IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-118

MARTIN GROSSMAN

Death Warrant Signed:
Execution Scheduled
For February 16, 2010
6:00 pm

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT FOR PINELLAS COUNTY,
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

Mr. Grossman's appeal involves mixed issues of law and fact and are to be reviewed de novo by this Court. Stephens v. State, 748 So.2d 1028 (1999).

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Grossman lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Grossman accordingly requests that this Court permit oral argument.

I. PROCEDURAL HISTORY

Mr. Grossman was convicted of First Degree Murder as charged after a trial held October 22-31, 1985. Following the penalty phase, a jury recommended the death penalty. On March 19, 1986, the trial judge entered his written order in support of the death sentence. Mr. Grossman appealed his conviction to the Florida Supreme Court which affirmed his conviction and sentence in Grossman v. State, 525 So.2d 833 (Fla. 1988). Included in Mr. Grossman's direct appeal for review was the denial of the motion to sever. Mr. Grossman sought review in the United States

Supreme Court which denied the petition for writ of certiorari. Grossman v. Florida, 489 U.S. 1071 (1989).

A death warrant was signed on March 8, 1990. The execution was stayed by the Florida Supreme Court on April 5, 1990. Mr. Grossman filed his Rule 3.850 Motion to Vacate Judgment of Conviction and Sentence in state court. Included in the motion were claims of ineffective assistance of counsel in penalty phase and the failure of the state to disclose exculpatory, material evidence. After an evidentiary hearing on May 31 - June 2, 1994, the state trial court denied the Rule 3.850 motion on October 2, 1995.

Mr. Grossman appealed the state court denial of the Rule 3.850 post-conviction relief motion to the Florida Supreme Court. The Florida Supreme Court affirmed the denial of Rule 3.850 relief. Grossman v. Dugger, 708 So.2d 249 (Fla. 1997).

Mr. Grossman then timely filed a federal Petition for Writ of Habeas Corpus on September 18, 1998. That petition was stricken and returned to Mr. Grossman. The order striking the petition was modified and Mr. Grossman filed a petition in response to that modified order. Respondent filed a response to that petition on February 25, 2002, and Mr. Grossman filed a reply on March 21, 2002.

On July 22, 2002, the case was administratively closed pending the outcome of two Florida cases that raised Ring v. Arizona, 536 U.S. 584 (2002) issues. On August 14, 2003, Mr. Grossman filed a successive state habeas petition. The Florida Supreme Court rejected the petition in a one-sentence order issued May 7, 2004. Mr. Grossman filed a motion for rehearing on May 19, 2004. The motion was denied on July 15, 2004. On May 16, 2005, Mr. Grossman filed a Successive Motion to Vacate Judgements of Conviction and Sentences. That motion was denied by the circuit court on August 1, 2005. A timely notice of appeal was filed August 31, 2005. The Florida Supreme Court summarily denied the appeal on May 25, 2006.

On July 26, 2004, Mr. Grossman's federal proceeding was reopened, and he filed his amended petition on August 25, 2004. The petition was denied by the Federal District Court on January 31, 2005. Mr. Grossman made application for a certificate of appealability which was denied by the Federal District Court on February 28, 2005. Mr. Grossman filed a renewed application for a certificate of appealability. The Eleventh Circuit Court of Appeals denied relief by affirming the district court's decision on October 16, 2006. Mr. Grossman made a petition for certiorari with the United States Supreme Court which was denied on May 21, 2007.

Pursuant to Florida Rules of Criminal Procedure 3.851, Mr. Grossman filed a Second Successive Motion to Vacate Judgements of Conviction and Sentences on September 12, 2007. The circuit court orally denied this motion on February 1, 2008 and the Honorable Judge Joseph A. Bulone signed his order of denial in writing on February 26, 2008. Mr. Grossman filed a notice of appeal on March 20, 2008. The Florida Supreme Court affirmed the lower court on February 26, 2009. On January 12, 2010, the Governor signed a death warrant on Martin Grossman.

Mr. Grossman filed his Third Successive Motion to Vacate Judgements of Conviction and Sentences on January 18, 2010. The circuit court denied the request for an evidentiary hearing in an order signed on January 21, 2010.

THE LOWER COURT'S ORDER

CLAIM I

In claim I, the Defendant alleges that trial counsel provided ineffective assistance at the penalty phase of his trial for failing to have him examined by a mental health professional. He contends that, therefore, the court did not hear all possible evidence regarding mitigating circumstances before sentencing. He further claims that he has not raised this matter before because it constitutes newly

discovered evidence. This court finds that the Defendant is not entitled to relief on claim I for the following reasons:

A. Claim I is successive

Claim VI of the Defendant's original rule 3.851 motion for postconviction relief, filed August 13, 1990, alleged that trial counsel provided ineffective assistance for not having the Defendant examined by a mental health professional. In an order entered October 17, 1991, this court summarily denied claim VI. Following an evidentiary hearing on several of the Defendant's other claims, this court entered a final order denying the Defendants original rule 3.851 motion for postconviction relief. In a written opinion, the Florida Supreme Court affirmed this court's order denying the Defendant's original rule 3.851 motion for postconviction relief. See Grossman, 708 So.2d 249.

The Defendant argues that the court erred in denying a hearing on claim VI of his original rule 3.851 motion. Specifically, his argument concerns an evaluation performed by the late Dr. Henry Dee. He asserts that Dr. Dee would have been available to testify at the evidentiary hearing conducted on May 31, 1994, through June 2, 1994, to support the Defendant's allegation in claim VI of the original rule 3.851 motion that counsel was ineffective for failing to investigate and arrange a mental health evaluation by a competent mental health professional. The

Defendant also claims that due to this court's summary denial of claim VI of the original rule 3.851 motion, he was precluded from presenting the testimony of R. Brad Fisher, Ph.D., at the evidentiary hearing conducted on May 31, 1994, through June 2, 1994. The Defendant indicates that Dr. Fisher would have testified that he examined the Defendant on March 28, 1990, and prepared a report that would have been presented into evidence to rebut the contentions of Sidney J. Merin, Ph.D. Attached to the Defendant's fourth rule 3.851 motion is Dr. Fisher's Psychological Evaluation of March 28, 1990. This same evaluation was attached to the original rule 3.851 motion as appendix 24. Further, the report of Dr.Merin, which is attached to the Defendant's fourth rule 3.851 motion, is dated September 17, 1985.

The Defendant claims that this court's ruling summarily denying claim VI of the original rule 3.851 motion was erroneous and asserts that the Florida Supreme Court's affirmance of this court's order also was erroneous. Specifically, the Defendant contends that the Florida Supreme Court used the wrong standard in affirming the denial of claim VI of the Defendant's original rule 3.851 motion. He alleges that the Supreme Court's review should have been governed by the standard set out in Gaskin v. State, 737 So.2d 509 (Fla. 1999).

The court finds this argument to be procedurally barred; the Defendant's claim that he was denied effective assistance of counsel based on the allegation

that there was a failure to arrange an examination by a competent mental health professional has already been addressed by this Court in the October 16, 1991, non-final order. As the Defendant concedes, the final order denying his original rule 3.851 motion has been affirmed by the Florida Supreme Court. Grossman, 708 So.2d 249. The Florida Supreme Court specifically noted that claim VI was procedurally barred. Id. at 252 n.6. In response to the Defendant's federal petition for writ of habeas corpus the Federal District Court concluded, "Grossman has failed to demonstrate any error in the denial of his claim that his attorneys were ineffective in the investigation and presentation of mitigating evidence." Grossman v. Crosby, 359 F. Supp. 2d at 1267-70. The District Court's denial of the petition for writ of habeas corpus was affirmed by the Eleventh Circuit Court of Appeal and, thereafter, a petition for writ of certiorari to the United States Supreme Court was denied. Grossman v. McDonough, 466 F.3d 1325, cert. denied, 550 U.S. 958.

This court did not err in summarily denying claim VI of the Defendant's original rule 3.851 motion. In addition to finding that claim VI was procedurally barred, the court went on to consider the merits of the claim, assuming that the procedural bar was not in place. The court, therefore, finds this claim to be successive and procedurally barred, as it has already been considered and denied.

B. Claim I is untimely

The court finds that the defendant's claim does not present newly discovered evidence and is therefore untimely. The Defendant has already had the opportunity to argue these grounds - in fact, he does not specifically cite any newly discovered evidence or information in his claim. In his original rule 3.851 motion, he presented substantially the same allegation of ineffective assistance of counsel for failing to have the Defendant examined by a mental health expert. The Defendant was clearly aware of this matter in 1991, when he argued it in his original motion. The court cannot consider the claim to be newly discovered.

Nevertheless, the Defendant contends that he should be granted an evidentiary hearing on this claim based upon Massaro v. United States; 538 U.S. 500 (2003), Allen v. Butterworth; 756 So.2d 52 (Fla. 2000); and Porter v. McCollum, 130 S.Ct. 447 (U.S. 2009). This court is not bound to grant an evidentiary hearing based on these cases. The court notes that Massaro deals with an initial claim and holds that allegations of ineffective assistance of counsel may be brought in collateral proceedings - not that evidentiary hearings should always be held on such claims. See Massaro, 538 U.S. at 502-503, 504. Additionally, Allen suggested proposed amendments to the Florida Rules of Criminal Procedure that would require an evidentiary hearing "in respect to the *initial* motion in every

case." Allen, 576 So.2d at 66-67 (emphasis added). Finally, Porter involved an initial federal habeas petition, holding that it was ineffective assistance for counsel not to uncover mitigating evidence during the penalty phase of trial. See Porter, 130 S.Ct. at 452-53. However, Porter provides no grounds for this court to return to a successive claim that has already been decided and upheld.

Lastly, the Defendant criticizes the Florida Supreme Court for reliance on "procedural defaults" to preclude consideration of issues and cites to an unidentified ABA report claiming that Florida's death penalty scheme violates Furman v. Georgia, 408 U.S. 238 (1972). The Defendant's allegations are without merit. See Marek v. State, 8 So.3d 1123, (Fla. 2009), cert. denied, 130 S.Ct. 40 (2009).

Claim I is denied.

CLAIM II

The Defendant argues that the Florida death penalty statute as applied to him is arbitrary and capricious, and therefore in violation of Furman, 408 U.S. 238, in the following three ways:

A. The Defendant submits that the court and jury were not able to consider

all possible mitigating evidence at the penalty phase, as argued in claim I, which renders his death sentence arbitrary. As discussed above, however, the Defendant's allegations regarding the matter of mitigating evidence at the penalty phase of trial are untimely and successive. In evaluating the Defendant's original rule 3.851 motion, this court found no error in counsel's performance at the penalty phase. Additionally, after conducting an evidentiary hearing on the Defendant's original rule 3.851 motion, the court concluded, "[e]ven if counsel were deemed ineffective for the reasons stated by the Defendant, such alleged ineffectiveness did not come close to be so prejudicial to the Defendant that it affected the outcome of the case." The court finds this claim is therefore procedurally barred.

B. The Defendant alleges that, at trial, the State violated Giglio v. United States,405 U.S. 150 (1972), by presenting false testimony of witness Charles Brewer. The Defendant claims that he is unfairly being treated differently than another inmate, Paul Beasley Johnson, whose sentence of death was recently vacated by the Florida Supreme Court due to a finding of prosecutorial misconduct resulting from a Giglio violation. See Johnson v. State, 35 Fla. L. Weekly S43a, 2010 WL 121248 (Fla., January 14, 2010).

The Defendant contends that Brewer was working as a government agent and testified falsely at trial. Brewer later recanted his testimony. The Defendant

points to the Johnson decision, which involved trial testimony of an informant that later was determined to be false. It appears that in both cases, the witness in question was another inmate who received information from the defendant while incarcerated. The Defendant alleges that he should receive the same relief as Johnson.

The Defendant is not entitled to relief. In Johnson, a successive rule 3.851 motion presented newly discovered evidence that the State committed a Giglio violation by knowingly presenting false testimony. See Johnson, 2010 WL 121248 at *1. In the Defendant's original rule 3.851 motion, he raised a claim of prosecutorial misconduct regarding Brewer's testimony. Following an evidentiary hearing on that claim, a final order denying the Defendant's original rule 3.851 motion was entered on October 2, 1995. The court found that there was no evidence that the State knew Brewer's testimony was false at the time of trial and further found that, in any event, the Defendant had not shown how Brewer's allegedly false testimony affected the judgment or sentence in the Defendant's case. In his fourth rule 3.851 motion, the Defendant does not provide any new evidence or indication that prosecutorial misconduct occurred. His claim is successive and has previously been determined to have no merit.

C. The Defendant also argues that the death penalty is arbitrary and capricious

as applied to him in relation to the clemency process. He was denied clemency by the Governor in 1988. He claims that clemency procedures are impermissibly arbitrary and that he has not had the opportunity to present newly discovered evidence acquired over the course of time about his mind-set at the time he was 19 years old, when the offense in this case was committed.

The court finds that the Defendant is not entitled to relief on this claim. Since the time of his clemency proceedings, nothing has prevented the Defendant from bringing claims about this allegedly newly discovered evidence. His motion does not explain why he has not previously addressed the matter.

As the Florida Supreme Court stated in Bundy v. State, 497 So.2d 1209, 1211 (Fla. 1986), "It is not our prerogative to second-guess the application of this exclusive executive function ... [T]he principle of separation of powers requires the judiciary to adopt an extremely cautious approach in analyzing questions involving this admitted matter of executive grace." Moreover, the Florida Supreme Court recently has denied claims that the clemency process is arbitrary. See Marek, 8 So.3d 1123.

Claim II is denied.

CLAIM III

The Defendant alleges that proceeding with his execution will violated the Eighth Amendment of the United States Constitution because he may be incompetent at the time of execution. However, this court has determined that this argument is premature under both section 922.07, Florida Statutes (2009) and Florida Rule of Criminal Procedure 3.811. Rule 3.811 (c) provides that "no motion for a stay of execution pending hearing, based on grounds of the prisoner's insanity to be executed, shall be entertained by any court until such time as the Governor of Florida shall have held appropriate proceedings for determining the issue pursuant to the appropriate Florida Statutes [section 922.07]." Furthermore, rule 3.811(d) states that a motion for stay after the Governor's determination of sanity to be executed "shall be filed in the circuit court of the circuit in which the execution is to take place..." At the January 20, 2010 initial hearing, the parties agreed that this court presently does not have jurisdiction to consider this matter. Claim III is therefore dismissed.

SUMMARY OF ARGUMENTS

Mr. Grossman was denied his constitutional rights because he was not granted an evidentiary hearing on his claim of ineffective assistance of counsel during the penalty phase of his trial. Trial counsel was ineffective because Mr. Grossman was not examined by a competent mental health professional. After the original 3.851 motion, Mr. Grossman was improperly denied a hearing based on the late Dr. Henry Dee's findings which would have supported the contention that trial counsel was ineffective during the penalty phase. Dr. Michael Maher has interpreted the findings on the late Dr. Dee, and is ready and able to evaluate Mr. Grossman and testify at an evidentiary hearing about trial counsel's ineffectiveness. New caselaw shows Mr. Grossman's argument to be timely based on newly discovered evidence.

Mr. Grossman further argues that Florida's death penalty statute is arbitrary and capricious in violation of his constitutional rights. Mr. Grossman's trial court and jury did not hear all of his available mitigating evidence. Mr. Grossman is also being treated differently from a similarly situated appellant concerning the issue of government agents' false testimony at the trial level.

The death penalty is arbitrary and capricious as it relates to Mr. Grossman because he has been denied clemency. Though Mr. Grossman did have a clemency

proceeding back on October 26, 1988, the Governor has not obtained new pertinent information about Mr. Grossman's life.

Lastly, executing Mr. Grossman would be cruel and unusual because he may be incompetent at the time of trial. Besides his well documented mental problems, Mr Grossman has been incarcerated since 1984. Statistics show that individuals incarcerated over a long period of time have diminished mental capacity.

ARGUMENT I

THE POST-CONVICTION COURT ERRED IN DENYING MR. GROSSMAN AN EVIDENTIARY HEARING FOR HIS SUCCESSOR MOTION. AS A RESULT, MR. GROSSMAN WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In its order denying relief on this claim, the lower court held in its order of January 21, 2010:

> Nevertheless, the Defendant contends that he should be granted an evidentiary hearing on this claim based upon Massaro v. United States; 538 U.S. 500 (2003), Allen v. Butterworth; 756 So.2d 52 (Fla. 2000); and Porter v. McCollum, 130 S.Ct. 447 (U.S. 2009). This court is not bound to grant an evidentiary hearing based on these cases. The court notes that Massaro deals with an initial claim and holds that allegations of ineffective assistance of counsel may be brought in collateral proceedings – not

> that evidentiary hearings should always be held on such claims. See Massaro, 538 U.S. at 502-503, 504. Additionally, Allen suggested proposed amendments to the Florida Rules of Criminal Procedure that would require an evidentiary hearing "in respect to the *initial* motion in every case." (See Court order of Jan. 21, 2010 page 6).

In his initial 3.850 motion, Mr. Grossman was denied an evidentiary hearing on Claim VI based on the holding that this claim would be used as a second appeal. This was error. The standard for summary denial of an evidentiary hearing on Defendant's 3.850 claims is detailed in Gaskin v. State, 737 So.2d 509 (Fla. 1999):

> Under rule 3.850, a post-conviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. *See* Fla. R. Crim.P. 3.850 (d);*Rivera v. State,* 717 So.2d 477 (Fla. 1998); *Valle,* 705 So.2d at 1333; *Roberts v. State,* 568 So.2d 1255, 1256 (Fla. !990). The movant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific "facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." *Id.* At 1259, *See Mendyk v. State*, 592 So.2d 1076, 1079 (Fla. 1992); *Kennedy v. State*, 547 So.2d 912, 913 (Fla. 1989). Upon review of a trial court's summary denial of post-conviction relief without an evidentiary hearing, we must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. *Valle,* 705 So.2d at 1333.
>
> FOOTNOTE OMITTED
>
> While the postconviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a *conclusive* demonstration that the defendant is entitled to

> no relief. In essence, the burden is upon the State to demonstrate that the motion is legally flawed or that the record conclusively demonstrates no entitlement to relief. The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion. To the contrary, the "rule was promulgated to establish an effective procedure in the courts best equipped to adjudicate the rights of those originally tried in those courts."
>
> *Roy v. Wainwright*, 151 So.2d 825, 828 (Fla. 1963). Its purpose was to provide a simplified but "complete and efficacious postconviction remedy to correct convictions on any grounds which subject them to collateral attack." *Id.* It is especially important that initial motions in capital cases predicated upon a claim of ineffective assistance of counsel be carefully reviewed to determine the need for a hearing. *Cf. Rivera* 717 So.2d at 487 (reversing for evidentiary hearing on claim of ineffective assistance of counsel where defendant alleged extensive evidence of mitigation in 3.850 motion compared to limited mitigation actually presented at trial); *Ragsdale v. State*, 720 So.2d 203 (Fla. 1998) (same holding) Id. at 516-517.

This claim was improperly denied because the record did not show that the defendant was entitled to no relief pursuant to Gaskins, Massaro, and Allen.

Regarding the issue of whether or not Mr. Grossman is entitled to an evidentiary hearing on the successor motion, Mr. Grossman cites for authority: Lemon v. State, 498 So.2d 923 (Fla. 1986). The Lemon Court held:

> George Lemon, a state prisoner for whom a death warrant has been signed, appeals the circuit court's denial of his motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. We have jurisdiction.

> Art. V.§ 3(b)(1), Fla. Const. We granted a stay of execution and now reverse the trial court's order and remand for an evidentiary hearing. We previously affirmed appellant's conviction for first-degree murder and sentence of death. *See lemon v. State*, 456 So.2d 885 (Fla. 1984), *cert. denied*, 469 U.S. 1230 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985).
>
> It is clear that appellant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief" Fla. R. Crim. P. 3.850; *State v. Crews*, 477 So.2d 984 (Fla. 1985); *O'Callaghan v. State*, 461 So.2d 1354 (Fla. 1984). Having reviewed appellant's motion, files and record, we find that his allegations are sufficient to require an evidentiary hearing. Accordingly, we remand to the circuit court for further proceedings consistent herewith. The stay of execution issued November 4, 1986, is hereby dissolved
> It is so ordered. Id. at 923.

Before the hearing on 1/20/10, a conversation took place between undersigned counsel and his expert, Dr. Maher. Dr. Maher indicated that since he did not get a chance to conduct a complete clinical evaluation of Mr. Grossman, he was unable to opine whether or not statutory mitigation was present. However, he did opine that non-statutory mental mitigation was present.

In Porter v. McCollum, 130 S.Ct. 447, 454-455 (2009), The United States Supreme Court held:

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - or even cursory-investigation is unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing. Under Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may be nonetheless be considered by the sentencing judge and jury as mitigating. *See, e.g.*, *Hoskins v. State*, 965 So.2d 1, 17-18 (Fla. 2007) *(per curiam).* Indeed, the Constitution requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 711 L.Ed. 1 (1982), Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge. Id. At 454-5

Clearly, Dr. Merin did not do a comprehensive evaluation of Mr. Grossman. His report was based on self-reporting. Dr. Maher's review of Dr. Dee's work revealed a great deal of non-statutory mental mitigation. Prior to Porter, Florida Courts did not consider non-statutory mental mitigation *as* mitigation. Dr. Maher's anticipated testimony regarding non-statutory mental mitigation (and possibly statutory mental mitigation pending a clinical evaluation)would have swayed a penalty phase jury to vote for life. Since the evidence of non-statutory mitigation could not have been

used prior to Porter, this evidence should be considered newly discovered evidence in light of Porter.

Prejudice

Mr. Grossman was prejudiced at his trial due to the failure of penalty phase counsel to investigate, prepare and provide his mental health expert with adequate background material from which to do a proper mental health evaluation. Mr. Grossman was prejudiced during his 3.850 hearing by Ira Berman's *post hoc* rationalization contrary to Wiggins v. Smith, 123 S.Ct. 2527 (2003). Mr. Grossman was prejudiced at the warrant successor hearing. Had the warrant court heard Dr. Maher's recitation of the numerous non-statutory mitigation and possibly the establishment of statutory mental mitigation, a new penalty phase trial would have been ordered. Instead of the paltry mitigation presented at Mr. Grossman's original trial, the new penalty phase jury would have heard enough mitigation to return a recommendation of life imprisonment. Relief is proper.

ARGUMENT II

THE FLORIDA DEATH PENALTY STATUTE AS APPLIED TO MR. GROSSMAN IS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The Supreme Court's constitutional regulation of the death penalty in the United States has been an abject failure. In Furman v. Georgia, 408 U.S. 238 (1972) the Supreme Court subjected the use of capital punishment to significant constitutional scrutiny leading to an intricate doctrine in administering the death penalty in the states. In Furman, the Court also announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. Id. at 310. This has not happened. In the almost forty years since Furman was decided, we have come full circle and the administration of the death penalty is no more fair than it was the year before Furman was decided. More dangerously, we have now the illusion of fairness in the administration of the death penalty. The intricate doctrine under Florida law now tolerates that the death penalty be wantonly and freakishly imposed on a "capriciously selected random handfull of individuals." Id at 310. Martin Grossman is one of those individuals.

A. Mr. Grossman is denied the presentation of mitigation.

As stated in Argument One of this brief, the court and jury were never able to consider all mitigation available to Mr. Grossman. The United States Supreme Court, as a part of the intricate doctrine to supposedly ensure fairness in administering the death penalty, stated that the sentencer should not be precluded

from considering as a mitigating factor any aspect of a defendant's character. In Eddings v. Oklahoma, 455 U.S. 104 (1982), the United States Supreme Court stated:

> In *Lockett v. Ohio*, 438 U.S 586 (1978), Chief Justice BURGER, writing for the plurality, stated the rule that we apply today:
> "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, (emphasis in original).
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> *****
>
> Beginning with *Furman*, the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused. Thus, in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the principal opinion held that the danger of an arbitrary and capricious death penalty could be met "by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." Id., at 195, 96 S.Ct., at 2935. By its requirement that the jury find one of the aggravating circumstances listed in the death penalty statute, and by its direction to the jury to consider "any mitigating circumstances," the Georgia statute properly confined and directed the jury's attention to the circumstances of the particular crime and to "the characteristics of the person who committed the crime...." *Id*., at 197, 96 S.Ct., at 2936.
> Similarly, in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), the plurality held that mandatory death sentencing was not a permissible response to the problem of arbitrary jury discretion. As

the history of capital punishment had shown, such an approach to the problem of discretion could not succeed while the Eighth Amendment required that the individual be given his due: "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, at 304, 96 S.Ct., at 2991. *See Roberts (Harry) v. Louisiana*, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

Thus, the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," *Gregg v. Georgia*, *supra*, at 197, 96 S.Ct., at 2936, the rule in *Lockett* recognizes that "justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed. 43 (1937). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency. *Id*. at 110-116.

*****

Denying Mr. Grossman the right to present to the trier of fact any aspect of his character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death is arbitrary and capricious. Eddings dictates that Mr. Grossman should be granted an evidentiary hearing to present the newly discovered evidence outlined in Argument One. The Court in Lockett v.Ohio, 438 U.S. 586 (1978) established that the sentencer's "possession of the fullest information possible concerning the defendant's life and characteristics, is [h]ighly relevant - if not essential - [to the] selection of an appropriate sentence." Id. at 602. By not granting Mr. Grossman an evidentiary hearing to present the evidence in Argument One, the court is denying him the individualized sentencing and procedural safeguards promised in Lockett.

B. The State withheld material and exculpatory evidence in Mr. Grossman's case.

In Johnson v. State, 2010 WL 121248 (Fla.) (Fla., 2010) this Court reversed the death sentence where a jailhouse informant acted as a "government agent" after an initial meeting with an investigator. The informant was told to go back and "keep his ears open" and to "take notes." The informant testified at trial as to the details of the charged crimes as described by Johnson and to Johnson's alleged statement that he would "play like he was crazy" at the time of the killings. This Court reversed holding that the statements were inadmissible under United States

v. Henry, 447 U.S. 264 (1980) and vacated the death sentences under Giglio v. United States, 405 U.S. 150 (1972), and remanded for a new penalty phase before a new jury.

Mr. Grossman is being treated differently than is Mr. Johnson.

Charles Robert Brewer was one of the State's most significant witnesses. The State cited his testimony repeatedly in closing arguments in both the guilt and penalty phases. (R 2462, 2469, 2471, 2662, 2664). Brewer testified that he met Mr. Grossman in July of 1995 while they were both incarcerated in the Pinellas County jail. As a jail trustee, Brewer served meals on the wing where Mr. Grossman was housed. (R 2084). At trial, Brewer testified that he overheard Mr. Grossman speaking to another trustee food server, Don Smith, regarding a magazine article concerning Mr. Grossman's case. Allegedly, Mr. Grossman asked Smith to give the magazine to Brewer when he was finished. (R 2086). Brewer read the article and stated that he and Mr. Grossman discussed it. At trial, he claimed that Mr. Grossman said the article was not accurate in several respects. Then, according to Brewer's trial testimony, Mr. Grossman recounted to him how the offense had occurred. (R 2087-88). Brewer also testified that Don Smith was present during the conversation. (R 2094). Brewer further testified that he had seven prior felony convictions and that no one had made him any promises in

return for his testimony against Mr. Grossman. (R 2090). Brewer was the only witness to whom these particular alleged statements were ever made, and the State made ample use of them. Another alleged statement involved Mr. Grossman's motive for the murder of Officer Parks, that he did not want to be arrested by a woman officer. (R 2089). This rationale was offered only by Brewer. The State's inordinate interest in this unique piece of testimony is evidenced by their repeated elicitation of this same alleged statement, on at least three occasions, during Brewer's testimony. (R 2106, 2108, 2109). Brewer was the sole witness to suggest gender as part of the motive for the killing, and the State made certain to repeatedly reinforce the point in its examination of Brewer. In addition, the Florida Supreme Court made much of these statements, labeling them contemptuous. Grossman v. State, 525 So. 2d at 841 n.3.

The other unique contribution of Brewer to the State's case at trial was a statement, purportedly made by Mr. Grossman in response to a perceived inaccuracy in the article, that if he had shot the victim in the back of the head, it would have blowed [sic] her face away. (R 2087). This statement was of little to no probative value and was clearly adduced for its prejudicial impact. Even if Brewer's testimony was truthful, there was absolutely no legal significance to Mr. Grossman's speculation regarding the results of a .357 shot to the back of the head.

The State made much of this statement, however, repeatedly referring to the potential destruction of Peggy Park's face. (R 2662, 2664). However, it became clear at the 3.850 evidentiary hearing that Mr. Grossman never made either statement.

Charles Brewer recanted his testimony both in an affidavit and in his testimony at the evidentiary hearing based on Grossman's 3.850 motion. At the evidentiary hearing, Brewer testified that he was coming forward to correct a wrong he had done to Mr. Grossman. (PR. 2388, 2398, 2399). Unbeknownst to the defense, prior to Mr. Grossman's trial, Brewer was helping Pinellas County detectives with an auto theft case who put him in touch with the homicide division. (PR. 2390). Brewer told the detectives he would be able to get to Mr. Grossman. (PR. 2390). The detectives met with Brewer in a separate room in the jail and told Brewer they wanted something for the grounds to convict him on, and they had asked me to -- what type of questions to -- that they wanted to know certain things. (PR. 2391, 2417, 2435). Brewer stated that he started spending a lot of time in front of Mr. Grossman's cell, knowing that someone in Mr. Grossman's position would be vulnerable and wanting to talk. (PR. 2392). Brewer admitted that the bulk of his knowledge of the case came from the magazine story, but he presented that information to the detectives as if it had come from Mr. Grossman himself.

(PR. 2393, 2412, 2416, 2434, 2438). Brewer testified that Mr. Grossman *never said* that he did not want to be arrested by a woman. The State and Florida Supreme Court considered this trial testimony highly damaging. (PR. 2393-94, 2415). Brewer stated that his testimony at Mr. Grossman's trial was false. (PR. 2394). He testified that the State attorneys told him to testify to the fact that he had seven or eight prior felonies, when in fact he had many more. (R 2090; PR. 2396, 2399).

Further, when Brewer was resentenced on a case following Mr. Grossman's trial, an assistant state attorney spoke up for Brewer regarding his cooperation in Mr. Grossman's case, and another charge was dismissed entirely. (PR. 2397). He admitted to committing perjury in his deposition. (PR. 2405). Further, Brewer testified that he had a deal with the state attorney's office, more specifically with a two-faced prosecuting attorney. (PR. 2410). He also testified that Mr. Grossman never told him that he had shot Officer Parks. (PR. 2414).

In his affidavit, Brewer stated, they told me to continue talking to him and they gave me some questions they wanted me to ask him. The detectives told me they would try to help me out on my cases. They said they would tell the court that I had helped in this case. I knew they could help me and believed they would, which is why I assisted them. My lawyer also advised me to cooperate and said it

would help me on my cases. I also knew that once I had started working for them, I could not back out or they would come down harder on me in my cases. (PR. 376-80).

In an affidavit, Don Smith, the purported other witness to Mr. Grossman's statements, stated that he never heard Mr. Grossman say anything to Brewer about the case. (PR. 555). He testified at the evidentiary hearing that Mr. Grossman never talked about his case. (PR. 2185). He stated that Brewer always wanted Mr. Grossman to go into detail, but that Mr. Grossman would refuse. (PR. 555, 2186, 2187, 2191). Smith also testified that he was the person who said if someone was shot in the back of the head her face would be shot off. (PR. 556, 2190). He never heard Mr. Grossman say anything of the sort to Brewer. (PR. 555-56, 2193-94).

Brewer was a government agent and deliberately elicited incriminating statements from Mr. Grossman. The government violates an accused's Sixth Amendment right to counsel when, after indictment, government agents secretly elicit incriminating statements in the absence of counsel. Massiah v. United States, 377 U.S. 201, 206 (1964). Statements obtained by an informant are the functional equivalent of interrogation, and violate the accused's rights if the informant acted beyond merely listening, deliberately eliciting incriminating remarks. Kuhlmann v. Wilson, 477 U.S. 436. 59 (1986). Consequently, a jailhouse informant violates an

accused's Sixth Amendment right to counsel when he deliberately elicits statements while acting as a government agent. United States v. Li, 55 F.3d 325. 328 (7th Cir. 1995). Witness Brewer was acting by prearrangement with the State, and therefore violated Mr. Grossman's Sixth Amendment rights. United States v. Henry, 447 U.S. 264, 273 (1980).

It is arbitrary and capricious that Johnson should have his death sentences vacated but Mr. Grossman be executed where the state used secretly elicited statements by an agent of the state and which the State knew to be untrue.

C. Mr. Grossman is denied clemency.

In Florida, under Article 4, Section 8 (a) Florida Constitution and F.S. 947.13 the Governor has the power to consider clemency applications. Although the United States Supreme Court has declined to hold that the discretion inherent in the clemency process is unconstitutionally arbitrary in Gregg v. Georgia, 428 U.S. 153, 199 (1976), the clemency process has precisely the effect of contributing to the arbitrary and capricious nature of the death penalty.

Mr. Grossman did have a clemency proceeding on October 26, 1988, however, he has not had an opportunity to present further information about his life since 1988. Over twenty years have passed since he was last able to present information about his life. Since then much newly discovered evidence was

learned which would explain why a 19 year old would act impulsively resulting in the crime for which Mr. Grossman has spent all of his adult life in prison. The courts have denied an opportunity to hear the newly discovered evidence and the Governor did not learn of this evidence before he signed the death warrant. The Governor may have begun the process to have a renewed clemency proceeding, but those proceedings were abandoned in February 2009, all without Mr. Grossman's knowledge. Mr. Grossman, in not having the opportunity to have a recent clemency proceeding, is subjected to a death sentence that is arbitrary and capricious. Relief is proper.

ARGUMENT III

MR. GROSSMAN'S 8TH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS HE MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

In accordance with Florida rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

The Mr. Grossman has been incarcerated since 1984. Statistics have shown that an individual incarcerated over a long period of time will diminish his mental capacity. Inasmuch as Mr. Grossman may well be incompetent at time of

execution, his Eighth Amendment right against cruel and unusual punishment will be violated. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Grossman contends the trial court erred. Mr. Grossman moves this Honorable Court to:

1. Grant Mr. Grossman an opportunity for oral argument.

2. Stay Mr. Grossman's execution.

3. Remand the proceeding to circuit court for an evidentiary hearing.

4. Vacate the sentence of death, and sentence him to life imprisonment.

RESPECTFULLY SUBMITTED,

_____

Richard E. Kiley
Counsel for Mr. Grossman

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant has been furnished to all counsel of record this 26th day of January, 2010.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing, Initial Brief of Appellant was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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