menser, Assistant Attorney General, Department of Legal Affairs, The Elliot Building, 401 South Monroe Street, Tallahassee, Florida, 32301, this 21 day of May, 1987.

_____
Attorney