IN THE FLORIDA SUPREME COURT

CLARENCE HILL,

Appellant,

v.

CASE NO. 75332

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Clarence Hill was the defendant below and will be referred to herein as Appellant. The State of Florida was the prosecution below and will be referred to herein as Appellee or the State. References to the record on appeal will be by the symbol "R" followed by the appropriate page number in parentheses. References to the trial transcripts will be referred to herein by the symbol "TR" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

On December 11, 1989. Clarence Edward Hill filed a Motion for Post Conviction Relief pursuant to Fla.R.Crim.P. 3.851 in the trial court and a Petition for Writ of Habeas Corpus in the Florida Supreme Court. In Hill's Motion for Post-Conviction Relief, fifteen (15) claims were raised. On January 3, 1990, a notice of hearing was sent to all parties providing that the matter would be heard on January 18, 1990, at 10:30 a.m., before the Honorable Jack R. Heflin, Circuit Judge, First Judicial Circuit Judge in and for Escambia County, Florida. In response thereto, the State filed its Response on January 16, 1990. On January 18, 1990, prior to the hearing commencing, Hill filed an appendix to his Rule 3.850 Motion containing a number of affidavits in support of the allegations contained in his Rule 3.850 Motion filed more then five weeks earlier. The trial court, after hearing oral argument as to the claims raised, found

that as to Claims I-III, and VII-XIV, said claims were procedurally barred. As to Claims IV, V and VI, the court, after reviewing the record, found that many of the allegations were insufficient on their face to make a claim that counsel rendered ineffective assistance and as to others the record conclusively demonstrated that trial counsel rendered effective assistance of counsel. With regard to Claim XV, the court held that the Florida Supreme Court decision in **Cave v. State,** 529 So.2d 293 (Fla. 1988), controlled. Hill's request for stay was denied and the motion for post conviction relief was denied.

On January 20, 1990, a rehearing motion was filed and attached thereto was an affidavit prepared by Hill's trial counsel dated January 19, 1990. The rehearing petition is bottomed on this belatedly obtained affidavit from Mr. Terry Terrell, who provides that although he has not looked at his file for approximately four years, he was confident that he could have done more to prepare for the 1986 resentencing proceedings in his representation of Clarence Hill. He opines that neither strategy nor trial tactics governed his preformance in developing all the mitigating evidence that could have been brought forth for the resentencing. On January 22, 1990, Judge Heflen denied the rehearing petition.

Clarence Edward Hill was indicted on November 2, 1982, in and for 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 on 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 the 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 and remanded for a new sentencing proceeding with a newly empaneled jury. The resentencing proceedings were held 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 in behalf of Hill in mitigation. Following all of the testimony, the jury rendered an advisory sentence of death. The trial judge, on April 2, 1986, resentenced Hill to death. An appeal followed and the Florida Supreme Court affirmed the resentencing and reimposition 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 of the case may be found in the Supreme Court's opinion of **Hill V. State, 515** So.2d at 177. Therein, the court observed:

> The facts relevant to this sentencing proceeding reflect that on October **19, 1982,** Appellant and his accomplice, Cliff Jackson, stole a pistol and an automobile in Mobile, Alabama. Later that day, Appellant and Jackson drove to Pensacola and robbed a Savings and Loan Association at gunpoint. The police arrived during the robbery and, upon their arrival, Appellant fled the Savings and Loan building through a back door. Jackson exited through the front door, where he was apprehended by police. Appellant approached two police officers from behind as they attempted to handcuff Jackson, and shot the officers, killing one and wounding the other. By an **11-1** vote, the resentencing jury recommended the death sentence. The judge, in reimposing the death sentence, found the following statutory aggravating circumstances: **(1)** The defendant had previously been convicted of another capital offense or violent felony; (2) the defendant knowingly created a great risk of harm or danger to many persons; **(3)** the murder was committed while the defendant was engaged in the commission of a robbery; **(4)** the murder was committed for the purpose of avoiding or preventing a lawful arrest or escaping from custody; and (5) the murder was cold, calculated and premeditated. In mitigation, the judge found the Appellant's age as a possible factor. Appellant's age at the time of the offense was twenty-three years.

Preceding the resentencing proceedings, Hill filed an unsuccessful motion in limine with the trial court to preclude his second jury from learning of his first jury's finding of premeditated murder. During voir dire, defense counsel informed the prospective jurors without objection that a mere finding of premeditation concerning a murder would not alone suffice to establish that the murder was also committed in a "cold, calculated and premeditated manner, without any pretense of moral or legal justification" for the purposes of aggravation. At the resentencing, the State tendered, over the objection of defense

counsel, that Hill and Jackson had stolen a 1978 Buick Regal automobile from Janet Pearce in Mobile, Alabama, at gunpoint earlier on the day the robbery occurred. Hill and his codefendant drove Mrs. Pearce's car to the Freedom Savings and Loan Association of Pensacola on the early afternoon of October 19, 1982. They entered the bank at approximately 1:30 p.m., wearing sunglasses as a disguise. Hill alone was armed with a .22 caliber pistol.

Inside the bank, with his pistol drawn, Hill did most of the talking for the pair, demanding money from the tellers and threatening to the blow the heads off of anyone who made a false move. After they obtained some $4,000.00 in cash, Jackson, unarmed, left the bank through the front door where he was immediately apprehended by Officer Larry Bailly of the Pensacola Police Department. Hill left the bank through the back door undetected. Hill observed Officer Bailly and Officer Taylor of the Pensacola Police Department apprehend Jackson and try to handcuff him. The record reflects that Hill casually snuck up behind the trio and without a warning began firing his pistol at the officers. Officer Taylor, who was struck in the back and chest from a distance of one foot, staggered a short distance to the curb, fell, and died. Officer Bailly, who was hit in the neck, returned fire, striking Hill five times as he ran away. Jackson then began grappling with Bailly and tried to get free, only to be shot be Officer Miller of the Pensacola Police Department. Hill was apprehended by Officer Paul Muller of the Pensacola Police Department after traveling a short distance on foot.

The State rested following its presentation of the facts and circumstances surrounding the robbery and shoot-out on October 19, 1982. The defense called Cliff Jackson, Hill's codefendant, who testified that in return for a guilty plea he received a life sentence for these crimes. Jackson testified that he was eighteen years old at the time of the offense and that it was Hill who handled the gun during the Pearce auto theft earlier that day. Jackson testified that the two had used cocaine around this time and although he, Jackson, had made the decision to rob the bank, it was Hill who handled the gun throughout the robbery-murder and it was Hill who shot and killed Officer Taylor.

Hill testified in his own defense and stated that he and Jackson did the robbery together. He stated that neither he nor Jackson was the leader. Hill admitted coming back to help his friend get away from the police, but denied that he intended to shoot if necessary the police. He could not explain why there was only aspirin found and not cocaine found in his blood drawn shortly after the incident.

The defense also presented five character witnesses besides Hill's parents in an effort to demonstrate mitigation. Their testimony in sum reflects that Hill at various points in his life was a nice boy or nice man and real pleasant. He was helpful to his parents and others and none of the witnesses could believe that he did it. The State's objections were sustained with regard to defense counsel's efforts to permit Hill's mother to testify that she had cared for children of her sister while Hill was growing up. The State's objection was also sustained to the

fact that Hill's father's listless condition on the stand was due to his disabilities from a recent heart attack. Dr. James Larson, a psychologist, testified that he had examined Clarence Hill on December 22, 1982, to ascertain whether Hill suffered from any mental disability, whether there was any need for involuntary hospitalization and for purposes of discovering any evidence in mitigation. Dr. Larson's testimony reflects that following a number of tests with regard to Hill's mental acumen and possible mental disease, his conclusion was that Hill was an average individual except that he was borderline retarded when it came to verbal ability. Dr. Larson evidenced no mental disorder or psychosis and there was no basis upon which to involuntarily hospitalize Hill based on his mental state. Dr. Larson had a plethora of school and medical records from which to draw these conclusions and testified that in none of the records was there any evidence that Hill suffered from any mental dysfunction. At this point, both sides rested.

A jury charge conference followed at which time the defense successfully requested an instruction that if the jury were to find that Hill was an accomplice in his role in the crime was relatively minor, said evidence could be considered in mitigation. The defense was unsuccessful in obtaining an instruction that if Hill was under the substantial domination of Jackson this could be similarly considered as a mitigating factor. The trial court found that the evidence presented at trial was insufficient to support such a charge based on both Jackson's and Hill's testimony at the resentencing proceeding.

The trial court, **without objection,** indicated that he would instruct the jury that if they found the murder to have been committed in a cold, calculated and premeditated fashion, such could be considered in aggravation. No request was forthcoming by the defense that this particular instruction be augmented with an explanation that the mere fact that a murder was premeditated would not automatically translate into a finding in aggravation. Defense counsel did however, during closing, draw this distinction to the jury's attention.

The prosecution, in closing, repeated his claim from opening argument that Hill had come to help Jackson escape because Jackson had the keys to their car. The prosecution also dealt with the life sentence Hill's codefendant received, pointing out that codefendant sentences may not always be the same. He closed by suggesting that if Hill had committed his crimes a hundred and fifty years ago he would have been "strung up from the nearest tree that day." Although times and procedures have changed, he argued death was still the appropriate punishment for the crimes committed. Said statements went without objection. The jury, by and 11-1 vote, recommended imposition of the death sentence. Said recommendation was followed by the trial court on April **2, 1986.**

Rule 3.850 Proceedings

As indicated in the introductory remarks, Hill filed his Rule **3.850** petition on December **11, 1989,** pursuant to Fla.R.Crim.P. **3.851.** Said pleading was filed as a result of the Governor signing a death warrant on November **9, 1989,** setting the

warrant week to run beginning noon, Wednesday, January 24, 1990, through noon, Wednesday, January 31, 1990. Hill's execution has been set for 7:00 a.m., Thursday, January 25, 1990. Hill's Rule 3.850 petition was summarily denied by the trial court as to claims which could have and should have been raised on appeal. As to the challenge to trial counsel's effectiveness at trial and at the penalty phase, the court concluded that the record conclusively demonstrated that trial strategy existed which negated the allegations contained in the petition. It was only after the petition had been denied that Hill's counsel acquired an affidavit from trial counsel. Said affidavit dated January 19, 1990, states that the failure to prepare and make extensive investigation with regard to Hills' drug abuse, et al. was not due to tactic or trial strategy. At best, Mr. Terrell provided that if he knew more, he would have done more.

SUMMARY OF ARGUMENT

The summary denial of Claims I-III, and VII-XIV in Issue I as procedurally barred was proper. Regarding Hill's ineffective assistance Claims IV, V and VI in Issue 11, said allegations were merely conclusory. Even those claims which belatedly gained greater "credibility", are conclusively refuted by the record and when considered in totality do not demonstrate a deficiency on the part of counsel which was detrimental to Hill. **Cave v. State,** 529 So.2d 293 (Fla. 1988), governs denial of relief as to Issue 111.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING THAT CLAIMS I, 11, III, AND VII-XIV WERE PROCEDURALLY BARRED.

The trial court found that the aforenoted claims raised in Hill's Rule 3.850 motion were procedurally barred. With regard to each, the following is submitted.

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

Hill's first issue (although not clearly explained) arose during the resentencing proceeding wherein a new jury was selected to ascertain what sentence was appropriate in the instant case. Hill admits that although (objections) were tendered during the course of the voir dire selection for resentencing, he did not raise this issue on direct appeal. As such, it is procedurally barred from being considered in his Rule 3.850 motion. See **Parker** v. **Dugger,** 550 So.2d 459 (Fla. 1989), wherein a unanimous court found that a similar issue with regard to Parker's issue 5 "the trial judge systematically excluded black's from the jury during voir dire, in violation of **State** v. **Slappy,** 522 So.2d 18 (Fla.), **cert. denied,** ____ U.S. ____, **108** S.Ct. 2873, 101 L.Ed.2d 909 (1988) **. . .** is procedurally barred **. . .**" 550 So.2d at 460. It should be noted that **Parker** filed this claim in a successive petition, however, that distinction is of no consequence. The reason being, that if a **Neil/Batson** issue

is a "new claim or fundamental error" it may be raised at any time and entertained. However, here as in **Parker,** the issue was procedurally barred and the nature of the claim was not one recognized as an exception under **Witt** v. **State,** 387 So.2d 922 (Fla. 1980).

The record reflects that **State** v. **Neil,** 457 So.2d 481 (Fla. 1984), was argued to the trial court with regard to the use of peremptory challenges to exclude individuals during the voir dire at resentencing. The record also demonstrates that those black jurors excluded were excluded on the basis that they could not follow the law in that they were opposed to capital punishment or a race reutral reason was provided for said removal. Clearly, this issue was a known issue and could have been raised on direct appeal albeit, groundless. Note: for example, other issues such as a **Booth** v. **Maryland,** 107 S.Ct. 2529 (1987), (constitutional claim) is procedurally barred from consideration where no objection is raised at trial or where the issue is not argued on direct appeal. **Grossman** v. **State,** 525 So.2d 833 (Fla. 1988); **Eutzy** v. **State,** 541 So.2d 1143 (Fla. 1989), and **Adams** v. **State,** 543 So.2d 1244 (Fla. 1989).

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

H 11 also argued that during the resentencing proceeding and before deliberations commenced, the trial court received two

questions from the jury. The record show that the trial court informed both counsel for the State and the defense in open court that no comment would be made with regard to the questions, at which time defense counsel asked to see the questions. The trial court said no "because I am not commenting on them". (TR 374). The questions were never disclosed to counsel nor made part of the record.

This issue, like the first, could have and should have been raised on direct appeal. There was an objection and the claim could have been brought forward to the Florida Supreme Court for disposition. A Rule 3.850 motion is not the basis upon which to air a claim which could have and should have been raised on direct appeal. See **Witt v. State,** 387 So.2d 922 (Fla. 1980).

Hill's assertion that the refusal of the trial court to disclose questions asked by the jury to trial counsel "preventing him from assisting the accused during a critical stage of the proceedings pursuant to **United States v. Cronic,** 466 U.S. 648 (1984)," is groundless. Beyond per adventure, the failure of the trial court to answer any question tendered by the jury cannot be a basis for a "**Cronic** assertion" unless and until (which has not been asserted herein) Hill suggests that this incident alone would have resulted in a new trial because the questions would have meaningfully tested the State's case against Mr. Hill. See: **Smith v. Wainwright,** 777 F.2d 609 (11th Cir. 1985)and **Warner v. Ford,** 752 F.2d 622 (11th Cir. 1985). This claim is clearly procedurally barred.

Claim III

WHETHER HILL'S CAPITAL TRIAL AND SENTENCING PROCEEDINGS WERE RENDERED FUNDAMENTALLY UNFAIR AND UNRELIABLE, AND VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, DUE TO THE PROSECUTION'S DELIBERATE AND KNOWING PRESENTATION AND USE OF FALSE EVIDENCE AND ARGUMENTS AND ITS INTENTIONAL DECEPTION OF THE JURY, THE COURT, AND DEFENSE COUNSEL

Hill's present counsel argues that the State used false evidence in attempting to prove its theory that "the bank robbery was the result of a well thought out plan orchestrated by Mr. Hill, and that once the plan went bad, Mr. Hill, in a cold, calculated and premeditated manner, murdered a police officer and wounded another in an attempt to assist him accomplice, Mr. Jackson." (Motion, page 16). Specifically, Hill's counsel points to the fact that "recently" Dr. William M. Manders "an imminently qualified forensic toxicologist" reviewed "Mr. Leonard's findings and his testimony presented at Mr. Hill's trial and resentencing proceedings concerning the test of Mr. Hill's blood." Dr. Manders, as a result of reading the reports, now concludes that the test results conducted by Mr. Leonard are "meaningless" and unworthy of belief. This all may be *so,* however, because Dr. Manders now suggests that Mr. Leonard's blood tests were inaccurate is not a basis upon which to assert the State knowingly used false evidence. The validity of the blood test results by Mr. Leonard could have been challenged at trial and certainly such a challenge could have been raised on direct appeal. It is interesting to note that even as late as March 1986 at the resentencing proceeding, Dr. Leonard again

testified as a rebuttal witness and no objection was raised by the defense with regard to his testimony as to the tests. Indeed, Dr. Leonard has withstood cross-examination on two separate occasions and absent this most recent venture into the land of speculation by Hill's present counsel, has never been meaningfully challenged as to either his expertise or his test methods or results with regard to the test conducted **sub judice.** This is not a cognizable claim on a **3.850** and it must be considered barred in that Dr. Leonard's credentials and testing methods could have and should have been objected to at trial. See **Grossman** v. **State, supra,** and **Parker v. State, 550** So.2d at 460. Moreover, no valid assertion has been made that the State either withheld information or knowingly used false information. At the **3.850** hearing, the trial court entertained and granted the state's motion to strike all references to Hill's counsel's unfounded allegations that the state knowingly used false or misleading evidence. Said claim is procedurally barred.

Claim VII

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

Hill recognizes that the Florida Supreme Court in Hill v. **State,** 515 So.2d **176** (Fla. 1987), concluded that this particular aggravating circumstance was not sufficiently proven and therefore was not applicable to the instant case. He now argues, however, that because **Maynard** v. **Cartwright, 108** S.Ct. **1853** (1988), was decided after Hill's direct appeal, that **Maynard** v.

Cartwright, supra, constitutes new law pursuant to **Witt** v. **State,** 387 So.2d 922 (Fla. 1980), and therefore "in the interests of fairness", retroactive application should be given to his case.

First of all, the Florida Supreme Court, in **Smalley** v. **State,** 546 So.2d 720 (Fla. 1989), distinguished Florida's sentencing scheme with regard to this aggravating circumstance and found that Florida's sentencing scheme does not violate **Maynard** v. **Cartwright, supra,** nor does **Maynard** v. **Cartwright, supra,** constitute new law. Moreover, this claim is procedurally barred because the basis upon which **Maynard** v. **Cartwright, supra,** was decided, to-wit: **Godfrey** v. **Georgia,** 446 U.S. 420 (1980), was available and could have been argued as a basis for further relief to the Florida Supreme Court on direct appeal. The instant claim constitutes an abuse of process in that a challenge to whether this particular aggravating circumstance was applicable to Hill's case was known and indeed raised to the Florida Supreme Court. As such, this issue is procedurally barred. **Atkins** v. **Dugger,** 541 So.2d at 1166, n.1; **Bertolotti** v. **Dugger,** 883 F.2d 1503, 1526-1527 (11th Cir. 1989); **Lindsey** v. **Thigpen,** 875 F.2d 1509 (11th Cir. 1989).

Claim VIII

WHETHER THE FLORIDA SUPREME 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 DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS

Hill argues that because the Florida Supreme Court did not remand for resentencing in **Hill v. State, 515** So.2d at **179,** when the court concluded that one of the five statutory aggravating factors found was improper, that court violated **Elledge v. State, 346** So.2d **998** (Fla. **1977).** This issue has been raised in a number of post-conviction cases wherein an aggravating factor has been found to be insufficiently proven and therefore no longer a valid factor in the weighing process in ascertaining whether death is the appropriate sentence. In the instant case, the Florida Supreme Court faced with this identical issue on direct appeal concluded:

> Appellant does not take issue with the finding that four of the aggravating circumstances were proven beyond a reasonable doubt. Given these four remaining aggravating circumstances, and the one mitigating circumstance, we find the erroneous consideration of the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner is not such a change under the circumstances of this sentencing proceeding that its elimination could possibly compromise the weighing process of the either the jury or the judge. See **Bassett v. State, 449** So.2d **803** (Fla. **1984); Brown v. State, 381 So.**2d **690** (Fla. 1980)**, cert. denied, 449 U.S. 1118, 101** S.Ct. **931, 66** L.Ed.2d **847 (1981); Hargrave v. State, 366** So.2d **1** (Fla. 1978)**, cert. denied, 444 U.S. 919, 100** S.Ct. **239,** 62 L.Ed.2d **176 (1979); Elledge v. State, 346** So.2d **998** (Fla. **1977).**

Hill v. State, 515 So.2d at **179.**

Hill is procedurally barred from raising this claim because it was disposed of by the Florida Supreme Court on direct appeal. Note: **Hamblen v. State, 546** So.2d **1039** (Fla. **1989),** and **Duest v. State,** ____**So.**2d____ (Decided January **19, 1990),** ____ F.L.W.____.

Claim IX

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

Hill next argues that the Florida Supreme Court "has consistently reversed the defendants sentence of death in cases in which aggravating circumstances were 'doubled'." (Motion, page 77). The record reflects that the jury was instructed at the resentencing that they could consider that two aggravating circumstances were proven sub judice that, the murder was committed to hinder law enforcement and to perfect an escape. Objection was made at the trial level that said instruction to the jury involved an unconstitutional doubling. The trial court overruled said objection stating that both would apply in this case. (TR 659). However, the record also reveals that the trial court in his sentencing order did not find these two separate factors but rather concluded that they were subsumed into one another. While the jury was informed as to both factors, there was no suggestion by either the court or the attorneys that these aggravating factors had to "out number" the mitigating factors. The record reflects this issue was available and could have been raised on direct appeal but was not. As such it is procedurally barred. See **Suarez** v. **Dugger,** 527 So.2d 190 at 192, n.3 (Fla. 1988).

Claim X

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.**

After reciting a number of mitigating factors that were proven and could have been considered by the sentencing jury and the trial judge, Hill makes a bold statement that neither the sentencing jury nor the trial court considered same. This issue is barred from consideration on a Rule 3.850 because said rule is not a substitute appeal for raising issues not raised on direct appeal. The record reflects that Hill's appeal from the resentencing and the reimposition of the death penalty raised six claims for consideration. Four of the six were issues complaining about the propriety of the sentence imposed. Specifically, Hill raised that it was improper for the trial court to exclude certain testimony concerning his family's background and a defense witnesses health problems; that it was error for the trial court to refuse to instruct the jury on the statutory mitigating circumstance that Hill acted under extreme duress or under the substantial domination of another person; that it was error for the new penalty jury to be informed that the original jury made a premeditation finding; and, that the trial court erred in finding that the homicide was committed in a cold, calculated and premeditated manner. The Florida Supreme Court observed:

> In his second point, Hill claims that the trial judge erred by excluding certain allegedly mitigating testimony concerning his background and character. The record reflects that five persons, including Hill's mother and father, testified as character witnesses for the defense. The judge refused

> to permit Appellant's mother to testify that she cared for Appellant's cousins, as well as her own children. Similarly, the judge declined to allow defense counsel to question Appellant's father regarding his own ill health and past job responsibilities. In our view, the excluded evidence focused substantially more on the witnesses character than on the Appellant's. There has been no showing that the trial judge abused his discretion in excluding the testimony and we find no violation of the United States Supreme Court's decision in **Hitchcock v. Dugger,** ____ U.S. ____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), or **Eddings v. Oklahoma,** 455 U.S. 104, 102 S.Ct. 869; 71 L.Ed.2d 1 (1982), or **Lockett v. Ohio,** 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).
>
> The third claim concerns the trial judge's refusal to instruct the jury on the statutory mitigating circumstance that Hill was acting under extreme duress or under the substantial domination of another person when he shot the arresting police officer. In support of this claim, Hill argues that his codefendant, Jackson, suggested the bank robbery, purchased the sunglasses for disguise, and directed actions during the crime. According to Hill, Jackson was the leader in the bungled robbery. We disagree. The unrefuted facts in this record establish that, when the twenty-three year old Hill and eighteen year old Jackson entered the bank, Hill was armed and Jackson was not. Hill did most of the talking, demanding money, and threatened that he would "blow some brains out." Hill also physically abused a bank teller by kicking him and pulling him by the hair while he lay on the floor. Finally, Hill chose to help Jackson rather than utilize his opportunity to escape, and later testified that neither he nor Jackson was a leader, claiming, "We did it together." Clearly, under these circumstances, we find the "substantial domination" mitigating factor does not apply.

515 So.2d at 177-178.

Clearly this issue was a cognizable claim that could have been more fully developed on direct appeal. Had Hill had concern with regard to the fact that mitigating evidence regarding his

drug abuse or "intoxication" was not properly being considered by either the trial court or the sentencing jury, said claim could have been a part of the issues raised on direct appeal. It was not and as such, the nuances now presented to issues raised on direct appeal are procedurally barred. Sullivan v. State, 441 So.2d 609 (Fla. 1983).

Claim XI

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 argues that generic references to the jury that mercy for mercy's sake is not a basis upon which to find reasonable doubt and that statements by the prosecutor that mercy and sympathy must be kept in proper perspective undermined Hill's constitutional rights to have the jury consider all matters with regard to mitigation, citing to **Penry** v. **Lynaugh,** 109 S.Ct. 2934 (1989).

This issue has become a fashionable issue in all of the capital cases presented within the last year in that the United States Supreme Court currently has pending the case of **Saffle** v. **Parks,** 109 S.Ct. 402, **cert. granted,** April 25, 1989. The instant claim is not new and certainly the defense counsel recognized same when he objected to the argument presented at the 1986 sentencing proceeding. However, this issue was not raised on direct appeal and could have been. As such, the instant claim is procedurally barred. **Atkins** v. **Dugger,** 541 So.2d at 1166, n.1 (Fla. 1989); **Bertolotti** v. **Dugger,** 883 F.2d 1503, 1525-1526 (11th Cir. 1989); **Parker** v. **Dugger,** 550 So.2d at 460.

Claim XII

WHETHER MR. HILL'S SENTENCE OF DEATH WAS BASED UPON *AN* UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Citing to Johnson v. **Mississippi, 108** S.Ct. **1981 (1988),** Hill contends that reliance by the trial judge and jury of his prior robbery in Mobile, Alabama violated his constitutional rights. Specifically, Hill asserts that the prior robbery conviction to establish "the prior crime of violence" as an aggravating factor, was based on a constitutionally unreliable conviction. The record reflects that Mr. Hill's prior conviction has not been assailed and that, lo these many years, the conviction has been the basis upon which this aggravating factor rests.

A similar issue was raised in Eutzy v. **State, 541** So.2d at **1145-1146,** and rejected therein. Specifically, the court found:

> Eutzy's fourth claim, that his **1958** Nebraska conviction which was the sole evidence of a prior conviction of a violent felony was secured in violation of this constitutional rights and cannot serve as a basis for his death sentence, is likewise procedurally barred because he failed to raise the claim on direct appeal, in his first Rule **3.850** motion, or in accordance with the two year provision with Rule **3.850. Bundy** v. **State, 538** So.2d **445** (Fla. **1989).** Eutzy contends that he is entitled to relief under the United States Supreme Court's decision in Johnson v. **Mississippi** (cite omitted), in which the court set aside the death sentence because his New York conviction for assault, which was the basis for the aggravating circumstance of a prior violent felony, had been reversed.

> On March **15, 1989**, Eutzy filed a complaint to the United States District Court for the District of Nebraska, pursuant to 42 U.S.C. **81983**, seeking to have the **1958** conviction expunged from the records of the Douglas County, Nebraska, District Court. He argues that "assuming that the prior conviction is vacated or reversed by the Nebraska courts on the basis that it was obtained in violation of [his] constitutional rights, it cannot constitutionally be relied on as the grounds for sentencing [him] to death." As the trial court found, "Eutzy raised this issue in his initial Rule **3.850** in a slightly different argument, however, the validity of the **1958** Nebraska conviction was known to Eutzy and could have been raised" at that time. Eutzy concedes that he was aware of some of the facts underlying this claim but contends that a psychiatric opinion concerning his mental capacity at the time of the **1958** offense and his guilty plea to that offense was only recently obtained. With the exercise of due diligence, Eutzy's mental capacity at the time of the **1958** conviction could have been ascertained prior to the exploration of the two year period. Further, Eutzy's Nebraska conviction has been final for over thirty years. The fact that Eutzy is seeking collateral review of this conviction does not entitle him to relief under **Johnson. Bundy, 538** So.2d at 447.

Likewise, where there has been no successful legal challenge to Hill's prior conviction in Mobile, Alabama, a claim known to him and available to him as a basis for seeking relief, procedural bar must be imposed as to the availability of this claim in the instant petition. Hill readily admits the working tools were available to him to raise this claim in **1986**. Said claim is procedurally barred. **Bundy** v. State, **538** So.2d at 447.

Claim XIII

WHETHER MR. HILL'S JURY WAS IMPROPERLY INSTRUCTED RESULTING IN FUNDAMENTALLY UNFAIR CONVICTIONS AND SENTENCES IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

Hill attempts to add a new spin to an old claim, that is that it was improper for the trial court to instruct the new sentencing jury that the original trial jury found the homicide was premeditated. A similar type claim was raised on direct appeal to the Florida Supreme Court in **Hill v. State, 515** So.2d at **178,** and rejected. Hill is procedurally barred from raising the claim in his Rule **3.850** in an attempt to reargue, in a slightly different fashion, a claim raised on direct appeal. Note: **Sullivan v. State, 441** So.2d **609** (Fla. **1983)** (attempt to raise ineffective assistance of counsel a second time by changing the facts).

Claim XIV

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

The burden shifting claim raised by Hill is a perennial of capital litigants where there has been no objection at the trial level and the standard jury instruction was given (contrary to the instruction presented in **Jackson v. Dugger, 837** F.2d **1469 (11th** Cir. 1988)**,** said claim is procedurally barred on a Rule **3.850** motion. **Hamblen v. Dugger, 546** So.2d **1039** (Fla. 1989)**,** does not suggest to the contrary. It should be noted that the

decision forthcoming in **Hamblen** was raised in a habeas corpus action arguing that appellate counsel rendered ineffective assistance of counsel. The court's discussion with regard to the burden shifting issue was an explanation as to why appellate counsel did not render ineffective assistance for failing to raise said claim. In the instant case, however, the cold issue as to burden shifting was neither objected to at the 1986 resentencing proceeding nor raised on direct appeal. As such, it is procedurally barred. See **Parker** v. **Dugger,** 550 So.2d 459, 460; **Harich** v. **State,** 542 So.2d 980 (Fla. 1989); **Henderson** v. **Dugger,** 522 So.2d 835, 836 (Fla. 1988); **Tompkins** v. **Dugger,** 549 So.2d 1370 (Fla. 1989); **Atkins** v. **Dugger,** 541 So.2d 1165 (Fla. 1989), and **Preston** v. **State,** 531 So.2d 154 (Fla. 1988).

The aforenoted issues were also properly found to be procedurally barred by the trial court at the 3.850 hearing. The court should similarly so conclude.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING HILL *AN* EVIDENTIARY HEARING WITH REGARD **TO CLAIMS IV, V AND VI.**

Judge Heflin in summarily denying Hill's Rule 3.850 motion concluded that as to Claims IV, V and VI, no evidentiary hearing was necessary. The Court found the trial record conclusively demonstrated trial counsel did not render ineffective assistance of counsel. While an effectiveness of counsel claim normally generates the need for further evidentiary development, there are those cases where no further evidentiary hearing is necessary because the trial record conclusively demonstrates that a movant

is entitled to no relief. The instant case falls into the **genre** of cases like **Kennedy** v. **State,** 547 So.2d 912 (Fla. 1989), wherein this court has held no evidentiary hearing was required.

> Kennedy's remaining claims concern his alleged ineffective assistance of trial counsel. He argues that his trial counsel was ineffective for two reasons. First, Kennedy contends his trial counsel was ineffective for failing to investigate Kennedy's background adequately in order to present compelling mitigating evidence. Second, he argues that counsel should have submitted to the trial court the video tape of Kennedy's surrender to and arrest by law enforcement to show his remorse over this incident, and argue that the jury should view it.
>
> A motion for post-conviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. See **Agan** v. **State,** 503 So.2d 1254 (Fla. 1987); **O'Callaghan** v. **State,** 461 So.2d 1354 (Fla. 1984). A defendant may not simply file a motion for post-conviction relief containing conclusiory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrated deficiency on the part of counsel which is detrimental to the defendant. The test for determining whether counsel has been ineffective was established in **Strickland** v. **Washington,** 466 **U.S.** 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and is setforth in our opinion in **Maxwell** v. **Wainwright:**
>
> > A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components, first, a claimant must identify a particular acts or omissions of the lawyer that are shown to be outside the broad range or reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated

> to have so affected the fairness and the reliability of the proceeding that confidence in the outcome is undermined. **Strickland** v. **Washington,** (cite omitted); **Downs** v. **State,** 453 So.2d 1102 (Fla. 1984). A court considering a claim of ineffectiveness of counsel need no make a specific ruling on the performance component of the test when it is clear the prejudice component is not satisfied. 490 So.2d at 932.

Kennedy v. State, 547 So.2d at 913-914.

The court in **Kennedy** stated that where the trial court fully reviewed the record and files and analyzed the allegations of ineffective assistance under the proper standard, the trial court was correct in concluding that the allegations were insufficient to require further evidentiary consideration. A similar result should obtain **sub judice.** See also **Glock** v. **Dugger,** 537 So.2d 99, 102 (Fla. 1989); **Lambrix** v. **State,** 543 So.2d 1151, 1153-1154 (Fla. 1988).

As to Claims IV, V, and VI, Hill argued below respectively: a) that trial counsel rendered ineffective assistance at the guilt/innocence phase because trial counsel failed to investigate and prepare a voluntary intoxication defense; b) trial counsel rendered ineffectiveness at the sentencing phase because he failed to investigate, prepare, and present available mitigating evidence: that Hill was under extreme intoxication; the court failed to instruct on the factor or extreme mental or emotional disturbance; Hill suffered from the nightmare of constant child abuse and neglect; Hill was mentally deficient and immature; Hill had a long history or abusing alcohol and drugs; and Hill's trial counsel did not present witnesses at the penalty phase that would

testify to same; and c) trial counsel rendered ineffectiveness for not properly preparing for resentencing and obtaining evidence regarding a wealth of nonstatutory mental health mitigation.

As to each of the aforenoted claims, the record conclusively refutes any suggestion that counsel rendered ineffectiveness assistance of counsel. Certainly, at best, the allegations are conclusiory and Hill's belatedly filed affidavits shed no more light nor give more vitality to said allegations. Moreover, the deficiencies complained of, even if true and proven, would not demonstrate a deficiency on the part of counsel which is detrimental to the defendant. The record is replete with evidence of a planned strategy, to-wit: that Mr. Hill committed the robbery but never intended to kill anybody. That was his theory at the guilt phase and that was his theory at the penalty phase of the proceedings. Avaliable information from Dr. Larson did not show anything to the contrary. Family members who spoke with defense counsel and who testified at the trial all portrayed Hill as a good person, a kind person who but for this bizarre behavior was a normal individual. Defense counsel continually sought to portray Hill as the person being dominated by his codefendant, Cliff Jackson. At resentencing, it was Cliff Jackson who was called to the stand not to talk about whether he and Clarence Hill had been using dope, but rather to talk about the fact that he, Jackson, was the leader, the planner, and the driving force behind the robbery. The theory behind the sentencing proceeding was to portray Hill as a good man who was

lead wrong by his cohort. Emphasis that Hill was using drugs would have negated everything that went before the jury in this case. Clarence Hill admitted the robbery, admitted knowing what he was doing and **relied** on that to convince the jury that he did not intend to kill the police officer. Hill clearly recalled that he shouted halt to the police officers detaining Jackson and a gun battle followed.

At trial, as stated, Hill's defense was that he knew about the robbery and went along with the robbery but never intended to kill the police officer. Rather, he returned to help his codefendant, Jackson, and when he did a shooting battle commenced at which time, Officer Taylor was shot and killed and Hill was wounded. He now suggest that a valid defense should have been presented that he was under the influence of cocaine at the time of the robbery and this voluntary "intoxication from cocaine" was a more believable defense. Such an assertion is totally without merit and totally refuted by the record. There was a paucity of evidence with regard to either Mr. Jackson or Mr. Hill using drugs prior to the robbery. The record at trial and at the resentencing proceeding reveals that the state called Dr. Leonard who testified that there was no cocaine in Hill's blood taken contemporaneously to the robbery. Whether an intoxication defense was a more viable defense then that presented cannot be the basis upon which to challenge the correctness of the trial strategy employed at trial unless, Hill, can make a compelling showing that the intoxication defense would have resulted in a different verdict. He cannot. See **Bundy** v. **Dugger, 850** F.2d

1402 (11th Cir. 1988), **cert. denied,** 109 S.Ct. 849 (1989); **Harich v. Dugger,** 844 F.2d 1464, 1470-1471 (11th Cir. 1988), wherein the court observed:

> . . . Defense counsel faced a difficult dilemma. Harich admitted that he was with the victim that evening, yet insisted that he was innocent of any wrongdoing. He also indicated that he was under the influence of drugs and alcohol that evening. Armed with these tough facts, defense counsel adopted the primary defensive strategy of asserting factual innocence.
>
> Petitioner suggests that defense counsel should have employed alternative defenses. We believe it was reasonable not to pursue alternative defenses beyond the length taken by counsel. Harich testified that he was only "mildly drunk" and did not commit these crimes.
>
> > To suggest to the jury that Harich was *so* drunk that he could not have "intended" the consequences of these acts proved by strong evidence would have been totally contrary to the undermining of the position taken by Harich himself. Although inconsistent and alternative defenses may be raised, competent trial counsel know that reasonableness is absolutely mandatory if one hopes to achieve credibility with the jury.
> >
> > By handling the manner the way he did, defense counsel labeled to inject the thought of diminished capacity (due to heavy drinking and marijuana) without totally rejecting the testimony of Harich.
>
> **Harich,** 813 F.2d at 1105 (Fay, J., dissenting in part, concurring in part).
>
> It is not enough for Petitioner to claim that his lawyer was ignorant of the Florida law. Petitioner must prove that the approach taken by defense counsel would not have been used

> by a professionally competent counsel. As the Supreme Court has stated, Petitioner "must overcome the strong presumption that counsel provided effective assistance . . . there are countless ways to prove effective assistance in any case. Even the best criminal defense attorneys would defend a particular client in the same way." **Strickland,** 466 **U.S.** at 689, 104 S.Ct. at 2065. Considering that defendant denied committing the crimes, and testified as to his factual innocence, we conclude that the approach taken and presentation made by defense counsel was one which falls well within the objective yard stick that we apply in considering the question of effective assistance of counsel. We cannot say that by failing to pursue an intoxication defense, counsel's approach to this case was outside the range of professionally competent assistance. A competent attorney completely informed on the intoxication defense and faced with a defendant advocating his factual innocence could well have taken action identical to counsel in this case.

Harich v. Dugger, 844 F.2d at 1470-1471.

As noted in **Lindsey** v. **Smith, 820** F.2d 1137, 1152 (11th Cir. 1987):

> . . . As the court observed, Appellant's trial counsel would have engaged in "poor strategy" had they attempted to "pursue to alibi defense when the petitioner had given a twenty-nine page statement to the police that was materially inconsistent with the alibi story and when at least one of the alibi witnesses placed the petitioner in an automobile which fit the description of one owned by the victim." A habeas petitioner who proposes alternative trial strategy that would itself prove futile has failed to demonstrate that the representation at trial fell below an objective standard of reasonableness.

Sub judice, Hill's trial counsel proceeded at trial with a defense that Clarence Hill never intended to kill the police officer. Hill testified as to the circumstances occurring that

day that after he left the bank he saw that the officer had Jackson on the ground:

Q: Okay. What did you do?

A: Well, I turned around to help him.

Q: To help who?

A: Jackson.

Q: Why?

A: Because, I figured it would be the best thing to do at the time.

Q: Okay. What were you going to do to help him?

A: Well, in order to help him, I had to approach the officer in a way that they didn't see me or something. And at the time I did approach them, *so* they didn't see me.

(TR 1101-1102).

Hill's testimony continued as follows:

Q: Okay. When you walked up to it, which officer did you come to first?

A: The one who testified yesterday with his knee in Jackson's back.

Q: What did you do?

A: I asked him to halt.

Q: Do you remember the words you used?

A: That was the exact word.

Q: What did he do?

A: He froze for a second, then he decided to turn around. As he turned around, he fired.

Q: What did you do?

A: I fired back, but my gun misfired.

Q: Okay. How far were you from the officer?

A: Probably a foot, no further than a foot from him.

Q: Alright. Did you keep firing or trying to fire as far as you know?

A: Well, I've never been shot before, and after he shot me, I didn't know exactly what was going on. And I just -- he continued to, you know, shot after shot. So, I just hold on to what I had, you know, because I didn't know what was happening really, you know.

Q: You said you just hold on or held on to what? What was that you had?

A: Well, after being shot you know, you are going through those feelings. You just grab -- if you can grab something to hold, you hold on to what you can hold on to to solve your pain or something. So, the only thing I had in my hand was a gun.

Q: Okay. You were squeezing the gun?

A: Yes.

Q: Do you know how many times you got shot?

A: Approximately five times.

(TR 1103-1104).

Based on the evidence presented, Hill failed to evidence a need for further evidentiary development. The record demonstrates that Hill maintained he had no intent to kill and postulated a defense which albeit not successful, was plausible and consistent with Hill's statements throughout. Hill has failed to demonstrate that counsel rendered ineffective assistance of counsel at the guilt phase of his trial for failing to develop further a "voluntary intoxication defense". Such a defense would not have been viable and certainly was not an alternative theory from which the jury would have granted an acquittal based on the overwhelming evidence of guilt.

Hill also contented that at the sentencing phase of his trial, counsel rendered ineffective assistance of counsel because he failed to investigate, prepare and present available mitigating evidence. Specifically, Hill argues that counsel failed to investigate evidence of his extreme intoxication; counsel failed to object to the court's refusal to instruct on the mitigating factor of extreme mental or emotional disturbance; failed to discover that Mr. Hill grew **up** "suffering the nightmare of constant child abuse and neglect"; failed to discover that Mr. Hill was so mentally deficient and immature that he withdrew into his own world and "played with toy trains until he was sixteen years old and rode a bicycle long after he was an adult" failed to discover Hill's long history of abusing alcohol and drugs and

failed to obtain documentary evidence to prove same. Each of the aforenoted omissions are speculation at best and woefully insufficient to support a claim that trial counsel at resentencing failed to properly investigate mitigating evidence.

The record reflects that a number of witnesses were called to the stand to testify with regard to Hill's character. Dr. Larson was called to the stand and informed the jury that Hill suffered from neither drug abuse, mental disease nor brain damage. Dr. Larson testified that Hill was of average intelligence with a borderline ability to develop verbally and that he suffered from no mental psychosis or emotional disturbance. At the penalty phase held in 1986 (long after any defense counsel had any doubt as to what constituted mitigating evidence), defense counsel tendered evidence as to Hill's work habits, his mental condition, his relationship with his family, his relationship with others, matters reflecting what a good person Clarence Hill was and that this particular criminal episode was in aberration from the norm. Defense counsel elected to strategically paint Mr. Hill as a average citizen, nice guy rather than portray him as a drug crazed robber acting out of control in order to evoke a life recommendation from the jury. While it is true that mitigating evidence may reflect either the good side of someone or the bad side of someone, in this case, defense counsel in 1986 determined his best strategy was to portray Mr. Hill in a favorable light rather than a bad light. While the speculation of present day counsel might at first blush seem compelling, the bottom line is as noted in Lindsey v. Smith,

820 F.2d at 1152 (11th Cir. 1987), ". . . a habeas petitioner who proposes alternative trial strategy that would itself prove futile has failed to demonstrate that the representation at trial fell below an objective standard of reasonableness."

This record demonstrates a trial strategy utilized by defense counsel that was plausible and reasonable based on other cases and decisions of the Florida Supreme Court. The fact that other evidence of mitigation was available to him but was not used is **not** evidence that he failed to investigate or had no knowledge of other evidence in mitigation. Defense counsel spoke to family members and spoke to Clarence Hill. Defense counsel chose, based on this record, to put Mr. Hill's character before the jury in a light most favorable to him, that is that this was a good man who would not hurt anyone and who clearly did not intend to kill Officer Taylor. See **Atkins** v. **Dugger,** 541 So.2d 1165 (Fla. 1989).

Any suggestion that this person who had just provided a clear account of the robbery and who had testified that he planned to help his codefendant (who had been captured) could not reason because he was extremely intoxicated is bogus. Hill elected the path to take and he should not and cannot demonstrate a deficiency in counsel's efforts to portray him as a good man who never intended to kill.

Terminally, Hill argues that defense counsel was unprepared for resentencing and thus never presented the wealth of mitigating evidence both statutory and nonstatutory regarding his mental health. This issue naturally ties into the question of

whether trial counsel rendered ineffective assistance of counsel at resentencing. Each necessarily turns on whether there was a legitimate trial strategy and whether the assertions made are so compelling that something different should have been done at a resentencing proceeding. The sheer speculation postulated by Hill at the present time is unsupported by any tangible evidence and is insufficient on its face to warrant relief.

Hill asserts that although his mental status at the time of the offense had been evaluated by a psychologist, that psychologist did not have sufficient evidence to properly evaluate Hill's condition. He now points to the purported testimony which would come forth from a Dr. Pat Fleming of Wyoming who would "assert" that if proper tests had been conducted in 1982, there would be evidence of brain damage and drug abuse which might support a statutory mitigating factor that Hill was under the influence of extreme mental or emotional disturbance or that his ability to appreciate the criminality of conduct or the conform his conduct to the requirements of law were impaired. Such speculation does not a claim make. Indeed, in **Eutzy V. State**, 541 So.2d 1143 (Fla. 1989), a similar claim was raised therein. The court held:

> Eutzy's fifth claim, that he was denied his constitutional right to a competent psychiatric evaluation, is also procedurally barred. Prior to the filing of the motion at issue, Eutzy was examined by Dr. Merikangas, a psychiatrist. Dr. Merikangas determined that at "the time of the crime [Eutzy] was suffering from starvation, the effects of stimulants, and chronic substance and alcohol abuse." In his opinion these factors resulted in "impaired judgment and extreme emotional disturbance" at the time of the

> murder. Due to possible hypoglycemia, Dr. Merikangas believed that it is also "most unlikely that he was able to think rationally, logically or normally" at the time of the murder. Dr. Merikangas also expressed his belief that further diagnostic testing "would demonstrate organic defects of the brain." Eutzy maintains that the psychiatric evaluations he received prior to trial were deficient because the court-appointed psychiatrist who examined him failed to consider issues relating to organic brain disorders, chronic alcoholism, and other neurological issues. The trial court summarily rejected this claim, finding it amounted to an abuse of process.

541 So.2d at 1146.

Similarly, sub judice, an abuse of process exists. Hill was evaluated in 1982 prior to trial, and was sentenced at that time based on testimony presented at trial. The Florida Supreme Court reversed the sentence and ordered a resentencing **not** based on a lack of mitigating evidence but rather based on a tainted juror who sat at the penalty phase. Hill received a second sentencing proceeding in 1986 at which time Dr. Larson again was called to the stand. Now, under a warrant in 1990, he is suggesting that a Dr. Pat Fleming from Wyoming has uncovered evidence that reflects eight years ago Hill was suffering from some sort of mental disease. The evidence shows Dr. Larson had available to him all of Hill's medical records and that based on his evaluation within two months of the crime, and his test results (based on standard tests), Hill suffered no brain damage nor did he suffer any kind of mental health disease.

To suggest that the above demonstrates that counsel failed to properly investigate Mr. Hill's case is absolutely unfounded. Dr. Larson's charge in 1982, was to investigate Hill's mental

health, the possibility of involuntary hospitalization, and explore possible mitigating factors. There has been no evidence that Dr. Larson nor Hill's counsel at resentencing failed to properly consider Hill's mental health. See **Jackson** v. Dugger, 547 So.2d 1197 at 1200-1201 (Fla. 1989), wherein the court held in a similarly postured case where Dr. James Larson was ordered to evaluate Andrea Jackson for her 1983 trial:

> . . . Thus, not only was Dr. Larson ordered by the trial court to examine Jackson for the purpose of assisting counsel in preparing a defense for Jackson, but he was also to determine whether Jackson was competent to stand trial. We find that the court-appointed psychiatrist, upon order of the trial court to determine Jackson's competence, examined her for that purpose. He concluded Jackson was competent to stand trial, and, therefore, competent to assist in her defense. Dr. Larson believed at the time he examined Jackson that her inability to recall and discuss certain circumstances of the shooting was due to the ingestion of alcohol and drugs preceding the offense. Counsel was informed of Dr. Larson's medical opinion supporting this conclusion.
>
> There is no requirement that the issue of a defendant's competence must be reopened because the psychiatrist who examined the defendant reached a legitimate conclusion based on the symptoms displayed by the defendant but failed to associate those symptoms with another mental deficiency. Nor is the attorney representing the defendant ineffective for failing to pursue every possible defense based on a particular mental condition. From the information given to counsel by the court-appointed doctor, counsel formulated a defense centered on Jackson's diminished capacity. The evidence of Jackson's abusive childhood, her abusive marriage, and her alcohol and drug addiction was presented to and considered by the jury during her sentencing proceeding. The additional testimony Jackson now seeks to admit on these points is, perhaps, more detailed than that originally presented at

> sentencing. Nonetheless, it is essentially cumulative of the prior events. We find nothing in the record to support the contention that Jackson's psychiatric evaluation was deficient or that trial counsel rendered ineffective assistance of counsel.

547 So.2d at 1200-1201.

The rank speculation at the present time that Hill suffered brain damage and mental disturbance at the time of the crime based on Dr. Fleming's recent evaluation is an attempt to second guess an otherwise rational and reasonable presentation of mitigating evidence in 1986.

It is interesting to note that just prior to the hearing held January 18, 1990, Hill finally tendered the affidavits of Dr. Yarbrough who apparently conducted and evaluation of Mr. Hill on December 27, 1989, and Dr. Pat Fleming of Wyoming who evaluated Hill on December 9, 1989. Each concluded that the prior evaluations of Mr. Hill were inadequate because there were "sufficient indications which should have triggered testing for organic impairment". Each speculated, although they are not lawyers, as to what mitigating factors could have been proven if their expertise had been used in a timely fashion and each observed that Hill was impaired in some way. Hindsight is a great, and Monday night quarterbacking is even better. Simply because Hill has found other doctors who would say that he sufferes from "brain impairment" in 1990, does not sufficiently demonstrate that trial counsel's investigation of Mr. Hill's mental capacity is wanting. The fact that other witnesses could have been called to provide the jury with the dark side of Mr.

Hill as opposed to the rosy side of Mr. Hill's character(which was presented at the resentencing) does not mean that trial counsel did not know about the dark side, or that no strategy was employed. Rather to the contrary that record reflects that defense counsel spoke to Hill's family members, investigated his mental background, had Mr. Hill examined by a doctor and had school records and other information concerning Mr. Hill's background available to present to the jury and judge. Selective utilization of that information portraying Mr. Hill as a nice guy was a viable tactical decision evidenced from the record.

It should be further noted that the aforenoted theory is not diminished by the recent vintage, to-wit after **3.850** hearing, on January **19, 1990**, of Mr. Terry Terrell executed an affidavit stating he had no trial strategy in what he did and what he did not do. Indeed, Mr. Terrell may be correct in that he had no specific strategy or tactics "not" to *so* something, but he did indeed have strategy and trial tactics as to what he did do. Mr. Terrell's representation of Mr. Hill (in spite of his recent affidavit) was satisfactory and effective within the two-prong test of **Strickland** v. Washington, **466** U.S. **668 (1984).**

Based on the foregoing, the trial court was correct in denying an evidentiary hearing and summarily denying Claims IV, V, and IV of the 3.850 motion.

ISSUE III

WHETHER HILL'S RIGHTS WERE VIOLATED BECAUSE HE WAS FORCED TO FILE HIS MOTION FOR POST CONVICTION RELIEF.

This last issue was raised by Hill in Claim XV. This court has found similar claims raised in **Cave v. State,** 529 **So. 2d** 293 (Fla. 1988), and **Tompkins** v. **Dugger,** 549 So.2d 1370 (Fla. 1989) to be groundless.

CONCLUSION

Based on the foregoing, all relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by 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