IN THE SUPREME COURT OF FLORIDA

NO. 70589

JAMES AGAN,

Petitioner,

v.

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

Respondent.

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# RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF, HABEAS CORPUS AND STAY OF EXECUTION

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## I. INTRODUCTION

Comes now the Respondent, herefter simply referred to as the State, and answers as follows:

(1) This response is filed notwithstanding the State's pending motion to strike, which is not waived. The State does not believe that oral argument will be necessary in this case.

(2) Mr. Agan has properly identified only two claims; to wit:

(a) A claim that the trial judge refuted to consider non-statutory mitigating evidence during sentencing.

(b) Ineffective assistance of appellate counsel.

(3) Mr. Agan alludes to another claim in his statement of the facts, but since this claim is not labeled or pled as such, it is not properly before the Court. The State would note, however, that Agan's complaint regarding Fla.R.Crim.P. 3.851 is not a challenge to the legality of his confinement, so it is not cognizable under habeas corpus. Since there is no right to collateral attack, there is no right to any particular procedure or to any "competent" counsel, even when one is provided by the State. Pennsylvania v. Finley, 1 F.L.W.Fed. S583 (1987).

(4) Buried in Agan's claim regarding the competence of appellate counsel is a single sentence renewal of a host of other claims disposed of on direct appeal from his motion for post conviction relief. As Agan is well aware, habeas corpus is not a vehicle for a second appeal. Steinhorst . Wainwright, 477 So.2d 537 (Fla. 1985); Messer v. Wainwright, 439 So.2d 875 (Fla. 1983). Thus, in addition to not being properly pled, these claims are raised out of a general disregard for the rules of

this Honorable Court and are procedurally barred. See Blanco v. State, nos. 68,263 68,839 (1987).[1]

## II. FACTS

The details of this, Agan's second capital murder (committed while serving time after commutation of his last death sentence) are adequately set forth in Agan v. State, 445 So.2d 326 (Fla. 1984) and Agan v. State, 503 So.2d 1254 (Fla. 1987).

In regard to Agan's de novo claim based upon Hitchcock v. Dugger, 1 F.L.W. Fed. S523 (1987), the State submits:

(a) Any "Hitchcock" claim could have been raised on direct appeal, but was not.

(b) This case was tried two years after Lockett v. Ohio, 438 U.S. 586 (1978), and a year after the Lockett induced amendment to our death statute.

(c) This Court has already ruled that non-statutory mitigating evidence was received and considered by the sentencer, thus mooting the issue.

## ARGUMENT

### CLAIM I

### AGAN'S "HITCHCOCK" CLAIM IS PROCEDURALLY BARRED

Contrary to the assertion in his petition, Agan has never raised a "Hitchcock" style claim in this or any other state court. Hitchcock v. Dugger, involved a claim that trial courts, in pre-1979 death cases, sometimes ruled that they were statutorily precluded from accepting nonstatutory mitigating evidence. All prior appeals in this case have attacked the weight which the sentencing judge, in this post-1979 case, gave to the nonstatutory mitigating evidence which Agan offered.

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[1] When the Blanco court admonished counsel not to duplicate claims it did not mean to simply stop pleading them "in detail", it meant not to file them at all.

Indeed, this Court has already found, as a matter of fact, that the sentencer considered nonstatutory mitigating evidence. Thus, the petition at bar is simply an effort to twist Agan's old arguments to make them fit a convenient new decision.

As Agan concedes, he was convicted and sentenced after Lockett and after the 1979 amendment to Section 921.141, Fla.Stat.. Agan never objected (at sentencing) to any "exclusion" of nonstatutory mitigating evidence. Indeed, when the court offered a presentence investigation, Agan refused to permit one. When Agan's lawyer argued nonstatutory mitigating factors to the court, he did so despite Mr. Agan, not because of him.

Habeas corpus, as noted above, is neither a device for the reargument of prior appeals nor the argument of de novo claims which could or should, if preserved, have been raised on direct appeal. Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985); Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985); Messer v. Wainwright, 439 So.2d 875 (Fla. 1983). Therefore, Agan cannot use habeas corpus as a device for raising his procedurally barred "Hitchcock" claim.

The "Hitchcock" decision did not stand as some fundamental change in Florida law, indeed, the opinion states:

> "Respondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. In the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid".

Clearly, the continuing availability of these defenses and the absence of any finding that "no procedural bars apply" reveal the limited nature of the holding in Hitchcock. In any event, this petitioner, had he perceived any Lockett ("Hitchcock") error, could and should have objected during his (1980) sentencing and then argued the point on appeal. The availability

of this claim and the fact that it was not raised precludes review.

Without waiving the procedural bar attending this claim, the State would note that the issue itself is meritless, if not moot.

The law is already well established that the fact that the written sentence refers only to statutory mitigating factors does not "prove" that the court failed to consider nonstatutory mitigating factors. Johnson v. Wainwright, slip opinion 83-3962 (11th Cir. 1986); Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985); Raulerson v. Wainwright, 732 F.2d 803 (11th Cir. 1984).

In fact, this Court has already found that no Lockett violation occured, since the court permitted counsel to argue nonstatutory mitigating evidence and considered same. Thus, this Court has already removed the factual underpinning of Agan's argument.

## CLAIM II

## APPELLATE COUNSEL WAS NOT INEFFECTIVE

Mr. Agan contends that Florida has abolished all procedural bars, including its contemporaneous objection rule, because this Court "examines the entire record for constitutional error". This accusation has also recently been made by a panel of the Eleventh Circuit. Mann v. Dugger, no. 86-3182 (May 14, 1987). Using this as a foundation, Agan contends that appellate counsel was ineffective for failing to brief every possible claim whether objected to or not.

Mr. Agan bases this contention on language contained in 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) and Muehleman v. State, 12 F.L.W. 39 (Fla. 1987), regarding this Court's review of death case records. None of these cases stand for the proposition cite by Agan (that procedural bars do not apply in death cases).

In Davis v. State, supra, the Court indeed examined the entire record to assess the sufficiency of the evidence, but this Court refused to consider some claims argued in Davis' brief because they were not preserved by proper objection at trial. Thus Davis continued to recognize and enforce procedural bars even in the course of a general record review.

Naturally, subsequent death cases have consistently upheld and enforced our procedural bars. Copeland v. State, 12 F.L.W. 179 (Fla. 1987); Nibert v. State, 12 F.L.W. 225 (Fla. 1987); Tompkins v. State, 12 F.L.W. 45 (Fla. 1987); Jackson v. State, 12 F.L.W. 53 (Fla. 1987). We would also note that in Muehleman v. State, 12 F.L.W. 39 (Fla. 1987), this Court's general review encompassed (in a guilty plea case) contested pretrial motions which preserved said errors for review.

Given the Eleventh Cricuit's desire to minimize the importance of this Honorable Court and assume the role of final arbiter of Florida capital cases, immence from all procedural bars, it is suggested that the recent decision in Mann v. Wainwright, be specifically repudiated, and that this Honorable Court assume its rightful role as the sole arbiter of issues of state law, including your own enforcement of our contemporaneous objection rule.

Given the fact that Agan admits that the procedural bars recognized in this state could attack to those claims counsel allegedly "failed" to raise on appeal, it is clear that appellate counsel was not ineffective for "failing" to raise said (barred) claims since he was prohibited by law from doing so.

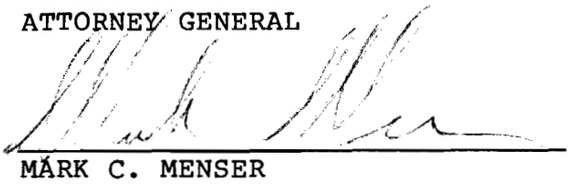
Finally, if counsel "failed" to raise an issue which this Court would "automatically" review anyway, then clearly Agan cannot establish "prejudice" even if he could establish "error". Strickland v. Washington, 466 U.S. 688 (1984).

## CONCLUSION

The Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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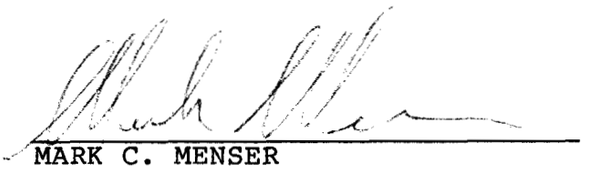
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Mr. Mark Evan Olive, Esq., Office of Capital Collateral Representative, 225 West Jefferson Street, Tallahassee, Florida 32302 by U.S. Mail on this 2nd day of June, 1987.



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