IN THE SUPREME COURT OF FLORIDA

JAMES AGAN,

Appellant,

v. CASE NO. 74,729

STATE OF FLORIDA,

Appellee.

______________________________/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Mr. Agan comes before the Court on appeal from the summary denial of an untimely and successive Rule **3.850** petition.

Mr. Agan, following repeated confessions and a guilty plea, was convicted of first-degree murder and sentenced to death. The details of Agan's crime are adequately reported in **Agan** v. **State, 445** So.2d **326** (Fla. **1983),** and shall not be repeated.

Mr. Agan eventually petitioned for relief pursuant to Fla.R.Crim.P. **3.850** and for (state) habeas corpus relief. Both petitions failed. **Agan** v. **State, 503 So.2d 1254** (Fla. **1987); Agan** v. **Dugger, 508** So.2d **11** (Fla. **1987).**

Mr. Agan petitioned the federal courts for relief, and received a full evidentiary hearing on the issues of his competence and the competence of counsel. While awaiting the federal court's ruling, Agan obtained an abatement of the federal proceedings by representing that he "had" to return to this Court to file a **"Hitchcock"** claim by August 1, **1989.** Agan did not advise the federal court - as ethically required - that he had already filed a **Hitchcock** claim in state court and lost; **Agan** v. **Dugger, supra;** or that he had already filed a "**Brady**" claim and lost, **Agan** v. **State, 503** So.2d **1254** (Fla. **1987),** thus procedurally barring both claims.

Agan eventually filed his second Rule **3.850** petition, raising therein a **"Hitchcock"** claim, a "**Brady**" claim and two issues which could have been raised on direct appeal.

The circuit court denied relief on the basis of the two-year time bar and procedural bars relating to successive c aims

and claims raised for the first time in a second "Rule 3.850" petition.

Citing to materials de hors the record, Agan's counsel attempted to excuse their conduct by alleging that a recent invocation of "Chapter 119" (the "Florida Public Records Act"), provided them with "new evidence". Agan alludes to a possible (1985) records request and to alleged interference with CCR's request by this office. None of CCR's or Agan's suggestions enjoy record support.

The truth is, Agan filed his first and only "Chapter 119" demand on October 31-November 1, 1988. The demand was a peculiar, mid-trial, demand made by CCR while federal proceedings were underway. Mr. Turner surrendered personal notes to CCR.

This office (Mr. Printy) had subpoenaed (duces tecum) certain evidence held by CCR. The defense ignored and refused to obey the federal subpoenas. Mr. Printy merely told Mr. Turner - and counsel for Agan - that Chapter 119 materials would not be surrendered until CCR obeyed the subpoena. The State did not "obstruct" anything. These facts should have been explained in Mr. Agan's (non-record) factual dissertation in his brief.

SUMMARY OF ARGUMENT

Mr. Agan *is* not entitled to merits review of his four untimely and procedurally barred claims. Mr. Agan did not allege or show any valid basis for consideration of these issues. Therefore, the trial court should be affirmed.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING MR. AGAN'S "BRADY" CLAIM.

Mr. Agan's appeal centers on the applicability of certain procedural bars to his case, not on the "merits". If the trial court erred in applying the procedural bars attending Rule 3.850, then the proper remedy is a remand for merits review, not merits review **de novo** in this Honorable Court. Thus, Mr. Agan's brief is superfluous and irrelevant to the issues at bar.

Mr. Agan's judgment and sentence became final in 1983. Under Rule 3.850, Agan had until January 1, 1987, to file any desired petition. After that, any petition would be considered time-barred. **Johnson** v. **State,** 536 So.2d 1009 (Fla. 1988).

Mr. Agan did, of course, file a Rule 3.850 petition and a petition for writ of habeas corpus, losing both. Thus, in addition to any time bar attending his case, Agan also incurred the procedural bars against the filing of successive Rule 3.850 petitions.

It is important to remind the Court at the outset that the federal courts, to date, have afforded proper deference to our procedural rules in this case. The strategic object of Mr. Agan's present case is to induce and delude this Court into "merits" determinations on these claims to revive his flagging federal petition.

The federal courts, discussing the issue of comity, have made it clear that the state courts' procedural bars will only be

recognized when a given case is clearly decided on the basis of said procedural bar. **Harris** v. **Reed, 489 U.S. ____, 103** L.Ed.2d **308 (1989);** see also **Teague** v. **Lane, 489 U.S. ____, 103** L.Ed.2d **334 (1989).**

It is undisputed that Agan's second petition was filed after January **1, 1987,** and therefore was untimely. It is equally undisputed that said petition sought to reargue a so-called "**Brady**" claim that was raised and argued in Agan's first petition.

Agan attempts to justify this second petition by arguing that new evidence, obtained last year pursuant to Chapter **119,** now lends additional support to his so-called **Brady** claim. This contention is simply incorrect.

First, Agan's only "Chapter **119"** demand was filed in late **1988,** even though the statute was available to Agan prior to the filing of his first Rule **3.850** petition. This belated use of Chapter **119** as a stall tactic was condemned by this Court in Demps v. **State, 515** So.2d **196** (Fla. **1987),** and again in **Bundy** v. **State, 538** So.2d **445** (Fla. **1989).** Mr. Agan cannot use his **1988** invocation of Chapter **119** as an excuse for not presenting this "new evidence" before. Demps could and should have incorporated such a demand in his first petition.

Second, the materials obtained from Mr. Turner are merely cumulative and redundant. Agan knew of the existence of alternate suspects when he and counsel (Mr. Brinkmeyer) requested and obtained a special D.O.C. investigation into this case during the time Agan's appeal was pending. Agan's convenient and sporadic factual averments fail to mention:

> (1) Inmate Anderson's story about some other prisoner seeing a third person (Gross) commit the crime was never corroborated by the *so*-called eyewitness. (F **76-109).**
>
> (2) Inmate Gross had a solid alibi. (F **90).**
>
> **(3)** Agan **also** confessed to is own lawyer, Mr. Futch. (F **378).**
>
> **(4)** Mr. Stinson, Agan's first lawyer, knew that alternate suspects had been checked even before Agan pled. (F **126).**

Thus, Agan has failed to demonstrate either the existence of previously undiscoverable evidence or the existence of "new facts'' of which he was totally unaware.[1] As such, Agan has failed to justify either the timing of his petition or the filing of a second successive claim. Thus, the lower court's ruling should be affirmed.

POINT II

MR. AGAN IS NOT ENTITLED TO RETRIAL ON THE BASIS OF NEWLY-DISCOVERED EVIDENCE.

Citing to **Richardson** v. **State, 546** So.2d **1037** (Fla. **1989),** Mr. Agan contends that "new evidence'' somehow entitles him to a "new trial".

Agan pled guilty. Agan did not go to trial. Agan preempted defense counsel and prevented counsel from performing any investigation. Agan even confessed to defense counsel. Agan's appellate lawyer provoked a formal reinvestigation of this case seven years ago. Agan also raised these same issues in a prior

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[1] The letters regarding other threats to the victim reflect DeWitt's unpopularity but did not eliminate Mr. Agan's own, uncontested and undisputed, personal motive for wanting to kill DeWitt. Agan got to DeWitt first, that's all.

Rule 3.850 proceeding in which he could have, but did not, file a Chapter **119** demand.

Mr. Agan, nine years after trial, now floats into court and contends that he suddenly wants to force the State to **trial.**[2] We submit that Agan has failed to show due diligence in the procurement of this so-called "evidence". We further submit that Mr. Agan's recitations of non-record "facts" omits, as noted above, the fact that inmate Gross has an alibi, that inmate Anderson's story could not be corroborated and that Agan's own motive to kill DeWitt is undiminished by the "new evidence". Also, Agan **confessed.** Agan is not entitled to relief.

More to the point, Mr. Agan should not be permitted to use **Richardson** as a back-door vehicle for some "merits" review of his **Brady** claim. Agan's devious ploy cannot overcome the fact that remedies, either by the former petition for writ of error coram nobis or by Rule **3.850** could have been utilized (and supported by a Chapter **119** demand) **at any time** after **1984.** Thus, the claim is time-barred and procedurally barred notwithstanding **Richardson.** See **Harris v.** Reed, **supra.**

POINT III

THE APPELLANT IS NOT ENTITLED TO REARGUMENT OF HIS "HITCHCOCK' CLAIM.

Mr. Agan pled guilty and waived any advisory jury. As such, no jury instructions were used and no **"Hitchcock** error" was

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[2] The State would also rely upon **laches,** since the post-trial investigation revealed that the physical evidence was eventually destroyed after Agan pled guilty and lost his appeals.

committed since **Hitchcock** v. **Dugger,** 481 **U.S.** ____**,** 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) was involved only with the propensity of a jury instruction (used prior to 1979, we add) to cause "**Lockett**" error.

Mr. Agan had "**Lockett**" review and lost. He has had "**Hitchcock**" (habeas corpus review) and lost. He cannot obtain a third review by an untimely Rule 3.850 petition. **Harris** v. **Reed, supra.**

POINT IV AND V

THE TRIAL COURT PROPERLY DENIED RELIEF ON AGAN'S REMAINING CLAIMS.

Once again, we address issues which could and should, if preserved, have been raised on direct appeal but instead have appeared for the first time in an untimely and successive Rule 3.850 petition. Procedural dismissal was proper, **Woods** v. **State,** 531 So.2d 79 (Fla. 1988); **Grossman** v. **State,** 525 So.2d 833 (Fla. 1988); **Adams** v. **State,** 14 F.L.W. 235 (Fla. 1989); **Bundy** v. **State,** 538 So.2d 445 (Fla. 1989); **Atkins** v. **State,** 14 F.L.W. 207 (Fla. 1989), and should be affirmed. **Harris** v. **Reed, supra.**

CONCLUSION

Mr. Agan is not entitled to relief.

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 Martin J. McClain, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 21st day of December, 1989.

MARK C. MENSER
Assistant Attorney General