**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

CASE NO. 84-11692 CFANO

STATE OF FLORIDA,

Plaintiff,

CAPITAL CASE:DEATH WARRANT SIGNED

v.

MARTIN GROSSMAN,

Defendant.
_____/

**SUCCESSIVE MOTION TO VACATE
JUDGMENTS OF CONVICTION AND SENTENCES
AND REQUEST FOR EVIDENTIARY HEARING AND STAY OF EXECUTION**

MARTIN GROSSMAN, Defendant in the above-captioned action, respectfully moves this Court for an Order, pursuant to Fla. R. Crim. P. 3.851, vacating and setting aside the judgments of conviction and sentence, including his sentence of death, imposed upon him by this Court.

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). 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 clemency hearing was held and clemency was denied on October 26, 1988. 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. 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 his 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 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.

Mr. Grossman filed on September 11, 2007 a Successive Motion to Vacate Judgment of Conviction and Sentences. Mr. Grossman raised claims of newly discovered evidence challenging Florida's lethal injection protocol and the death penalty statute based on the newly released American Bar Association study titled Evaluating Fairness and Accuracy In State Death penalty Systems: The Florida Death Penalty Assessment Report, An Analysis of Florida's Death Penalty Laws, Procedures, and Practices, which was published on September 17, 2006. The motion was denied on February 28, 2008. The Florida Supreme Court affirmed the denial February 26, 2009.

Governor Crist signed a death warrant on January 12, 2010.

INFORMATION REQUIRED BY RULE 3.851

1. Statement specifying the judgment and sentence under attack and the name of the court that rendered the same.

One count of first degree murder and sentence of death, Sixth Judicial Circuit, Pinellas County, Florida.

2. Statement of each issue raised on appeal and the disposition thereof;

(1) The trial court erred in permitting the introduction of codefendant Taylor's statement in a joint trial with instructions that the statement could only be used against Taylor, not appellant; (2) the court erred in refusing to suppress items found in a warrantless search of the Grossman residence and cars in the Grossman garage; (3) the state and court violated Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), by denigrating the importance of the jury recommendation of life or death and by failing to give a requested instruction on the weight to be given the jury recommendation; (4) the court erred in denying a request for a continuance; (5) the

court erred in failing to exclude television cameras from the courtroom and in releasing an evidentiary videotape during the course of the trial; (6) the court erred in denying a subpoena duces tecum for Officer Park's personnel file and in permitting evidence at trial of Officer Park's demeanor and conduct just prior to the murder; (7) the court erred in permitting evidence of appellant's prior burglary during which he obtained a handgun, of other crimes for which appellant was on probation, of appellant's threats to kill Hancock, and of appellant's orders to Hancock to bury the two handguns; (8) the court erred in permitting introduction of a photograph of the victim at the crime scene and photographs of the victim's head at the autopsy; (9) the court erred in permitting introduction of the shoes and T-shirt recovered from the lake; (10) the court erred in permitting expert testimony on blood splatter evidence; (11) the court erred in instructing the jury on burglary, robbery, and escape as underlying felonies to felony murder; (12) the evidence was insufficient to support the conviction; (13) the court erred in refusing to give a jury instruction that an accomplice's testimony should be received with great caution; (14) the court erred in refusing to give requested penalty phase instructions; (15) the court erred in finding four aggravating factors and no mitigation factors; (16) the court committed reversible error by failing to enter written findings on the death sentence before the notice of appeal had been filed; (17) Florida's death penalty is unconstitutional on its face and as applied; and (18) reversible error was committed in permitting family members to testify before the sentencing judge on the impact of the murder on the next-of-kin.

3. The nature of relief sought.

This is a successive motion to vacate judgments of conviction and sentences, including the sentence of death. Mr. Grossman requests an evidentiary hearing. However, the requisite hearing should not be conducted under the unreasonable circumstances created by the imminent execution

date. Mr. Grossman's execution should be stayed, and this Court should conduct an evidentiary hearing at a time when the Court, Mr. Grossman's counsel, and the State's representatives can address these serious issues with thought, care, and reason. A full, fair, and proper evidentiary hearing simply cannot be conducted in this case under the exigencies created by the pending execution date.

4. Detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought.

See below:

5. Disposition of all previous claims raised in post conviction proceedings and the reason or reasons the claim or claims raised in the present motion were not raised in the former motion or motions:

All previous claims raised in postconviction proceedings have been denied as of this date. The reason Mr. Grossman's current claims raised in the present motion were not raised in the former motion is because these claims are based on newly discovered evidence. The evidence upon which Mr. Grossman is relying to raise the claims in this motion were unknown to the trial court, counsel, or Mr. Grossman at the time of his trial and the facts could not have been discovered through due diligence.

Under Florida and federal law, there are two requirements needed for relief based on newly discovered evidence. First, the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by use of due diligence." Hallman, 371 So. 2d at 485. Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Jones v. State, 591 So.2d 911, 915 (Fla. 1991). The Jones standard is also applicable where the issue

is whether a life or death sentence should have been imposed. Id. Scott, 604 So.2d 465, 468 (Fla. 1992). See also Robinson v. State, 707 So.2d 688, 691 n.4 (Fla. 1998); Jones v. State, 591 So.2d 911, 914-915 (Fla. 1991); Fla. R. Crim. P. 3.851 (d)(2)(A).

CLAIM I

MR. GROSSMAN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS AND THEIR FLORIDA COUNTERPARTS.

Procedural Default

Some of Mr. Grossman's claims were never heard by a court, which violated his Due Process rights pursuant to the 14th Amendment of the United State Constitution due to the State's failure to adopt a "knowing, understanding, and voluntary" standard of evaluating waiver of claims because of procedural default. The ABA Report on page 232 argues:

> Florida post-conviction courts, including the circuit court hearing the 3.851 motion and the Florida Supreme Court hearing an appeal from the denial of the motion, do not use the "knowing, understanding, and voluntary" standard for overcoming procedural default of constitutional errors not properly preserved at trial or raised on appeal.....the Florida Supreme Court hearing an appeal from the motion, does not use the "knowing, understanding and voluntary" standard for overcoming procedural default of state law errors not properly preserved at trial or raised on appeal. If the constitutional error claimed for the first time in a post-conviction could have been, but was not raised on appeal, the claim of error is procedurally barred during post conviction proceedings. In order to obtain post-conviction consideration of such claim, rule 3.851 requires the movant to give reasons why the claim was not raised on direct appeal. Other than ineffective assistance of counsel, it is unclear what other reasons for not raising the claim on direct appeal would justify consideration of a procedurally barred claim.

Mr. Grossman was denied a hearing on his claims resulting from an evaluation by Dr. Henry Dee, MD based on a prior successive 3.851 motion. Dr. Dee was able and willing to testify at a prior hearing, however Dr Dee is now deceased and postconviction counsel was forced to retain Dr. Michael Maher M.D. to review the raw data of Dr. Dee and to evaluate Mr. Grossman on January 20, 2010. Moreover, in the trial court's denial order of the defendant's original 3.850 motion drafted by the Honorable Crockett Farnell on October 16, 1991 the post-conviction court denied the defendant an evidentiary hearing on his claim of ineffective assistance of counsel based on failure to provide for, or arrange an examination by a competent mental health professional. (See attached ORDER dated October 16, 1991 page 7 (V). (A)). This was error. The post conviction court in relying on Medina v. State, 573 So.2d 293, 295 (Fla. 1990), ruled that Mr. Grossman's claim was procedurally barred due to the claim allegedly being "used as a second appeal, or to use a different argument to relitigate the same issue, or to circumvent the rule against second appeals". Case law is clear that the defendant has an absolute right to attack this ineffective assistance of counsel claim in a collateral proceeding. Massaro v. U.S., 538 U.S. 500 (2003) holds in part:

> An ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal. Requiring a criminal defendant to bring ineffective-assistance claims on direct appeal does not promote the procedural default rules objectives: conserving judicial resources and respecting the law's important interest in the finality of judgements. Applying that rule to ineffective-assistance claims would create a risk that defendants would feel compelled to raise the issue before there has been opportunity fully to develop the claims factual predicate, and would raise the issue for the first time in a forum not best suited to assess those facts,... Id. At 504.

The reasoning for granting an evidentiary hearing is further detailed in Allen v Butterworth, 756 So.2d 52 (Fla. 2000):

> In addition to the unnecessary delay and litigation concerning the disclosure of public records, we have identified another major cause of delay in post-conviction cases as the failure of the circuit courts to grant evidentiary hearings when they are required. This failure can result in years of delay. This Court has been compelled to reverse a significant number of cases due to this failure. When a case gets reversed for this reason, the entire system is put on hold, as the hearing on remand takes many months to be scheduled and completed, and the appeal therefrom takes many additional months in order for the record on appeal to be prepared and the briefs to be filed in this Court. In order to alleviate this problem, our proposed rules require that an evidentiary hearing be held in respect to the initial motion in every case. This single change will eliminate a substantial amount of the delay that is present in the current system Id. At 66,67.

The Florida Supreme Court frequently relies on procedural defaults to preclude consideration of meritorious issues that go to the reliability of the conviction and sentence of death. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002); Jones v. State, 709 So. 2d 512, 519-20, 525 (Fla. 1998). The refusal to consider such issues increases the risk that the innocent or the legally undeserving will be executed. It diminishes a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not" Furman, at 313 (White, J., concurring). The ABA Report recommended that "State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid." ABA Report at 241. As it is, the Florida death penalty scheme violates Furman. The Florida Supreme Court dismissed numerous claims in Mr. Grossman's appeals because they

were purportedly procedurally defaulted. Had the merits been reached, Mr. Grossman would have obtained relief.

In the last court opinion in this case, issued by the Supreme Court of Florida, the court denied five claims, including the conflict of interest claim, and in footnote 6 said that the claims were procedurally barred but without explanation. Grossman at 708 So.2d 250. (Fla. 1997). The court did not explain how or why the procedural bar was applicable. A paltry declaration concerning an issue of constitutional importance should not deny Mr. Grossman federal habeas review.

Finally, after filing the successive state habeas petition based on the decisions in Wiggins v. Smith, 539 U.S. 510 (2003) and Ring v. Arizona, 536 U.S. 584 (2002), the Supreme Court of Florida denied the petition in a one sentence order. No reference was made to a procedural bar.

A claim that a defendant was denied professionally adequate mental health assistance due to ineffective assistance is cognizable in a rule 3.850 motion. See Mason v. State, 489 So.2d 734 (Fla. 1886); State v. Sireci, 536 So. 2d 231 (Fla. 1988); State v. Groover, 489 So.2d 15 (Fla. 1986); Jones v. State, 478 So. 2d 346 (Fla. 1985); Hill v. State, 473 So.2d 1253 (Fla. 1985).

In Grossman v. State, 708 So.2d 249 (Fla. 1997), regarding Claim V in his 3.850 motion and the denial of an evidentiary hearing for said claim the Court held:

> "Grossman claimed in his 3.850 motion before the trial court that trial counsel failed to investigate Grossman's history of mental problems and thus did not provide sufficient background information to the defense mental health expert, Dr. Merin. Grossman now claims that the trial court erred in failing to address this issue during the evidentiary hearing. We disagree. In its order granting an evidentiary hearing on certain issues (but denying it on this issue), the trial court addressed this issue at length, concluding:
>
> Defendant's claim is without merit as it fails the second prong of Strickland, as there has been no showing that but for such claimed

> ineffectiveness, the outcome probably would have been different. Furthermore, this Court concludes the jury would not have been persuaded to arrive at a different result, nor would this Court have been persuaded to reach a different result, assuming the substance of Defendant's allegations had been introduced into evidence."
>
> Competent substantial evidence supports the trial court's finding. We find no error. We find the remainder of Grossman's rule 3.850 claims to be procedurally barred. Id.at 252

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

Due to the postconviction court's summary denial of the above stated claim, defendant was precluded from presenting evidence at the evidentiary hearing which would have demonstrated the very prejudice required under Strickland. For example, postconviction counsel was prepared to call Dr. Brad Fisher. Dr. Fisher would have testified that he had examined Mr. Grossman on March 28, 1990 at Florida State Prison. Dr. Fisher would have testified that he had prepared a report and said report would have been entered into evidence (See attached PSYCHOLOGICAL EVALUATION dated March 28, 1990, recovered from the files of the late Dr. Henry Dee). This evidence would have been used to rebut the contentions of Dr. Sidney Merin PhD as memorialized in his report (See report of Sidney J. Merin, PhD.dated September 17, 1985, also recovered from the files of the late Dr. Dee).

At the evidentiary hearing, defendant will call Dr. Michael Maher M. D. Dr. Maher is a medical doctor with a certification in forensic psychiatry. Dr.Maher will testify that he has been qualified as such in the Sixth Judicial Circuit. Dr. Maher will testify that he has reviewed the raw data generated by the testing done by Fisher and Dee (Merin did no testing). Merin relied only on self-reporting unlike Dr. Fisher who relied on independent, objective sources. Dr. Maher will testify about Mr. Grossman's life-long intellectual neurological deficits and how it effected Grossman's

state of mind at time of the crime. Dr Maher will also testify about Grossman's drug usage; Mr. Grossman became dependent on alcohol and drugs at an early age. These dependencies were chronic and of long duration, and are the likely cause of neurological dysfunction displayed on testing.

In conjunction with the evaluation of the neuropsychological testing done by Dee and Fisher, evaluating the independent, objective sources; Dr. Maher will also conduct a clinical evaluation of his own to establish statutory or non-statutory mitigation.

The prejudice to Mr. Grossman would have become apparent. A mental health professional did not testify in the penalty phase of Mr. Grossman's trial.

The importance of calling a psychiatrist is detailed in Ake v.Oklahoma, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093 (1985), the Supreme Court of the United States stated:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, *Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *Id.*, at 612, 94 S.Ct., at 2444. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal, "*Britt v. North Carolina* 404 U.S. 226, 227, 92 S.Ct. 431, 433, 30 L.Ed.2d 400 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them.
> Id. at 77

The Ake Court further held:

> These statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant's mental

> condition relevant to his criminal culpability **and to the punishment he might suffer,** (emphasis added), the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effect of any disorder on behavior and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Id. At 80, 1095.

Ineffective trial counsel denied Mr. Grossman the right to a competent mental health examination. Mr Grossman was deprived of a fair trial under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

Effective trial counsel would have prepared Dr. Merin by gathering facts through professional examination, interviews, and elsewhere. None of this was done in Mr. Grossman's case. There were no interviews with family members, no psychological testing, just self reporting. The jury knew nothing about the defendant's mental condition. No opinions about Mr. Grossam's mental condition and about the effect of any disorder on behavior was tendered because Dr. Merin was not prepared to adhere to the letter and spirit of Ake.

The prejudice is that Mr. Grossman was sentenced by a jury who knew nothing about him and certainly had no knowledge of Grossman's mental state. The mitigation in the penalty phase case was the statutory mitigator of age and the catch- all instruction of any aspect of the defendant's character or of the case which would mitigate against the imposition of the sentence of death. Due to the time constraints imposed and the unforseen circumstances of Dr. Dee's death; undersigned counsel, as an officer of the Court is unable to state whether or not statutory mitigation exists or

would be considered and weighed pursuant to Porter v. McCollum, 130 S.Ct. 447 (U.S. 2009) because a *complete* clinical evaluation has not been done by Dr. Maher.

An evidentiary hearing should have been granted by the postconviction court. The exhibits attached to prove this claim could not have been obtained by direct appeal counsel. This issue could (then and now) have only been developed pursuant to Massaro. Relief is proper.

CLAIM II

THE FLORIDA DEATH PENALTY STATUTE AS APPLIED TO MR. GROSSMAN IS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE 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 Claim One of this pleading, the court and jury was 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 mitigaing 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:
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> > "[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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> *****
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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.
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> 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).
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> 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.
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> *****

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 Claim One.

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

In Johnson v. State, 2010 WL 121248 (Fla.) (Fla., 2010) the Florida Supreme 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 an "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. The 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.

In Mr. Grossman's case, a Charles Brewer testified at trial that he was a jail trustee and served meals on the wing where Mr. Grossman was housed. Brewer testified that he read a magazine article about the shooting of Officer Park and that Mr. Grossman said that the article was not accurate in several respects. Then, according to Brewer's trial testimony, Mr. Grossman recounted to him how the offense occurred.

Brewer testified at trial that he had seven prior convictions and that no one made him any promises in return for his testimony against Mr. Grossman. An alleged statement involved Mr. Grossman's motive for the murder of Officer Parks in that he did not want to be arrested by a woman officer. The State elicited this piece of testimony on at least three occasions during Brewer's testimony. Furthermore, the Florida Supreme Court focused on these statements, labeling them contemptuous. Grossman v. State, 525 So.2d at 841 n.3.

Brewer, at trial, also testified regarding an alleged statement by Mr. Grossman that if he shot Parks in the back of the head, it would have blowed [sic] her face away.

Brewer recanted his testimony both in an affidavit and in his testimony at the evidentiary hearing based on Mr. 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.

Prior to trial, unbeknownst to the defense, Brewer was helping Pinellas County detectives with an auto theft case. The detectives put Brewer in touch with the homicide division. Brewer told the detectives he would be able to get Mr. Grossman. 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. 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. 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. Brewer testified that Mr. Grossman never said that he did not want to be arrested by a woman. Brewer stated that his testimony at Mr. Grossman's trial was false. 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. 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. He admitted to committing perjury in his deposition.Further, Brewer testified that he had a deal with the state attorney's office, more specifically with a two faced prosecuting attorney. He also testified that Mr. Grossman never told him that he shot Officer Parks.

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.

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. He testified at the evidentiary hearing that Mr. Grossman never talked about his case. He stated that Brewer always wanted Mr. Grossman to go into detail, but that Mr. Grossman would refuse. 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. He never heard Mr. Grossman say anything of the sort to Brewer.

Brewer was a government agent and deliberately elicited incriminating statements from Petitioner. 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.

Although Mr. Grossman did have a clemency proceeding on October 26, 1988, 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. Although the Governor may have begun the process to have a renewed clemency proceeding, those proceedings were abandoned in February 2009 and without Mr. Grossman's knowledge. Mr. Grossman, in not having the opportunity to have a recent clemency proceeding, is resulting in a death sentence that is arbitrary and capricious.

CLAIM 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.

1. 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).

2. 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.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Mr. Grossman requests that his motion for a stay of execution be granted, that the judgment and conviction and sentence of death be vacated, in particular the sentence of death, that he be granted a new trial, an evidentiary hearing, a new penalty phase and any other relief this Court deems necessary and proper.

Respectfully submitted,

Richard E. Kiley

James Viggiano, Jr.

Ali A. Shakoor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES AND REQUEST FOR EVIDENTIARY HEARING AND STAY OF EXECUTION has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 18th, day of January, 2010.

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**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

CASE NO. 84-11692 CFANO

STATE OF FLORIDA,
V.

Active Death Warrant
Execution Scheduled for February 16, 2010 at 6:00 pm

Plaintiff,

v.

MARTIN GROSSMAN,

Defendant.
_____/

VERIFICATION

STATE OF FLORIDA)
) ss.
COUNTY OF Bradford)

BEFORE ME, the undersigned authority, this day personally appeared, **MARTIN GROSSMAN** who, being first duly sworn, says that he is the Defendant in the above-styled cause, that he has read the foregoing Successive Motion to Vacate Judgments of Conviction and Sentences Relief and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.

FURTHER AFFIANT SAYETH NAUGHT.

⊗ Martin E. Grossman
MARTIN GROSSMAN

SWORN TO AND SUBSCRIBED TO before me this 17 day of JAN., 2010, by MARTIN GROSSMAN, who is personally known to me or who provided the following identification:

Mark E Hough
NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires:

MARK E. HOUGH
Commission # DD 914704
Expires October 1, 2013
Bonded Thru Troy Fain Insurance 800-385-7019