IN THE SUPREME COURT OF FLORIDA

CLARENCE EDWARD HILL,

Petitioner,

v. CASE NO. 75,149

RICHARD L. DUGGER,

Respondent.

RESPONSE TO PETITION
FOR WRIT OF HABEAS CORPUS AND
STAY OF EXECUTION

COMES NOW Respondent, Richard L. Dugger, by and through undersigned counsel, and files this Response to Hill's Petition for Extraordinary Relief, for a Writ of Habeas Corpus, Request for Stay of Execution, and, if necessary, Application for Stay of Execution pending the filing and disposition of Petition for Writ of Certiorari, and would show:

I. Preliminary Statement

On December 11, 1989, Clarence Edward Hill filed his Petition for Writ of Habeas Corpus, et al., raising nine (9) claims for relief. Said petition was filed pursuant to the dictates of Fla.R.Crim.P. 3.851, and as a direct result of the death warrant signed on November 9, 1989, setting Hill's execution for 7:00 a.m., Thursday, January 25, 1990. Contemporaneous to the filing of said habeas, Hill filed a Motion

for Post-Conviction Relief in the trial court. On January 18, 1990, a hearing was held on said motion and on that same day, the Honorable Jack R. Heflin, Circuit Judge, First Judicial Circuit in and for Escambia County, Florida, denied all relief. An appeal followed said denial.

11. Statement of the Case and Facts

Clarence Edward Hill was indicted on November 2, 1982, in and for the Circuit Court for Escambia County, Florida, for the first degree murder of Officer Stephen Taylor, attempted first degree murder of Officer Larry Bailly, three counts of armed robbery and possession of a firearm during the commission of a felony. Cliff Anthony Jackson, a codefendant, was also charged with first degree murder, attempted murder, and three counts of armed robbery. The guilt phase of Hill's trial began on April 25, 1982, and concluded April 29, 1982, with the jury finding, **inter alia,** Hill guilty on both first degree premeditated murder and felony murder as alleged in Count I. The sentencing phase began on April 29, 1983, and as a result thereof, the jury recommended a death recommendation by a 10-2 vote. On May 17, 1983, the trial court concurred with a recommendation of death in a written sentencing order.

In **Hill V. State,** 477 So.2d 553 (Fla. 1985), the Florida Supreme Court affirmed Hill's convictions, but reversed the death sentence, remanding the cause to the trial court for a resentencing proceeding before a new sentencing jury. The resentencing proceedings occurred on March 24-27, 1986. The record reflects that most of the witnesses presented at trial

were called at the resentencing proceeding and they testified with regard to what occurred the day of the robbery. A number of witnesses testified on behalf of Hill in mitigation. Following all of the testimony, the jury rendered an advisory sentence of death by an 11-1 vote. The trial judge, on April 2, 1986, resentenced Hill to death. The Florida Supreme Court affirmed the imposition of the death penalty in Hill v. State, 515 So.2d 176 (Fla. 1987). Certiorari was denied, Hill v. Florida, 108 S.Ct. 1302 (1988).

The facts relating to the robbery and murder may be found in the Florida Supreme Court's opinion in Hill v. State, 515 So.2d at 177.

The facts germane to each of the issues presented in the habeas corpus petition will be set out with specificity as a part of the argument to each claim.

111. Reasons for Denying Relief

Habeas corpus is not a substitute appeal for the failure to raise matters on direct appeal. In the instant petition, a number of the claims raised were also raised in Hill's contemporaneously filed Rule 3.850 motion. As to those issues, the trial court found many to be procedurally barred in that they could have and should have been raised on direct appeal. A similar result should be reached with regard to claims that could have and should have been raised on direct appeal but are now being raised in a petition for writ of habeas corpus under the auspices that said claims represent fundamental error.

Claim I

WHETHER THE PROSECUTOR PEREMPTORILY EXCUSED BLACK PROSPECTIVE JURORS SOLELY BASED UPON THEIR RACE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE IN NOT ARGUING THIS ISSUE ON DIRECT APPEAL

Hill's first issue asserts a **State** v. **Neil**, **457** So.2d **481** (Fla. **1984**), violation. Specifically, Hill argues ". . . defense counsel noted the prosecutor's unconstitutional use of peremptory challenges against prospective jurors and sought to invoke the inquiry mandated by this Court into the State's use of peremptory challenges . . ." (Petition, page **6**). In support of this allegation, Hill points to two prospective jurors specifically, Ms. Greta Lowe and Ms. Mary Carter, as examples of the prosecutor's use of peremptory challenges to exclude blacks. Hill raised this claim in his Rule 3.850 motion and the trial court denied said claim bottomed on the fact that it was procedurally barred because it could have been raised and should have been raised on direct appeal. See **Parker** v. Dugger, **550** So.2d 459 (Fla. **1989**). In anticipation of a procedural bar finding, Hill further asserts that his appellate counsel rendered ineffective assistance of counsel for failing to raise this claim on appeal from the resentencing proceedings held March **1986**. The underlying claim as to whether the prosecution impermissibly used peremptory challenges to exclude blacks from the jury is not properly before the Court in a habeas corpus petition however, this Court may view the claim for the sole purpose of ascertaining whether appellate counsel rendered ineffective

assistance in electing not to raise this claim on direct appeal. Based on this premise, Respondent would address the "**Neil**" issue.

Preliminarily, it should be noted that appellate counsel's failure to brief an issue which is without merit cannot result in a finding that said performance was deficient and that the performance falls measurably outside the range of professional acceptable performance. **Suarez** v. **Dugger, 527** So.2d **190, 193** (Fla. **1988),** and **King v. Dugger,** ____ So.2d ____**,** (Fla. decided January **4, 1990), 15 F.L.W. 11. Sub judice,** the **Neil** claim is groundless.

The record reflects that a Motion To Dismiss Indictment Based On Underrepresentation Of Blacks And Other Minorities found at (TR **1484)** and cited by Hill, **occurred at the original trial proceedings** in the selection of the jury panel that heard the guilt portion of Hill's trial. **That jury is not the subject matter of the inquiry sub judice.** Rather, the jury under scrutiny is the jury assembled for resentencing in **1986.** There is no nexus between the allegations raised in the **1983** trial and that of the **1986** resentencing proceedings. **(Nor** has Hill alleged such a nexus).

At the resentencing proceedings in March **1986,** prospective juror Greta Lowe was first asked whether she had any fixed feelings regarding the death penalty. Her response was "my personal tendency is to oppose it." (TR **18).** The record reflects that the prosecutor inquired further with regard to Ms. Lowe's views or opposition to the death penalty at which time the following colloquy occurred:

MR. ALLRED: Okay. But, on that spectrum that I indicated, from the strongly opposed to the strongly in favor, and then those in the middle who are just ambivalent or neutral about it, how far over would you say you are towards strongly opposed? Are you halfway over? Are you slight across the line from being neutral about it?

PROSPECTIVE JUROR: I'd say halfway. Like I said, it depends on the circumstances.

MR. ALLRED: Okay. Now are there things about the death penalty that you believe in that would be a factor for you? If you were selected as a juror, would things that you feel about the death penalty, kind of halfway towards strongly opposing it, that would play a part for you if you were selected as a juror? Would they play a part for you in this sense, that as you were sitting there listening to the evidence about the circumstances of this case, would your feelings tend to color the way that you looked at the facts?

PROSPECTIVE JUROR: I believe that I can hear the facts impartially.

MR. ALLRED: Totally objectively?

PROSPECTIVE JUROR: Objectively.

MR. ALLRED: Just as you were sitting in the middle?

PROSPECTIVE JUROR: Uh-huh.

MR. ALLRED: Allright. Once you got back into the jury room, after you heard all of the circumstances and the judge told you what the law in Florida is that you have to, or are required to apply to those facts, and understand the law as he tells it to you, understanding your oath as a juror that you are sworn to follow the law and not your personal feelings, do you still feel like your personal feelings are going to sneak in and make you inclined to make a recommendation of mercy, even though the circumstances may have convinced you beyond a reasonable doubt that the defendant under the law, the defendant should receive the death penalty?

PROSPECTIVE JUROR: I have a degree in criminal justice, and I have devoted myself to it for four years. And I believe I can be impartial.

MR. ALLRED: Okay. Allright. Then again, to my question, you don't feel like your personal feelings are going to sneak in and play any kind of subconscious part or conscious part in your decision?

PROSPECTIVE JUROR: I believe I could adhere to the instructions.

MR. ALLRED: Okay. Where did you receive your training in criminal justice?

PROSPECTIVE JUROR: University of West Florida.

MR. ALLRED: What are you doing at this time?

PROSPECTIVE JUROR: I'm a library technical assistant at the library.

MR. ALLRED: At UWF?

PROSPECTIVE JUROR: Uh-huh.

MR. ALLRED: How much time did you all devote in your schooling to considerations of matters that involved the death penalty?

PROSPECTIVE JUROR: We had a class for a semester. It was about the prison system, and we devoted a lot of time to it.

MR. ALLRED: Okay. You studied things like penology, prison conditions, prison function in society, that sort of thing?

PROSPECTIVE JUROR: Function of the prisons and the role of sentencing and things like that.

MR. ALLRED: You know that's like a full time three or five hour course? I forgot what they offer out there, but on a quarter is it like three hours a week?

PROSPECTIVE JUROR: It's three hours a week.

MR. ALLRED: Is that the only course or the only study that you've done with respect to things that would involve the death penalty? Have you done any independent reading or research?

PROSPECTIVE JUROR: I've done reading, yes.

MR. ALLRED: Do you feel like you have a good sound understanding of the role of the death penalty in society?

PROSPECTIVE JUROR: Yes.

MR. ALLRED: Do you believe in it?

PROSPECTIVE JUROR: In the death penalty?

MR. ALLRED: Yeah.

PROSPECTIVE JUROR: I don't per se believe in it, no.

MR. ALLRED: Do you believe it should be the law in Florida? In other words, is it okay with you if it's the law in other states, but you don't want it here in Florida?

PROSPECTIVE JUROR: It doesn't matter to me that it's the law in Florida.

MR. ALLRED: Do you feel like you could conscientiously and under your oath follow the requirements that are imposed upon you as a juror under the law?

PROSPECTIVE JUROR: Yes, I do.

MR. ALLRED: Do you understand the procedure involved in reaching a decision as a juror on whether or not to recommend the death penalty, or whether or not to recommend mercy or life?

PROSPECTIVE JUROR: I know that there are different things that are given, instructions that you have to consider, yes.

MR. ALLRED: Are you familiar with the actual process and procedure as far as the judge telling you about first you must find, so and *so,* and then you find that then you must find, *so* and *so,* and then you see which outweighs the other?

PROSPECTIVE JUROR: Yeah, we've done that in my class.

MR. ALLRED: So, you have already thought these things out?

PROSPECTIVE JUROR: (Nods head affirmatively).

(TR 18-23).

After an examination of a number of prospective jurors, the prosecutor announced to the court that it was going to use a peremptory challenge. The following took place:

MR. ALLRED: Greta Lowe.

THE COURT: There you go.

MR. ALLRED: Ms. Lowe, who is it that you are either close friends or related to in law enforcement?

PROSPECTIVE JUROR: I have two uncles, one in Detroit and one in New York City.

MR. ALLRED: And what do they do?

PROSPECTIVE JUROR: They're deputy sheriffs.

MR. ALLRED: Allright. Are you close to those uncles?

PROSPECTIVE JUROR: They're not really -- one of them is married -- divorced from my aunt. And the other, he's my mother's brother-in-law. We're not close.

MR. ALLRED: Okay. Not closely related any more because of divorces and that sort of thing?

PROSPECTIVE JUROR: Right.

MR. ALLRED: Did either of them have any influence upon your decision to go into criminal justice?

PROSPECTIVE JUROR: No.

MR. ALLRED: What was it exactly you were studying at West Florida?

PROSPECTIVE JUROR: Criminal justice.

MR. ALLRED: Do you feel that you may be influenced at all when you start beginning to consider in some detail evidence that the deceased in this case was a law enforcement officer on active duty in the performance of his duties, shot?

PROSPECTIVE JUROR: No.

MR. ALLRED: Okay. Does that have any impact upon you at all?

PROSPECTIVE JUROR: No. No. I'm sorry that he's dead, yes.

MR. ALLRED: Do you feel anything extra because he was a law enforcement officer?

PROSPECTIVE JUROR: No.

MR. ALLRED: Is it of interest or worthy of your consideration that this is a case involving a law enforcement officer as a deceased, as opposed to some other citizen?

PROSPECTIVE JUROR: You mean do I weigh it more?

MR. ALLRED: Yes.

PROSPECTIVE JUROR: No.

MR. ALLRED: That's all I have. Thank you.

(TR **164-165).**

At this juncture, defense counsel noted his objection for the record as follows:

MR. TERRELL: Your Honor, for the record, I need to voice an objection. The three black people on the panel who have been challenged, one was Mr. Belland, the other was Ms. Baker, who indicated she was slightly for the death penalty. Now we've got Ms. Lowe who has a background in criminal law enforcement, and feel that the circumstances, the State has started to selectively strike blacks from the panel.

MR. ALLRED: Your Honor, Ms. Lowe just gave some answers about whether or not if it was of any importance to her if it was a law enforcement officer when I asked her those questions. It was of no great concern to her, and of course, one of the aggravating circumstances is that the law enforcement officer -- anyway I was not satisfied with her answers to those questions in that regard. And I'm using a peremptory challenge. I'm not saying blatant enough to strike her for cause, the grounds for me, not regarding race. I still got -- Mr. Greene is still on there. I'm satisfied with him as a juror, you know, as he's a black. That's not what I'm doing here.

THE COURT: Motion denied.

MR. ALLRED: In addition, Schiller's notes say Ms. Lowe says she doesn't believe in the death penalty.

THE COURT: Says she was neutral.

MR. ALLRED: That's what his notes say. I though she said she was neutral.

THE COURT: I've got neutral.

MR. TERRELL: Yes, sir. That's what my notes show.

(Bench Conference Concluded)

MR. ALLRED: We tender Your Honor.

(At the Bench)

MR. TERRELL: Your Honor, so that the record may accurately show my objection on the issue we've just been discussing, technically I'm objecting and moving that the panel be struck and under the Neilson case, based on prosecution's selective peremptory challenges of blacks.

THE COURT: Strike the panel? You've still got -- we've got blacks out there.

MR. TERRELL: Yes, sir. I think I have to make that objection under the Neilson case.

THE COURT: Now wait a minute, what's the **Neilson** case?

MR. ALLRED: He just needs to make the record. Technically he's got to move to strike.

THE COURT: **McNeal,** not **Neilson.**

MR. ALLRED: One of them. The first one that came out was **Neal.**

THE COURT: **Neal,** that's it.

MR. ALLRED: It's just a technical matter, Judge. I need to put one more thing on the record. The first gentlemen I mentioned that we struck for cause, he caused that himself.

THE COURT: Blatantly.

(Bench Conference Concluded)

(TR **166-168).**

The record reflects that the prosecution in no way was using peremptory challenges to exclude blacks from the jury. With regard to Ms. Lowe's answers to questions asked of her, the aforecited colloquy shows that the prosecution did not believe she was a good witness at this resentencing proceeding. Ms. Lowe had no strong feeling that law enforcement officers' deaths were more significant that any other citizens. This was in spite of the fact that she had a criminal justice background and relatives who worked in the criminal justice system. The record also reflects that Ms. Lowe was not strong on the death penalty although she was a student of the criminal justice system and she had a semester class wherein they went through a death penalty process in class.

In **State** v. **Neil, 457** So.2d **481, 488** (Fla. **1984),** this Court made it clear that the **Neil** decision was not retroactive. The Court opined:

> Although we hold that Neil should receive a new trial, we do not hold that the instant decision is retroactive. The difficulty of trying to second-guess records that do not meet the standards set out herein as well as the extensive reliance on the previous standards make retroactive application a virtual impossibility. Even if retroactive application were possible, however, we do not find our decision to be such a change in the law as to warrant retroactivity or to warrant relief in collateral proceedings as set out in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). To recapitulate, a parties peremptories cannot be examined until the issue is properly presented to the trial court and until the trial court has determined that such examination is warranted. If such occurs, the challenged party must show that the questioned challenges, but no others, were not exercised solely on the basis of race. . .

457 So.2d at 488.

At the time Hill's case was being briefed on appeal, Neil was the law in the State of Florida. To suggest now that State v. Slappy, 522 So.2d 18 (Fla. 1988), cert. denied, 108 S.Ct. 2873 (1988), should have retroactive application with regard to deciding whether appellate counsel rendered ineffective assistance, flies in the face of both decisional law which states that counsel is to be judged based on his performance at the time (in this instance, the appellate briefing schedule), and based on the law at the time.

Appellate counsel for Hill raised six issues on appeal. Hill v. State, 515 So.2d 176 (Fla. 1987). Specifically, he raised:

> In this appeal, Appellant contends the trial court erred by: (1) Allowing the State to introduce irrelevant collateral crime evidence; (2) excluding certain testimony

> concerning Appellant's family background and a defense witnesses health problems; (3) refusing to instruct the jury on the statutory mitigating circumstances that the defendant acted under extreme duress or under the substantial domination of another person; (4) disclosing to the new penalty jury the original jury's premeditation finding; (5) finding the homicide cold, calculated and premeditated, and (6) permitting prosecutorial misconduct which denied Appellant a fair trial.

515 So.2d at 177.

Defense counsel's intent was to demonstrate on appeal why the death penalty was not an appropriate sentence. In that vein, defense counsel raised those claims geared towards a result that the death penalty was improperly imposed and that mitigation had not been properly considered. In determining whether to raise a "**Neil**" issue, it was reasonable for appellate counsel to tactically elect, based on the state of the law and the facts of the instant case, not to pursue this issue. As observed in **Atkins** v. **Dugger,** 541 So.2d 1165, 11667 (Fla. 1989):

> . . . Therefore, appellate counsel could have argued this point, but once again he cannot be deemed ineffective for failing to do *so.* Most successful appellate counsel agreed that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of stronger points.

Sub judice, even assuming for the moment that we must view appellate counsel's performance in light of recent developments regarding the use of peremptory challenges in particular, **State v. Slappy,** 522 So.2d 18 (Fla. 1988), the use of a peremptory challenge to remove Greta Lowe did not violate **Slappy.** As observed in **Tillman** v. **State,** 522 So.2d 14 (Fla. 1988):

> This Court in **State** v. **Neil,** 547 So.2d 481 (Fla. 1984), delineated the procedure a trial court must follow when faced with a challenge to the use of peremptory strikes based solely on race. In **Neil,** the trial court ruled that the State did not have to explain why it had struck all three black people who had been questioned to that point. This Court reversed that ruling, holding that when a party timely objects the other party's use of its challenges, the objecting party shows that the strikes were used against a distinct racial group, and there is a strong likelihood that they have been challenged solely because of their race, then the burden shifts to the striking party to "show that the questioned challenges were not exercised solely because of the prospective jurors race." 457 So.2d at 486-87 (footnote omitted).
>
> In **Slappy** v. **State,** 522 So.2d 18 (Fla. 1988), and **Blackshear** v. **State,** 521 So.2d 1083 (Fla. 1988), this Court further defined the procedure to be utilized when a challenge of racial discrimination in the use of peremptory challenges is made. We held that "any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor." **Slappy,** at 22. Moreover, the trial judge must "evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons." Id. In other words, "a judge cannot merely accept the reasons proffered at face value." Id. In essence, the proffered reasons must be not only neutral and reasonable, but they must be supported by the record. It is incumbent upon the trial judge to determine whether the proffered reasons, if they are neutral and reasonable, are indeed supported by the record.

Tillman v. State, 522 So.2d at, 16-17.

In the instant case, the race-neutral reasons given by the prosecution satisfied the criteria set forth in **State** v. **Slappy, supra.** There was record support for the conclusions drawn by the prosecutor that Ms. Lowe would not be a sympathetic juror and all

questions asked of her were directed towards that end. While appellate counsel in **1986** could not have reasonably fashioned this Court's pronouncement in **1988**; to-wit: **State v. Slappy, supra,** and its progeny, it is submitted that even today the race-neutral reasons given by the prosecution in **1986** would pass **1990** standards.

Hill also points to the use of a peremptory challenge to excuse a prospective juror, Mary Carter. What Hill fails to explain regarding the record surrounding the use of a peremptory to remove Ms. Carter is that when first asked **(TR** 38), Ms. Carter indicated that she was definitely opposed to the death penalty. At **(TR 69-70),** she indicated that she had read the newspapers at the time of the incident and had read that mornings headlines concerning the case. At **(TR** 231), she again informed the court that she was definitely opposed to the death penalty in any case. At that point further questions were asked of her at which time she waffled with regard to her opposition to the death penalty indicating that she could impose the death penalty against Hitler. When the prosecution asked to have her removed for cause, the court indicated that he would not but that the State was free to use a peremptory challenge and stated same on the record. The court noted that the State, in an abundance of caution, used a peremptory challenge to strike this juror. **(TR** 235).

While not unmindful of the serious connotations raised by this kind of an issue, Respondent would urge that sub **judice,** appellate counsel did not fall below the standards required of

normal appellate counsel in making a tactical decision to raise other issues. Based on the state of the law at the time, note **Thomas v. State,** 502 So.2d 994 (Fla. 4th DCA 1987), citing to **State v. Neil, supra,** (similar fact pattern wherein the court found "furthermore, the exclusion of a juror of a minority race, by itself, is insufficient reason for requiring counsel to justify the challenge."), and the recognition early on that **Neil** and parenthetically all cases that follow such as **State v. Slappy, supra,** should not be held to be retroactive, appellate counsel did not render ineffective assistance of counsel for failing to raise this issue on direct appeal.

Claim II

WHETHER THE TRIAL COURT ERRED WHEN IT RESPONDED TO QUESTIONS FROM THE JURY AND REFUSED TO DISCLOSE TO MR. HILL AND HIS COUNSEL THE QUESTIONS ASKED, IN VIOLATION OF MR. HILL'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Hill next argues that at this resentencing proceeding the trial court violated his rights when it refused to turn over to defense counsel questions presented to the court by the jury, that were not answered. See (TR 374). The court did not turn the questions over to defense counsel based on the fact that he had not commented on them. The record is silent as to what the questions were.

Hill raised this issue in his Rule 3.850 motion and said claim was found to be procedurally barred. In an effort to get to the heart of the issue, Hill argues that his appellate counsel rendered ineffective assistance for failing to raise this claim

on direct appeal. Citing **Ivory v. State,** 351 So.2d 26 (Fla. 1977), he contends that it was prejudicial error for the trial court not to respond to the request to see the questions and as such appellate counsel should have raised said claim on appeal. At best, this issue raises speculation as to whether any "constitutional" right has been violated. More importantly, however, Hill's suggestion that the trial court's refusal to disclose the questions to trial counsel, prevented counsel from assisting Hill during a critical stage of the proceedings pursuant to **United States** v. **Cronic,** 466 **U.S.** 648 (1984), is totally groundless. Indeed, in order for Hill to succeed under a **Cronic** analysis he must meet a very heavy burden as observed in **Smith** v. **Wainwright,** 777 F.2d 609, 620 (11th Cir. 1985), ("yet to be found in the Eleventh Circuit"). See also: **Stone v. Dugger,** 837 F.2d 1477 (11th Cir. 1988), and **Warner** v. **Ford,** 752 F.2d 622 (11th Cir. 1985) (counsel's silence not "**Cronic**" ineffectiveness).

With regard to the instant issue, as observed in **Atkins** v. **Dugger, supra,** wise appellate counsel argues those claims deemed important, not every issue available. See Tompkins **v. Dugger,** 547 So.2d 1370, 1371-72 (Fla. 1989); **Preston v. State,** 531 So.2d 154, 158-59 (Fla. 1988), and **Rose v. Dugger,** 508 So.2d 321, 325 (Fla. 1987) (failure to raise an **Ivory** issue not ineffective appellate counsel). Based on the foregoing, Hill has failed to satisfactorily demonstrate that appellate counsel rendered ineffective assistance for failing to raise this issue on direct appeal.

Claim III

WHETHER THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. HILL'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Hill readily acknowledges that on direct appeal the Florida Supreme Court invalidated this aggravating factor because there was insufficient evidence to support it. **Hill** v. **State,** 515 So.2d at 179. Hill urges that under **Maynard** v. **Cartwright,** 108 S.Ct. 1853 (1988), the overbroad application of this aggravating circumstance violates the Eighth Amendment, and represents a fundamental change in law. In the interests of fairness, he argues this decision, **Cartwright,** must be given retroactive application in light of **Witt** v. **State,** 387 So.2d 922 (Fla. 1980). This court has rejected the identical issue finding that **Maynard** v. **Cartwright, supra,** does not constitute new law **(Smalley** v. **State,** 546 So.2d 720 (Fla. 1989)), and should not be given retroactive application. See **Hamblen** v. **Dugger,** 546 So.2d 1039, 1041 (Fla. 1989); **Eutzy** v. **State,** 541 So.2d 1143, 1146-1147 (Fla. 1989); **Jones** v. **Dugger,** 533 So.2d 290, 292-293 (Fla. 1988), and **Tompkins** v. **Dugger,** 549 So.2d 1370, 1371 (Fla. 1989). Moreover, this argument could have been asserted on direct appeal (and indeed was successfully asserted in a slightly different context), because the working tools were available. As such, this claim should be barred (as it was found to be by the trial court), because it could have been raised on direct appeal. See **Godfrey** v. **Georgia,** 446 U.S. 420 (1980). No relief should be forthcoming as to Issue III because said claim constitutes an abuse of the habeas process.

Claim IV

WHETHER THIS COURT'S FAILURE TO REMAND FOR RESENTENCING AFTER STRIKING AN AGGRAVATING CIRCUMSTANCE ON DIRECT APPEAL DENIED MR. HILL THE PROTECTIONS AFFORDED UNDER FLORIDA'S CAPITAL SENTENCING STATUTE, IN VIOLATION OF THE DUE PROCESS, EQUAL PROTECTION AND EIGHTH AND FOURTEENTH AMENDMENTS

Citing to **Elledge** v. **State,** 346 So.2d 998, 1003 (Fla. 1977), Hill argues, as others have, that the Florida Supreme Court held therein that if improper aggravating circumstances are found, "then regardless of the existence of other unauthorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." As a result thereof, the Court in **Elledge** reversed to the trial court for further consideration. This issue also has been raised in a number of cases and rejected as not a basis upon which relief might be given. See **Atkins** v. **Dugger,** 541 So.2d 1165 (Fla. 1989); **Jackson** v. **Dugger,** 529 So.2d 1081 (Fla. 1988); **Parker** v. **Dugger,** 537 So.2d 969, 972 (Fla. 1988); **Hall** v. **Dugger,** 531 So.2d 76 (Fla. 1989), and **Tafero** v. **Dugger,** 520 So.2d 287 (Fla. 1988). In particular, note **Hamblen** v. **Dugger,** 546 So.2d 1039 (Fla. 1989). In **Hill** v. **State,** 515 So.2d at 179, the court reviewed the remaining aggravating circumstances against the mitigation and found the sentence imposed was reliable. No remand for resentencing was required.

Based on the foregoing, this claim should be denied.

Claim V

WHETHER MR. HILL'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HIS JURY WAS PREVENTED FROM GIVING APPROPRIATE CONSIDERATION TO, AND HIS TRIAL JUDGE REFUSED TO CONSIDER, ALL EVIDENCE PROFFERED IN MITIGATION OF PUNISHMENT CONTRARY TO **EDDINGS** V. **OKLAHOMA, MILLS v. MARYLAND,** AND **HITCHCOCK v. FLORIDA**

Hill's claim, to-wit: whether the trial court and jury gave appropriate consideration and considered mitigation; could have been and should have been raised on direct appeal. Hill has argued that his appellate counsel rendered ineffective assistance of counsel for failing to fully develop this claim. The record reflects, on direct appeal in Claim II and III of Hill's **1986** Initial Brief, he challenged the propriety of the trial court's refusal to allow family background information to be excluded pursuant to **Eddings** v. **Oklahoma, 455** U.S. **104 (1982),** and other decisions and in Claim III challenged the trial court's failure to find Hill was under the domination of his codefendant Jackson and that Hill was under extreme duress. What has been added to the earlier claims is an expansion of issues raised on direct appeal. By merely fleshing out more alluring "mitigating factors", Hill is attempting to reargue a claim posited on direct appeal. For example, Hill now argues that under **Penry** v. **Lynaugh, 109** S.Ct. **1934 (1989),** appellate counsel should have argued on direct appeal that both the jury and the trial court failed to consider (a) Hill's drug intoxication; (b) Hill's chronic drug abuse; (c) Hill's low intelligence; (d) Hill's learning disability; (e) Hill's domination by Jackson, and (f) that Hill was a good provider.

The record reflects that at the resentencing proceeding, Hill put on evidence as to each to some degree. For example, Hill took the stand and testified that before the day of the robbery and the day of the robbery he had ingested drugs. Dr. Larson testified that although Hill was of average intelligence he scored borderline with regard to his verbal abilities. Certainly, evidence of this nature did reflect, based on the school records reviewed by Dr. Larson, that Hill did not do well in school. Moreover, family members testified that Hill was a good man and took care of his family when he could and was kind to others. With regard to whether Hill was dominated by his codefendant, Cliff Jackson took the stand in behalf of Hill and testified that it was his idea to rob the Savings and Loan. He also testified that he planned the robbery and that he told Hill what to do. Jackson had no explanation, however, as to why Hill was the one that carried the gun into the bank or why it was Hill who was the one who pushed people around or why it was Hill who, after making a successful escape, came back and without provocation, shot and killed a police officer, (who had Jackson on the ground about to be handcuffed).

The trial court, in his sentencing order, found:

> As to mitigating circumstances:
>
> 1. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. There was testimony of a psychologist who conducted psychological evaluations on the defendant. That he gave I.Q. tests as to the psychological age. He had furnished to him the school records of the defendant from ninth to the twelfth grade and had the

benefit of the consultations with the defendant himself. That the verbal I.Q. test showed the defendant at 76 which was borderline normal. His performance was 101, 52 being the average; and that the defendant was well within the range of average. He was at 84 in another category which was low-average. He had no mental illness or disorder. He would not be appropriate for involuntary hospitalization under the **Baker** act. On cross-examination, he testified that the mental age was consistent with the chronological age. Along with this, there was the benefit of the defendant's testimony at trial and the court's observation was that his testimony did not appear to be unusual, slow or dim-witted. He testified in a manner that indicated that he understood the nature of the questions and responded appropriately. He did testify that he had been sniffing cocaine and presented the testimony of his accomplice who indicated that they had had some cocaine, but there was expert testimony by Dr. Reid Leonard that as a result of the blood samples of the defendant furnished by examination by way of a chemical analysis showing only a residue of aspirin. The court had the benefit of the defendant's testimony to weigh with this testimony. The court is of the opinion based upon the evidence that the defendant has not sustained this mitigating circumstance.

2. The age of the defendant at the time of the crime. The court is of the opinion based upon the psychological tests and again the defendant's testimony by way of his defense and the testimony of the other witnesses of defendant's activities that the evidence does not substantiate that there is any difference in the chronological or actual mental age of the defendant. The age of the defendant at the time of the offense would have been younger than it was at this hearing so it possibly could have been a factor, but the court is of the opinion it would not be that significant.

3. The defendant was an accomplice in the offense for which he is to be sentenced but the actual offense was committed by another person and the defendant's participation was relatively minor. As to the record in this instance, the codefendant did testify to the

jury that he was the leader and that he gave directions tending to indicate he was the prime mover; but the testimony of other witnesses show it was the defendant Hill who was the armed participant and that defendant's own testimony shows he was the one that was armed and that the accomplice Jackson testified that he did not have a weapon. All the testimony from the witnesses shows that it was the defendant who did the threatening of the bank employees, that he abused other employees. He was the one demanding that the vault be opened or he would blow one of the tellers' brains out. It was the defendant who actually had taken flight and made good his flight or escape and that it was he who had returned and that it was he who made the decision to assist his accomplice Jackson and that it was he who had the firearm and it was he who fired the shots that killed Officer Taylor and wounded Officer Bailly. It is the court's opinion, based upon this evidence that the defendant has failed to support this mitigating circumstance.

4. Any other aspects of the defendant's character or record and any other circumstance of the offense -- several witnesses, James Wilson, knew the defendant for nineteen years and was a schoolmate; Lucille Tilley knew the defendant and his family for nineteen years; Mrs. Petway knew the defendant and his family for a number of years in Mobile since 1968; Grace Singleton, 79 years old, knew the defendant when he was a little boy; Patsy McCaskill, his sister-in-law, knew him about six years; and the father and mother of the defendant testified as to the particulars of his character when he was a boy for honesty and peacefulness. On cross-examination, Tilley didn't know that the defendant had been arrested for robbery in Mobile as did Petway; Singleton was not aware of the robbery; McCaskill did not know about the robbery. The court is of the opinion that this evidence is insufficient to support this mitigating circumstance.

> The court is of the opinion that the age of the defendant may have been a factor, but there has not been established sufficient mitigating factors to outweigh the aggravating factors.

(TR 839-842).

The trial court did not fail to consider tendered mitigating evidence. What the trial court did was reject the tendered evidence as "mitigating evidence" outweighing the aggravating circumstances in the instant case. The trial court found that Hill's age may have been a factor but it was not a significant factor with regard to the mitigating outweighing the aggravating circumstances. To suggest that appellate counsel should have further fleshed out the trial court's consideration of each of the aforenoted points (regard to intoxication and drug abuse and the domination by Jackson), is second-guessing at best what appellate counsel believed to be compelling issues to present on appeal. **Sullivan v. State,** 441 So.2d 609 (Fla. 1983). Pursuant to **King** v. **Dugger,** ____ So.2d ____ (Fla. decided January 12, 1990), 15 F.L.W. 11, counsel did not render ineffective assistance on appeal. See also **Lightbourne v. Dugger,** 549 So.2d 1364, 1366, n.2 (Fla. 1989); **Gore** v. **Dugger,** 532 So.2d 1048, 1050 (Fla. 1988) (domination theory); **Lambrix v. Dugger,** 529 So.2d 1110, 1112 (Fla. 1988).

Where, as here, appellate counsel attempted to argue that the trial court failed to consider certain mitigating factors on direct appeal, said counsel cannot be flawed for failing to present every nuance now raised. See **Jackson v. Dugger,** 547 So.2d 1197, 1200-1201 (Fla. 1989) (selecting the exact mental

illness to be asserted is not required for effective assistance). Based on the foregoing, relief should be denied on this issue because this issue was raised on direct appeal and the present assault constitutes an attempt to obtain a second appeal on this same issue. **Hill v. State**, 515 So.2d at 177-178.

Claim VI

WHETHER DURING THE COURSE OF MR. HILL'S TRIAL THE COURT IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY TOWARDS MR. HILL WAS *AN* IMPROPER CONSIDERATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Hill asserts that "the jury in Mr. Hill's trial was repeatedly admonished by the state attorney, and instructed by the trial court, that feelings of mercy or sympathy could play no part in their deliberations as to Mr. Hill's ultimate fate." This issue was raised in Hill's Rule 3.850 motion and found to be procedurally barred. In order to review this claim, Hill now argues that his trial counsel rendered ineffective assistance of counsel for failing to raise this issue on direct appeal. The record reflects that while trial counsel did object to statements made by the prosecution at (TR 668), no curative instructions were sought and no objection was made with regard to the instructions given by the trial court. The record reflects that defense counsel, in response to the State's closing argument, objected to the fact that "that is a proper mitigating circumstance that can be considered by any trier of fact." (TR 668). Specifically, what the prosecution was arguing was that one should not for "mercy's sake grant mercy.''

Appellate counsel cannot be chided for not raising on direct appeal claims which were not preserved by trial counsel, and in the instant case the trial court's instructions were not objected to. The only statement that was objected to was the statements by the prosecutor at closing arguments. However, neither curative instructions were sought nor a mistrial requested. While this issue "could have been raised" on direct appeal, such an argument would not have been granted. Indeed, this claim has taken on a more popular posture in recent years. (Note: **Saffle v. Parks, 104** S.Ct. 402, **cert. granted,** April **25, 1989)).** However, appellate counsel did not render ineffective assistance. See **Tompkins** v. **Dugger, 549** So.2d **1370-1371,** n.2 (Fla. **1989); Atkins v. Dugger, 541** So.2d **1165, 1167** (Fla. 1989), and **King v. Dugger, supra.** As observed most recently in **Duest** v. **Dugger,** ____ So.2d ____ (Fla. decided January 18, 1990), __ F.L.W. ___ :

> Duest claimed that appellate counsel was ineffective for failing to argue that testimony relating to an incident concerning Duest's use of a razor should have been excluded is also without merit. In the context with which the evidence was presented, it may have been admissible. However, it is unnecessary for us to decide this question because even if it could be said that the evidence should have been excluded, the error would have been clearly harmless. Appellant counsel cannot be faulted for failing to argue a point which, even if correct, would amount to no more than harmless error.

The oblique reference by the prosecution that mercy should not be given for mercy's sake did not skew the jury's ability in ascertaining whether the aggravating circumstances outweighed mitigation presented. Based on the foregoing, this claim must

also be denied. **Bertolotti** v. **Dugger,** 883 F.2d 1503, 1525-1526 (11th Cir. 1989); **Parker** v. **Dugger,** 550 So.2d at 460.

Claim VII

WHETHER MR. HILL'S JURY RECEIVED IMPROPER INSTRUCTIONS RESULTING IN FUNDAMENTALLY UNFAIR CONVICTIONS AND SENTENCES IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

The record reflects that appellate counsel, on direct appeal in Claim V, challenged the correctness of the trial court instructing the jury that the earlier jury had found Hill guilty of premeditated murder. This Court, in **Hill** v. **State,** 515 So.2d at 178, found:

> We summarily reject Hill's fourth claim that the trial judge impermissibly disclosed to the new penalty jury the original jury's finding that the homicide was premeditated. We previously affirmed Appellant's premeditated first degree murder conviction against the various challenges presented in that proceeding, and its introduction during this resentencing phase was essential for the jury to carry out its responsibilities.

Hill contends argues that the facts and circumstances do not support the premeditation finding and that it was error for the resentencing jury to be given such an instruction. The current assertion is a reargument of a claim raised on direct appeal, which this court rejected. Based on similar assertions, in particular, **Parker** v. **Dugger,** 557 So.2d 969, 970-971 (Fla. 1988) (premeditated/felony murder at issue), and **Suarez** v. **Dugger,** 527 So.2d 190, 193 (Fla. 1988); **Bertolotti** v. **Dugger,** 514 So.2d 1095, 1096 (Fla. 1988), and **Lightbourne** v. **Dugger,** 549 So.2d 1364 (Fla. 1989), relief must be denied because this was previously argued

on direct appeal in 1986. **Sullivan v. State,** 441 So.2d 609 (Fla. 1983).

Claim VIII

WHETHER MR. HILL'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTION SHIFTED THE BURDEN TO MR. HILL TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. HILL TO DEATH

This issue also was raised in Hill's Rule 3.850 motion and found to be procedurally barred. Hill attempts to address the merits of this issue by asserting that appellate counsel rendered ineffective assistance for failing to raise such a claim. This issue has been a perennial issue with capital defendants and as observed in **Tompkins v. Dugger,** 549 So.2d 1370, 1371 (Fla. 1989), where trial counsel failed to object to said claim, appellate counsel is not ineffective for not raising this claim on appeal. See also **Suarez v. Dugger,** 527 So.2d 190, 193 (Fla. 1988); **Lightbourne v. Dugger,** 549 So.2d 1364, 1366, n.2 (Fla. 1989); **Hamblen v. Dugger,** 546 So.2d 1039, 1041 (Fla. 1989); **Jones** v. **Dugger,** 533 So.2d 290 (Fla. 1988); **Atkins v. Dugger,** 541 So.2d 1165, 1167, n.2 (Fla. 1989), and **Preston v. Dugger,** 531 So.2d 154, 160 (Fla. 1988). Based on the foregoing, appellate counsel did not render ineffective assistance of counsel where trial counsel failed to raise said claim, **King v. Dugger, supra; Henderson v. Dugger,** 522 So.2d 835, 836 (Fla. 1988); **Parker v. Dugger,** 550 So.2d 459, 460 (Fla. 1989).

Claim IX

WHETHER MR. HILL WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE JURY WAS NOT PROPERLY INSTRUCTED CONCERNING THE IMPROPER DOUBLING OF AGGRAVATING FACTORS

Terminally, Hill argues that the trial court erred in instructing the jury regarding whether two statutory aggravating factors applied or whether improper doubling occurred based on a reliance of these two aggravating factors. The record reflects that trial counsel objected to the court's instruction on both aggravating factors. (TR 659, 705). The court, in its written findings, concluded that both statutory aggravating factors were not available. (TR 837-838). Hill argues the jury should not have been instructed as to both issues, however. This issue was the subject matter for review in Hill's Rule 3.850 motion and was found to be procedurally barred because it could have been raised on direct appeal but was not. As such, Hill has now taken the opportunity to review this claim by challenging the effectiveness of his appellate counsel for failing to raise this issue.

Because the jury was instructed as to both, he suggests, they improperly doubled these factors and as such their recommendation was unreliable. Such an assertion is without merit. See **Jones** v. **Dugger,** 533 So.2d 290 (Fla. 1988); **Suarez** v. **Dugger,** 527 So.2d 190, 193 (Fla. 1988), and **Lightbourne** v. **Dugger,** 549 So.2d 1364 (Fla. 1989). **Kennedy** v. **State,** 455 So.2d 351 (Fla. 1984), is not contrary to such a conclusion. Hill has cited no authority that would require the trial court to limit what statutory aggravating factors may be instructed. Moreover, in the instant record, the trial court clearly informed the jury

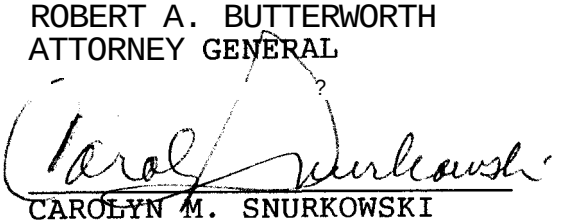
that the jury must weigh the aggravating factors against the mitigating factors and reach an advisory sentence. (TR 706-707). There was no suggestion by the trial court nor for that matter counsel for either the State or the defense that this was a numbers game and "that x number of aggravating factors would outweigh y number of mitigating circumstances." Based on the foregoing, Hill has failed to demonstrate that counsel rendered ineffective assistance of counsel on this issue or that he is entitled to relief.

IV. Conclusion

Based on the foregoing, it is respectfully urged that this Court deny all relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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V. Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Thomas Dunn, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 24th day of January, 1990.

CAROLYN M. SNURKOWSKI
Assistant Attorney General