IN THE

SUPREME COURT OF FLORIDA

CASE NO. 74,729

JAMES AGAN,

Appellant,

versus

STATE OF FLORIDA,

Appellee,

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Agan's second motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Agan's claims.

The following symbols will be used to designate references to the record in the instant cause:

"R" -- Record on Direct Appeal to this Court;

"T" -- Record on First 3.850 Appeal to this Court

"S" -- Record on Second 3.850 Appeal to this Court

"F" -- Transcript of Federal evidentiary hearing conducted October 31, 1988 and December 1, 1988.

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Agan has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Agan through counsel accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 16, 1980, Mr. Agan was indicted for murder in the first degree. He was charged with killing Dana DeWitt, a fellow inmate at Florida State Prison. Mr. DeWitt had been found stabbed to death in his cell on September 19, 1980. During the ensuing investigation, Mr. Agan confessed to the homicide. That confession, along with Mr. Agan's statements made directly to the grand jury, served as the basis for the indictment.

Following Mr. Agan's initial confession, before the indictment had been returned, the public defender's office was appointed to represent Mr. Agan. Specifically, Assistant Public Defender John Stinson was assigned as Mr. Agan's counsel. Immediately after the indictment was returned, Mr. Stinson moved to withdraw on the basis of a case load conflict. On October 20, 1980, the Motion was granted, and Mack Futch was appointed to represent Mr. Agan.

On November 24, 1980, Mr. Agan pled guilty and was sentenced to death. During the proceedings, the State represented that there was no mitigating or exculpatory evidence to disclose except Mr. Agan's identification of the wrong knife as the murder weapon. In this regard, the prosecutor informed the court:

> [THE PROSECUTOR]: Excuse me, Mr. Agan.
>
> The issue of exculpatory information, under what I believe to be my responsibility under Grady [sic] v. Maryland decision, Your Honor, would be the following:
>
> That the defendant, although testifying very clearly to the knife having stuck in the bone of Mr. Dana DeWitt, which is very strong valid evidence as supported by the Medical Examiner, Mr. Agan described, at least tentatively, and said that that could have been a particular weapon being approximately consistent with the width and the lenghth of the weapon that the Medical Examiner would say was the weapon that was used.
>
> He described it as being a weapon that he used. It was shown to him and he said, "Yeah, that looks like the weapon."
>
> In his statement to Inspector Turner, as well as his statement taken by me before the Grand Jury, he indicated that the knife that he used stuck in the neck and that he had pulled the knife out and that a gauze bandage came off that knife that he threw away.

That knife was found in or around adjacent to the area of the cell of the deceased in the outside ground area.

There was also another knife that was found that had a wooden handle on it, which was of a different design and different size but, nonetheless, consistent with the depth and the width of the wounds that the Medical Examiner would testify to. That particular knife with the wooden handle, Your Honor, was submitted along with the other knife that was submitted to the Florida Department of Criminal Law Enforcement Laboratory, as proper investigation by the Department of Corrections would dictate.

They submitted those weapons.

The weapon that Mr. Agan had tentatively identified to me was not the weapon that came back with the blood match and type and group of Mr. Dana Dewitt. The weapon that he did not indicate, that had the wooden handle, was the weapon that came back with a blood type and group, I believe, that the defendant or, rather, the victim.

That is the only information that I can consider, in this case, to be exculpatory in some sense or fashion. I do, however, stand on what has already been indicated in the factual basis which, in my opinion, would be those facts which would support the trial of this case as well as supporting the Indictment in the prosecution of this defendant. That is one matter, however, that I feel obligated even though I don't have a complete report from the lab to tender, on behalf of Mr. Futch, as exculpatory information.

(R. 46-48)(emphasis added).

However, contrary to the prosecutor's representations, a wealth of additional exculpatory evidence existed at that time and was not disclosed to Mr. Agan's counsel until January of 1989. Mr. L. E. Turner was the lead prison investigator into the DeWitt homicide, and maintained his own file on the homicide. This file contained conclusive evidence that Mr. Agan did not commit the murder, and that the murder was committed by another inmate, Michael Gross.[1] Included in the file was information identifying Michael Gross as the killer.

The following note from Mr. Turner to Richard Dugger, referring to a telephone conversation with Mr. DeWitt's stepfather, Mr. Carl E. Fry, Sr., was in Mr. Turner's file:

Had telephone conversation with DeWitt's Step-Father who stated

---

'The State Attorney's own file is missing, and has been unavailable for inspection.

he had a letter from DeWitt directing him to send $50 each to Michael Gross and Lawrence Cormack as they were threatening his (DeWitt's) life if he didn't do the above.

(S. 53). There is a notation on the letter indicating that this incident occurred September 5th or 6th, two weeks before the murder (Id.).

On September 9, 1980, just ten days before his murder, Mr. DeWitt wrote a letter to Carl E. Fry, Sr. The letter is date stamped as received by the investigator's office September 30, 1980 (S. 55), and was contained in Mr. Turner's file. The letter speaks for itself, as it clearly implicates Michael Gross and Lawrence Cormack in DeWitt's murder:

> M did not come by with the mower today. For all I know, since I didn't see him today, he may have transferred and you may hear here from him in a day or two. In either event, whether he's transferred or comes over tomorrow, I must make my decision now! Per my conversation in last night's letter, I told you of the several options available. Not a wide variety, is it? . . . Since I don't wish to hurt anyone this close to our ballgame, and I can not see hiding on "Max," the best solution I can assume will be to Po ahead and pay the two desperadoes. If, after they've spent their money they try to do it again, I'll have to take a different path. For the time being, I want to get the burden off my back, so, if you don't mind, please send 2 money orders. one to Lawrence Cormack 11048866. and one to Michael R. Gross 11072141 -- $50.00 each. Enclose one sentence in each letter, saying, "Enclosed is $50.00 to cover your expenses." Sign each with the letter "D". Don't say any thing more, above all, don't place your name on the return address -- use initials only, okay? Carl, believe me, if I thought there was another way around this problem, aside from extreme violence, I would never ask you to help, but there isn't! It's imperative that I pay the extortion at your earliest convenience. The inmate bank takes 4-5 days to process the mo's, so please hurry.
>
> Aside from all this bullshit, in case I change my mind in saying anything to Max, don't, when you see him next week -- or whenever -- say anything about this dilemma. In any event, I'll write you again tomorrow night and tell you more, or if M shows up.
>
> What more can I say? I'm sick to my stomach about everything! Don't feel like saying more.
>
> Love,
> Dan
>
> P.S. Please keep this to yourself.

(S. 55-56)(emphasis added).

On September 15, 1980, just four days before his murder, Mr. DeWitt wrote

the following letter, also contained in Mr. Turner's file, to Cindy Pellagrino:

> I'm in trouble! On Saturday, Sept. 6, while I was lying on my bunk reading my racing forms, two white men threw down on me with knives. They wanted money. I don't -- or didn't -- have any money. To make a long story short, I did some fast talking. So here it is 9/15 and I still haven't done anything. Neither have I given any money nor have I destroyed one of the extortionists. Unfortunately, I have only 3 alternatives: check-in (jail) or pay the $100.00 they desire. My 3rd course of action, is to attack! Because I'm on the verge of leaving -- hopefully -- this God forsaken, rat infested prison, I really don't wish to hurt anyone. However, it's too late to play it by ear. There's no doubt in *my* mind that the aparessors will stick me if I don't pay their request. Hell of a place, isn't it? Cindy, I'm truly sorry to have to bring you into *my* personal affairs. But, do I have any choice? Who else can I complain to? I certainly can't say anything to anyone I know that lives here. Their advice would be to kill one of the bad guys. Aside from that, I don't want anyone to know my business. It's an unfortunate situation, wouldn't you say? Moreover, *my* step father and my professor advised me to go to jail. In the 3 1/2 years I've been here, nothing like this has ever happened. So, anyway, what's Dana going to do? When Dana doesn't know, who does? I shall keep you informed of any new developments. . . . (P.S. keep this to yourself).
>
> * * *
>
> Cindy, you'll have to excuse my reticence tonight, I'm too worried about my personal problems to write a clear letter. In other words, my bullshit is very weak for a 15 Sept. 1980. Will write again soon.

(S. 61-62)(emphasis added).

Also contained in Mr. Turner's file was part of a letter written by Mr. DeWitt to Cindy Pellegrino dated September 17, 1980. The following portion of that letter -- written just two days before the murder -- expressed Mr. DeWitt's concern for his safety due to Gross and Cormack's extortion scheme:

> Well, I'm still alive and well. I still haven't taken care of my little problem I told you about on Monday. They want money! Unfortunately, as I've told you before, I receive a check for $25.00 once every 30 days from *my* older brother's Chase Manhattan Bank account. Doesn't leave any extra for luxuries or recreation, does it? That's one of the reasons I wanted you to find some acid; thus enabling me to earn a little extra money. This is one hell of a place, isn't it?

(S. 65)(emphasis added).

After the homicide, Cindy Pellegrino wrote Mr. Turner, voicing her concerns that if Mr. Dewitt owed Mr. Agan gambling debts she would have known. This letter obviously related to the State's theory that the homicide resulted because Mr. DeWitt owed Mr. Agan a gambling debt.

> Enclosed you will find all the information Dana DeWitt mentioned to me about the events leading up to this murder. I hope you will find them useful, even though no mention of names is given.
> As far as I am concerned, I am glad to be of any help. Dana and I were very close and we were both very excited about our first meeting. Unfortunately, it didn't turn out as expected.
>
> I know the stabbing has been attributed to a gambling debt. Dana would have mentioned that. as he tells me much of what happens at F.S.P. Also, he told me of an occasion he lost $50 and a watch. There is no reason why he couldn't or wouldn't mention the debt. Also, I have found out the only thing he owed anyone was $2. That is not a very large amount, is it?

(S. 67)(emphasis added).

However, the most startling item contained in Mr. Turner's file was the following field note:

> 9/22/80 4:53 p.m. --
> Horace Anderson -- P/M - DC #C-011681
>
> Luociues Kitchen, 034269, on V-Wing standing at window and observed Gross go into DeWitt's cell. DeWitt was facing window talking to Kitchen. Kitchen saw Gross stab DeWitt in the neck.

(S. 70)(emphasis added). Mr. Luociues Kitchen witnessed Gross stab Mr. DeWitt. Mr. Turner had knowledge of an eye witness who actually saw the victim killed by Gross. This evidence was undisclosed to Mr. Agan's counsel.

Another field note reflected that inmate Robert Todd Harrison told Mr. Turner that on September 14, 1980 -- five days before the murder -- Michael Gross told Harrison to stay away from Dana DeWitt: "I got to kill DeWitt. Stay away from him." (S. 72).

Without benefit of this exculpatory evidence, counsel pled Mr. Agan guilty. Without benefit of this exculpatory evidence, the circuit court accepted the guilty plea and sentenced Mr. Agan to death. Without benefit of the exculpatory

evidence, this Court affirmed the conviction and sentence of death. Agan v. State, 445 So. 2d 326 (Fla. 1983).

On February 22, 1985, a warrant was signed for Mr. Agan's execution. A stay was entered to allow Mr. Agan to obtain counsel and pursue a Rule 3.850 motion which had been filed pro se. Included in the attachments to the Rule 3.850 motion were portions of a Department of Corrections internal investigation into Mr. Agan's case. This investigation had been conducted in 1982 (T. 599-620). Mr. Agan and his counsel obtained access to the investigation through a public records request to inspect the Department's files. However, neither Mr. Agan nor his counsel received a copy of Mr. Turner's investigative file or the materials contained therein. Without the benefit of the exculpatory evidence contained in Mr. Turner's file, Mr. Agan's Rule 3.850 motion was summarily denied on August 8, 1985. Also without the benefit of the exculpatory evidence contained in Mr. Turner's file, this Court affirmed the summary denial of the Rule 3.850 motion on February 7, 1987. Agan v. State, 503 So. 2d 1254 (Fla. 1987).

On April 21, 1987, the Governor signed a second death warrant. Mr. Agan filed a petition for a writ of habeas corpus with this Court. This petition was denied on June 8, 1987. Agan v. Dugger, 508 So. 2d 11 (Fla. 1987). Thereafter, Mr. Agan filed a federal petition for habeas corpus relief. A stay of execution was granted by the Eleventh Circuit Court of Appeals. Aaan v. Dugger, 828 F.2d 1496 (11th Cir. 1987). Subsequently, the Eleventh Circuit ordered that the federal district court conduct an evidentiary hearing. Agan v. Dunner, 835 F.2d 1337 (11th Cir. 1987). At the time of this second death warrant, Mr. Agan's counsel again requested access to the Department of Corrections Inspector General's file regarding Mr. Agan's case. Again, as in 1985, Mr. Turner's file was not disclosed.

The evidentiary hearing commenced in federal district court on October 31,

1988. Mr. L. E. Turner appeared at the evidentiary hearing on October 31, 1988, pursuant to a subpoena duces tecum issued by Mr. Agan (S. 41). The file that Mr. Turner brought to the hearing contained the exculpatory information set out above, which had not been previously turned over to Mr. Agan by the State. The file had been compiled while Mr. Turner was investigating the DeWitt homicide. It included his "field notes" and other documentation he gathered during his investigation. Mr. Turner's testimony was cut short by the federal court before Mr. Agan's counsel obtained access to Mr. Turner's file. While Mr. Turner was waiting to be released from his subpoena, Bret Strand, then an investigator (now an attorney) for the Office of the Capital Collateral Representative, was given a brief opportunity to scan the file. It was then for the first time learned that the file contained material never before released to Mr. Agan's counsel (S. *45-46).*

Mr. Strand informed Mr. Turner that the information in the file was not included with the materials concerning the DeWitt murder investigation turned over to Mr. Agan by the Department of Corrections. Mr. Strand on behalf of Mr. Agan made a public records request that a copy of the materials in the file be turned over to Mr. Agan. Mr. Turner asked Mr. Gary Printy, co-counsel for Respondent in the federal hearing, whether he should provide Mr. Strand with access to the file. Mr. Printy advised Mr. Turner that he should not allow Mr. Strand access to the file at that time (S. *46).*

On November 1, 1988, counsel for Mr. Agan wrote a letter to Mr. Turner again seeking access to the file. Mr. Turner was also contacted by telephone concerning the file. However, Mr. Agan's counsel was still denied access to the file (S. *47).*

On January *5,* 1989, at the direction of Mr. Jerry Vaughn, Inspector General, Department of Corrections, Mr. Agan was finally provided a copy of Mr. Turner's file in compliance with section 119 01, et seq, Florida Statutes (1985)

(S. 47). Inspector Vaughn stated that due to a change in procedure the materials in this file were not included in the official Inspector General's file and thus had not been previously provided to Mr. Agan or his counsel when previous requests to inspect and copy the files had been made (S. 24).

On August 1, 1989, Mr. Agan filed a second Rule 3.850 motion. This motion raised four claims and was premised upon new case law and new facts. On August 25, 1989, the motion was summarily denied without a response from the State. The circuit court ruled that there was neither new case law nor new facts which authorized a second Rule 3.850 motion. The circuit court found that the issues had been previously raised and ruled upon by this Court during the direct appeal and the appeal from the denial of the original Rule 3.850 motion (S. 229). From the circuit court's order summarily denying relief, this appeal was perfected.

Meanwhile, on September 26, 1989, the federal district court held proceedings on Mr. Agan's federal petition for habeas corpus relief in abeyance pending the outcome of Mr. Agan's state court proceedings.

SUMMARY OF ARGUMENT

I. Information which was not disclosed by the State until January of 1989 establishes that Mr. Agan did not commit the offense for which he was convicted and sentenced to death. This information includes letters from the victim to his family and friends indicating that another prison inmate, not Mr. Agan, was extorting money from the victim and that the victim feared that the extortionist would murder him if the extortion was not paid. Most significantly, the previously undisclosed information includes the account of an eyewitness who saw the victim being murdered by the extortionist. Despite repeated previous public records requests for access to information regarding the offense which was in the State's possession, this material exculpatory evidence was not disclosed until January of 1989. The State's failures to disclose this information violated Florida discovery rules, and the fifth, sixth, eighth, and fourteenth

amendments. The circuit court's summary denial of this claim was erroneous because the information upon which the claim is based could not have been discovered earlier, the claim requires an evidentiary hearing for proper resolution, and the claim establishes Mr. Agan's entitlement to relief. Mr. Agan is innocent of the offense for which he was convicted and sentenced to death. Rule 3.850 relief is mandated.

11. Newly discovered evidence establishes that Mr. Agan is innocent of the offense for which he was convicted and sentenced to death. This evidence is properly presented in a Rule 3.850 motion and entitled Mr. Agan to an evidentiary hearing on his allegations. Richardson v. State. Thereafter, Rule 3.850 relief is proper so that Mr. Agan may receive a new, fair trial at which all material facts are presented.

111. A capital sentencer may not fail to provide independent and serious consideration to the nonstatutory mitigating circumstances presented by a capital defendant in making the sentencing determination. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987). Here, the trial judge refused to consider nonstatutory mitigation and imposed death. As this Court first recognized in Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), Hitchcock is a retroactive change in law requiring reconsideration of claims regarding a capital sentencer's failure to consider nonstatutory mitigation. Analyzed according to the appropriate post-Hitchcock standard of review, the record of the proceedings -- including the trial judge's oral pronouncements and sentencing order -- demonstrates that the judge did not consider nonstatutory mitigation. The circuit court erred in relying on this Court's prior opinions in Mr. Agan's case, rather than applying the constitutionally required post-Hitchcock standard of review.

IV. The trial court failed to provide a factual basis in support of the death sentence, in violation of Florida law and the eighth and fourteenth

amendments. Thus, the record does not demonstrate that the death sentence is based upon an individualized, reasoned judgment regarding the appropriateness of the death sentence. Rule 3.850 relief is proper.

V. This case involves the unconstitutional doubling of aggravating circumstances, in violation of Florida law and the eighth and fourteenth amendments. This unconstitutional doubling of aggravating circumstances created the risk that death was imposed based upon an unguided emotional response and despite the existence of factors calling for a life sentence. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The error was not harmless. Rule 3.850 relief is proper.

ARGUMENT I

THE STATE'S FAILURE TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE VIOLATED MR. AGAN'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AS WELL AS RULE 3.220 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE.

Throughout the post-conviction proceedings in this case, Mr. Agan has consistently maintained that he is innocent of the offense for which he was convicted and sentenced to death. Just as consistently, the State has failed to disclose the material exculpatory evidence establishing Mr. Agan's innocence. The true extent of the State's withholding has now come to light -- since 1980, the State has had the evidence establishing Mr. Agan's innocence and has failed to disclose that evidence despite repeated requests from Mr. Agan's counsel. The undisclosed evidence which has finally been revealed conclusively establishes that another prison inmate -- not Mr. Agan -- was extorting money from the victim and that an eyewitness saw the extortionist murder the victim. This finally disclosed evidence demands that an evidentiary hearing be conducted and that Mr. Agan be granted relief from his unconstitutional and wrongful conviction and sentence of death.

As Claim IV of his Rule 3.850 motion filed on August 1, 1989, Mr. Agan

asserted that the State's nondisclosure of material exculpatory evidence violated the Florida discovery rules and the due process clause of the fourteenth amendment. The circuit court denied this claim, saying:

> this information has been known to the Defendant and his counsel since the inception of this case. Finally, this issue was also rejected by the Florida Supreme Court in its affirmance of the trial court's denial of the first 3.850 motion.

(S. 232-33). The circuit court's conclusions are erroneous as a matter of fact and law.

A. THE UNDISCLOSED FACTS

Contrary to the circuit court's conclusion, the information upon which Mr. Agan's claim is based was only disclosed by the State in 1989 and has not been known "since the inception of this case." In 1980, at the time of Mr. Agan's conviction and sentencing, the only exculpatory information disclosed by the State was that Mr. Agan had identified the wrong knife as the murder weapon. At that time, the prosecutor informed the court:

> [THE PROSECUTOR]: Excuse me, Mr. Agan.
>
> The issue of exculpatory information, under what I believe to be my responsibility under Grady [sic] v. Maryland decision, Your Honor, would be the following:
>
> That the defendant, although testifying very clearly to the knife having stuck in the bone of Mr. Dana DeWitt, which is very strong valid evidence as supported by the Medical Examiner, Mr. Agan described, at least tentatively, and said that that could have been a particular weapon being approximately consistent with the width and the lenghth of the weapon that the Medical Examiner would say was the weapon that was used.
>
> He described it as being a weapon that he used. It was shown to him and he said, "Yeah, that looks like the weapon."
>
> In his statement to Inspector Turner, as well as his statement taken by me before the Grand Jury, he indicated that the knife that he used stuck in the neck and that he had pulled the knife out and that a gauze bandage came off that knife that he threw away.
>
> That knife was found in or around adjacent to the area of the cell of the deceased in the outside ground area.
>
> There was also another knife that was found that had a wooden handle on it, which was of a different design and different size but,

nonetheless, consistent with the depth and the width of the wounds that the Medical Examiner would testify to. That particular knife with the wooden handle, Your Honor, was submitted along with the other knife that was submitted to the Florida Department of Criminal Law Enforcement Laboratory, as proper investigation by the Department of Corrections would dictate.

They submitted those weapons.

The weapon that Mr. Agan had tentatively identified to me was not the weapon that came back with the blood match and type and group of Mr. Dana Dewitt. The weapon that he did not indicate, that had the wooden handle, was the weapon that came back with a blood type and group, I believe, that the defendant or, rather, the victim.

That is the only information that I can consider, in this case, to be exculpatory in some sense or fashion. I do, however, stand on what has already been indicated in the factual basis which, in my opinion, would be those facts which would support the trial of this case as well as supporting the Indictment in the prosecution of this defendant. That is one matter, however, that I feel obligated even though I don't have a complete report from the lab to tender, on behalf of Mr. Futch, as exculpatory information.

(R. 46-48)(emphasis added).

After the prosecutor's assertion that the only exculpatory evidence in the case was Mr. Agan's identification of the wrong knife as the murder weapon, the trial court inquired of defense counsel, "Mr. Futch, do you have exculpatory information" (R. 48). Mr. Futch responded, "I have no exculpatory information, Your Honor" (R. 49). Of course, the recent disclosures by the State demonstrate that a great deal of exculpatory -- indeed, exonerating -- information existed in 1980.

In 1985, Mr. Agan asserted in his pro se Rule 3.850 motion:

44. In 1982, the Department of Corrections investigated itself to determine whether Defendant was offered a concurrent life sentence and a transfer from F. S. P. in return for pleading guilty to a murder the state could not prove. The Department of Corrections determined that the Department of Corrections was innocent of any such wrongdoings. See Department of Corrections Special Investigation Entry #82-2502.

What was admitted by D. O. C. personnel was the following:

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

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

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

d. Investigator Ball knew in 1980 that the Defendant was reluctant to talk much about the crime, and as the investigators learned more and spoke with Defendant about their knowledge, the closer Defendant's confessions came to the known facts. See Exhibit 33, attached.

(T. 40-41). Again, in 1985, as in 1980, a great deal of exculpatory evidence existed but was unrevealed by the State.

That evidence -- finally revealed in 1989 -- is materially different from anything which was known before. The evidence was not known before because the State concealed it. The evidence was contained in the investigative file of L. E. Turner, who investigated the offense for the Department of Corrections. The evidence remained in the custody of the Department of Corrections from 1980 until 1989, when it was finally disclosed. The evidence establishes that Mr. Agan was unconstitutionally convicted and sentenced to death.

Mr. Turner's file contains evidence demonstrating that another inmate, not Mr. Agan, was extorting money from the victim and that in fact that inmate, not Mr. Agan, murdered the victim. For example, in Mr. Turner's file was a note memoralizing Mr. Turner's conversation with the victim's stepfather. Neither the note nor its contents were disclosed as required by Florida discovery rules and by the fifth, sixth, eighth, and fourteenth amendments. The note identified Mr. Gross as a person who threatened the victim's life unless the victim paid extortion:

Had telephone conversation with DeWitt's Step-Father who stated he had a letter from DeWitt directing him to send $50 each to Michael Gross and Lawrence Cormack as they were threatening his (DeWitt's) life if he didn't do the above.

(S. 53). A notation on the letter indicates that this incident occurred September 5th or 6th. two weeks before the murder.

On September 9, 1980, just ten days before his murder, Mr. DeWitt wrote his stepfather. This letter is date stamped as received by the Department of Corrections investigator's office September 30, 1980. The undisclosed letter clearly implicates Michael R. Gross and Lawrence Cormack in DeWitt's murder, establishing their efforts to extort money from the victim:

> M did not come by with the mower today. For all I know, since I didn't see him today, he may have transferred and you may hear here from him in a day or two. In either event, whether he's transferred or comes over tomorrow, I must make *my* decision now! Per *my* conversation in last night's letter, I told you of the several options available. Not a wide variety, is it? . . . Since I don't wish to hurt anyone this close to our ballgame, and I can not see hiding on "Max," the best solution I can assume will be to go ahead and pay the two desperadoes. If, after they've spent their money they try to do it again, I'll have to take a different path. For the time being, I want to get the burden off my back, so, if you don't mind, please send 2 money orders. one to Lawrence Cormack *11048866.* and one to Michael R. Gross *11072141* -- $50.00 each. Enclose one sentence in each letter, saying, "Enclosed is $50.00 to cover your expenses." Sign each with the letter "D". Don't say any thing more, above all, don't place your name on the return address -- use initials only, okay? Carl, believe me, if I thought there was another way around this problem, aside from extreme violence, I would never ask you to help, but there isn't! It's imperative that I pay the extortion at your earliest convenience. The inmate bank takes 4-5 days to process the mo's, so please hurry.
>
> Aside from all this bullshit, in case I change my mind in saying anything to Max, don't, when you see him next week -- or whenever -- say anything about this dilemma. In any event, I'll write you again tomorrow night and tell you more, or if M shows up.
>
> What more can I say? I'm sick to my stomach about everything! Don't feel like saying more.
>
> Love,
> Dan
>
> P.S. Please keep this to yourself.

(S. 55-56)(emphasis added).

On September 15, 1980, just four days before his murder, Mr. DeWitt wrote a letter to Cindy Pellagrino. This letter was in Mr. Turner's file and further established that the victim was in fear for his life because of the extortion.

Again, this letter was not provided to the defense:

> . . . On Saturday, Sept. 6, while I was lying on *my* bunk reading my racing forms, two white men threw down on my with knives. They wanted money. I don't -- or didn't have any money. To make a long story short, I did some fast talking. So here it is 9/15 and I still haven't done anything. Neither have I given any money nor have I destroyed one of the extortionists. Unfortunately, I have only 3 alternatives: check-in (jail) or pay the $100.00 they desire. My 3rd course of action, is to attack! Because I'm on the verge of leaving -- hopefully -- this God forsaken, rat infester prison, I really don't wish to hurt anyone. However, it's too late to play it by ear. There's no doubt in my mind that the aggressors will stick me if I don't pay their request. Hell of a place, isn't it? Cindy, I'm truly sorry to have to bring you into *my* personal affairs. But, do I have any choice? Who else can I complain to? I certainly can't say anything to anyon I know that lives here. Their advice would be to kill one of the bad guys. Aside from that, I don't want anyone to know my business. It's an unfortunate situation, wouldn't you say? Moreover, *my* steop father and my professor advised me to go to jail. In the 3 1/2 years I've been here, nothing like this has ever happened. So, anyway, what's Dana going to do? When Dana doesn't know, who does? I shall keep you informed of any new developments . . . . (P.S. keep this to yourself)* * *
>
> Cindy, you'11 have to excuse *my* reticence tonight, I'm too worried about my personal problems to write a clear letter. In other words, my bullshit is very weak for a 15 Sept. 1980. Will write again soon.

(S. 61-62)(emphasis added).

When read in conjunction with Mr. DeWitt's letter to his stepfather dated September 9, 1980, this letter indicates that Mr. DeWitt knew if he did not pay Mr. Gross and his cohort the extortion money, they would "stick" him. This information is clearly exculpatory, supporting the conclusion that Mr. Gross had a motive to kill Mr. DeWitt since Mr. DeWitt was unable to pay the extortion.

Also contained in Mr. Turner's file was part of a letter written by Mr. DeWitt to Cindy Pellegrino dated September 17, 1980. This letter was also not disclosed to the defense. It was written just two days before Mr. DeWitt's murder and expressed his concern for his safety due to Mr. Gross' extortion:

> Well, I'm still alive and well. I still haven't taken care of my little problem I told You about on Monday. They want money! Unfortunately, as I've told you before, I receive a check for $25.00 once every 30 days from my older brother's Chase Manhattan Bank account. Doesn't leave any extra for luxuries or recreation, does it?

That's one of the reasons I wanted you to find some acid; thus enabling me to earn a little extra money. This is one hell of a place, isn't it?

(S. 65).

After the homicide, Cindy Pellegino wrote Mr. Turner, voicing her concerns that if Mr. Dewitt owed Mr. Agan gambling debts, as the State's prosecution theory in 1980 went, she would have known about such a debt. Certainly, the absence of such a debt would support the defense that someone else committed the offense. This letter clearly negates Mr. Agan's guilt:

Enclosed you will find all the information Dana DeWitt mentioned to me about the events leading up to this murder. I hope you will find them useful, even though no mention of names is given.

As far as I am concerned, I am glad to be of any help. Dana and I were very close and we were both very excited about our first meeting. Unfortunately, it didn't turn out as expected.

I know the stabbing has been attributed to a gambling debt. Dana would have mentioned that, as he tells me much of what happens at F.S.P. Also, he told me of an occasion he lost $50 and a watch. There is no reason why he couldn't or wouldn't mention the debt. Also, I have found out the only thing he owed anyone was $2. That is not a very large amount, is it?

(S. 67).

Most startling is the nondisclosure of the following information which was in the State's possession:

9/22/80 4:53 p.m. --
Horace Anderson -- D/M - DC #C-011681

Luociues Kitchen, 034269, on V-Wing standing at window and observed Gross go into DeWitt's cell. DeWitt was facing window talking to Kitchen. Kitchen saw Gross stab DeWitt in the neck.

(S. 70)(emphasis added). Mr. Luociues Kitchen witnessed Gross stab Mr. DeWitt. Mr. Turner had knowledge of an eve witness who actually saw the victim killed by Gross. This evidence was undisclosed to Mr. Agan's counsel. Another undisclosed field note reflects that inmate Robert Todd Harrison told Mr. Turner that on September 14, 1980 -- five days before the murder -- Michael Gross told Harrison to stay away from Dana DeWitt: "I got to kill DeWitt. Stay away from

Bhim" (S. 72).

All of the evidence disclosed in 1989 should have been disclosed in 1980. Mr. Stinson and Mr. Futch, trial level attorneys for Mr. Agan, should clearly have been provided with this exculpatory material. If either Mr. Stinson or Mr. Futch had been properly provided with this information, they would have been able to inform Mr. Agan that he had a valid defense that would have led to a judgment of not guilty in a trial. Certainly Mr. Futch would not have knowingly pled an innocent client guilty. In fact, Mr. Futch has stated that if he had been aware of evidence indicating Mr. Agan was innocent, Mr. Futch would not have participated in a guilty plea and would have tried to talk Mr. Agan out of pleading guilty (F. 389, 391-92).

In addition, had the evidence in Mr. Turner's file been disclosed in 1980, defense counsel would have been on notice to investigate further evidence indicating Mr. Agan's innocence. The evidence in Mr. Turner's field notes in conjunction with the statements of other inmates firmly establish Mr. Agan's innocence (F. 173-75). These inmates surely would have been contacted had counsel been provided the materials in Mr. Turner's file. If counsel had known to look, he would have discovered Jackie Gentry, who has said he saw Mr. Gross running from the area of Mr. DeWitt's cell, at the same time he saw Mr. Agan on the opposite side of the cell block on a different level. Mr. Gentry then went to Mr. Dewitt's cell and saw Mr. DeWitt bleeding profusely. According to Mr. Gentry, Mr. Agan could not possibly have committed the crime (S. 43-44). Another inmate witness was John Adams. He would have testified that Mr. Gross told Mr. Adams to tell Mr. Agan "he had better take his chances with the courts, because if he implicated Gross, he would be murdered in the prison" (S. 45). According to Mr. Adams, Mr. Agan confessed to save his life. Counsel would have discovered this had the State revealed the exculpatory evidence in its possession.

Clearly, the evidence revealed by the State in 1989 has not been known "since the inception of this case," as the circuit court concluded in summarily denying relief. All that was revealed in 1980 was that Mr. Agan had identified the wrong knife as the murder weapon. All that was revealed in 1985 was that a prison inspector had some "problems" with Mr. Agan's confessions. The information revealed in 1980 and the information obtained in 1985 from the Department of Corrections did not include the letters of Mr. DeWitt to his family and friends. It did not include the letters from family and friends to the prison officials. Most importantly the Department of Corrections disclosures did not include the prison nvestigator's report regarding the existence of an eyewitness who had seen Michael Gross stab Dana DeWitt to death.

When Mr. Turner's files were ultimately disclosed, Jerry Vaughn, Inspector General, Department of Corrections, explained to Bret Strand, an investigator on Mr. Agan's behalf, the reason for the failure to previously disclose the information in Mr. Turner's file to Mr. Agan or his counsel. Mr. Vaughn indicated that due to a change in procedure the materials in Mr. Turner's file were not in the Inspector General's file and thus had not been previously provided to Mr. Agan or his counsel when previous requests for access to the Inspector General's file had been made. See Motion to Vacate at 24, paragraph 6.

The question which the circuit court failed to address is whether "'the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence.'" Lightbourne v. Dugger, ___ So. 2d ___, 14 F.L.W. 376 (Fla. July 20, 1989), quoting Rule 3.850. Resolution of this question requires an evidentiary hearing. Id. Here, the files and records establish that the exculpatory evidence in Mr. Turner's file was not disclosed to Mr. Agan or his counsel until January 5, 1989; counsel first learned of the file's existence October 31, 1988.

The State has not challenged these facts because it cannot. As explained in Lightbourne, Mr. Agan's allegations in this regard must be accepted for purposes of this appeal. The facts as pled establish that the circuit court erred in concluding that Mr. Agan and his counsel have known all along that the State had in its possession information from an eyewitness identifying Mr. Gross as the killer, the person who actually stabbed and killed Mr. DeWitt, and information establishing Mr. Gross' motive for the murder.[2]

B. THE DISCOVERY VIOLATION

There can be no doubt about Mr. Agan's entitlement to relief. Rule 3.220 of the Florida Rules of Criminal Procedure provides in pertinent part:

> (a) Prosecutor's Obligation.
>
> * * *
>
> (2) As soon as practicable after the filing of the indictment or information the prosecutor shall disclose to the defense counsel any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged.

Failure to honor Rule 3.220 requires a reversal unless the State can grove that the error is harmless beyond a reasonable doubt. This is the express standard of review when Rule 3.850 proceedings establish a discovery violation which was unknown at trial. Roman v. State, 528 So. 2d 1169 (Fla. 1988). Here a comparison of the prosecutor's statement at the time of the guilty plea with the documents in Mr. Turner's investigative file establishes that exculpatory evidence and statements material to the defendant's case were undisclosed. Clearly, the documents in Mr. Turner's file negate the guilt of Mr. Agan. Taken together, they build a strong case that Mr. Gross was in fact the killer.

Certainly Rule 3.220(a)(2) was violated. Evidence which "tend[ed] to negate the guilt of the accused as to the offense charged" was undisclosed.

'Even if the State were to challenge Mr. Agan's allegations, an evidentiary hearing would be required as to whether the Department of Corrections previously disclosed the eyewitness account and the letters contained in Mr. Turner's file.

This evidence was "within the State's possession or control." It was in the possession of the law enforcement officer investigating the homicide. The nondisclosure cannot be found to be harmless "beyond a reasonable doubt." Roman, 528 So. 2d at 1171. Mr. Futch, Mr. Agan's defense counsel, has testified that he would not have participated in a guilty plea if he had had evidence of innocence (F. 389). Cf. Stano v. Dugger, No. 88-3375, ___ F.2d ___ (11th Cir. Nov. 17, 1989). The undisclosed eyewitness account regarding Michael Gross stabbing and killing Dana DeWitt establishes much more than a reasonable possibility of a different outcome. There would have been no guilty plea, no conviction, and no death sentence.

C. THE BRADY VIOLATION

The prosecution's suppression of evidence favorable to the accused also violated due process. United States v. Bagley, 105 S.Ct. 3375 (1985). The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984).

The Constitution provides a broadly interpreted mandate that the State reveal anything that benefits the accused, and the State's withholding of information such as that contained in Mr. Turner's files renders a criminal defendant's trial fundamentally unfair. Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 105 S. Ct. 3375 (1985); Aranno v. State, 497 So. 2d 1161 (Fla. 1986). A defendant's right to confront and cross-examine witnesses against him is violated by such state action. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Giglio v. United States, 405 U.S. 150 (1972). Counsel cannot be effective when deceived; consequently, Mr. Agan's sixth amendment

right to effective assistance of counsel was also violated. United States v. Cronic, 466 S. Ct. 648 (1984); Stano v. Duager, No. 88-3375, ___ F.2d ___ (11th Cir. Nov. 17, 1989). The resulting unreliability of a conviction or sentence of death derived from proceedings such as those in Mr. Agan's case also violates the eighth amendment requirement that in capital cases the Constitution cannot tolerate any margin of error. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977). Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87. The evidence here meets that test, but it was not disclosed. The Bagley materiality standard is met and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, supra, 105 S. Ct. at 3383. Such a probability undeniably exists here. Had this evidence been disclosed, there would have been no guilty plea, no conviction, and no death sentence.[3]

---

[3]An even more serious due process violation occurs when the State deliberately presents false and/or misleading testimony. See Bagley, supra; Moonev v. Holohan, 294 U.S. 103 (1935); Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959); Miller v. Pate, 386 U.S. 1 (1967); Giglio v. United States, supra, 405 U.S. 150 (1972); United States v. Agurs, 427 U.S. 91 (1976). When such is the case, the defendant is entitled to relief if there is "any reasonable likelihood" that the testimony "could have" affected the finding of guilt. United States v. Banley, 105 S. Ct. at 3382, quoting Agurs, 427 U.S. at 103 (emphasis supplied).

D. CONCLUSION

Mr. Agan's motion to vacate judgment and sentence pled substantial facts supporting this claim. See Fla. R. Crim. P. 3.850. The claim is based upon nonrecord [hidden] evidence of prosecutorial misconduct and knowing use of false or misleading evidence which was kept from the defense and the court at the time of Mr. Agan's guilty plea and sentencing. The State concealed the truth and kept it from the record.[4] The true facts revealing the State's misconduct have only now come to light.

Claims such as that presented by Mr. Agan cannot be raised anywhere but in post-conviction proceedings, as this Court has acknowledged. See Aranno v. State, 437 So. 2d 1099, 1102 (Fla. 1983)("A Bradv violation is normally predicated on not knowing of the withheld evidence."); see also Smith v. State, 400 So. 2d 956, 963 (Fla. 1981). Rule 3.850, Fla. R. Crim. P., provides the forum and mechanism.

The court below should have granted an evidentiary hearing -- the files and records do not demonstrate that Mr. Agan is entitled to no relief. The lower court erred by not conducting an evidentiary hearing to fairly determine this claim. Sauires v. State, 513 So. 2d 138, 139 (Fla. 1987)(ordering Rule 3.850 evidentiary hearing on Brady claim); Demps v. State, 416 So. 2d 808, 809-10 (Fla. 1982)(same); Smith v. State, supra, 400 So. 2d at 962-64 (same); Aranno v. State, supra, 437 So. 2d at 1104-05 (same), subsequent history in, 467 So. 2d 692 (Fla. 1985)(granting Rule 3.850 post-conviction relief), vacated and remanded, 474 U.S. 806 (1985)(directing reconsideration in light of United States v. Bagley), opinion on remand, 497 So. 2d 1161 (Fla. 1986)(granting Rule 3.850 post-conviction relief under Banley). Claims predicated on Bradv v. Maryland are precisely the type of issues which must be heard pursuant to Rule

[4]It is interesting to note that the state attorney's file on Mr. Agan's case is missing and unavailable for public records inspection.

3.850. See Demps, supra, 416 So. 2d at 809-10 (directing a Rule 3.850 hearing on Brady claim); Smith, supra, 400 So. 2d at 963 ("Since the trial court believed that [a Brady claim] was inappropriate to a Rule 3.850 proceeding, it did not pass on the merits of the question , . . and accordingly we remand this singular issue to the trial court to make this determination."); Arango, supra, 437 So. 2d at 1104-05 ("[P]etitioner has made a prima facie case which requires a hearing, We remand to the trial court for the purpose of conducting a hearing on the claimed Brady violation."); cf. Cash v. State, 207 So. 2d 18 (Fla. 3d DCA 1968); Smith v. State, 191 So. 2d 618 (Fla. 4th DCA 1966); Wade v. State, 193 So. 2d 459 (Fla. 4th DCA 1967). As in Demps, Mr. Agan's claim is that "the State affirmatively manipulated testimony, a violation more egregious than the mere passive nondisclosure disapproved in Bradv v. Maryland." 416 So. 2d at 809.

The circuit court's summary denial was in error. A more blatant violation of Rule 3.220 and Bagley cannot be found. Even after Mr. Agan's conviction and sentence of death, the exculpatory evidence continued to be hidden. The nondisclosure cannot be attributed in any way to Mr. Agan or his counsel. In 1980, the prosecutor stated on the record that all exculpatory evidence had been disclosed. In 1985, Mr. Agan's counsel was allowed to inspect and copy what was purported to be the entire Department of Corrections file regarding Mr. Agan's case, and those disclosed materials were used in Mr. Agan's first Rule 3.850 motion. However, disclosure of the existence of Mr. Turner's file did not occur until 1988 at the very first evidentiary hearing ever ordered in the case. Full disclosure of the contents of the file had to wait until January of 1989. "[T]he cause for [Agan's] delay in presenting this claim rested on the State's failure to disclose." Walker v. Lockhart, 763 F.2d 9942, 955 n. 26 (8th Cir. 1985)(in banc). Under the circumstances, Mr. Agan's claim premised on the newly disclosed facts was properly presented in the Rule 3.850 Motion filed August 1,

1989. Lightbourne v. Dugger, supra. Accordingly, the circuit court's decision must be reversed, an evidentiary hearing conducted, and Rule *3.850* relief granted.

ARGUMENT II

AN EVIDENTIARY HEARING IS REQUIRED ON MR. AGAN'S CLAIM THAT HE IS ENTITLED TO A NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE.

As an alternate basis for Rule *3.850* relief, Mr. Agan set forth in his motion that he was entitled to a new trial because of this Court's holding in Richardson v. State, *546* So. 2d 1037 (Fla. 1989). As this Court noted in Richardson:

> The 1984 amendment to rule *3.850*, while not making any substantive changes, implicitly recognized that a motion pursuant to rule *3.850* is the appropriate place to bring newly discovered evidence claims by including, as one of the exceptions to the two-year time limitation for bringing claims under the rule, situations where "the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence." The Florida Bar re Amendment to Rules of Criminal Procedure, 460 So.2d 907, 907 (Fla. *1984).*

546 So. 2d at *1038.* In Richardson, this Court recognized that newly discovered evidence alone could warrant Rule 3.850 relief. Mr. Agan has pled that there exists a wealth of newly discovered evidence that was "unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence.'' See Argument I, supra.

Mr. Agan urges this Court to recognize the importance of this evidence which establishes his innocence. This evidence unquestionably undermines confidence in the reliability of Mr. Agan's conviction, a conviction which resulted in a sentence of death. The eighth amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. Such matters cannot be treated through mechanical rules and stiff principles.

As the Supreme Court noted in the context of ineffective assistance of counsel, the correct focus is on the fundamental fairness of the proceeding:

> A number of practical considerations are important for the

> application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on th fundamental fairness of the proceeding whose result is being challenned. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland v. Washington, 466 U.S. 668, 696 (1984)(emphasis added).

The evidence presented by Mr. Agan in his Rule 3.850 motion demonstrates that Mr. Agan's conviction is unreliable. Richardson and Rule 3.850 provide the authority to "produce just results." The Supreme Court has repeatedly held that because of the "qualitative difference" between death and imprisonment, "there is a corresponding difference in the need for reliability in the determination that death ishe appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586. 604 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Gregg v. Georeia, 428 U.S. 153, 187 (1976); Reid v. Covert, 354 U.S. 1, 45-56 (1957) (Frankfurter, J., concurring); id. at 77 (Harlan, J., concurring). This requirement of enhanced reliability has been extended to all aspects of the proceedings leading to a death sentence, including those phases specifically concerned with guilt, Beck v. Alabama, 447 U.S. 625, 637-38 (1980); sentence, Loclcett v. Ohio, 438 U.S. 586, 604 (1978); appeal, Gardner v. Florida, 430 U.S. 349, 360-61 (1977); and post-conviction proceedings. Amadeo v. Zant, 108 S. Ct. 1771 (1988). Accordingly, a person who is threatened with or has received a capital sentence has been recognized to be entitled to every safeguard the law has to offer, Greee v. Georgia, 428 U.S. 153, 187 (1976), including full and fair post-conviction proceedings. See, e.g., Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980); Evans v. Bennet, 440 U.S. 1301, 1303 (1979) (Rehnquist, Circuit Justice).

Under the eighth and fourteenth amendments, the circuit court erroneously dismissed the newly discovered evidence presented here.[5] Under Richardson, at a minimum an evidentiary hearing was warranted. Mr. Agan submits that the new evidence sufficiently questions the reliability of his conviction and death sentence to require an evidentiary hearing and Rule 3.850 relief. When viewed in conjunction with the evidence withheld in violation of Bradv and the discovery rules, there can be no question that his conviction cannot withstand the requirements of the eighth amendment and the due process clause. Mr. Agan is entitled to a new, fair trial, for the outcome of the original proceedings are unreliable.

ARGUMENT III

THE TRIAL COURT ERRED BY FAILING TO CONSIDER NONSTATUTORY MITIGATING CIRCUMSTANCES, WHICH MUST BE CONSIDERED REGARDLESS OF WHETHER THERE EXIST STATUTORY MITIGATING CIRCUMSTANCES, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Agan's case presents a clear violation of Hitchcock v. Dunner, 107 S. Ct. 1821 (1987). Mr. Agan's entitlement to relief is clear: his "sentencing judge refused to consider[] evidence of nonstatutory mitigating circumstances, and . . . the proceedings therefore did not comport with [the eighth amendment]." Hitchcock, 107 S. Ct. at 1824.

A. THIS CLAIM IS PROPERLY BEFORE THE COURT

Pre-Hitchcock, Mr. Agan challenged the trial judge's preclusive consideration of mitigating circumstances in prior state proceedings. See Agan v. State, 445 So. 2d 326, 328-29 (Fla. 1983). Post-Hitchcock, Mr. Agan presented this claim to this Court, which held: "The intervening United States Supreme Court decision in Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), does not require us to reexamine that issue as it presents

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[5] Again the evidence as noted in previous sections of this brief includes materials contained in Mr. Turner's file and interviews of inmate witnesses who say Mr. Gross, and not Mr. Agan, was the perpetrator of this crime.

no new issues of law as to this case." Agan v. Dugger, 508 So. 2d 11, 12 (Fla. 1987).

The Court thus failed to recognize as it has in every post-Hitchcock case except Mr. Agan's, that Hitchcock represents "a substantial change in law" requiring reconsideration of the issue. See, e.g., Downs v. Dugger, 514 So. 2d 1069, 1070 (Fla. 1987). The Court's prior decision on Mr. Agan's Hitchcock claim has been overruled by later decisions of this Court and is contrary to every post-Hitchcock decision by this Court. The issue must be reconsidered.[6]

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[6]This Court's decision in Agan v. Dugger, supra, was rendered on June 8, 1987. Later that same year, the Court held that Hitchcock represents "a substantial change in law" requiring reconsideration of the issue. Downs, supra, 514 So. 2d at 1070. The Court thus overruled its decision in Agan v. Dugger, supra, that Hitchcock "presents no new issues of law." Moreover, in Downs, the Court for the first time announced that Hitchcock was a change in law requiring issues regarding Florida capital sentencer's failure to consider nonstatutory mitigation to be reconsidered. The Court has made a similar ruling in every other post-Hitchcock case which has been presented for its review. See Waterhouse v. State, 522 So. 2d 341 (Fla. 1988)(defendant sentenced after Lockett v. Ohio and Sonner v. State; no procedural bar applied and merits relief granted because Hitchcock v. Dugger represents change in law mandating merits post-conviction review); Thompson v. Dunner, 515 So. 2d 173 (Fla. 1987)(granting relief and rejecting State's procedural default contentions because Hitchcock is a "change in law" mandating merits review in post-conviction proceedings); Morgan v. State, 515 So. 2d 975 (Fla. 1987)(same); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987) (same); McCrae v. State, 510 So. 2d 874 (Fla. 1987)(same); Mikenas v. Dunner, 519 So. 2d 601 (Fla. 1988)(merits relief granted and no procedural bar applied to Hitchcock claim because Hitchcock "represented a sufficient change in the law to defeat the application of procedural default."); Combs v. State, 525 So. 2d 853 (Fla. 1988)(same, defendant sentenced after Lockett and Songer); Foster v. State, 518 So. 2d 901 (Fla. 1988); Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988). This Court has reviewed the merits of every post-conviction litigant's Hitchcock claim, whether the claim had been raised in earlier proceedings or not, and irrespective of whether the defendant was sentenced before Lockett, see McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987), between Lockett v. Ohio and Sonner v. State, 365 So. 2d 696 (Fla. 1978), see Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), or after Lockett and Sonner, see Waterhouse v. State, 522 So. 2d 341 (Fla. 1988); Combs v. State, 525 So. 2d 853 (Fla. 1988); Card v. Dugger, 512 So. 2d 829 (Fla. 1987).

B. THE COURT BELOW ERRED IN REJECTING MR. AGAN'S HITCHCOCK V. DUGGER CLAIM

1. Hitchcock Changed the Standard for Reviewing Claims That a Capital Sentencer Failed to Consider Nonstatutory Mitigating Circumstances

In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the United States Supreme Court held:

> 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. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)(plurality opinion).

Id. at 1824. What made this conclusion "clear" was the Court's independent examination of the record in Mr. Hitchcock's case, including an examination of the evidence of mitigation, the arguments of counsel, and the trial judge's findings in imposing the death sentence. Id. at 1823-24. The Court concluded, "our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed . . . a prohibition [against the consideration of mitigating circumstances not enumerated in the statute] and instructed the jury accordingly. . . ." Id. at 1823.

The court below did not apply this standard of review, and thus did not follow what Hitchcock itself held in rejecting Mr. Agan's claim. Rather, the circuit court disposed of Mr. Agan's claim without reaching the merits, in reliance on this Court's pre-Hitchcock rejections of Mr. Agan's claim.[7] The

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[7]The circuit court relied upon this Court's decisions in Mr. Agan's direct appeal and in the appeal of the denial of Mr. Agan's first Rule 3.850 motion (S. 231-32), and held that Mr. Agan's Hitchcock claim was barred by the two-year time limitation provision of Rule 3.850. However, in Spalding v. Duaeer, No. 74,355 (Fla. June 30, 1989), this Court allowed capital defendants until August 1, 1989, to file Rule 3.850 motions raising a claim premised upon Hitchcock. Mr. Agan's motion was filed on August 1, 1989, and thus is not barred by the time limitations of Rule 3.850. Further, a Rule 3.850 motion is the proper mechanism for presenting a Hitchcock claim, as the Court held in Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989).

circuit court's disposition was contrary to Hitchcock and to the post-Hitchcock analysis of this Court.

Hitchcock has worked a substantial change in the law, which the circuit court's disposition failed to consider. The circuit court's disposition rested upon this Court's previous decisions in Mr. Agan's case. However, the fundamental change in the standard for reviewing claims such as Mr. Agan's brought about by Hitchcock directly implicates the manner in which the claim was rejected in the past by this Court and, in reliance on that previous disposition, now by the circuit court.

Post-Hitchcock, "mere presentation" of nonstatutory mitigating evidence is simply not enough. Downs v. Dunner, 514 So. 2d at 1071. Nor does the record any longer have to affirmatively show a specific preclusion, as in the pre-Hitchcock standard, see Sonner v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(in banc); post-Hitchcock, judicial preclusive consideration is presumed where, as here, the sentencing order makes no reference or finding regarding nonstatutory mitigation. Woods v. Duaner, No. 88-910-Civ.-J-14 (M.D. Fla., Feb. 21, 1989)(App. 20), slip op. at 35-37 (sentencing order demonstrated that consideration of the evidence presented was only provided in terms of the statute's factors; failure to afford independent consideration to nonstatutory mitigating evidence requires resentencing); Armstrong v. Dugger, 833 F.2d 1430, 1435 (11th Cir. 1987)(sentencing order does not refer to nonstatutory mitigation); Messer v. Florida, 834 F.2d 890, 894 (11th Cir. 1987); McCrae v. State, 510 So. 2d 874 (Fla. 1987). Additionally, post-Hitchcock, "the issue is not what the Florida law actually was at the time of sentencing. Instead, the issue is what the trial court . . . believed the law to be." Magill v. Duaaer, 824 F.2d 879, 892 n.15 (11th Cir. 1987)(emphasis in original). Finally, the post-Hitchcock analysis focuses on whether nonstatutory mitigation was given "serious" consideration. McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987).

There can be no doubt that "serious" consideration, McCrae, supra, 510 So. 2d at 880; Woods v. Dugger, supra, was not afforded to Mr. Agan.

Under the prior standard for assessing claims such as Mr. Agan's, the opportunity to "present" evidence of nonstatutory mitigation defeated a constitutional challenge. Hitchcock rejected that standard, as this Court has explained. Downs, supra, 514 So. 2d at 1071. Additionally, whereas under the prior standard, the courts presumed that the trial judge considered all evidence of mitigation unless there was an affirmative indication that the judge refused to consider nonstatutory mitigating circumstances, see Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(in banc), under Hitchcock and its progeny, that presumption is reversed. Post-Hitchcock, the inquiry looks to the record of the proceedings -- including judge comments and the sentencing order -- to determine whether the sentencer did not properly, independently and "seriously", McCrae, supra, consider nonstatutory mitigation. Judicial preclusive consideration is presumed from the fact that the sentencing order makes no reference to or finding regarding nonstatutory mitigation. McCrae, supra, 510 So. 2d 874; Messer, supra, 834 F.2d 890; Armstrong, supra, 833 F.2d 1430; Woods v. Duener, No. 88-910-Civ.-J-14 (M.D. Fla., Feb. 21, 1989).

Finally, post-Hitchcock, if the record reflects ambiguity as to the consideration the judge may or may not have given to nonstatutory mitigation, relief is proper: the very ambiguity renders the proceedings constitutionally unreliable, the sentence unindividualized, and the proceedings' results tainted. Cf. Woods, supra, slip op. at 32-37 (App. 20)(granting relief under Hitchcock notwithstanding the fact that the jury was instructed on nonstatutory mitigation); Skipper v. South Carolina, 476 U.S. 1 (1986). If the record leaves any ambiguity about whether the sentencing judge considered factors which would support a lesser sentence, then resentencing is required. Thus, this Court has ordered resentencing based upon a Hitchcock claim when "the record . . . leaves

unresolved the question of whether the trial court considered nonstatutory mitigating evidence." Thomas v. State, 546 So. 2d 716, 717 (Fla. 1989). It is "the 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. 586, 605 (1978), that "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered." Eddines v. Oklahoma. 455 U.S. 104, 119 (1982)(O'Connor, J., concurring). Reading the record of this case in proper context, there is no ambiguity that the sentencer restricted consideration. Even if the record was ambiguous, however, resentencing would be required.

When Mr. Agan's claim is analyzed according to appropriate post-Hitchcock standards, his entitlement to relief is plain. As is demonstrated in the discussion below, the proceedings "actually conducted," Hitchcock. 107 S. Ct. at 1823, resulted in the imposition of a death sentence by a trial judge who believed he was constrained in his consideration of nonstatutory mitigating circumstances. What cannot be doubted, on the basis of this record, is that "serious", independent consideration, McCrae, supra, was not afforded the nonstatutory mitigating factors in Mr. Agan's case.

2. The Lower Court's Disposition of this Claim is Contrary to the Record of the Proceedinas "Actually Conducted"

All participants in Mr. Agan's capital sentencing proceedings -- prosecutor, defense counsel, judge -- operated under a constrained view of mitigation. This view is evident from the participants' comments on the record and from the trial judge's sentencing findings.

The prosecutor's penalty phase closing argument focused solely on statutory mitigation:

> Your Honor, in conclusion, I know of no statutory mitigating factors in this case. This defendant has a fully formed intent, mental faculty, and that crime which he has committed is not one which he has evidenced, at least today, of any feeling of remorse or sympathy or anything else.

(R. 59)(emphasis added).

The court's oral pronouncement likewise referred only to statutory mitigation:

> 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 be 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. 63-64)(emphasis added).

The judge reduced the sentence to writing, rejected the applicability of cold, calculated and premeditated, and in its stead split Mr. Agan's prior conviction into two aggravating circumstances. He also only considered statutory mitigation:

> 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 circumstances.
>
> 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).

In addition, defense counsel did not investigate, develop or present any evidence of nonstatutory mitigation because he felt constrained by 1) his client's belief that the only way not to get death was not to ask for mercy and 2) his belief that a death sentence was appropriate for his client. In a recent

federal evidentiary hearing, defense counsel discussed these constraints as follows:

> Q. Did you feel obligated at all to *go* ahead and do some investigation and go back to Mr. Agan and try and convince him that you needed to present what you had found at the penalty phase?
>
> A. Well, I think you are asking me the same thing over in different ways, but in view of his attitude and in view of what I knew about the circumstances, not only the circumstances but the facts as they existed from the prosecution's side, I couldn't go back to Mr. Agan and say, This is not the thing for you to do because you didn't do this, you're innocent, or I think that -- more mitigation than there is aggravation in this case, and that a jury would recommend mercy and the judge would impose a life sentence, I didn't have any basis for that. When he was saying that I'm guilt, I want to plead guilty, it's my decision to because that's the only way I can beat the electric chair.
>
> Q. Did you feel that the aggravators then were outweighing the mitigators?
>
> A. Yes, sir, I did.
>
> Q. And did you feel that a death sentence was appropriate?
>
> A. I felt that under -- yes, sir, I did.

(F. 391-92).

A capital sentencer may not fail to provide independent and serious consideration to nonstatutory mitigating circumstances in making the sentencing determination. Hitchcock v. Dunner, 107 S. Ct. 1821 (1987); McCrae v. State, 510 So. 2d 874. 880 (Fla. 1987). Every actor involved in this case -- judge, defense attorney and prosecutor -- was unaware that nonstatutory mitigation had to be considered. Here, the trial judge failed to consider nonstatutory mitigation and imposed death on the basis of only two aggravating circumstances. Analyzed according to the appropriate post-Hitchcock standard of review, the record of the proceedings -- including the trial judge's comments and sentencing order -- demonstrates that the judge believed he could not consider nonstatutory mitigating circumstances and that he did not consider nonstatutory mitigating circumstances. As the United States Supreme Court most recently stated:

> "In contrast to the carefully defined standards that must narrow

> a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 481 U.S. 279, 304 (1987) (emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the [sentencer] must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the [sentencer] is to give a "'reasoned moral response to the defendant's background, character, and crime.'" Franklin, 487 U.S., at --- (opinion concurring in judgment)(quoting California v. Brown, 479 U.S., at 545 (concurring opinion)). In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson, 428 U.S., at 305, the [sentencer] must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.
>
> . . . Our reasoning in Lockett and Eddinas thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S., at 605; Eddinns, 455 U.S., at 119 (concurring opinion). When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S., at 605.

Penry v. Lynaugh, 109 S. Ct. 2934, 2951-52 (1989).

Similarly, this Court has reversed death sentences where by virtue of the failure of the sentencer to have or consider nonstatutory mitigation because of the operation of state law and the constraints on all participants (the court, the prosecutor and the defense attorney), the death sentence is unreliable. Hall v. State, 541 So. 2d 1125 (Fla. 1989); Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989). This Court has also required a resentencing where ambiguity exists as to whether the trial court gave consideration to all of the mitigation in a case. Thomas, supra; Lamb v. State, 532 So. 2d 1051, 1054 (Fla. 1988).

3. The Nonstatutory Mitigation Which Was Ignored

The trial judge's preclusive view of mitigating circumstances and consequent refusal to consider nonstatutory mitigation resulted in the judge's failure to consider the significant nonstatutory mitigation present in the

record. For example, because of his preclusive view, the judge did not consider Mr. Agan's cooperation with authorities and the extremely violent conditions at Florida State Prison. As a result, the judge did not consider the character of the defendant and circumstances of the offense, as required by Lockett v. Ohio, 438 U.S. 586 (1978), Hitchcock, suura, and Penry, supra.

Here, there was a wealth of nonstatutory mitigation of record that the sentencer did not consider. There was even more nonstatutory mitigation not of record which counsel because of his constrainment did not present. Mr. Agan was born October 13, 1927, in Alabama City, Alabama. His father, who was not married to his mother, died five months before Mr. Agan was born. After Mr. Agan was born, his mother's parents took custody of him and his older brother (See Exhibits to Original 3.850, No. 22). As a child, Mr. Agan suffered from night terrors, and had black out spells; extreme headaches preceded these black out spells. At age 17, while in the Army, he reported that during these "crazy spells" he "[doesn't] know what he is doing" (Id., No. 23). According to his Aunt, everyone believed Mr. Agan's "mind was bad . . . From the day he was born, James never seemed to be all there. He just never seemed normal. He'd run away and hide for 2 or 3 days and then come back and not say where he'd been. I truly believe he really didn't know where he'd been or what he'd been doing . . . All his life James has been confused. His mind was always wandering. One minute he'd seem perfectly normal and the next he'd be confused and not know what to do" (Id., No. 22).

According to Army records, Mr. Agan lied about his age and joined the Army when he was 16 years old. He adjusted very poorly and was discharged in 1945 at age 17, due to "inaptness [sic] and lack of adaptability." As described by Major Molitch, a neuropsychiatric consultant, Mr. Agan was "unable to adjust to the service because of mental deficiency and unstable behavior . . . . He has retained very little instruction . . . He complains of pains in various parts

of his body and claims that he is subject to frequent 'black out' spells . . . A psychological examination indicates that he is very dull mentally." The report concludes:

Diagnosis: Mental Deficiency, low moron level.

(Id., No. 24).

Ten months later, in January, 1946, Mr. Agan enlisted in the Army again. He was in for sixteen months. The Army did not realize he had been previously discharged. When Mr. Agan was constantly AWOL, an inquiry occurred, whereupon Mr. Agan gave conflicting statements about his Army history, was found to be not very intelligent, and was discharged -- a Section 8 discharge (Id., No. 25). Mr. Agan again successfully enlisted in the Army in 1950. After two years, the Army discovered its three errors, court-martialed Mr. Agan for fooling them, and he was dishonorably discharged after serving time for the fraudulent enlistment (Id., No. 26).

Upon release from the Army in 1952, Mr. Agan returned to Georgia. He was shortly thereafter convicted of robbery and sentenced to prison on June 17, 1953. Forty days later, he was evaluated at Reidsville Prison by three psychiatrists who unanimously concluded that he was:

PSYCHOTIC

(Id., No. 27)(Boldface in original). He was transferred to Milledgeville State Hospital, where he received extensive electric shock therapy and continued to make repeated complaints about headaches, for which he was placed on drugs (Id., No. 28).

It is reported at Milledgeville that two of Mr. Agan's cousins were "mental cases," that one of them committed suicide, and that one died while at the Milledgeville Hospital (Id., No. 29). Mr. Agan attempted suicide while in Reidsville prison. His records there show that as a child he "heard voices, especially at night and he would raise up in the bed and look around and thought

he heard somebody call his name." One doctor stated Mr. Agan's diagnosis as: "psychoneurosis, anxiety reaction, with psychotic episodes" (Id., No. 30).

It is clear that considerable evidence of nonstatutory mitigation was available in Mr. Agan's case, and that this evidence is of the kind which the courts consistently recognize as mitigating. The records of Mr. Agan's prior incarceration are rife with compelling documentation of his mental illnesses, intellectual impairment, and deteriorating psychological status. His dull intellect, functioning at a below normal level, and borderline retardation, were variously attributed to cultural, social, economic, and intellectual deprivation and the adverse influences imposed by his family's cultural and economic situation. All of this would have of course provided powerful, albeit nonstatutory, mitigating evidence.

Under Florida law there is no question but that the background information that was not considered by the sentencer was proper evidence of mitigating circumstances. This Court has recognized that the kinds of information available regarding Mr. Agan's background were mitigating. For example, a deprived and abusive childhood is mitigating. Holsworth v. State, 522 So. 2d 348 (Fla. 1988)("Childhood trauma has been recognized as a mitigating factor"); DuBoise v. State, 520 So. 2d 260, 266 (Fla. 1988)(jury could have considered "deprived family background"); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988)(jury could have considered "family history of physical and drug abuse"); Brown v. State, 526 So. 2d 903 (Fla. 1988)("family background and personal history . . . must be considered"); Livinnston v. State, 458 So. 2d 235 (Fla. 1988)("childhood . . . marked by severe beatings" as mitigating); see also Eddings v. Oklahoma, 455 U.S. 104, 107 (1982). Certainly mental and emotional deficiencies are similarly mitigating. Here the judge did not consider what nonstatutory mitigating there was in the record in violation of what this Court has said is required. See Lamb, supra. Moreover, counsel was constrained from

presenting the additional mitigation which existed. See Hall, supra. Accordingly, Hitchcock, which this Court recognized as new law in Downs, requires a new sentencing at which the sentencer will be "allowed to consider and give effect to mitigating evidence." Penry, 109 S. Ct. at 2951.

ARGUMENT IV

MR. AGAN'S DEATH SENTENCE MUST BE VACATED BECAUSE THE COURT FAILED TO PROVIDE A FACTUAL BASIS IN SUPPORT OF THE PENALTY, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Florida law provides that for a death sentence to be constitutionally imposed there must be specific written findings of fact in support of the penalty. Fla. Stat. section 921.141(3). The legislature has mandated that the imposition of the death penalty cannot be based on a mere recitation of the aggravating or mitigating factors present, but must be supported by written findings regarding the specific facts giving rise to the aggravating and mitigating circumstances. The legislature has provided as part of the capital sentencing scheme:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

Fla. Stat. section 921.141(3); see also Van Royal v. State, 497 So. 2d 625 (Fla. 1986). The statute makes adequate written findings a jurisdictional prerequisite to the imposition of a death sentence. It states that if the requisite written findings are not made, "the court shall impose [a] sentence of life imprisonment." (emphasis added).

The duty imposed by the legislature directing that a death sentence may only be imposed when there are specific written findings in support of the penalty serves to provide for meaningful review of the death sentence and fulfills the eighth amendment requirement that a death sentence not be imposed

in an arbitrary and capricious manner. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). The specific written findings allow the sentencing body to demonstrate that the sentence has been imposed based on an individualized determination that death is appropriate. Cf. State v. Dixon, 283 So. 2d 1 (1973).

This Court has strictly enforced the written findings requirement mandated by the legislature. Van Royal, 497 So. 2d at 628. A death sentence may not stand when "the judge did not recite the findings on which the death sentences were based into the record." Id. The imposition of such a sentence is contrary to the "mandatory statutory requirement that death sentences be supported by specific findings of fact." Id. The written findings serve to "assure [] that the trial judge based the [] sentence on a well-reasoned application of the factors set out in section 921.141(5) and 6." The

> written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it.

Id.

This Court has recently stated:

> We reiterate . . . that the sentencing order should reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to "memorialize" the trial court's decision. Van Royal, 497 So.2d at 628. Specific findings of fact provide this Court with the opportunity for a meaningful review of a defendant's sentence. Unless the written findings are supported by specific facts and are timely filed, this Court cannot be assured the trial court imposed the death sentence based on a "well-reasoned application" of the aggravating and mitigating factors. Id.

Rhodes v. State, 547So. 2d 1201, 1207 (Fla. 1989)(emphasis added). This is consistent with the United States Supreme Court's recent holding that the

sentencer must make a "reasoned moral response" to the evidence when deciding to impose death. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). The court in Penry also declared that its decision in that case applies retroactively to cases on collateral review.

The findings in support of Mr. Agan's death sentence fail to in any way comport with the statutory mandate set out in section 921.141(3) or the requirements of Penry. The sentencing order provides:

> 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.

(R. 9-10). The trial court based the death sentence merely on a written recitation of the aggravating factors applicable under the statute. The trial court failed to point out any specific factual circumstances used to find the existence of the factors in aggravation and mitigation. Mr. Agan's death sentence does not rely on a "well-reasoned application" of the statute. Indeed, the written findings differ significantly from the court's oral pronouncements regarding the sentence (see R. 63-64), further indicating the court's failure to properly weigh and consider before imposing sentence.

It is clear that the court never conducted the type of proper weighing and consideration of aggravating and mitigating circumstances. This is precisely what Van Royal prohibits. This death sentence is unlawful, and must be vacated and a life sentence imposed. See Fla. Stat. section 921.141(3). Here, as in Van Royal, the record is wholly "inadequate", 497 So. 2d at 698, to demonstrate that Mr. Agan's death sentence is appropriate. Indeed, even the findings contain no facts. Rule 3.850 relief must be granted, Mr. Agan's death sentence

vacated, and a life sentence imposed.

ARGUMENT V

MR. AGAN WAS DENIED HIS EIGHTH *AND* FOURTEENTH AMENDMENT RIGHTS BECAUSE OF THE IMPROPER DOUBLING OF AGGRAVATING FACTORS.

This case involved unconstitutional doubling of aggravating circumstances ("prior conviction/under sentence of imprisonment"). This issue involves per se reversible error, as this Court's precedents make irrefutably clear. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981). Since mitigation was before the sentencing court, this error mandates reversal, see Elledge v. State, 346 So. 2d 998 (Fla. 1977), particularly because only these two aggravating circumstances supported the death sentence.

The United States Supreme Court recently held in a case declared to be retroactive on its face that a capital sentencer must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2954 (1989). It is improper to create "the risk of an unguided emotional response." Id. A capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Id. at 2952. There can be no question that Penry must be applied retroactively. The Court there concluded that, Jurek v. Texas, 428 U.S. 262 (1976), notwithstanding, the Texas death penalty scheme previously found constitutional created the "risk that the death penalty [would] be imposed in spite of factors which [] call[ed] for a less severe penalty." 109 S. Ct. at 2952. Thus, Mr. Penry's claim was cognizable in post-conviction proceedings. Similarly, here, the decision in Penry requires the examination of the procedure in Mr. Agan's case where excess and inappropriate aggravating circumstances invoked "an unguided emotional response."

Although this Court has consistently reversed the defendant's sentence of death in cases in which aggravating circumstances were "doubled", Mr. Agan's capital sentence was allowed to stand when his case was reviewed on direct appeal. See Agan v. State, 445 So. 2d 326 (Fla. 1984). This case, however, involved and involves the unconstitutionally classic types of doubling of aggravating circumstances. It involves fundamental error, and this Court should now correct the clear errors that were not corrected on direct appeal. Moreover, under Penry, the presentation of these extra aggravating circumstances guaranteed an "unguided emotional response'' by the sentencing judge who also did not consider nonstatutory mitigation, and thus violated the eighth amendment. There is in fact a likelihood in this case that the death sentence was "imposed in spite of factors which [] call[ed] for a less severe penalty." 109 S. Ct. at 2952. Relief is now proper.

The sentencing order demonstrates that the sentencing judge used one identical underlying predicate to establish two separate aggravating factors. The sentencing order in this case thus involved the classically condemned unconstitutional "doubling up" and overbroad application of aggravating factors. Mr. Agan's sentence of death was and is fundamentally unreliable and unfair, and violates the eighth and fourteenth amendments. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976), relying on State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Cf. Maynard v. Cartwright, 108 S. Ct. 1853 (1988)(condemning overbroad application of aggravating factors). Such procedures flatly abrogate the constitutional mandate that a sentence of death not be arbitrarily imposed, and that the application of aggravating factors "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 876 (1983).

In Mr. Agan's case, error under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989), also occurred. Defense