IN THE SUPREME COURT OF FLORIDA

JAMES DOUGLAS HILL,

Appellant,

v. CASE NO. 65223

STATE OF FLORIDA,

Appellee.

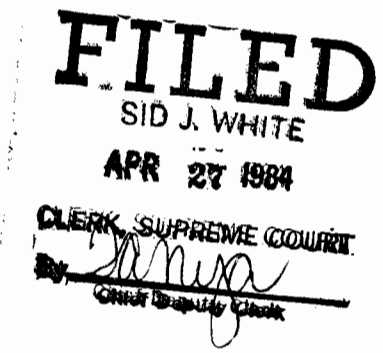

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TABLE OF CONTENTS

	PAGE NO.
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
ARGUMENT	8
THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF.	
CONCLUSION	20
CERTIFICATE OF SERVICE	20

TABLE OF CITATIONS

	PAGE NO.
Armstrong v. State, 429 So.2d 287, 290, 291 (Fla. 1983), cert. denied, __ U.S. __ 104 S.Ct. 253, 78 L.Ed.2d 177 (1983)	17
Bolins v. Wainwright, 597 F.2d 986 (5th Cir. 1979)	9, 11
Bruce v. Estelle, 493 F.2d 794, 798 (5th Cir. 1974)	9
Davis v. Alabama, 545 F.2d 460, 465 (5th Cir. 1977)	9, 13
Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d d103 (1975)	13
Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)	8, 13
Gray v. Lucas, 677 F.2d 1086, 1093 (5th Cir. 1982)	17
Hill v. Florida, __ U.S. __, 103 S.Ct. 1262, 75 L.Ed.2d 488 (1983)	16
Hill v. State, 422 So.2d 816, 818 - 819 (Fla. 1982)	19
Holmes v. State, 429 So.2d 297 (Fla. 1983)	18
Knight v. State, 394 So.2d 997 (Fla. 1981)	12, 15, 16, 19
Meeks v. State, 382 So.2d 673 (Fla. 1980)	12
Nathaniel v. Estelle, 493 F.2d 794, 798 (5th Cir. 1974)	9
Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)	8, 9, 12, 13 14, 15
Pedero v. Wainwright, 590 F.2d 1383, 1387 (5th Cir. 1979)	8, 13

PAGE NO.

Reese v. Wainwright, 600 F.2d 1085, 1093 (5th Cir. 1979) — 9, 13

Songer v. State, 419 So.2d 1044, 1047 (Fla. 19820 — 12

Stanley v. Zant, 697 F.2d 955, 962 (11th Cir. 1983) — 17, 18

Straight v. Wainwright, 422 So.2d 827, 832 (Fla. 1982) — 17

United States v. Markis, 535 F.2d 899, 904 - 905 (5th Cir. 1976), cert. denied, 430 U.S. 954, 97 S.Ct. 1598, 51 L.Ed.2d 803 (1977) — 9

Washington v. State, 397 So.2d 285 (Fla. 1981) — 15

Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) — 17

Whitney v. State, 132 So.2d 599 (Fla. 1961) — 18

Zapata v. Estelle, 588 F.2d 1017, 1021 (5th Cir. 1979) — 9

PRELIMINARY STATEMENT

This is on appeal from an order denying James Douglas Hill's Motion for Post-Conviction Relief brought pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The Circuit Court, Hillsborough County, Judge Harry Lee Coe, presiding. The parties in this brief will be referred to by their proper names or as they stand before this court. The symbol "R" will be used when referring to the record on appeal, case number 60,144. The symbol "RR" will be used when referring to the record on appeal presently before this court in case number _____. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE

The appellant, James Douglas Hill, was convicted of first degree murder and, in accordance with the jury's recommendation, was sentenced to death. This Court affirmed the judgment and sentence on July 15, 1982. Hill v. State, 422 So.2d 816 (Fla. 1982). The United States Supreme Court denied certiorari review on February 28, 1983. Hill v. Florida, __ U.S. __, 103 S.Ct. 1262, 75 L.Ed.2d 488 (1983).

On July 1, 1983, appellant filed in the trial court a motion for post-conviction relief pursuant to Florida Rules of Criminal Procedure 3.850. The State filed a response on August 10, 1983. While the motion was pending before the Circuit Court, the Governor signed a Death Warrant on April 12, 1984, ordering the execution of Hill between noon, Thursday the 3rd of May, 1984, and noon, Thursday the 10th of May, 1984. Execution is presently set for Wednesday, May 9th at 7:00 a.m..

Also on April 12th, the State filed with the trial court a Motion to Expedite proceedings and the case was set for hearing before Judge Harry Lee Coe on April 17, 1984. At that hearing the defense filed an Amended Motion for Post-Conviction Relief and a Motion for Stay of Execution. A hearing was held on defendant's Motion on April 19, 1984. On April 24, 1984, the trial court heard legal argument and the motion was denied. A stay of execution was also denied and these proceedings ensued.

STATEMENT OF THE FACTS

Direct Appeal

The facts of this case are set forth in this Court's decision at 422 So.2d 816 (Fla. 1982). References to the record on direct appeal will be made whenever it becomes necessary to supplement these facts.

The record reflects that on the afternoon of June 23, 1980, the appellant asked his cousin, Russell Jackson, if he wanted to help rape the victim, Rosa Lee Parker, and, if he did, appellant would take her somewhere afterwards and "get rid of her". One of appellant's friends, Daniel Munson, testified that on midnight of the same day appellant took Munson to Rosa Lee's dead body. While viewing the body, appellant boasted, "She wouldn't give it up, so I had to take it".

Munson related this information to police who persuaded him to go to the appellant's home wired with electronic surveillance equipment for the purpose of eliciting incriminating statements from the appellant. Munson agreed to do so in exchange for certain promises. Thereafter, he went to Hill's home, asked appellant to accompany him into the backyard, and there obtained statements in which appellant admitted committing the murder. Munson testified concerning those statements at trial and the state introduced, over objection, both the recording of the conversation and the testimony of the officers who overheard it.

Appellant took the stand in his own behalf and testified that he was at home asleep on the living room floor when the murder

occurred. (R 593) Arnel Perkins and Gary Hill, the defendant's brother, testified consistent with this alibi defense. (R 546, 578) Arnel and Gary further testified that they saw Daniel Munson leaving the area where the body was found. (R 546, 578)

When questioned regarding the incrminating statements made to Daniel Munson, Hill testified that he was simply repeating facts told to him by the investigating officer, Ted Gibson. (R 609, 611, 612, 613, 614, 616, 619, 626, 627) Officer Gibson testified on rebuttal that he did not tell Hill the circumstances surrounding the murder during their interviews. (R 632)

Post Conviction Proceedings

Appellant filed in the trial court a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. (RR. 12 - 33) A hearing was held on that motion on April 19, 1984. The trial court heard the testimony of Hill's attorney, Ronald Young. Young testified that although Hill had limited communication skills, he was able to relate the circumstances surrounding the offense and disclosed pertinent facts relevant thereto. (RR. 96, 102, 113 - 117, 123) Young testified further that Hill furnished him with an alibi defense, did not exhibit any irrational conduct, and commented during trial on the testimony of prosecution witnesses. (RR, 115, 116, 117, 123)

The court also heard testimony from Tek Marciniak, Hill's

court-appointed private investigator used to assist the defendant at the time of trial. Marciniak testified that Hill had difficulty "relating time" and as a result he was unable to relate sufficient information to assist in the investigation of his case. (RR. 129, 130, 370)

Hill's principal witness was Dr. Arthur Norman who testified by deposition. Norman examined Hill on April 28, 1983, nearly three years after trial. (RR. 593 - 608) Dr. Norman's conclusion that Hill was incompetent at the time of trial is based, in part, on the reports of M.W. Pike, a Classification Specialist and Psychologist, Robert Moore. (RR. 303)

Mr. Pike interviewed Hill on March 30, 1981, four months after trial. (RR. 578) Although the report indicates that Hill seemed to be unsure of the purpose of the interview, it was also noted that Hill continued to maintain his innocence and attempted to shift the blame to Danny Munson and his cousin Russell Jackson.

Psychologist Robert Moore evaluated Hill three months after trial on February 27, 1981. (RR. 575 - 576) Contrary to Dr. Norman's testimony, Moore's report indicates that Hill is <u>not</u> mentally retarded. Norman and Moore both agree, however, that Hill has not in the past, nor is he at present, suffering from any psychiatric disorder or mental illness.

Moore's report indicates that Hill exhibited no symptoms of acute distress during the interview, did not make "loose associations" and remained relevant and coherent. Although his memory

seemed impaired for "selective remote events" such as place of birth, Hill "generally demonstrated adequate memory for most information" and "related the events of trial."

Hill also presented testimony from a pathologist, Dr. Edward N. Willey, who testified that the body of the victim was substantially decomposed, and for that reason the ability to examine the soft tissue was greatly impaired. (RR. 452) This testimony is not inconsistent with the testimony of the pathologist (Dr. Lee Miller) who testified at the defendant's trial. (R 320, 322)

Roy Mathews investigated the case at the post-conviction stage. He testified that he attempted to talk with Hill regarding his trial but the defendant could relate only "basic things as to what happened during the trial, nothing about procedure." (RR. 426) Mathews' first contact with Hill was in February of 1983, more than three (3) years after trial. (RR. 422)

Hill's former teacher, Felicia Williams, and school administrator, Scott Anderson, testified over State objection that Hill had difficulty expressing himself and because of this was often times used as a scapegoat by the other children in the class. Williams and Anderson's last contact with the defendant was in 1973 - 1974. (RR. 202, 207, 223 - 224, 227). The court sustained the state's objection to this testimony on the issue of competency (RR. 487) and considered the testimony only for the purpose of mitigation. (RR. 501).

Elliott Metcalfe, Jr. the Public Defender for the Twelfth Judicial Circuit and Larry Helm Spalding, a practicing attorney, testified over the State's objection on the issue of ineffective assistance of counsel. (RR. 234 - 259, 260 - 288) The State's objection to this testimony (RR. 486 - 487) was overruled by the trial court. (RR. 498).

Hill's father, Willie Hill, and his brother, Gary Hill, testified that the defendant suffers with epilepsy and described Hill's behavior during an epileptic seizure. (RR. 414 - 419, 438 -443)

In rebuttal, the State put on evidence from the three investigating officers: Sergeant Stokes, Sergeant Martelli and Sergeant Gibson. These officers testified that they had no problem understanding Hill during a prolonged interview and that Hill responded appropriately to questions and answered in the narrative. There was also testimony that Hill at one point even inquired about the amount of his bond on an unrelated burglary charge. (RR. 401, 403, 404, 406, 377, 380, 381, 382, 356, 357, 358)

On April 24, 1984, the trial court heard legal argument on the defendant's motion for post-conviction relief. The motion was denied as was an application for stay of execution. (RR. 530, 531) These proceedings ensued.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF.

Hill's Motion for Post-Conviction Relief alleges ineffective assistance of counsel and incompetency to stand trial. The competency issue is two-fold. First, petitioner claims a violation of substantive due process because he was incompetent at the time of trial. Second, Hill alleges a violation of procedural due process because his attorney failed to request a competency hearing. We address each issue separately.

A. Substantive Due Process

Due process requires that a defendant not be made to stand trial for a criminal charge unless he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and possess a rational and factual understanding of the proceedings against him. Dusky v. United States, 362 U.S 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). To safeguard that substantive due process guarantee, the Supreme Court announced in Pate v. Robinson, 383 U..S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), a separate procedural due process right to a competency hearing whenever the facts or events presented to the trial court raise a "bona fide doubt" as to the defendant's competency to stand trial. See Pedero v. Wainwright, 590 F.2d 1383, 1387 (5th Cir. 1979). The state law standard for entitlement to a competency hearing appears to be identical to

the federal constitutional standard. Id. at 1388.

The law is clear that a defendant is entitled to raise in a collateral proceeding his actual incompetence at the time of trial. See Bolius v. Wainwright, 597 F.2d 986 (5th Cir. 1979); Zapata v. Estelle, 588 F.2d 1017, 1021 (5th Cir. 1979); United States v. Markis, 535 F.2d 899, 904 - 905 (5th Cir. 1976), cert. denied, 430 U.S. 954, 97 S.Ct. 1598, 51 L.Ed.2d 803 (1977); Bruce v. Estelle, 493 F.2d 794, 798 (5th Cir. 1974). This substantive right is not to be confused with the defendant's procedural rights under Pate. Reese v. Wainwright, 600 F.2d 1085, 1093 (5th Cir. 1979). A determination that insufficient evidence existed to sustain a Pate violation does not preclude a post-conviction inquiry into substantive due process. Nathaniel v. Estelle, 493 F.2d 794, 798 (5th Cir. 1974).

Once a defendant has raised a substantial threshold doubt about his competency at the time of trial by clear and convincing evidence, he must at the ensuing hearing prove the fact of that incompetency by a perponderance of the evidence. Zapata v. Estelle, 585 F.2d 750 (5th Cir. 1978), receding from contrary language in Bruce v. Estelle, supra.

The standard which must be met to sustain a post-trial claim of incompetency is set forth in Bruce v. Estelle. That standard requires the defendant to show (1) a history of mental illness and (2) substantial evidence of mental incompetence at or near the time of trial supported by the opinions of qualified physicians and the testimony of laymen. Davis v. Alabama, 545 F.2d 460, 465 (5th Cir. 1977), quoting Bruce v. Estelle.

The record before this Court does not satisfy the Bruce

standard. Appellant introduced a report and testimony from Dr. Arthur Norman who examined Hill on April 28, 1983, nearly three years after trial. Dr. Norman's conclusion that Hill was incompetent at the time of trial is based, in part, on the report of Classification Specialist, M.W. Pike, who interviewed Hill on March 30, 1981, four months after he was sentenced. (RR. 578) Although the report indicates that Hill appeared to be unsure of the purpose of the interview, it was noted by the interviewer that Hill continued to maintain his innocence and implicated Danny Munson and his cousin, Russell Jackson.

Dr. Norman also relied on the evaluation of psychologist, Robert Moore, done three months after trial on February 27, 1981. (RR. 575 - 576) Significantly, both Moore and Norman agree that Hill is not presently, nor has he in the past, suffered any psychiatric disorders or mental illness. Contrary to Norman's testimony, Moore concluded that Hill is not mentally retarded.

In his report, Moore states that Hill's memory appears to be impaired for selective remote events, such as place of birth. The report, however, also, indicates that Hill related the events of his trial and denied participation in the crime, shifting the blame to Danny Munson.

The evidence thus presented indicates that as early as three months after trial Hill was found not mentally retarded and not suffering from any mental illness. On the basis of this evidence, a medical expert concluded three years after the fact that Hill was incompetent to stand trial.

Other evidence included the testimony of Hill's trial attorney,

Ronald Young. Young testified that although Hill had limited communication skills, he was able to relate the circumstances surrounding the offense and disclose facts pertinent thereto. (RR. 96, 102, 113 - 117, 123) Young testified further that Hill furnished him with an alibi defense prior to trial, did not at anytime exhibit irrational behavior, and made comments during trial on the testimony of prosecution witnesses. (RR. 115, 116, 117, 123)

The State also put on evidence from the investigating officers who communicated with Hill prior to trial. These officers testified that they had no difficulty understanding Hill during a prolonged interview and that Hill responded appropriately to questions and answered in the narrative. There was also testimony that Hill at one point even inquired about the amount of his bond on an unrelated burglary charge. (RR. 401, 403, 404, 406, 377, 380, 381, 382, 356, 357, 358)

Finally, Hill's trial testimony was coherent and responsive to the questions asked. He gave an alibi defense (R 593, 625) and attempted to explain his incriminating statement to Munson, saying he was simply repeating facts told to him by the investigating officer. (R 609, 611, 612, 613, 614, 616, 626, 629).

The question of the sufficiency of the evidence to make a retrospective determination of competency is, subject to appellate review, left to the discretion of the trial court. Bolius v. Wainwright, supra at 988. Weighing the conflicting evidence, the trial court found that Hill had failed to prove by a perponderance of the evidence that he was incompetent at the time of trial. There was no abuse of discretion and the decision of the lower court must be affirmed.

B. Procedural Due Process

Hill's claim that his attorney was ineffective because he failed to request a competency hearing presents a problem of procedural due process under Pate v. Robinson, supra and ineffective assistance of counsel under the standard announced by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981).

The appropriate test to be applied in determining whether the defendant was afforded effective assistance of counsel is whether counsel was reasonably likely to render and did render reasonably effective counsel based on the totality of the circumstances. Meeks v. State, 382 So.2d 673 (Fla. 1980). This does not mean that a defendant is entitled to errorless counsel or that counsel will be judged ineffective by a standard based on hindsight. Id. As this Court recently stated in Songer v. State, 419 So.2d 1044, 1047 (Fla. 1982):

> We will not use hingsight to second guess counsel's strategy, and so long as it was reasonably effective based on the totality of the circumstances which it was, it cannot be faulted. See Meeks v. State, 382 So.2d 673 (Fla. 1980). That the strategy did not prove successful, from appellant's point of view, does not mean that the representation was inadequate.

In Knight v. State, 394 So.2d 997 (Fla. 1981), the Florida Supreme Court expanded the principles earlier developed in Meeks v. State, supra, and announced a four-step test for determining whether a defendant has been denied effective assistance of counsel at trial. First, the specific act or omission must be detailed in the appropriate pleading. Second, the defendant has the burden to show that this specific act or omission was a substantial and serious

deficiency measurably below that of competent counsel. Third, the defendant has the burden to show prejudice, or that this specific, serious deficiency affected the outcome of the proceedings. Finally, in the event the defendant does make a prima facie showing of prejudice, the state still has the opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact.

The standard by which competency to stand trial is measured was stated by the Supreme Court in Dusky v. United States, supra. The test is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as a factual understanding of the proceedings against him. To safeguard that due process guarantee, the Supreme Court announced in Pate v. Robinson, a separate procedural due process right to a competency hearing whenever facts or events presented to the trial court raise a "bona fide doubt" as to the defendant's competency. See Pedero v. Wainwright, supra; Reese v. Wainwright, supra; Davis v. Alabama, supra and Christopher v. State, 416 So.2d 450, 452 (Fla. 1982).

The relevant factors in assessing competency are a defendant's past history of irrational behavior or mental illness; the opinion of psychiatric experts and the defendant's demeanor at trial. Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). We examine the record in light of these factors.

There is no evidence of past or present mental illness or

irrational behavior such as that uncovered in Pate v. Robinson.[2] The record shows only that Hill is of low intelligence and suffers from epileptic seizures.

A psychological evaluation of Hill done three months after trial by psychologist, Robert Moore indicates that Hill exhibited no symptoms of acute distress during the interview; did not make "loose associations" and remained relevant and coherent. Although his memory seemed impaired for "selective remote events", such as place of birth, Hill "generally demonstrated adequate memory for most information". Hill's test results showed no evidence of psychotic thinking and place him in the borderline range of intelligence. He is not mentally retarded. (RR. 575 - 576)

Nothing that occurred during trial was sufficient to evoke a bona fide doubt in the mind of the attorney or the court that Hill was not truly competent. There is no evidence in the record of any unusual behavior by Hill. Hill's trial testimony was coherent and

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[2] The Supreme Court noted that the uncontradicted testimony of four witnesses called by the defense revealed that Robinson has a long history of disturbed behavior. 383 U.S. at 378. This history, included confinement in a mental hospital following a violent fit in which he kicked a hole in his mother's bar and tried to jump from a cab carrying him to the hospital. The medical records at the hospital revealed that he suffered from frightening hallucinations, and that his behavior suggested schizophrenia.

Robinson's irrational periods became even more violent. He served four years in prison for an episode in which he shot and killed his eighteen month old son and attempted suicide. Subsequently, he attacked and seriously injured his mother's brother-in-law, causing her to swear out a police warrant for his arrest. Finally, he was arrested for the killing of the woman with whom he was living. This history, coupled with the testimony of four witnesses that Robinson was insane and the contention of Robinson's attorney that he was "presently insane", caused the court to conclude that a "bona fide" doubt regarding Robinson's competency to stand trial had been raised.

responsive to the questions asked. He gave an alibi defense and attempted to explain his incriminating statement to Munson saying that he was only repeating facts told to him by the investigating officer. (R 593, 609, 611, 612, 613, 614, 616, 626, 629).

In summary, considering the fact that Hill has no history of mental illness, the favorable diagnosis made by the examining psychologist three months after trial, and the demeanor of the defendant throughout the proceedings, there was no evidence before the court that was sufficient to raise a "bona fide" doubt as to Hill's competency to stand trial, Pate v. Robinson, and the attorney was not ineffective because he failed to request a competency hearing. Knight v. State.

C. Remaining Claims

Hill's remaining claims of ineffectiveness do not merit extensive discussion. Briefly, he asserts that his attorney failed to properly interview witnesses. The record does not support this allegation. Young testified at the hearing on defendant's motion that he deposed and/or interviewed all witnesses prior to trial. (RR. 89, 110)

Hill's claim that Young failed to effectively cross examine prosecution witntesses Munson and Jackson is also without merit. This Court held in Washington v. State, 397 So.2d 285 (Fla. 1981) that cross-examination is a trial tactic choice properly within counsel's discretion.

Hill's claim that counsel failed to properly investigate and

prepare for trial on the suppression hearing is also refuted by the record. Young filed a pretrial Motion to Suppress (R 12 -13) and presented extensive legal argument at the hearing on the defendant's motion. (R 818 - 872) The issues raised in that motion have since been rejected by the United States Supreme Court. Hill v. Florida, _ U.S. __, 103 S.Ct. 1262, 75 L.Ed.2d 488 (1983). In addition, Young testified at the hearing that he utilized the services of a court-appointed private investigator and that he deposed and interviewed all witnesses, including Hill and his family. (RR. 89, 90, 91). It was no doubt counsel's investigation which revealed the alibi defense Hill and other witnesses testified to at trial. (R 536 - 571, 572 - 579, 593).

Hill's claim that the prosecutor improperly remarked to the jury that Arnel Perkins conspired with the Hill family to present perjured testimony is not supported by the record. (R 701) Perkins' close relationship to the Hill family was brought out by the State on cross-examination (R 579) but there was not, contrary to appellant's claim, any intimation by the prosecutor of conspirary and perjury.

Appellant's claim that his attorney was ineffective for failing to object to the instruction on felony-murder is also without merit. (R 713 - 715) There was sufficient evidence of sexual battery to support the giving of this instruction.

As to the sentencing phase, Hill contends that trial counsel failed to investigate mitigating evidence and failed to put on psychiatric evidence such as that provided by Dr. Norman.

Both state and federal law is clear that the choice by counsel to present or not present evidence in mitigation is a tactical decision properly within counsel's discretion. See Stanley v. Zant, 697 F.2d 955, 962 (11th Cir. 1983); Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982); Armstrong v. State, 429 So.2d 287, 290 291 (Fla. 1983), cert. denied, __ U.S. __ 104 S.Ct. 253, 78 L.Ed.2d 177 (1983); Straight v. Wainwright, 422 So.2d 827, 832 (Fla. 1982).

When a defendant alleges that his counsel's failure to investigate prevented the attorney from making an informed tactical choice, the defendant must show that knowledge of the uninvestigated evidence would have altered counsel's decision. Gray v. Lucas, 677 F.2d 1086 1093 (5th Cir. 1982).

Hill's attorney presented testimony pertaining to a broad range of both statutory and nonstatutory mitigating factors. Five witnesses testified to the defendant's reputation for truthfulness, employment record and general good character. (R 748, 749, 753, 757 - 758, 771). There was also evidence of Hill's low intelligence, his epileptic seizures, age and the fact that he had no prior convictions. (R 741, 743, 762, 878) In addition, Hill's mother testified that he was "not the brightest kid in the world" and he is "easily influenced by others". (R 762, 766) Letters written by Hill to his mother were also introduced into evidence. (R 763, 766).

Hill's claim that his attorney failed to investigate and use the psychiatric testimony of Dr. Arthur Norman is without merit.

Aside from the fact that Norman's testimony would only have been cumulative to evidence presented through the lay witnesses, Hill's attorney could have reasonably concluded that such evidence would be of little persuasive value or that it would cause more harm than good by opening the door for harmful cross-examination or rebuttal evidence. See Stanley v. Zant, 697 F.2d 955, 965 (11th Cir. 1983).

The defendant's reliance upon Holmes v. State, 429 So.2d 297 (Fla. 1983) is misplaced. There was evidence in that case that the defendant suffered a psychological disturbance at the time of the capital felony and the court imposed sentence without the benefit of available expert opinion pertaining to Holmes' mental and emotional condition. Here, the defendant's own expert witness, Dr. Norman, testified that Hill is not psychotic or emotionally disturbed. (RR. 317)

Hill's contention that his attorney failed to rebut the state's presentation of aggravating circumstances is also without merit. The state put on no evidence during the penalty phase of defendant's trial. (R 736)

Hill's claim that his attorney failed to challenge improper prosecutorial argument pertaining to mitigating and aggravating circumstances is without merit. The prosecutor's argument that Rosa Lee Carter was killed during the commission of a felony murder is suppported by the record and is fair comment on the evidence. Whitney v. State, 132 So.2d 599 (Fla. 1961). For the same reason, the jury instruction on felony murder was supported by the evidence and counsel was not ineffective for failing to object to same.

Hill's argument that his attorney was ineffective because he

failed to object to the doubling of two statutory aggravating circumstances on the basis of the same facts was considered by this court on direct appeal and rejected. Hill v. State, 422 So.2d 816, 818 - 819 (Fla. 1982).

In conclusion, on the claims of ineffective counsel, the appellant has failed under the Knight criteria to make a prima facie showing of substantial deficiency or possible prejudice which would entitle him to relief. The trial court's denial of appellant's motion for post-convictoin relief should be affirmed and any motion for stay of execution denied.

CONCLUSION

Based on the facts as related above and the case as cited herein, it is respectfully submitted that the trial court's denial of appellant's motion for post-conviction relief be affirmed and any motion for stay of execution 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 Federal Express Mail to Michael Eschevarria, Esquire, 222 West Pensacola, Room 133, Tallahassee, Florida 32301; Robert A. Foster, Jr., Esquire, Suite 1207, 412 Madison Street, Tampa, Florida 33602 and to B. V. Dannheisser, III, Esquire, 222 West Pensacola, Room 133, Tallahassee, Florida 32301, this 26th day of April, 1984.

OF COUNSEL FOR APPELLEE.