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

REPLY 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.

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STATEMENT OF THE CASE

Mr. Agan relies primarily upon the Statement of the Case and Procedural History contained in his initial brief. However, several misrepresentations set forth in Appellee's Statement of the Case and Facts require a response.

Appellee stated in its Statement of the Case and Facts: "While awaiting the federal court's ruling, Agan obtained an abatement of the federal proceedings by representing that he 'had' to return to this Court to file a "Hitchcock" claim by August 1, 1989." Appellee's brief at 1.

While the relevance of this statement to this Court's resolution of Mr. Agan's appeal is unclear, a brief history of the federal proceedings is required by the Appellee's misrepresentation. The limited federal evidentiary hearing was held on October 31 and December 1, 1988. On January 17, 1989, Proposed Findings of Fact and Conclusions of Law were submitted to the federal court. Contemporaneously, Mr. Agan filed a motion to reopen the federal evidentiary hearing in light of the newly revealed material contained in Mr. L. E. Turner's file. The federal court ordered the State to respond to this motion. On February 24, 1989, the State filed a response opposing reopening the evidentiary hearing.

On August 1, 1989, the federal court had yet to rule on Mr. Agan's motion to reopen. However, that date was the deadline set by this Court for submitting Hitchcock claims to the state courts. See Adams v. State, 543 So. 2d 1244 (Fla. 1989); Spalding v. Dugger, No. 74,355 (Fla. June 30, 1989). Accordingly, Mr. Agan filed his Hitchcock claim in a Rule 3.850 motion. He also submitted in that motion his other Rule 3.850 claims, including claims premised upon the newly revealed material contained in Mr. L. E. Turner's file.

Having filed a Rule 3.850 motion while his federal habeas petition was still pending, Mr. Agan notified the federal court on August 14, 1989, and asked that the federal proceedings be held in abeyance. Attached to the motion was a

copy of the already filed Rule 3.850 motion. In this motion Mr. Agan stated:

> 3. On September 9, 1987, after Mr. Agan had filed his federal habeas petition, the Florida Supreme Court held that Hitchcock was new law which was not procedurally barred from being raised in a successor Rule 3.850 motion. Thus at that point in time Mr. Agan's ability to pursue his Hitchcock claim in state court was first established; the Florida Supreme Court removed the procedural bar. However, Mr. Agan's case was already pending in the Eleventh Circuit. Subsequently in Adams v. State, 543 So. 2d 1244 (Fla. 1989) the Florida Supreme Court directed that all capital defendants with Hitchcock claims must file them by July 1. 1989 or be again procedurally barred. The Office of the Capital Collateral Representative requested an extension of this deadline. It was granted extending the time for filing until August 1, 1989.
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> 4. On August 1, 1989, Mr. Agan filed his Rule 3.850 motion as required presenting to the state courts Mr. Agan's unexhausted Hitchcock claim. (A copy of this motion is attached.) In his motion Mr. Agan also included a claim based upon the newly discovered evidence of a Brady violation which had been presented to this Court in the Motion to Reopen Evidentiary Portion of Hearing. Presentation of this claim in a Rule 3.850 motion is proper now under the Florida Supreme Court's ruling in Richardson v. State, ___ So. 2d ___, 14 F.L.W. 318 (FLa. June 29, 1989), which recognized that claims premised upon newly discovered evidence were cognizible in Rule 3.850 proceedings. In light of the pendency of his Rule 3.850 motion, Mr. Agan asks this Court to hold his habeas petition in abeyance pending resolution of his motion in state court.

On August 17, 1989, Appellee filed its opposition to the motion to hold the federal proceedings in abeyance. In it Appellee stated:

> (4) Mr. Agan has represented to this Honorable Court that he has a claim of error under Hitchcock v. Dunner, 491 U.S. 393, 95 L.Ed.2d 347 (1987) which, by virtue of Adams v. State, 543 So. 2d 1244 (Fla. 1989) [and a subsequent 30-day extension] he was permitted to file on August 1, 1989. Agan also contends that Hitchcock is "new law" as to its holding that sentencers must consider non-statutory mitigating evidence. We submit that Agan's petition is incorrect regarding the availability of this issue in his case.
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> (5) Hitchcock, supra, did not create new law on the subject of whether a sentencer must consider non-statutory mitigating evidence. That issue was resolved in Lockett v. Ohio, 438 U.S. 586 (1978), nine years before Hitchcock. The Hitchcock decision struck a "Florida Standard Jury Instruction" which was "confusing" and thus capable of promoting "Lockett" error on the part of the advisory jury that received it. Thus, Hitchcock created "new law" because of its impact upon a standard jury instruction, not because it somehow "changed" the established law of "Lockett." Thus, Agan has incorrectly identified

the "new law" of the decision.'

It was only after the State filed its opposition to the abeyance motion in which it set forth its reasoning, that the federal court, on September 26, 1989, ordered the federal proceedings to be held in abeyance pending state court resolution of the Rule 3.850 motion. Also contrary to the State's blatant misrepresentation, the Rule 3.850 motion was filed before the motion to hold abeyance was filed and before the federal proceedings were held in abeyance.

In its Statement of the Case and Facts, Appellee also argues:

> Citing to materials de hors the record, Agan's counsel attempted to excuse their conduct by alleging that a recent invocation of "Chapter 119" (the "Florida Public Records Act"), provided them with "new evidence". Agan alludes to a possible (1985) records request and to alleged interference with CCR's request by this office. None of CCR's or Agan's suggestions enjoy record support.
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> The truth is, Agan filed his first and only "Chapter 119" demand on October 31 - November 1, 1988. The demand was a peculiar, mid-trial, demand made by CCR while federal proceedings were underway. Mr. Turner surrendered personal notes to CCR.

(State's brief at 2).

Mr. Agan's Rule 3.850 motion is of record. Allegations contained in a Rule 3.850 motion must be accepted "at face value." Linhtbourne v. Dunner. 549 So. 2d 1364, 1365 (Fla. 1989). In his Rule 3.850 motion, Mr. Agan alleged:

> 3. Mr. L. E. Turner, Assistant Superintendent, Florida State Prison, appeared at the evidentiary hearing on October 31, 1988, pursuant to a subpoena duces tecum requested by Mr. Agan (Appendix A). The file that Mr. Turner brought to the hearing contained exculpatory information not previously turned over to Mr. Agan by the State. Mr. Turner was the lead prison investigator on the DeWitt homicide, and had collected a wealth of exculpatory evidence in his file which was never provided to Mr. Agan's trial counsel. The file he brought with him was the file he compiled while investigating the DeWitt homicide. It included his "field notes" and other documentation gathered by him during his investigation. Mr. Turner's testimony was cut short by the federal court before the defense had gotten access to Mr. Turner's

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[1]The State's argument to the federal court was, of course, contrary to Hitchcock and to this Court's post-Hitchcock precedents. Hitchcock did indeed establish new law, see Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), and applies to the sentencing judge as well as the sentencing jury, see Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987); Morgan v. State, 515 So. 2d 975 (Fla. 1987), not simply to the standard jury instructions.

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 discovered that the file contained material never before released to Mr. Agan's counsel (Appendix B).

4. 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 requested that a copy of the materials in the file be turned over to Mr. Agan pursuant to section 119.01 et seq, Florida Statutes (1985). Mr. Turner asked Mr. Gary Printy, co- counsel for Respondent, 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.

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

6. 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 pursuant to section 119.01, et seq. Florida Statutes (1985). 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 copy and thus had not been previously provided to Mr. Agan or his counsel when initially requested pursuant to section 119.01, et seq., Florida Statutes (1985).

Motion to Vacate at 23-24.

The place to ascertain what "the truth is" (State's brief at 2) is at an evidentiary hearing. Moreover, the State has cited no record authority for its claim that "Agan filed his first and only 'Chapter 119' demand on October 31 - November 1, 1988." (State's brief at 2).[2] Mr. Agan has alleged he obtained the DOC file which was made part of the record in Mr. Agan's first Rule 3.850 proceedings as a result of a request for access (T. 599). Nothing in the record

[2]The State filed no response in the circuit court and thus obviously raised none of the defenses it now presents in the lower court. It is the State which is now attempting to raise matters "de hors the record" (State's brief at 2), presenting factual disputes with Mr. Agan's allegations which were never presented to the lower court. All of the allegations which Mr. Agan is arguing in this appellate proceeding were presented to the circuit court. Taken "at face value, as [they] must [be] for purposes of this appeal, [those allegations] are sufficient to require an evidentiary hearing." Linhtbourne, 549 So. 2d at 1365.

disputes or refutes that statement. If the State has evidence Mr. Agan never requested access, Mr. Agan would be very surprised. Access to the DOC file which Mr. Agan obviously had during the previous Rule 3.850, came about through a request for access.[3] When access was provided, Mr. Agan's counsel was not provided the material contained in Mr. Turner's file. Mr. Jerry Vaughn, Inspector General, Department of Corrections, explained in 1989 that the failure to previously disclose Mr. Turner's file was due to a change in procedure which caused DOC to fail to provide full access to materials regarding the DeWitt homicide. See Motion to Vacate at 24.

Finally, the State asserts in its Statement of the Case and Facts that Mr. Agan's 119 request was not honored because Mr. Agan "ignored and refused to obey the federal subpoenas" (State's brief at 2). This is the first Mr. Agan's counsel has heard of this. No action has ever been taken in federal court for failure to honor federal subpoenas. Nothing was said about this during the federal hearing. Certainly if this had occurred that would have been the proper forum for raising it. Moreover, 119 disclosure has not been made dependent on action or conduct in federal court. Under Chapter 119 when a request for access is made, it must be honored.

ARGUMENT I

THE STATE'S FAILURE TO DISCLOSE MATERIALLY 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.

The State argues in its brief that the merits of Mr. Agan's claim that undisclosed evidence that another person committed the DeWitt murder "is superfluous and irrelevant to the issues at bar" (State's brief at 5). The

[3]Later in its brief, in fact, the State relies on the results of the previous request for access (the DOG file regarding the internal investigation of Mr. Agan's case) to claim that Mr. Turner's file contained no new evidence (State's brief at 5).

State is simply wrong, as a reading of this Court's precedent should have made clear. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

In Lightbourne, this Court was presented with a second Rule 3.850 motion containing a Brady claim. The circuit court denied relief "on the premise that as a successive motion for post conviction relief, it constituted an abuse of process." 549 So. 2d at 1365. This Court reversed, saying:

> Accepting the allegations concerning Chavers and Carson at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing with respect to whether there was a Brady violation. Moreover, we cannot say that these allegations are procedurally barred. Lightbourne's first motion for postconviction relief did not address Chavers' and Carson's testimony, and the allegations of his current motion sufficiently demonstrate that "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" contemplated by the exception to the time limits of rule 3.850.

549 So. 2d at 1365.

The situation in Mr. Agan's case is identical. This is a seond Rule 3.850 motion. The first motion did not address the materials contained in Mr. Turner's file. These materials were previously unknown to Mr. Agan and his counsel and could not have been ascertained because of the State's failure to disclose. Clearly, the merits of Mr. Agan's claim are before this Court and relevant to resolution of this appeal.

The State's brief also asserts, "It is equally undisputed that said petition sought to reargue a so-called 'Brady' claim that was raised and argued in Agan's first petition." (State's brief at 5). However, the State cannot cite to anywhere in the previous Rule 3.850 motion where allegations were made concerning the exculpatory documents in Mr. L. E. Turner's file. These documents were never revealed before; they were not presented to this Court before. They were not raised or argued before. The State refused to provide access to these documents until January 5, 1989. The State misrepresents the record in contending otherwise.

The State further contends that the materials in Mr. Tuner's file were "merely cumulative and redundant" (State's brief at 5). Yet again, the State fails to explain this statement. Nowhere but in Mr. Turner's file were there letters from De Witt indicating Gross was extorting money from him and threatening to kill him. In such circumstances, how can these letters be "merely cumulative and redundant"? Nowhere but in Mr. Turner's file was there a field note reflecting an eyewitness saw Gross kill DeWitt. How can this field note be characterized as "cumulative and redundant"?

The State additionally makes several representations concerning the evidence presented at the federal evidentiary hearing:

> (1) Inmate Anderson's story about some other prisoner seeing a third person (Gross) commit the crime was never corroborated by the so-called eyewitness. (F. 76-109).

(State's brief at 6).[4] The State's citation to pages 76-109 of the transcript of the federal hearing is more than a bit odd; it is bizarre. The citation is to the direct testimony of Mr. Leonard Ball, the original prison investigator into the DeWitt murder, from whom Mr. L. E. Turner took over when he led the investigation and compiled his file of exculpatory material. Mr. Ball's federal testimony occurred on October 31, 1988. At the time of the direct examination of Mr. Ball, the State had yet to disclose the materials in Mr. Turner's file. Undersigned counsel (who did the examination of Mr. Ball) did not have the field note regarding Horace Anderson. At the time of Mr. Ball's testimony, counsel did not know that the State had a field note indicating

> Lusciues 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.

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[4]Again, the State did not present these or any other factual disputes to the lower court. Again, the State is citing to material "de hors the record" (State's brief at 2).

(S. 70). Nowhere in Mr. Ball's testimony was he asked about Horace Anderson or Lusciues Kitchen. In fact, there is no indication that Mr. Ball even knew of the exculpatory documents that Mr. Turner had collected after taking over the investigation. After Mr. Turner's file was disclosed in January of 1989, Mr. Agan sought to reopen the evidentiary hearing so that the appropriate questions could be asked. However, to date, that motion has not been ruled upon. Contrary to the State's assertion, there was absolutely no testimony as to what Lusciues Kitchen would or would not say or corroborate.

The State also maintains, "Inmate Gross had a solid alibi" (F. 90). Again, the citation is to the testimony of Mr. Ball. At the federal evidentiary hearing, Lusciues Kitchen's eyewitness account of Gross murdering DeWitt was unknown. No questions regarding it were asked of Mr. Ball. Also at that time, DeWitt's letters identifying Gross and Cormack as extortionists who threatened to kill DeWitt were unknown. No questions about those letters or their contents were asked of Mr. Ball. At the evidentiary hearing, it had been disclosed that Michael Gross had been seen running from DeWitt's cell. ("We were getting fragmented information from the inmates -- or I should say from at least two inmates that I can think of -- and I don't remember their names -- that they saw another man running from the cell." (F. 83)). Mr. Ball was asked if Gross was confronted with this information, and he responded, "Yes, I believe we did." (F. 84). Mr. Ball later indicated: "And I believe Gross had an alibi that he returned shortly before the inmate [DeWitt] was discovered." (F. 90).

Mr. Ball was not the chief investigator of the DeWitt homicide; Mr. Turner was. Once Mr. Turner took charge, Mr. Ball "would have submitted to anything he said" (F. 106). Mr. Ball was not aware of information collected by Mr. Turner unless Mr. Turner for some reason chose to apprise him. Moreover, Mr. Ball did not recall any details of Gross' alibi, and thus did not recall, for example, if Gross' co-conspirator Cormack was part of the alibi. The bottom line is that an

evidentiary hearing has not been held on the exculpatory material contained in Mr. Turner's file. The files and records do not conclusively establish that Mr. Agan is entitled to no relief. Lemon v. State, 498 So. 2d 923 (Fla. 1986). Accordingly, an evidentiary hearing and Rule 3.850 relief are warranted.

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.

The State asserts, "Agan also raised these same issues in a prior Rule 3.850 proceeding in which he could have, but did not, file, a Chapter 119 demand." (State's brief at 7). The State seems to be implying that Chapter 119 requests must be "filed". However, Section 119.07 of the Florida Statutes does not require a filing or even a written request:

> (1)(a) Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or his designee.

Mr. Agan requested and obtained the DOC file, including the internal investigation into the DeWitt homicide, prior to his first Rule 3.850 proceeding. Mr. Turner's file was not included in the DOC file due to DOC error. If the State wishes to contest these facts, the place to do it is at an evidentiary hearing. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

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.

The State argues that "no 'Hitchcock error' was committed since "Hitchcock . . . was involved only with the propensity of a jury instruction . . . to cause 'Lockett' error" (State's brief at 7-8). However, as Hitchcock itself and this Court's precedents make undeniably clear, "the standards imposed by Lockett bind both the judge and the jury under our law." Riley v. Wainwright, 517 So. 2d

656, 659 (Fla. 1987). In Hitchcock, the Court ordered resentencing because "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." Hitchcock v. Dunner, 107 S. Ct. 1821, 1824 (1987)(emphasis added). In accordance with the holding of Hitchcock, this Court has ordered resentencing where, as in Mr. Agan's case, the judge has failed to seriously and independently consider nonstatutory mitigation. See, e.g., Thomas v. State, 546 So. 2d 716 (Fla. 1989); Zeigler v. Dugger, 524 So. 2d 419, 421 (Fla. 1988); Morgan v. State, 515 So. 2d 975, 976 (Fla. 1987). The same relief is required in Mr. Agan's case.

The State further argues that Mr. Agan cannot obtain review of his Hitchcock claim "by an untimely Rule 3.850 petition" (State's brief at 8). The State fails to recognize that Mr. Agan's Hitchcock claim was filed in accordance with the procedure and deadline set by this Court in Adams v. State, 543 So. 2d 1244 (Fla. 1989), and Spalding v. Dugger, No. 74,355 (Fla. June 30, 1989), and thus that no Rule 3.850 time limitations bar consideration of Mr. Agan's claim. Further, as discussed in Mr. Agan's initial brief, this Court's prior decision on this issue in Mr. Agan's case has been overruled by later decisions of this Court and is contrary to every post-Hitchcock decision by this Court (See Initial Brief at 26-27).

Mr. Agan's Hitchcock claim is properly before the Court on its merits, and the merits require relief.

ARGUMENTS IV AND V

The State has said nothing to refute Mr. Agan's entitlement to relief regarding Arguments IV and V of his initial brief. Mr. Agan relies on the presentations in his initial brief, which demonstrate his entitlement to relief.

CONCLUSION

Because the circuit court erred in denying relief to Mr. Agan, the circuit court's order should be reversed. Because facts have not been properly

developed, this case should be remanded for an evidentiary hearing. Because Mr. Agan is entitled to the relief he seeks, his conviction and sentence must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Mark Menser, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Street, Tallahassee, Florida 32301, this 24th day of January, 1990.

_____
Attorney