IN THE SUPREME COURT OF FLORIDA

JAMES DOUGLAS HILL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 65223

INITIAL BRIEF OF APPELLANT

On Appeal from Denial of Motion to Vacate by the Circuit Court of the Thirteenth Judicial Circuit of Florida, In and For Hillsborough County.

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Issue One

Appellant was denied a full and fair hearing on his claim for post-conviction relief.

Issue Two

Appellant was tried before a jury for murder in the first degree while he was not competent to stand trial. This deprived him of effective assistance of counsel and due process under the Sixth and Fourteenth Amendments to the Constitution of the United States.

Issue Three

Trial counsel failed to render effective representation by failing to reasonably investigate the issue of Appellant's competency to stand trial and assist in preparation of his defense and the issue of Appellant's sanity at the time of the alleged offense. Appellant was therefore deprieved of his rights to effective assistance of counsel and due process under the Sixth and Fourteenth Amendments to the Constitution of the United States.

Issue Four

Trial counsel failed to render effective representation in the guilt-innocence stage of trial for failing to reasonably investigate, prepare and present relevant and necessary factual issues, thus depriving Appellant of the

right to effective representation and due process under the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States.

Issue Five

Trial counsel failed to render effective representation during the sentencing phase of Appellant's trial. Appellant was therefore deprived of his rights to effective representation under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

PRELIMINARY STATEMENT

Certain exhibits submitted to the lower court and appendices referred to in appellant's brief are submitted separate bound volumes for the convenience of the Court.

RDA refers to Record on Direct Appeal. RAPC refers to Record on Appeal of Post-Conviction. RPC refers to the transcript page numbers of the hearing in the court below.

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STATEMENT OF THE CASE

A.

Original Trial Court Proceedings

Appellant James Hill was indicted on July 9, 1980 by a Hillsborough County Grand Jury for the crime of first degree murder (RDA-5). The indictment alleged that James Hill murdered Rosa Lee Parker by choking her with his hands. Hill voluntarily, in the company of his family, turned himself in to the Hillsborough County Sheriff's Office on July 14, 1980.

A plea of Not Guilty was entered by Hill's counsel, Ronald Young, and trial was commenced on November 4, 1980.

The guilt-innocence phase of the trial culminated on on November 6, 1980 with a jury finding of guilty as charged (RDA-26).

Sentencing presentation began, without objection from counsel, at 8:30 A.M. on November 7, 1980 (RDA-27) culminating with a jury recommendation of death. Judge Harry Lee Coe sentenced Hill to death on November 7, 1980 (RDA-31) and issued his written findings on April 16, 1981 (RDA-61-78), finding "that sufficient aggravating circumstances exist, and that insufficient mitigating circumstances exist to outweigh the aggravating circumstances . . . " (RDA-77).

Direct appeal was filed in this court to challenge both the conviction and sentence.

B.

The Direct Appeal

Hill's direct appeal to this Court resulted in affirmation to the conviction with Justices McDonald and Sundberg dissenting and affirmation to the sentence of death with Justice McDonald dissenting. Hill v. State, 422 So.2d 816 (Fla. 1982).

C.

The Post Conviction Proceedings

Governor Graham denied Hill's Petition for Executive Clemency and signed a death warrant on April 12, 1984, directing the execution of sentence on "some day of the week beginning noon, Thursday, the 3rd day of May, 1984, and ending noon, Thursday, the 10th day of May, 1984."

Shortly after the warrant was signed, on behalf of James Douglas Hill, an Amended Post Conviction Motion to Set Aside Conviction and Sentence and Order a New Trial, hereinafter referred to as The Motion, and an Application for a Stay of Execution were filed in Hillsborough County before Judge Coe.

The State filed its Motion to Expedite Proceedings on April 13, 1984 and same was heard before Judge Coe on April 17, 1984, at which time Judge Coe scheduled the Motion to be heard on April 19, 1984 at 8:30 A.M.

Hill asserted, in the Motion, numerous fundamental errors pertaining to his conviction and sentence, including claims that he was not competent to stand trial prior to and during his trial, and that he had received ineffective assistance of counsel during pre-trial, trial and sentencing phases.

Judge Coe, on April 19, 1984 allowed Hill's trial counsel, Ronald Young, to be examined as a court's witness and entertained his testimony. Judge Coe then entertained partial testimony from Appellant's witness, Tek Marciniak, who had served as the sole defense investigator prior to and during Hill's trial. The court then refused to allow certain relevant testimony to be elicited from witness Marciniak (RPC-77).

The court then refused to allow counsel to present any other witness testimony in the court's presence and directed that any such testimony be presented by taking the witnesses' depositions (RPC-78, 81, 82, 83, 84, 85, 86, 89).

Counsel for James Hill repeatedly objected to this procedure (RPC-86, 87, 92, 93, 95, 115). Judge Coe, in response, repeatedly ruled that the expert and lay witnesses offered by Appellant were not relevant and that the issues were simply a judgment call for trial counsel and not subject to review or evaluation by the court or third parties (RPC-84, 87, 90, 93, 97, 105).

Judge Coe further refused to review the depositions and stated that he was willing to rule immediately without the aid of further testimony (RPC-102, 105, 84, 87, 90, 93).

The court subsequently stated it was willing to read the depositions (RPC-107, 111) but otherwise maintained its position as to the procedure described. Counsel then attempted to demonstrate that the procedure did not allow for contemporaneous rulings to objections (RPC-109). The court directed counsel to simply place objections on the record "and move on," (RPC-109).

As directed, depositions of witnesses offered by Appellant and the State were taken on April 19, 1984 (RAPC-191-467).

Judge Coe reconvened the "hearing" on April 24, 1984 at 8:30 A.M.

Appellant, on April 19, 1984, offered into evidence numerous affidavits, expert reports and other documents which were labeled by the clerk as Defense Exhibit 1 (report of forensic psychologist, Dr. Harry Krop), Defense Exhibit 2 (sworn affidavit of Ronald Young), and Defense Exhibit 3 (composite of exhibit of numerous reports, affidavits, etc.). Judge Coe issued rulings on April 19 and April 24, 1984, pertaining to the admissibility of the items. Appellant objected to a number of the rulings. (Further discussion on this issue is presented in latter portions of this brief.)

Judge Coe then, on April 24, 1984, without clarifying which, if any, depositions and testimony he considered and without entertaining argument from the State on the issue of trial counsel's effectiveness, denied The Motion "as a matter of law," (RAPC- 532). The court further denied, as a matter of law, Appellant's Application for a Stay and Application for a Stay Pending Appeal (RAPC- 532).

This appeal was timely filed on April 27, 1984.

STATEMENT OF THE FACTS

The facts introduced at trial are accurately described by the Florida Supreme Court. Additional facts introduced at the 3.850 hearing but not at the trial due to the ineffective assistance of counsel are contained in the footnotes:

The facts show that on June 25, 1980, authorities retrieved the dead body of twelve-year-old Rosa Lee Parker from an area known as the "Pits" in Hillsborough County. The body lay partially exposed in a shallow grave, covered with mud and hyacinths, and was clothed only in a brassiere pulled up over the breasts. The medical examiner determined the cause of death to be mechanical aspyhxiation.[1] The state charged twenty-two-year-old appellant with first degree murder. The testimony at trial revealed that on the afternoon of June 23, the victim, appellant, young Tina and Tammy Deal, and Russell Jackson went skating. Afterwards, they returned to the Deals' home. Later in the evening, Rosa Lee asked Tammy Deal to accompany her to a nearby schoolyard to play, but Tammy's mother would not permit it. Rosa Lee then left alone, headed toward the school. This was the last time anyone saw Rosa Lee alive.

1/ Initially, the medical examiner listed the cause of death as "unknown." The deposition of Dr. Edward Willie, a pathologist, shows that he was prepared to testify at the 3.850 hearing that the cause of death could not be determined. The trial attorney never investigated the cause of death by hiring his own pathologist (RAPC-95), or cross-examined the pathologist as to his prior inconsistent statements.

Russell Jackson testified that on the same evening appellant asked him if he wanted to help rape Rosa Lee, and, if he did, appellant would take her somewhere afterwards and "get rid of her."[2] Another of appellant's friends, Daniel Munson, testified that, early in the evening of the murder, appellant

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2/ Although only nineteen years old, Jackson had a substantial criminal history (RAPC- 539-745 at Q-2). Jackson gave two reports to the police on June 24 and 25 where he did not report any such statements (Id. at R- 2,3,4) At that time, Jackson said he was in the woods with appellant's brother and David Munson and they encountered four or five men huddled in a group. One man said "hurry, I'm getting blood all over me." On April 26, Jackson was arrested for burglary. He was on probation for other crimes. At that time, he was granted immunity for the homicide, and the police dropped the burglary and grand larceny charges. He was also given probation on another pending charge (Id. at R-1). Jackson then told them of appellant's supposed statement. None of this was introduced at trial, despite the fact that it was all a matter of public record. This was proffered in the 3.850 hearing to show ineffective assistance of counsel (Id. at Q-R).

After trial, but before sentencing, Jackson told Robert Moye, an ex-employer of his father, that Hill "did not kill the girl, but I know who did. James was framed . . . But if I tell who did it, then they would put me away." (Id. at S-1.) Moye told this to defense counsel (Id). Shortly thereafter, Jackson also told Venessa Childs that "if I had to do it all over again, I would tell the truth." (Id. at S-2.) He said that he didn't tell the truth because he didn't want to go to prison. Although the 3.850 judge would not allow Moye or Childs to testify, their affidavits were proffered. Despite the fact that Moye told this to trial counsel before appellant was sentenced (Id. at S-1), no motion for a new trial was made.

came to his house on his motorcycle, accompanied by a female[3] whom Munson could not identify. Munson would not let appellant enter his home, and appellant and the female departed. Munson further testified that appellant returned to his home alone about midnight, said that "he had the nerve to hurt someone," and took Munson to see Rosa Lee Parker's dead body (according to Munson). While viewing the body, appellant boasted, "she wouldn't give it up, so I had to take it."[4]

3/ Munson testified that he was not sure if the female was white or black, and he said she was wearing long pants (RDA-308). The victim was wearing short pants on the day of the crime (RDA-254, 367). He also said in the police report that he had never seen this female before, yet he knew the victim, according to Tina Deal and the deposition of Thomas Gaskin (RAPC-539-784 at L-4; RAPC-1239). Gaskin was told by Munson that if Gaskin testified about Munson and the victim, Munson would "do him like he did Rosa," (RAPC-1245), "kill him," (RAPC-1240-41), and "stab [Gaskin] with a needle." (RAPC-1242.) (Munson had been seen using narcotics. RAPC-539-754 at P-1.) Affidavit of Vellesco (RAPC-539-754 at P-4). None of this was brought out at trial due to the ineffective assistance of counsel, despite the fact that Gaskin's deposition had been taken.

4/ Like Jackson, Munson has a criminal background (RAPC-539-745 at N-2). Initially, Munson gave the same account as Jackson, saying that they were walking in the woods and encountered four or five men. At the time, Munson was on parole for armed robbery (Id. atN3). He was arrested for burglary and parole violation (Id.). Appellant was arrested on unrelated charges, which were later dropped, and placed in the same cell with Munson (Id. at O-1). The next morning, Munson went to the police. The report shows:

> Prior to this interview, Mr. Munson refused to cooperate with the investigators assigned to this homicide. Mr. Munson, at this point and time, indicated to the writer he was concerned about having his parole revoked, due to the fact that he had knowledge (only) of a homicide.

Munson was then granted immunity for his testimony and the charges were dropped (Id at N-2). Other than this fact, none of the above was introduced at trial. Moreover, at this deposition, Munson testified:

Q: On your previous statement, you told Detective Gibson, "Well, I've never seen James wearing sunglasses before, I don't know if those are -- I'm not postively sure if those are his or that those are the ones . . I found there.'

In the initial investigation, Munson related this information to the police.[5] They persuaded him to go to appellant's home wire with electronic surveillance equipment for the purpose of eliciting incriminating statements from appellant. Munson agreed to do so after authorities promised to drop a pending burglary charge against him, drop pending parole violation charges, and not to charge him with accessory after the fact for the instant murder. Munson went to appellant's home, persuaded appellant to accompany him into the backyard, and there obtained statements in which appellant admitted committing the murder.[7] Munson testified concerning those statements at trial and the state introduced, over objection, both the police

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[4]/ (cont'd) A: Well, there's a lot of things I told those detectives. They were putting so much pressure on me --

Q: I can imagine.

A: -- that I said a lot of things that weren't right.

Also, Munson supposedly found sunglasses (RDA-370) at the crime scene which were introduced into evidence. Persons who knew appellant say that he never owned sunglasses (RAPC-539-745 at L-2, 4, 5). Further, Winston and Carlton cigarette butts were found near the body (RDA-872). Munson smoked Winstons and appellent smoked Marlboros (RDA-617). None of this was brought out at the trial.

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[5]/ Munson's initial statement to the police was contradicted by him at trial in countless ways. None of this was raised by trial counsel. The police reports are in the appendix hereto.

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[6]/ The deposition of Dr. Arthur Norman, proffered at the 3.850 hearing showed that appellant "can say anything to anybody at any given moment and it has minimal validity." Deposition at 33 (RAPC-289-350). Norman says it is consistent with appellant's mental retardation that he would admit to a crime he did not commit.

recording of the conversation and the testimony of the officers who overheard the conversation by way of the surveillance equipment.

6/ (cont'd) Norman's statement, also proffered, says:

> James Hill is a simple, passive, dependent young man who is extremely niave, childlike, and very easily led by others. He desperately wants approval, to be seen as important and as a "big men." Thus, he has a very strong tendency to want to please others by agreeing with what they ask of him or say to him. (RAPC-539- 745 at F-1.)

Dr. Harry Krop points out similar matters (RAPC-534-36)

> Current testing reveals that Mr. Hill is functioning intellectually in the Mild range of Mental Retardation. On the WAIS-R, he earned a Verbal I.Q. of 68, a Performance I.Q. of 67 and a Full Scale I.Q. of 66. These results appear to be a valid estimate of his maximun effort on all tasks. These results are consistent with previous testing conducted a year ago by Dr. Norman and indicate that Mr. Hill is functioning intellectually in the lowest percentile (i.e. 99% of the American population of similar age exceed his scores).
>
> Neuropsychological screen supports a diagnosis of organic brain damage which is primarily manifested in deficits of memory, reasoning and conceptualization. The results of the WMS indicate a Memory quotient of 48 (average=100), a score even lower than that expected from an individual with Mr. Hill's I.Q. He was unable to recall any details from two simple stories read to him ninety minutes earlier, indicating a significant memory dificit, particularly for verbally presented material. His presentation of his history supports these deficits as he was unable to provide accurate information concerning events in his past.
>
> Personality assessment depicts Mr. Hill as an extremely niave, socially immature, young man with a high need for approval. This desperate need causes him to be extremely dependent on others and easily influenced. Because of Mr. Hill's early academic failures and peer ridicule (primarily due to a speech impediment), he has an impaired self-concept and thus tends to be extremely non-assertive (Assertiveness Quotient=23/100)

6/ (cont'd) in his attempts at problem solving. Mr. Hill's responses to the Hand Test and Prescott suggest no evidence of aggressive tendencies or sexually deviant behavior. There is no data to support any sociopathic tendencies, as Mr. Hill is capable of experiencing guilt, remorse and embarrassment.

If, indeed, Mr. Hill were involved in aggressive behavior, it would likely be under the substantial influence or domination of another person, or possibly a manifestation of a psychomotor epileptic seizure.

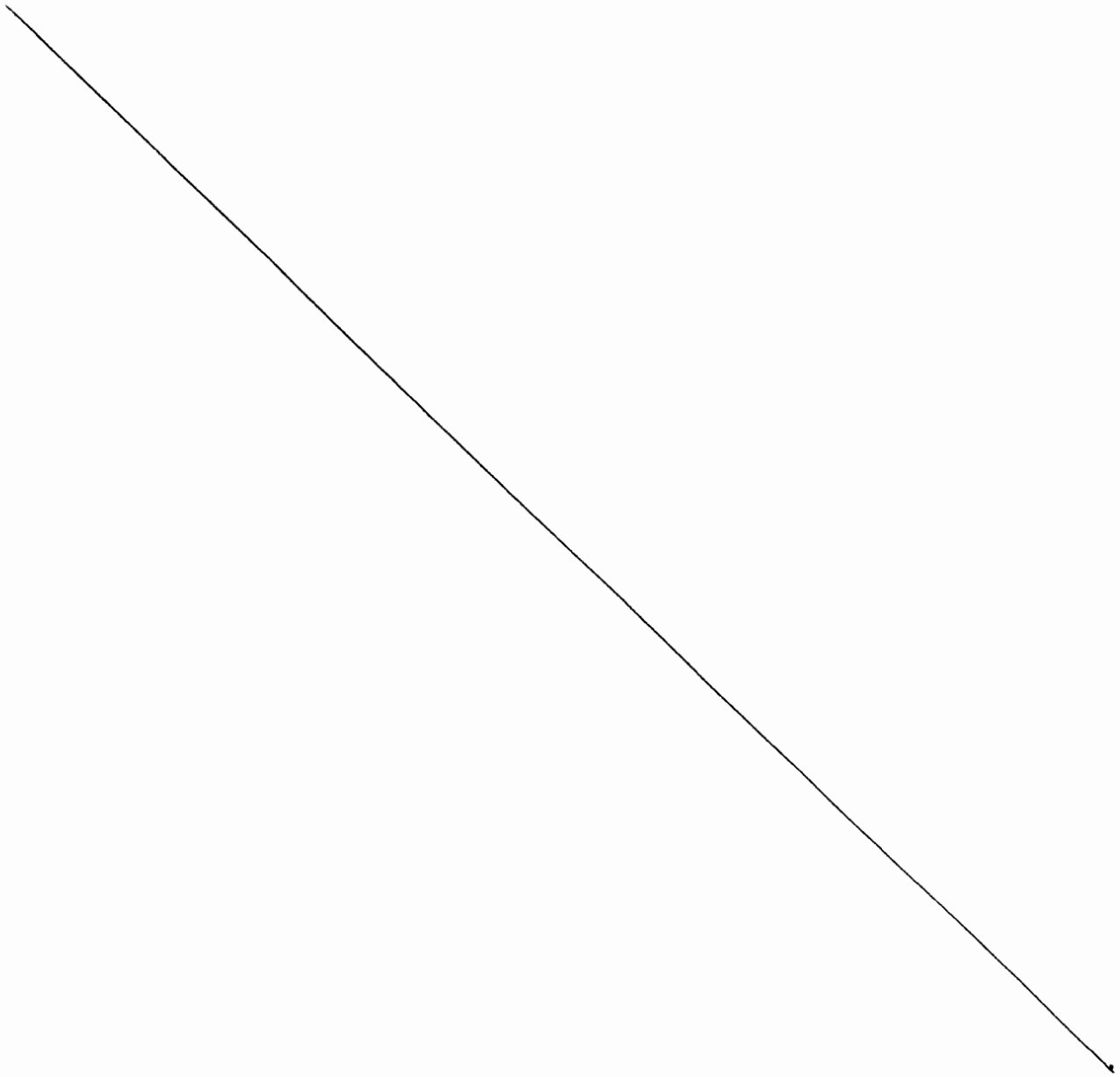
Current testing shows that Mr. Hill's recall capacity is inaccurate for events occurring from ninety minutes to twenty-four hours in the past. It is even more significantly impaired for events and details occurring more remotely. Thus, it is highly unlikely that Mr. Hill possessed the capacity to testify relevantly at the time of his trial or to adequately assist his attorney in all phases of the defense preparation.

Appellant's two teachers of his class for mentally retarded children confirmed this. They said he was very child-like, that other kids took advantage of him, that he was frequently unjustly accused of wrongdoing and tht he did not have the mental ability to stand up and defend himself when unjustly accused. Deposition of Scott Anderson at 8-9, 6-10; Deposition of Felicia Williams at 8-17. (RAPC-191-233.) Williams further stated that appellant did not have the mental capacity to plan a murder. Moreover, Williams testified:

Q: Did you ever note a behavior pattern in James where he would acknowledge yes to things of which he has no knowledge?

A: That was usually the case when he was brought back to the room. You are asking well, why did he say this or why did he -- why didn't he admit to something. I don't know. Why did he say this. Yes. Did you say this? Yes. By the time you found out the facts, you found out that his yesses were just a matter of being able to say something which is characteristic of mentally retarded, some mentally retarded students.

Q: Did you ever find that after James would answer yes and you would explore his knowledge, that he really had no knowledge of what he was --



6/ (cont'd) A: This is what I am saying. After you found out so many yeses and then after you found out through his smiles and yeses and shrugging his shoulders that he was not the problem he was just the person that someone else was easy to point to and say he did it. Everyone knew that he couldn't talk plainly or express himself well. He was an easy scapegoat.

Due to the ineffective assistance of counsel, none of this was raised at trial.

A motion for post conviction relief, pursuant to Fla.R.Crim. P. 3.850, was then filed below.

A variety of legal challenges were raised in the Motion. The evidence presented to the court in support of the Motion related primarily to issues enumerated at the outset of this brief dealing with James Hill's incompetence to stand trial prior to or during trial and the ineffective representation rendered by his trial counsel.

Hill was represented at trial by Mr. Ronald Young. Young testified before the court on April 19, 1984. Counsel testified that prior to representing James Hill, he had never participated, in any fashion, in the defense of a capital murder case (RAPC-13). He also testified that he failed to associate another attorney to aid and assist him in preparation of trial (RAPC-13). Appellant offered into evidence a sworn affidavit by Corporal Larry G. Young of the Hillsborough County Sheriff's Office (RAPC-539-745, Section J). Corporal Young's affidavit shows that Hill was incarcerated at the Hillsborough County Jail from June 1980

to March 1981 and that the records at the County Jail show that attorney Young visited Hill on only one date, October 11, 1980. The Corporal stated that "there were no other visits on record to inmate Hill from an attorney between June 1980 and March 1981."

The trial court refused to accept the forestalled affidavit notwithstanding the fact that attorney Young testified that he met with Hill at "various times during my representation," although he did not "recall the total number of times," (RAPC-88).

Ronald Young admitted that he had been advised that James Hill had been classified as mentally handicapped and placed in a special class in Hillsborough County for persons who are

mentally retarded. He further admitted that he had been advised that Hill suffered from epilepsy. However, Young stated that, although he had been put on notice that Hill suffered from a mental disability, he failed to ever consult any school records, medical records, or education or medical personnel for purposes of investigating Hill's mental status or for purposes of developing a mitigation presentation at sentencing (RAPC-91, 92).

Counsel testified that he did not have money to hire experts to assist him in his defense. However, he admitted that the court had adjudicated Hill partially indigent for purposes of costs to allow him to hire experts (RAPC-93). Throughout his testimony, he evidenced the fact that he did not understand that an adjudication of indigency for purposes of costs provided funds to obtain expert assistance. The evidence was so obvious that the trial court inquired (RAPC-93, 94) as to how counsel could allege both the lack of monies to hire experts and the fact that the court had adjudicated Hill partially indigent for costs.

Numerous issues were of concern during trial counsel's testimony. However, the most critical omissions from trial counsel's preparation were believed to be his failure to investigate the availability of mitigating evidence for presentation during sentencing.

Counsel inquired of attorney Young pertaining to the

competency issue. Young clearly evidenced the fact that he did not understand the distinction between determination of competency and determination of sanity pursuant to the McNaughton Rule.

Young initially stated tht he resolved the issue of appellant's sanity by interviewing his client and the client's family. He states that, from these interviews, he was able to determine that James Hill knew right from wrong and therefore eliminate the possibility of an insanity defense. This determination was made solely by Young without the assistance of experts from any mental healthcare discipline (RAPC-90).

When initially questioned as to Hill's ability to assist him in preparation of a defense, Young testified that Hill was able to communicate with him and assist him in preparation of the defense to a degree (RAPC-96, 97). At that time, appellant offered into evidence a sworn affidavit that had been signed by attorney Young on July 1, 1983, where Young swore that "due to the defendant's limited communication skills, he was not able to fully assist me in preparation for trial," (RAPC_ 537-538). Young subsequently admitted that Hill would have "a hard time" effectively challenging prosecution witnesses or assisting Young in Hill's defense (RAPC-109).

Young was, on several occassions, asked to state whether he invistigated the issue of competency on behalf of his client. He stated that he failed to retain a psychiatrist or psychologist (RAPC-95). He testified that he was aware that James is "relatively on the lower end of of the intelligence scale," (RAPC-97). He stated that James was not able to fully assist

him in preparation for trial (RAPC-99). Discussing the issue of competency, counsel stated, "when you are discussing competency, obviously you are discussing various aspects of competency. Number 1, the basic insanity, whether or not the person under the McNaughton Rule knows right from wrong, very basic. Does he know right from wrong, that he is incompetent to stand trial. . . Then you have other areas as far as competency to stand trial. The areas of ability to assist counsel, ability to aid consel in preparation of defense, ability to realistically challenge prosecution witnesses and have the defendant advise you." (RAPC-107, 108)

Counsel was then asked whether it was his testimony that "as far as evaluation of his [Hill's] competence," Hill had difficulty in effectively challenging witnesses, "but he knew right from wrong." Counsel then answered "that is essentially it." (RAPC-110)

He has admitted, in cross examination by Assistant State Attorney Ober, that Hill had limited ability to communicate with him as to the reliability or credibility of witnesses (RAPC-116). However, Young repeatedly made it clear to the court that his determination of appellant's competency was based on the fact that appellant knew right from wrong as evidenced by his statement that "obviously, you are saying as far as right from wrong, competency questions whether he knows right from wrong, and if not, then obviously he is not competent to stand trial." (RAPC-108).

Young testified that he utilized the investigative assistance of private investigator Tek Marciniak to handle pre-trial investigation and to assist throughout the trial. Marciniak testified during the hearing on The Motion.

Marciniak testified that he was experienced as a law enforcement homicide investigator and private investigator (RAPC-145). He further testified that any investigation that was performed was performed by him (RAPC-149).

The investigator stated that Hill was unable to assist him preparing investigation and a defense in "a normal manner," (RAPC-130). He could not, for example, relate concepts of time as he was unable to distinguish between three weeks and three months (RAPC-130).
Marciniak stated that he had difficulty in "extracting sufficient information from him [Hill] to go out there and do an investigation," (RAPC-134).

The investigator further explained (RAPC-138), before being cut off by the trial court, that Hill appeared to suffer from mental disabilities and stated that he had notified attorney Young of same.

Even though Young was by now supplied with this data plus the knowledge that Hill was retarded and epileptic, no follow-up was executed. Young's only response to this information was to "talk" with Marciniak about the possibility of an insanity defense. At no time did they (Young or Marciniak) investigate whether Hill was competent to stand trial (RAPC-138).

The investigator was also concerned that appellant acted inappropriately during trial. He recalled that Hill did not appear to be "involved in the proceedings" and did not appear "to be aware of what was going on." Instead appellant just stared into space (RAPC-140).

When asked whether appellant's inability to communicate damaged his ability to prepare and investigate a defense, Marciniak responded affirmatively (RAPC-141). He stated that "of all the people I have interviewed . . . he [Hill] is way down on the list of being able to give pertinent, clear information."

The investigator also candidly admitted that he and Young performed no investigation into available mitigating evidence to present during sentencing (RAPC-138,148). When Marciniak related this to the court, prosecutor Ober cross examined. During the examination it was established that any mitigation investigation that would have been performed would have been done through the investigator. Further, when Ober commented that five witnesses were called during sentencing by Young, Marciniak informed the court that "these witnesses were not the product of . . . an investigation. These witnesses were there," (RAPC-149-150).

Counsel for appellant attempted to further the line of questioning to allow Marciniak to provide a more specific answer. The trial court refused to allow Marciniak to personally answer but allowed counsel to proffer the fact that had the investigator been allowed to provide an answer hw would have explained that by the statement "these witnesses

were there," he meant that Young was able to present them, not because he had performed an investigation for mitigating evidence, but because these witnesses simply happened to be in the courtroom when Young was instructed to bring forth testimony during the sentencing phase of the trial (RAPC-150).

The remaining facts were brought forth, over appellant's objections, outside of the presence of the trial judge. Appellant, to date, does not know which, if any, of this testimony was considered by the court.

A history of mental disabilities was brought forth by Hillsborough County educators Felicia Williams (RAPC-191-215) and Scott Anderson (RAPC-216-233).

Their testimonies demonstrated that appellant was taught in the Educably Mentally Handicapped division of the Hillsborough County school system, was unable to defend himself from other students, and was often the victim of pranks where others would accuse him of improper behavior which accusations, although unfounded, Hill could not defend himself against (RAPC-199, 202, 222, 224, 225).

Williams offered particularly enlightening testimony when she revealed that Hill, as is "characteristic" of mentally retarded students, would admit to having committed acts which, in fact, he had no knowledge of (RAPC-202). (This testimony was offered to the court in light of statements made by appellant prior to trial and used to establish his purported guilt.)

Numerous pieces of evidence were offered to the court to show that appellant's history of mental/psychiatric disability continued throughout his life. They were consistently refused by the court and proffered. Appellant requests this Court to review these proffers and find them to be relevant.

Appellant offered a report from then Hillsborough County Jail nurse C. Todd (RAPC-539-745 at D-1). (Todd could not be located at the time of appellant's hearing.)

Nurse Todd's report indicates that she requested Hill be evaluated while he was incarcerated pending trial. Hillsborough County Medical Health Center psychiatrist, Dr. Bhatty, recommended then that Hill receive psychiatric evaluation.

Also offered were reports compiled upon Hill's arrival at Florida State Prison in early 1981 by psychologist Robert Moore and Classification Specialists John Warren and M. W. Pike (RAPC-539-745 at D- 2 & 3). They found the following:

(a) memory impaired;

(b) possible organic brain deficiencies;

(c) inability of appellant to understand the purpose of the classification interview;

(d) difficulty in understanding "his present situation" of being incarcerated; and

(e) inability to think in abstract terms.

The deposition of Robert Austin Sullivan was also proffered (RAPC-746-784). The deposition had been taken prior to Sullivan's November 29, 1983 execution. Notice

had been given to the State, who chose not to attend.

Sullivan, who studied at the University of Miami for four years, talked with Hill upon his arrival at Death Row at Florida State Prison in Starke, Florida. He recalled that Hill "understood tht he was on death row, but he found it very, very difficult to understand anything else related to how he got here or why he is here," (RAPC-746-784; p.6).

Sullivan further commented that, "over this entire period of time, we have addressed his case probably literally for hundreds of hours, at various times at great length. Of course, with my knowledge of the case increased from other sources as well. However, very, very little of the information itself was I able to get directly from James, and some of that information proved to be inaccurate. James had almost no extensive knowledge of what went on during the trial."

Sullivan also stated that "James had, you know, he may have been in jail, but I don't think he really had an idea of what he was there for. He had no idea about the death penalty or death row until he arrived here. . . James, you can explain something to him, but many times James will acknowledge that he understands it, but when you try to probe into it, he has zero understanding of it. He even just -- basic simple things that I have tried to explain to him, one has to go over them time after time after time before he even gets a basic understanding of it. Therefore, based

upon that experience, I just find it incomprehensible that he could possibly have understood what was going on because nobody ever explained it to him." (RAPC-746-784; pp.7-8).

Sullivan also commented that "James could not read writing outwards, but he can read words that are printed, which is easier for him. I was able to learn words that he was able to understand. Based upon my experience in the past with younger children, if his education level is above second or third grade, I would be very much surprised. It was very, very bad when I found him." (RAPC-746-784; p.10).

Sullivan consistently worked with Hill to help him understand why he was incarcerated, what had happended during his trial, and what would occur during post conviction proceedings. These efforts brought limited success. "James has a habit of, oftentimes, if someone says, 'Do you understand this,' he will acknowledge understanding it. However, when one probes deeper into his understanding of it, it turns out that he just does not understand it at all. . . James, as I said earlier, James can say he understands something, but in reality, he will not understand it. There is no doubt in my mind that he did not understand what was going on during his trial or what significance it had for him." (RAPC-746-784; pp. 17-18).

Sullivan,, attempting to demonstrate the extent of Hill's limited mental capabilities, provided several clear examples (RAPC-746-784; p.35, lines 8 through 25,p.36,p.37,lines 1 through 5). Although the trial court refused to consider

Sullivan's testimony, appellant suggests to this Court that it is particularly relevant and requests that the testimony be considered.

The testimonies of numerous expert witnesses were offered by appellant.

The reports of psychologists Dr. Arthur Norman (see RAPC-539-745;F-1)and Dr. Harry Krop (RAPC-534-536) were offered. The trial court refused to accept Dr. Norman's report and accepted Dr. Krop's report for the limited purpose of its applicability to trial counsel's failure to present mitigating evidence. Appellant contends this is error and these reports, which were proffered to the record, should be considered by this Court. (Dr. Norman's report was excluded as hearsay. Norman testified as an expert witness, using his report. The report is clearly admissable pursuant to Fla. Stat. 90.803 (6).)

Doctors Krop and Norman concluded that appellant was not competent to assist in his defense and to stand trial in November, 1980. This testimony, had trial counsel so requested, would have been available during and prior to appellant's trial.

Krop and Norman, both of whom have extensive experience in evaluations of retarded persons and examinations into competency to stand trial, independently of each other found Hill to have an I.Q. of 66.

Dr. Krop further related the following.

> Neurospychological screening supports a diagnosis of organic brain damage which is primarily manifested in deficits of memory, reasoning and conceptualization. The results of the WMS indicate a Memory quotient of 48 (average=100), a score even lower than that expected from an individual with Mr. Hill's I.Q. He was unable to recall any details from two simple stories read to him ninety minutes earlier, indicating a significant memory dificit, particularly for verbally presented material. His presentation of his history supports these deficits as he was unable to provide accurate information concerning events in his past.
>
> The current psychological evaluation certainly reveals that Mr. Hill is a mentally retarded individual (I.Q. = 66) who would not have the ability to design, execute or cover up any detailed plans.
>
> Current testing shows that Mr. Hill's recall capacity is inaccurate for events occurring from ninety minutes to twenty-four hours in the past. It is even more significantly impaired for events and details occurring more remotely. Thus, it is highly unlikely that Mr. Hill possessed the capacity to testify relevantly at the time of his trial or to adequately assist his attorney in all phases of the defense preparation.

Dr. Norman's testimony related numerous relevant findings. He stated in his deposition that "James was about as incompetent to stand trial, in my professional opinion, as anyone that I have seen except for several people who are actively hallucinating at the time of the interview." (RAPC-297.)

As noted in Norman's testimony and professional records pertaining to appellant, the doctor further formed numerous opinions pertinent to the actual defense of appellant and to presentation of mitigating evidence. (See RAPC-539-745; pp 5-14.) Dr. Norman stated that, "My opinion is that James was not competent to stand trial. . . There is absolutely no doubt in my mind." (RAPC-303.)

Dr. Norman further concluded that James Hill could not assist in planning a defense, challenge witnesses or testify relevantly (RAPC-304).

When asked whether he had an opinion as to Hill's ability to formulate the intent requisite to premeditated murder Norman stated "I believe that James, it would be extremely unlikely approaching the probability approaching zero that James could premeditate any sort of crime and carry it out regardless of what it was." (RAPC-305.)

Appellant presented testimonies from attorneys Elliot Metcalfe (RAPC-260-288) and Larry Spaulding (RAPC-234-259), both experienced in defense of capital cases and post conviction relief.

Metcalfe and Spaulding testified that trial counsel's representation was measurably below that of effective assistance in his failure to investigate Hill's competency and his failure to investigate available testimony for mitigation in sentencing. Within the confines of this Court's holdings in Knight v. State, 394 So.2d 997 (Fla. 1981). The witnesses continued that, having familiarized themselves with the testimony offered during the hearing on The Motion, that the presentation of the testimonies would likely have affected the outcome of appellant's trial (RAPC-242-249, 251, 270-271, 274, 276, 278-279).

ISSUE ONE

APPELLANT WAS DENIED A FULL AND FAIR HEARING ON HIS CLAIM FOR POST-CONVICTION RELIEF

Hearing was set on the Motion in front of the trial court on April 19, 1984. The trial court denied Appellant an adequate, full and fair hearing, denied Appellant the right to present relevant evidence, and decided the motion against the clear weight of the evidence. For these reasons and others, Appellant was denied a full and fair hearing.

Appellant's claims on the Motion were clearly stated and proven.

Appellant alleged violation of his Constitutional rights because he was tried before a jury for the charge of first degree murder while Appellant was not competent to stand trial. Appellant further alleged that he received ineffective representation in violation of his Constitutional rights because trial counsel failed to investigate the issue of Appellant's competency when such investigation was clearly required. Appellant, lastly, alleged inefficient representation by trial counsel at trial during the guilt and sentencing stages.

To support his claims, Appellant relied upon the tests of numerous expert and lay witnesses, medical records affadavits, law enforcement records and other pieces of evidence.

The trial judge allowed Appellant to present only two witnesses in the court's presence, trial counsel Young and defense investigator Marciniak. The court, over objection by Appellant's counsel, mandated that any other witnesses offered by Appellant would be presented only by deposition outside of the court's presence (RAPC 78-89, 92-93, 115).

This procedure precluded the judge from judging credability of witnesses, properly accessing weight to be given to testimonies and precluded Appellant from obtaining ruling on admission of evidence prior to the date of the court's final ruling. The judge directed the parties to return to court on the following Tuesday at which time he would finalize his ruling.

The return to court on that Tuesday was, however, a mere formality. Judge Coe repeatedly made it clear that he had no intention of reviewing Appellant's presentation in a fair and impartial fashion as it was the opinion of the court that Appellant's witnesses were not relevant. In fact, it was the judge's opinion that decision of the trial counsel was not reviewable by witnesses in retrospect (RAPC 57, 60, 63, 78, 81, 90, 93, 94, 96, 97, 102, 105).

The trial judge clearly evidenced that he was not interested in properly weighing the evidence and rendering a fair and impartial verdict.

"I don't believe that any of that needs to be heard . . . My impression is that it is Mr. Young's decision as his attorney to decide whether he is or isn't competent," (RAPC 60)

"If you have eighty-three people that examined the defendant and found him incompetent after the trial, it still comes to a question of whether or not what the lawyer thought." (RAPC 78)

"I am not going to review the depositions of these people because I feel the law is it is a judgment call for the lawyer, and it doesn't matter how many people you bring in here after the fact, the fact of finding of guilt by the Jury. It is still a judgment call by the lawyer." (RAPC 84)

"But they are not relevant. The question is, assuming all that you say is true, I mean we assume it for the sake of argument, that is the reason that I say that I don't need to listen to it. What does that have to do with Mr. Young?" (RAPC 96-97)

When asked by counsel for Appellant as to when the court intended to give it's rulings, Judge Coe responded: "Anytime you want me to. I am not being facetious. I will give the ruling anytime you want me to give it." (RAPC 102)

"So we can understand each other procedurally, if you want me to rule now I will rule now. If you want to go take your depositions, have them typed and have me read them, I will rule after that." (RAPC 105)

Although the judge, for the record, finally stated he would read the depositions, he clearly demonstrated that the review would not be fair and impartial.

At no time, during or after the proceedings on April 19 and April 24 when the court's ruling was finalized, did the judge ever indicate which, if any, depositions he had read or what rulings had been made on the various objections and motions contained therein.

Since the trial judge precluded himself from being able to properly weigh the credability of witnesses presented, it is the position of Appellant that the testimony presented must be treated as though the trier of fact allowed the witness full credability.

The prejudice, on this point, is clear. Had the trial judge presided over the testimony in person, Appellant would have been able to know, at the time of presentation, the weight and credability afforded to each witness and then be in the position to evaluate whether additional witnesses and evidences would be advantagous.

The trial judge also improperly prevented Appellant from entering into evidence several relevant and necessary testimonies and items of evidence.

Prior to the hearing, counsel for Appellant was aware that trial counsel had failed to perform <u>any</u> investigation for presentation of mitigation during sentencing.

During examination, trial counsel attempted to remain

vague on this point and to give general denials to the allegation. Appellant therefore called to the stand Tek Marciniak. Through Marciniak's and Young's testimonies it was established that Marciniak had been the defense investigator and handled the investigation.

Marciniak explained that he and trial counsel had performed no investigation into mitigation (RAPC 75). The investigator, when asked by the State about the fact that Young had called five witnesses during sentencing, stated: "These witnesses were not the product of going out and doing an investigation. These witnesses were there." (RAPC 76) Counsel for Appellant than attempted to allow Marciniak to complete the statement by fully explaining the meaning of his statement "These witnesses were just there."

From prior interviews with Marciniak counsel was aware that it was his test that when Young appeared for sentencing presentation on November 7, 1980, he had simply looked through the courtroom and without prior consultation, called witnesses to the stand who happened to be in attendance (RAPC 77). The trial judge refused to entertain this test, and thereby prejudiced Appellant's ability to obtain a full and fair hearing and compile a complete hearing record (RAPC 77).

The trial judge further refused to allow the investigator to testify as to his observations of the effectiveness and ability of Appellant's attempts to communicate with and assist his attorney, Ronald Young (RAPC 67).

Young, being the target of much of the Motion, was

a biased witness to the point that the court allowed him to be treated as a court's witness during examination. Appellant was not viewed by counsel, based on psychological examinations, as competent. Therefore, Marciniak was the only competent and unbiased witness to these communications between Hill and Young. The trial judge's ruling therefore precluded Appellant from presenting relevant and vital testimony in this regard.

Appellant was further denied full and fair hearing by the trial judge's ruling to admit the report of Dr. Harry Krop, other than for purposes of mitigation (RAPC 503-504).

Counsel for Appellant had, in good-faith, entered into a stipulation with Assistant Attorney General Theda Davis that Appellant would be allowed to enter the report of Dr. Krop into evidence in lieu of Dr. Krop's personal appearance (RAPC 7, 8, 9, 502, 503). Davis subsequently denied recalling the stipulation. At this time, Dr. Krop's personal appearance could not be obtained as he was in Gainesville, Florida and the hearing was in progress in Tampa. The court took Appellant's offer of the report into evidence under advisement and did not issue its ruling until April 24, 1984, minutes before the judge finalized his ruling

denying the Motion. This precluded Apellant from being able to utilize extremely relevant and vital evidence.

The judge's statements, cited supra, clearly indicate the court based its ruling on inaccurate interpertations of the law even though counsel for both parties cited the court the appropriate case decisions (RAPC 58, 59, 78, 84, 96, 97).

The trial judge utilized a procedure that precluded full and fair evaluation of the credability of Appellant's witnesses. That put the trial judge in between one of two positions. Since he could not fairly evaluate credability he had to either disregard the testimonies or give full credit to them. If he disregarded them this again deprives Appellant of a full and fair hearing. If full credit and weight was allotted the trial judge would be required to grant Appellant's Motion in light of the State's failure to sufficiently rebut the evidence under Knight. In this latter instance, the trial judge's denial is erroneous as being against the clear weight of the evidence.

Since the trial judge issued no finding of fact and failed to place on the record whether he reviewed the depositions and what evidentiary value he attributed to them Appellant is denied due process as the record is not subject to review.

Lastly, the court's refusal to accept various relevant affadavits, reports, etc. offered by Appellant and

identified as RAPC 537-784 was in error and deprived Appellant of a full record and full and fair hearing. Included in these documents was a deposition of the late Robert Sullivan. The deposition had been taken prior to Sullivan's death to perpetuate testimony. The State had been noticed and chose not to appear.

Sullivan's observations of Appellant at Starke, Florida were probative of Appellant's competence and exclusion of the document deprived Appellant of a full and fair hearing.

ARGUMENT

ISSUE TWO

APPELLANT WAS TRIED BEFORE A JURY FOR MURDER IN THE FIRST DEGREE WHILE HE WAS NOT COMPETENT TO STAND TRIAL. THIS DEPRIVED HIM OF EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Every Defendant is constitutionally entitled to a fair trial under the concept of due process. Trial and conviction of a legally incompetent defendant violates that constitutional right. Drope v. Missouri, 420 U.S. 162 (1975). To determine whether a defendant is competent, the Supreme Court of the United States has fashioned a two-part test: Does the defendant have: (1) present ability to consult with his lawyer with a reasonable degree of rational understanding; and (2) a rational and factual understanding of the proceedings. Dusky v. United States, 362 U.S. 402 (1960). Dusky is applicable to state courts. Bolius v. Wainwright, 597 F.2d 986 (5th Cir. 1979).

Accordingly, the statutory criteria to determine whether a defendant is competent to stand trial found in Rule 3.211 Florida Rules of Criminal Procedure, is mandated by the United States Supreme Court decision of Dusky. The issues to be considered are:

> 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 factual, understanding of the proceedings against him.

This Court, in Lane v. State, 388 So.2d 1022 (Fla. 1980) held that "a person accused of a crime who is incompetent to stand trial shall not be proceeded against while he is incompetent." (Emphasis added.)

Case law further permits appellant to demand, via his post conviction relief motions, retrospective determination of competency. Fowler v. State, 255 So.2d 513 (Fla. 1971); State v. Williams, 9 F.L.W. 534, ____ So.2d ____ (1st DCA, Case No. AR-445, March 8, 1984).

When a defendant's serious mental impairment is obvious, the trial court has an obligation to hold a competency hearing on its own motion. Acosta v. Turner, 666 F.2d 949 (5th Cir. 1982). See also Drope, supra. Failure by the defendant to demand a competency hearing at trial is not a waiver of his right to do so. Where there is a post conviction diagnosis of factors which would case "real, substantial and legitimate doubt" on a pretrial determination of competence, a subsequent hearing is required. Pride v. Estelle, 649 F.2d 324 (5th Cir. 1981). The United States Supreme Court held in Pate v. Robinson, 383 U.S. 375 (1966) that where failure to hold a competency hearing could not be cured by a retroactive determination of competency in the original proceeding, a completely new trial was required.

As indicated above, the assurance that one will not be tried before his peers while incompetent is not a right which ceases with a defendant's failure to demand evaluation. The trial court has the clear responsibility to conduct a hearing

to determine competency when such reasonably appears necessary. Lane v. State, supra at 1025.

> Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.

420 U.S. at 180-181, 95 S.Ct at 908.

In Drope counsel for defendant had suspicions about the defendant's competency but had failed to move for a competency hearing. A psychiatrist had suggested psychiatric treatment, and defendant attempted to kill himself during trial. The Supreme Court of the United States held that under these facts it was error to fail to inquire into defendant's competency. See State v. Green, 395 So.2d 532 (Fla. 1981); Christopher v. State, 416 So.2d 450 (Fla. 1982) (Court has responsibility to conduct a hearing on competency if it reasonably appears necessary.)

In Lane none of the three medical experts "were able to say that the appellant was competent to stand trial," (at 1025) although appellant had been found competent nine months prior to trial. This Court found that the record presented "doubt concerning the appellant's present competency at the time of trial," (at 1026).

The record in the instant case demonstrates infinitely stronger evidence that, (a) James Hill was not competent to stand trial in November, 1980, and (b) the necessity for a competency hearing during trial reasonably appeared necessary.

The expert opinions of Doctors Norman and Krop speak for themselves. It should be noted that the State presented no testimony from any qualified mental health care personnel on this issue. The State's sole witnesses were three deputies (RAPC-351-367, 372-413). However, they only observed appellant during custodial interviews and the extent of their conversations with appellant included superficial discussions of appellant's actions on June 22, 1980, enquiries into bail and appellant's concern as to whether the jail would be feeding him that evening.

The testimonies of educators Williams and Anderson, supra at 13-14, establishes evidence of appellant's incompetence years before his arrest, and the observations of nurse Todd and Dr. Bhatty update the existance of mental infirmity to the exact time of appellant's pre-trial incarceration.

Proffered medical reports dating as far back as 1975 (RAPC-539-745 at H) demonstrate a record of appellant's retardation.

Dr. G. Smith, University Community Hospital, on October 30, 1975, wrote that Hill appeared and acted "mentally retarded."

Dr. A.C. Gipson, also at University Community Hospital on October 30, 1975, stated that, "I thing this is probably a retarded individual who has had the recent onset of grand mal seizures."

Nurse Todd at the Hillsborough County Jail observed that Hill "seems retarded" (RAPC-539-745 at D-1).

Even the medical and non-medical personnel at Florida State

Prison, shortly after Hill's conviction, observed pertinent incapacities.

Dr. Moore noted that appellant could not accurately relate even the place of his birth, appeared to have organic brain damage and had doubtful ability to think abstractly (RAPC-539-745 at D-2).

The findings made during classification evaluation at Florida State Prison, supra at 14, show the existance of an unbroken chain through and beyond appellant's trial.

This Court, in the Lane decision at 1025, relying on Pate v. Robinson, 383 U.S. 375 (1966) stated:

> Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient.

Notwithstanding the prior evaluations of appellant leading to his being determined mentally retarded (Lane also was mentally retarded, Lane at 1024), Hill's demeanor at trial was sufficient to notify the court of the need for a competency evaluation.

Investigator Marciniak was present with appellant throughout the trial and described Hill's courtroom behavior during his recent testimony.

> "On one particular instance when a member of the audience laughed in response to a witnesses' answer, Mr. Hill got extremely upset and stood up or began to stand up and look towards the person and said, 'Stop laughing at me,' which

> we told him to be quiet, sit down. On another instance when the jury returned with the guilty verdict, when the verdict was read and he was found guilty, Mr. Hill looked towards the audience, again, I believe towards members of his family and smiled like this is fun."
>
> When the jury returned he [Hill] sat there and he crossed his fingers, fingers of both hands, and after the recommendation when he was told to approach the Bench, he stood in front of the Bench with his hands behind his back and his fingers crossed. After he was sentenced to death he returned to the table and he said to me, 'How did I do?'
>
> I just feel that he didn't participate in what was going on. He didn't seem to be aware of what was going on and, although, he may have made odd comments which specifically I can't remember, he didn't seem to be actually involved in the proceedings. He was staring off into space, so to speak."

(RAPC-66-68.)

Marciniak additionally recalled that appellant even laughed out loud during various proceedings druing trial (RAPC-74).

Appellant's unusual mentality was so obvious that the prosecutor, in closing argument, described him to the jury as "a twenty-two year old man in a child's body. . . That is his mentality." (RDA-703.)

The investigator saw it, the prosecutor saw it, the trial court and trial counsel should have seen it.

(Even Commissioner Scriven, at the conclusion of appellant's clemency proceedings, apparently saw the obvious red flag when he inquired "was the question raised in trial or before trial as to his competency to stand trial.?") (RAPC-539-745 at C-2).

The law is clear that appellant has a fundamental guarantee not to be tried when he is not competent to stand trial. The law was not followed in the instant case and appellant therefore suffered injury which is reparable only by a new trial where determination that he was competent to stand trial cannot and was not achieved.

The trial court erred in its denial of relief to appellant on this issue.

ISSUE THREE

TRIAL COUNSEL FAILED TO RENDER EFFECTIVE REPRESENTATION BY FAILING TO REASONABLY INVESTIGATE THE ISSUE OF APPELLANT'S COMPETENCY TO STAND TRIAL AND ASSIST IN PREPARATION OF HIS DEFENSE AND THE ISSUE OF APPELLANT'S SANITY AT THE TIME OF THE ALLEGED OFFENSE. APPELLANT WAS THEREFORE DEPRIVED OF HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

It is well established that the Sixth Amendment guarantees not only the right to an attorney but the right to "reasonably effective assistance" of counsel. Powell v. Alabama, 287 U.S. 45,77 L.Ed 158, 53 S.Ct. 55 (1932); Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 70 L.Ed.2d 650 (1980). The federal and state courts are in disagreement, however, as to an appropriate test for the determination of the effectiveness of counsel.

The Supreme Court has granted certiorari to review the decision of the Fifth Circuit in Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B, 1982)(en banc) cert. granted, 51 U.S.L.W. 3685 (U.S. June 7, 1983), which provides a more flexible standard for determining ineffective assistance of counsel claims in death penalty cases than that which was established by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981).

In determining whether a defendant has been provided with reasonably effective assistance of counsel under Knight, the courts must adhere to the following four-step approach:

(1) the act or omission upon which the claim is based must be detailed in the appropriate pleading; (2) the defendant has the burden to show that the specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel; (3) the defendant has the burden to show that the act or omission when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceeding; and (4) in the event that the defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the State still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. The Washington standard merely requires a defendant to show that the ineffectiveness "resulted in actual and substantial disadvantage to the course of his defense" but not necessarily that the "disadvantage determined the outcome of the entire case." Washington v. Strickland, supra; King v. Strickland, ____ F.2d ____ (11th Cir. Case No. 82-5306, September 2, 1983).

However, in that Knight is still the accepted standard set by this Court, appellant will utilize the Knight standards in regard to his claims of eneffective representation and submits that he has clearly established each element under that holding.

A.

The Specific Acts or Omissions Were Detailed in the Motion

The Motion contained at least five specific deficiencies in trial counsel's representation as it pertained to counsel's failure to investigate and present required evidence relating to appellant's competency to stand trial (The Motion, Issue II). The Motion was served on the State prior to the "hearing" and the State did not challenge the sufficiency of appellant's factual allegations. Thus the first element of the Knight test has been established and the State cannot argue otherwise in light of its statements to the trial court (RAPC-4).

B.

The Acts or Omissions Were Proven to Be Substantial Deficiency Measurable Below That of Competent Counsel

The fact that counsel's representation in this regard was measurable below that of competent counsel appears quite clear on the record.

Counsel was on notice from the outset that competency of his client was at issue.

Attorney Spaulding noted, in his testimony (RAPC-243), that the mere fact that counsel is retained to represent a twenty-two year old man accused of the rape and murder of a twelve year old child presents counsel with a red flag that al likelihood exists that the client, if he committed the act,

suffers from a mental or emotional disability.

Attorney Metcalfe testified "I believe any attorney who has that type of offense. . . it is incompetence for that lawyer not to have that client evaluated in terms of competency and as to sanity." (RAPC-270-271.)

However, Ronald Young was not merely on notice that his client was accused of committing a psychologically deviant and abnormal act, he was actually aware of particular infirmities suffered by his client.

Counsel had been informed at the outset that appellant was retarded and suffered from epilepsy and grand mal seizures. He was aware that the client's retardation was so severe that the Hillsborough County school system had place in special classes for the mentally handicapped.

Young admitted that he had even discussed appellant's apparent mental and emotional abnormalities with his investigator, Tek Marciniak. However, the record is clear that after Young concluded that Hill understood the difference between right and wrong (this conclusion being made without the assistance of mental health care professionals) no further consideration of appellant's competence or sanity was expended.

Although Young admitted that appellant had "a hard time" effectively challenging prosecution witnesses and had only limited ability to communicate with and assist counsel in preparation of his defense no action was taken by Young.

Investigator Marciniak was even more candid than attorney

Young when he related that appellant could not assist in the preparation of his defense, that appellant could not even distinguish between the concepts of months and weeks, and that appellant did not even seem "to be aware of what was going on" during trial (RAPC-67).

It is not fathomable that an attorney could accept representation in a capital murder and, with knowledge of these facts, totally fail to investigate whether his client is even minimally competent.

It is then tragic when the client, having been sentenced to death, is finally evaluated by professionals who conclude "there is absolutely no doubt in my mind . . . that James was not competent to stand trial." (RAPC-302). Dr. Norman, who has performed at least 95 criminal evaluations for both prosecution and defense teams (RAPC-291-292), stated that "James was about as incompetent to stand trial, in my professional opinion, as anyone that I have seen except for several people who are actively hallucinating at the time of the interview." (RAPC-297).

Hill's ability to comprehend is so marked that Norman observed that after talking with Hill for a matter of minutes "if you really are interested in the answers and you don't want just a perfunctory response, I think you can pick up that James really doesn't know what is going on." (Defense investigator Marciniak commented that after his first meeting with appellant he realized he was mentally handicapped in

some fashion (RAPC-65).)

It was previously discussed in the second issue section of this brief the long list of persons,from Tampa hospitals to jail personnel to school officials to Florida State Prison officials, all of whom easily recognized that Hill was "retarded," "unable to defend himself," "mentally slow," etc.

Why did defense counsel drop the ball? Why wasn't a pre-trial competency examination performed? When counsel knew that "due to the defendant's limited communication skills he was not fully able to assist me in the preparation of trial (RAPC-537-538), why did he not request an evaluation?

The fact that counsel spent so little time with his client that the jail records show but one visit during the entire period of representation was certainly a factor (RAPC-539-745 at J). The fact that counsel considered appellant's ability to distinguish right from wrong a controlling factor as to competency obviously contributed (RAPC-37).

The fact that counsel obviously did not realize that the trial court's finding of indigency for costs allowed him monies to hire mental health experts also played a role (RAPC-20, 21).

Regardless, counsel's failure to understand the law and Florida rules of procedure do not excuse his flagrant neglect of his client's interests.

The law is abundantly clear that counsel had an ethical and legal duty, under these facts, to secure an evaluation of

appellant's competency to stand trial and his failure to do so constitutes a gross and flagrant omission constituting deficiencies measurably below that of competent counsel. Florida Code of Professional Responsibility, Cannon 6; Washington v. Strickland, supra; Young v. Zant, 677 F.2d 921 (Cal. 1970); Knight v. State, 394 So.2d 997 (Fla. 1981); Chapinau v. State, 442 So.2d 1024 (5th DCA 1983) relying on Torna v. Wainwright,649 F.2d 290 (5th Cir. 1981) ("Knowledge of the rules of evidence and basic proceedure is required in order to provide effective assistance of counsel.")

C.

The Acts or Omissions Were Substantial Enough to Demonstrate Prejudice

The prejudice suffered by appellant is clearly substantial enough to create a likelihood that the deficient conduct affected the outcome of the hearing.

It is inappropriate to burden this Court by repeating passages from earlier portions of this brief.

Doctors Norman's and Krop's opinions that appellant was not competent to stand trial carry an evidentiary impact that speaks for itself. If these opinions had been supplemented by the other available testimonies from Nurse Todd, Dr. Bhatty, Dr. Gipson, Dr. Smith, Mrs. Williams, medical and school records, etc., not only would the outcome have likely been affected, but the trial court would have been extremely hard pressed to

rule other than that appellant was not competent to stand trial and should be treated as directed by the Florida Rules of Criminal Procedure.

If appellant had been treated as was required by the facts and laws applicable to his case, the treatment would obviously have been successful or not successful. If the latter became the case his treatment would continue and appellant would still not be subject to execution.

If treatment was successful and Hill was then able to assist his defense team it is certainly likely that investigator Marciniak would have been able to perform a more effective examination. (See RAPC-68, where Marciniak states that appellant's inability to assist the defense team damaged Marciniak's ability to investigate and prepare a defense.)

Counsel's previously described conduct produced further prejudice. The psychological evaluations also concluded that appellant did not have the ability to form the intent requisite to premeditated murder (RAPC-305). The impact of this testimony an jury deliberations is certainly sufficient to present a likelihood that the jury would have at least returned a quilty verdice to a lesser included offense.

The testimonies of Doctors Norman and Krop and the other aforementioned witnesses further presented subsequent mitigating evidence for the sentencing presentation.

Therefore, counsel's deficient conduct created a prejudice that, at the very least, created a <u>likelihood</u> that the outcome was affected and, in the view of present counsel for appellant,

was so measurably below the standards of competent counsel that there can be no doubt that it caused James Hill clear and tragic prejudice.

D.

The State Had An Opportunity to Rebut

The State chose only to present three deputies who testified they noticed no mental infirmities about appellant when they interrogated him in June of 1980.

Sgt. Stokes (RAPC-397-413) candidly admitted that his interaction with appellant was brief and "I just more or less [was] sitting in there for security reasons and we talked about his tattoos on his arms and whether or not he would be fed." (RAPC-404-405.)

Stokes further stated that he attempted to explain to appellant the concept of Release on Recognizance but Hill could not understand, requiring Stokes to explain that James might be able to go home without giving money to anyone (RAPC-412-413).

The testimonies of Sergeants Gibson and Martelli related brief discussions with the death of Rosa Lee Parker where appellant basically said he had been with her and others skating and did not kill her.

These were the only testimonies presented by the State and are not sufficient to overcome appellant's evidence beyond and to the exclusion of a reasonable doubt.

ISSUE FOUR

TRIAL COUNSEL FAILED TO RENDER EFFECTIVE REPRESENTATION IN THE GUILT-INNOCENCE STAGE OF TRIAL FOR FAILING TO REASONABLY INVESTIGATE, PREPARE AND PRESENT RELEVANT AND NECESSARY FACTUAL ISSUES, THUS DEPRIVING APPELLANT OF THE RIGHTS TO EFFECTIVE REPRESENTATION AND DUE PROCESS UNDER THE FOURTH, FIFTH, AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Determination of this issue is controlled by the same legal standards cited at the outset of Appellant's Issue Two. In light of the fact that Appellant was prosecuted for the commission of a capital murder, the representation must be subjected to the strictest of scrutinies. Lockett v. Ohio, 438 U.S. 586 (1978); Knight v. State, supra.

The Motion sets out a plethera of acts and omissions in trial counsel's representation that were measurably below that of competent counsel and which demonstrated prejudice likely to have affected the outcome of the trial.

A.

THE SPECIFIC ACTS OR OMISSIONS WERE DETAILED IN THE APPROPRIATE PLEADING

Appellant adopts the position described in Appellant's brief at Issue Three Section A, supra.

B.

THE ACTS AND OMISSIONS WERE PROVEN TO BE SUBSTANTIAL DEFICIENCY MEASURABLY BELOW THAT OF COMPETENT COUNSEL

The indictment used to prosecute Appellant alleged that Appellant murdered the deceased "by choking her with his hands." The prosecution's case rested on the testimony of Medical Examiner Miller (cause of death), State's witnesses Munson

and Jackson, and a statement by Appellant surreptitiously taped by witness Munson.

Trial counsel failed to perform an effective investigation sufficient to prepare a defense in light of the evidence.

Counsel failed to consult experts to investigate avenues of defense. It is clear to the most remedial defense counsel that the statement purportedly given by Appellant, the opinion of Dr. Miller and the testimonies of Munson and Jackson were issues of paramount importance.

Young failed to consult any experts in the field of pathology as to the opinion rendered by Miller, supra at page 6.

Dr. Willie's testimony (RAPC 444-467) was that the facts were insufficient for a medical examiner to conclude that the deceased died of mechanical asphyxiation. Willie stated that such an opinion was nothing more than "reasonable speculation" (RAPC 475). He explained that the facts just as equally supported numerous other causes of death such as excessive blood loss and other soft tissue injuries (RAPC 476).

Counsel failed to question Dr. Miller on cross examination effectively. Miller, on deposition at page 8, had testified that his finding was also consistent with drowning as fluid in the deceased's pleurel cavities evidenced drowning. He testified (page 11) that drowning and strangulation was "probably" the cause of death.

Dr. Willie's test would have been available to directly impeach Miller's testimony. However, trial counsel did not seek the assistance of a pathologist - or any other expert for that matter (RAPC 22).

Young failed to investigate available testimony to explain the apparently incriminating statement made by Appellant to Munson. The testimony which was available to assist is described supra at 9-12. This avenue, as with the other afore described potential defenses, was never crossed by trial counsel. Failure of trial counsel to investigate available lines of defense affords Appellant relief through post-conviction proceedings. Washington v. Strickland, supra; Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979); Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979).

Young failed to bring out any of the plethora of available cross-examination of witnesses Munson and Jackson, supra at pages 7, 8 and 9. Young failed to, during the guilt or innocence phase, bring forth testimony from Tommy Deal who was able to testify that it was Danny Munson who was with Rosa Lee Parker on the evening of June 22, 1980 after Parker left the Deal home (RDA 745).

Vanessa Child and Diane Gant (RDA 746) able to testify to Munson's previously attempting to "molest" the deceased were not interviewed or called by trial counsel.

The failure to investigate scientific evidence has been held to be inefficient representation and prejudical. Weidner v. Wainwright, 708 F.2d 614 (11th Cir. 1983).

The keys to effective representation are pre-trial investigation and preparation. An attorney does not provide effective assistance if he fails to investigate sources of evidence which may assist in the defense. Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979).

The Eleventh Circuit Court of Appeals in Washington v. Strickland, supra, recently held that failure to properly interview clients and witnesses precludes counsel from making an informed assessment of available defenses and precludes counsel and client from intelligently discussing the realities of the case and, in such, constitutes ineffective representation. Citing the Florida Supreme Court Knight v. State, 394 SO.2d 997, 1001 (Fla. 1981) the court held that counsel has provided ineffective representation and the client has a right to relief pursuant to his motion for post-conviction relief where he has shown that counsel's sub-par representation created "a likelihood that the deficient conduct" created a substantial likelihood that the outcome of the trial was effected.

THE ACTS AND OMISSIONS WERE SUBSTANTIAL ENOUGH TO CREATE PREJUDICE

The prejudice is strictly one of fact. Appellant had limited availability of defenses and counsel failed to investigate any.

The credability of his two chief accusers was left intact. Young had available at his beck and call a bevy of facts to show the jury that, (a) Appellant's statement was not an admission but only the parrotting of a retarded man-child (supra at pages 9-12); (b) that the States's witnesses, Munson and Jackson, had given many blatantly inconsistent testimonies; and (c) the testimony of the prosecution's medical examiner was subject to substantial and damaging impeachment.

Where defense counsel fails to investigate any and all relevant issues the conclusion that Appellant was prejudiced to the extent of the standard in Knight is an inescapable conclusion.

The State was given opportunity to rebut and chose to present no testimony on point.

was guilty. She had not seen appellant for five years prior to trial. This was the extent of her testimony (RDA 754 - 759).

Young's fourth witness was Alma Hill, appellant's mother. Ms. Hill stated she did not believe her son to be guilty. She stated "he's not the brightest kid in the world", that appellant had epilepsy which kept him from keeping "a job long, and "never really gets into any trouble." She then read into the record a letter appellant wrote to her from jail. The letter contained no relevant data, saying only that he loved her and to "tell Linda to write."

On cross examinations she explained that her son, Gary, told her about a body in "the pits". That is the extent of her testimony. (RDA 761 - 770).

Young's last witness was Linda Parker Thomas, a seventeen year old girl who testified she had known appellant for five years and he was "very nice." She had dated Hill for three years and never known him to lie or be violent (RDA 761 - 770).

The above evidence is the unabridged total of Ronald Young's presentation.

The absolute lack of any quality in the testimony presented clearly supports investigator Marciniak's allegation that no preparation or investigation was done for the mitigation presentation.

ISSUE FIVE

TRIAL COUNSEL FAILED TO RENDER EFFECTIVE REPRESENTATION DURING THE SENTENCING PHASE OF APPELLANT"S TRIAL. APPELLANT WAS THEREFORE DEPRIVED OF HIS RIGHTS TO EFFECTIVE REPRESENTATION AND DUE PROCESS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A.

The Specific Acts or Omissions Were Detailed in the Appropriate Pleadings

Appellant adopts the position taken by appellant in Issue Two, section A.

B.

The Acts and Omissions Were Proven to Be Substantial Deficiency Measurably Below That of Competent Counsel

Failure of defense counsel to investigate, prepare and present available mitigating evidence on behalf of his client constitutes ineffective assistance of counsel. Strickland v. Washington, supra.

"The failure to contest or negate existance of aggravating circumstances and to present available expert evidence of defendant's mental and emotional condition in support of mitigating circumstances constituted substantial deficiencies and thus defendant was entitled to relief on his Motion to Vacate Death Sentence." Holmes v. State, 429 So.2d 296 (Fla. 1983).

Trial counsel's preparation for sentencing presentation

not only was a substantial deficiency measurably below that of competent counsel but it was, in fact, non-existent (RAPC - 65).

Counsel, as noted in the record and proffer, was able to offer five witnesses during mitigation. None of these were products of investigation but, instead, were witnesses who happened to be in the courtroom at time of sentencing (RAPC - 65, 76-77).

None of the witnesses were able to offer any effective testimony in mitigation. The following are their testimonies.

Doris Ensinosa testified that appellant used to work with her and was a good worker. He was courteous, truthful and never stole and she had not seen James in the last two years. Ms. Ensinosa had no further testimony to offer (RDA 747 - 750).

Angela Watts, a twelve year old child, testified she had known appellant for eight years and that they lived in the same neighborhood while James Hill rented an apartment from her mother. Angela told the jury the names and ages of her brother and sister and that they had skated with Hill in the past. She further said Hill never got into fights and she liked him. No further testimony was offered thru this witness (RDA 751-754).

Young's third witness was Angela's mother, Betty, who confirmed her daughter's testimony. She testified that appellant had drank coffee at her house before, that she felt him to be "a very nice man" and did not believe he

The next set of testimonies and evidence are those which were available had counsel performed any reasonably diligent investigation into mitigation.

Appellant had no significant history of prior criminal activity. Counsel, before the bench and out of the jury's hearing, stipulated with the State to the lack of a prior criminal history (RDA 741 - 742). This stipulation was entered after Young explained to the court that he did not know how to present this factor (RDA 742), thereby admitting that he was not familiar with the basic rules of evidence and proceedure. (Such a lack of familiarity is proof of ineffective representation. Torna v. Wainwright, supra; Chapman v. State, supra.)

If that was not enough, Young never did bring this stipulation to the attention of the jury or even comment upon it during arguments showing a total lack of preparation for sentencing presentation.

Witnesses Tammy Deal and Vanessa Child approached Young and offered testimony that would link State's witness, Danny Munson, with Parker on the day of Parker's death.

Judge Coe refused to allow the testimony and counsel failed to object to this ruling.

Defense counsel, in failing to investigate and present mitigating evidence, failed to present particularly relevant testimony from Melinda and Melissa Parker (RAPC - 659 - 784 at T). These testimonies showed not only a lack of prior criminal

history of James Hill but emphatically demonstrate that it was Hill who saved Melissa Parker from being raped. And of even more interest is the fact that the person that James prevented from raping Melissa Parker was one of his chief accusors and State's witness, Russell Jackson.

Counsel failed to present available psychological tests such as that which reasonably diligent investigations would have gathered.

Dr. Norman spoke directly to the issues of mitigation in his report (RAPC - 539-658 at F pages 5, 10 - 13) and in his testimony (RAPC 307 - 308).

The testimonies by Drs. Norman, Krop, Smith, Gibson et al as to appellant's retardation, 66 IQ, inability to premeditate and inability to think abstractly certainly were appropriate for sentencing presentation.

Counsel failed to bring easily available teachers and other professionals whose comments were also relevant to the jury's sentence recommendations.

Young further failed to provide competent representation by allowing prosecution co-counsel Guarisco to breach the previously established stipulation between Young and Ober without objection from Young. In the face of Ober's prior stipulation, Guarisco effectively instructed the jury that they were not bound to believe the evidence that Hill had no prior significant criminal history. Guarisco argued that the only evidence of this mitigation was testimony from

Hill and the jury was not bound to accept that testimony as credible. Young failed to object, request a mistrial in the proceeding or demand a curative instruction. Instead, he remained silent allowing Guarisco to flagrantly prejudice and inflame the jury and violate James Hill's right to due process under the United States and Florida Constitutions (RDA 780).

Counsel further remained mute while the prosecution argued that the jury consider statutory aggravating circumstances for which there was insufficient evidentuary support. Counsel thereby permitted the jury to be influenced to consider aggravating circumstances which were not supported by evidence and therefore violating James Hill's rights of due process. See Gregg v. Georgia, 428 U.S. 153, 198 (1976); Proffitt v. Florida, 428 U.S. 242, 253 (1976); Franklin v. State, 403 So. 2d 975 (Fla. 1981); Robles v. State, 188 So.2d 789, 793 (Fla. 1966). The prosecution was allowed to argue that the evidence was sufficient to establish that Rosalie Parker was killed by James during the commission of a sexual battery. The prosecution was also, without objection, allowed to request and obtain a jury instruction on felony murder to the same effect. The evidence presented to the jury was insufficient to support either the jury instruction or allow the State to present the above stated argument on aggravation.

C.

The Acts and Omissions Were Substantial Enough to Demonstrate Prejudice and the State was Given an Opportunity to Rebut

The prejudice to appellant has been clearly demonstrated. The jury was never presented evidence on any mitigating circumstance which the evidence was readily available but never searched for. This is impermissible. Holmes v. State, supra; Douglas v. Wainwright, Eleventh Circuit Court of Appeals, Case # 81-5927, September 19, 1983.

The State failed to present any evidence at hearing on the motion to rebut appellant's presentation.

The lawyer has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions. (ABA Standards, section 4 - 4.1).

In a factually similar case, one court wrote:

We note that "sentencing is a critical stage of the criminal proceeding at which the defendant is entitled to the

assistance of counsel." Gardner. Effective assistance at this stage, as at other stages, requires zealous, and not merely perfunctory or pro forma representation. As stated, petitioner's trial counsel failed to present any evidence of mitigating circumstances, although an array of witnesses to testify in mitigation would have been readily available upon proper investigation. An appeal to spare the petitioner's life could have been forcefully made through diligent efforts of his trial counsel.

We are thus faced with a situation where the defense attorney "put on what amounted to no defense at all," thereby making any showing of prejudice unnecessary. Voyles v. Watkins 489 F.Supp. 901 (S.D. Ga. 1978)

CONCLUSION

The Order of the Trial Judge denying the Motion to Vacate the Judgment and Sentence should be reversed and the Defendant should be granted a new trial. Alternatively, the Court should vacate the sentence of death.

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 to JIM SMITH, Attorney General, State of Florida, 401 South Monroe Street, Tallahassee, Florida this 28th day of April, 1984.

ATTORNEY