IN THE SUPREME COURT OF FLORIDA

JAMES DOUGLAS HILL, :

Appellant, :

v. : CASE NO. 65223

STATE OF FLORIDA, :

Appellee. :

REPLY BRIEF OF APPELLANT

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

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PRELIMINARY STATEMENT

Appellee State of Florida misstates the status of Hill v. State, 422 So. 2d 816 (Fla. 1982). Certiorari review was not granted by the United States Supreme Court; however, this is not synonomous with the assertion by the State that the "issues raised in that motion to suppress have since been rejected by the United States Supreme Court" (Brief of Appellee, p. 16).

ISSUE II

In its answer to appellant's assertion of his incompetency to stand trial, appellee State suggests that a report of Robert Moore, psychologist at Lake Butler Correctional Institution, holding a master of science degree, shows otherwise. The State relies on Moore's comment that James Hill was not mentally retarded which conclusion was based on an I.Q. test, the Beta, which is not an accurrate measure for an in-depth evaluation (RH-314).[1]

The standard for incompetency to stand trial is set out in Florida Rules of Criminal Procedure Rule 3.211(a); mental retardation is not an express criterion, although certainly it should be considered. Furthermore, what Moore's report does provide as to facts underlying those express criteria which are included in the Rule is ignored by the State. For example,that James had difficulty understanding some of the interviewer's questions, that information provided by James was unreliable, and that James was naive and immature. Some of the comments made by James were untrue; he has two younger siblings not one, he had recently been evaluated for mental health problems, and his siblings did not have speech problems. As stated by

[1]The State of Florida provides in its answer to appellant's argument on incompetency at trial that Robert Moore's report included the statement that Hill "related the events of trial" to him (Brief of Appell, pp. 6,]0). No where in that document can such a statement be found (R. 575-76).

Mr. Moore, none of the information given by James was verified so the interviwer would not have known if Jameswas capable of providing basic factual information about himself. Moore's screening test and evaluation simply was not an in-depth review and exploration such as the one done by Dr. Arthur Norman. Dr. Norman did extensive testing with the most reliable tools and with a firm grasp of James Hill's background. Yet despite Moore's handicap, the staff psychologist did conclude that James had certain mental deficiencies.

Moreover, Robert Moore's report could not have been considered by the trial court in its ruling on the motion for post-conviction relief which is the subject of this appeal. It was not used by the defense and only used by the State to impeach . It was not admitted into evidence. The defense did not at the hearing have an opportunity to confront Robert Moore by cross examination.

The State of Florida states that:

> Weighing the conflicting evidence, the trial court found that Hill had failed to prove by a perponderance [sic] of the evidence that he was incompetent at the time of trial.

(Brief of Appellee, p.11). In fact, the trial court denied the motion for post-conviction relief "as a matter of law" (RH-61). The trial court has not provided any clues as to the basis for its ruling. It certainly has made no specific findings as to appellant's competency at the time of trial.

ISSUE III

The State asserts in its brief (Brief of Appellee, p. 14) that "[T]here is no evidence in the record of any unusual behavior of Hill" at trial. This bald statement is contrasted by Tech Marciniak's testimony at the Rule 3.850 hearing in front of Judge Coe on April 19, 1984 (Initial Brief of Appellant, pp.39-40 citing RAPC-66-68). He testified that appellant thought the jury was laughing at him, that appellant laughed inappropriately during the trial, that appellant did not seem to be aware of what was going on at trial, and that he asked after he was sentenced to death "how did I do?"

ISSUE IV B

The failure to object to an instruction on felony murder and rape constituted ineffective assistance of counsel at trial and on appeal. The jury was instructed on both premeditated and felony murder (R. 713-14). The jury returned a general verdict of guilty (R. 732), without specifying whether it was felony-murder or premeditated murder.

There was no evidence that the victim was raped. The medical examiner specifically testified that the tests for rape were negative and there was no evidence of trauma to the genitalia (R. 322-25). Thus, there was insufficient evidence as a matter of law that the crime was committed and a verdict based upon felony

murder would violate the principles of Jackson v. Virginia, 443 U.S. 307 (1979). Under Florida law, without the proof of a corpus delecti, rape cannot be proven by a confession. Jefferson v. State, 128 So. 2d 132 (Fla. 1961). The question, then is where the jury verdict could be valid and could be unconstitutional, was it violative of the constitution to instruct on felony murder.

This question was answered in Zant v. Stephens, 103 S.Ct. 2733, 2745 (1973) relying on Stromberg v. California, 283 U.S. 359 (1931).

> One rule derived from the Stromberg case requires that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may has rested exclusively on the insufficient ground. The cases in which this rule has been applied all involved general verdicts based on a record that left the ground on which the jury's decision rested. See, e.g., Williams v. North Carolina, 317 U.S. 287, 292, 63 S.Ct. 207, 210, 87 L.Ed. 279 (1942); Cramer v. United States, 325 U.S 1, 36n.45, 64 S.Ct. 918, 935n. 45, 89 L.Ed. 1441 (1945); Terminiello v. Chicago, 337 U.S. 1, 5-6, 69 S.Ct. 894, 876-97. 93 L.Ed. 1131 (1949); Yates v. United States, 354 U.S. 298, 311-12, 77 S.Ct. 1064, 1072-73, 1 L.Ed. 2d 1356(1959).

Thus it is plain and clear that since there was no evidence to show that the victim was raped, a conviction of felony murder would be legally insufficient under Jackson v. Virginia. Since the jury was instructed that it could rely upon either felony murder or premeditated murder, and one of those grounds is legally insufficient, the conviction is invalid under the

principles of Stromberg, approved by the Supreme Court in Zant v. Stephens.

Trial counsel's failure to object to the jury instruction and to raise this issue on appeal constituted ineffective assistance of counsel. The Stromberg rule has existed since 1981, and has been applied by the Supreme Court at least five times since then. It is a well-settled principle of criminal law. The failure to raise such a well-settled principle obviously falls measurably below the mark expected of trial and appellate counsel. This failing also prejudiced appellant . Had it been raised on appeal, it constituted a sure ground of reversal. Had an objection been lodged to the jury instruction, it should have been sustained and half the possible basis for conviction would have been eliminated. It is not possible to say on which instruction the jury based its verdict, but the Stromberg line of cases seems to establish a per se rule of prejudice since it applies any time that the jury verdict may have rested exclusively on the insufficient ground. Moreover, it would be improper for the appellate court to later go back and determine that, despite the Stromberg error, the evidence was sufficient to sustain the conviction on the valid ground, since such a rule would blatantly violate Presnell v. Georgia, 439 U.S. 14 (1978).

Thus, it is clear that counsel was ineffective at trial and on appeal for failing to raise this sure winning issue and the conviction must be reversed.

Even if the verdict and conviction may stand, the sentence may not since there was never a clear jury finding that the petitioner intended to kill. This is true because, if the jury believed the murder was felony murder, it was not required to find intent to kill.

In Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982), modified on rehearing, 694 F. 2d 701 (5th Cir. 1983), the jury was instructed on both premeditated murder and accomplice liability. As in the instant case, the jury returned a general verdict of guilty. Despite the fact that the evidence tended to show that Clark was guilty of premeditated murder, the Fifth Circuit ruled that the verdict could not stand:

> Before the Constitution will allow this conviction and sentence, ... we must know that the jury found beyond any reasonable doubt that Clark personally, did have that mind to kill. The conspiracy instruction may not have been read by any juror as affecting the requirement that they find Colin Clark guilty of lethal purpose. On the other hand, the ... fact that a reasonable juror could have done so means that we must discount the possibility that the jurors did proceed as the trial court intended. See Sandstrom v. Montana, 442 U.S. 510, 519 (1979).

Id. at 78 (emphasis added).

The proof in Clark tended to show that Clark himself was the actual murderer, but the court could not be assured that the jury based its finding upon such a conclusion: "At no time during the trial or in the court's instruction to the jury was

it explained that a conspiracy alone to rob does not attach equal guilt and intent for all to a co-conspirator's act of murder." Id. at 78.

As in Clark, "we are left with a level of uncertainty and unreliability in the fact-finding process that cannot be tolerated in a capital case." Beck v. Alabama, 447 U.S. 625, 643 (1980)." Clark at 78.

Similarly, in Reddix v. Thigpen, ____F.Supp.____ (N.D. Miss. January 20, 1983), appeal pending, Case No. 83-4068 (5th Cir. 1983), where Reddix was sentenced to death based upon his liability as an accomplice, the district court granted the writ of habeas corpus.

Although the instruction in the instant case was felony-murder, not accomplice liability, the crucial similarity is that each instruction allowed the jury to find murder in the first degree without a specific finding of premeditation. While Florida is, of course, free to define first degree murder in such a way, Clark, 697 F.2d 699 (rehearing opinion), it may not impose the death penalty upon a conviction which was not based upon a premeditated murder, Clark, 694 F.2d at 78, because it leaves a "level of uncertainty and unreliability in the fact-finding process that cannot be tolerated in a capital case." Clark, 694 F.2d 75, 78 (5th Cir. 1982). Indeed, Justice White, drawing upon the carefully delineated language of Gregg v. Georgia, 428 U.S. 153 (1976) -- which approved the imposition of a death sentence only upon proof

that "a life has been taken deliberately by the offender," Gregg v. Georgia, 428 U.S. at 187 -- had expressly contended in 1978 "that it violates the Eighth Amendment to impose the penalty of death without finding that the defendant possessed a purpose to cause the death of the victim." Lockett v. Ohio, 438 U.S. 586, 642 (1982) (White, J., concurring). The finding must be clear and unequivocal.

If the jury in fact found felony murder, and if this was permissible, then from the point of view of appellant's individual and personal culpability -- what he did and what he intended to -- appellant is not rationally differentiable from either Enmund or Coker. Coker v. Georgia, 443 U.S. 584 (1977). His proven deliberate conduct created no greater danger of death to others than did Enmund's or Coker's. It was fortuitous, as in Enmund's case, that death of another occurred here, but not in Coker's case. The question is whether that fortuity makes a constitutionally decisive difference.

We submit that it does not, and cannot in light of the consistent emphasis upon individual culpability -- upon the characteristics of the particular offense and offender -- that jurisprudence of capital punishment since 1972. E.g., Enmund v. Florida, 102 S.Ct. 3368 (1982); Eddings v. Oklahoma, 445 U.S. 104 (1982); Roberts v. Louisiana, 431 U.S. 633 (1977); Lockett v. Ohio, 438 U.S. 586 (1978). Once it is recognized that the Eighth Amendment forbids the treatment of "all persons

convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentitated mass," Woodson v. North Carolina, 428 U.S. at 304 (plurality opinion), then appellant's technical guilt of first-degree murder by virtue of the felony murder legal doctrine can no longer warrant classing him among the Greggs, Gregg v. Georgia, 428 U.S. 153 (1976), rather than admitting his factual identity with Enmund and Coker, for purposes of the Constitution's prohibition of disproportionate and excessive punishment. To distinguish appellant from them upon grounds that have no bearing on the individual culpability and fitness for punishment of each would trivialize the Eighth Amendment by a "dialectic ... empty of reason," Trop v. Dulles, 356 U.S. 86, 125 (1958) (Frankfurter, J., dissenting).

As in the case of Enmund and Coker, if appellant's verdict was based upon felony murder, he committed a serious felony that does not contemplate the taking of human life. All of them thereby created a risk -- which in neither case was deliberately incurred or even foreseen -- that, by setting in train a series of events, the death of another person might result. Fortunately, in Coker's case the risk did not materialize. In appellant's case, it did. That is the only difference between them.

Surely, "that degree of respect due the uniqueness of the individual" which requires "individualized consideration as a constitutional requirement in imposing the death sentence,"

Lockett v. Ohio, 438 U.S. at 605, forbids the subjection of appellant alone to capital punishment by happenstance, when nothing he has intended sets him apart from Coker or other non-homicidal felons in regard to "relevant facets of the character and record of the individual offender or the circumstances of the particular offense," Woodson v. North Carolina, 428 U.S. 304. The whole thrust of this punishment that focuses upon the individual offender and his offense as the basis for determining the appropriateness of a death sentence requires that, unless appellant's case can be distinguished from Coker's in dimensions relevant to personal culpability, it cannot be constitutionally distinguished at all. And plainly, it cannot.

Trial counsel was ineffective for failing to object to the felony murder instruction on this ground at trial. These principles represent that fundamentals of death penalty litigation. The failure to recognize them when they have been established constitutes conduct measurably below the standards of competent counsel in a death penalty case. The prejudice, obviously, is overwhelming. Even the Florida Supreme Court was lulled into finding that petitioner raped the victim. The jury could easily have done the same. If they did, the death sentence could not stand.

ISSUE V C

Appellee State of Florida stated in its answer brief that whether to present certain evidence is a tactical decision within

counsel's discretion citing Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983); Washington v. Strickland, 693 S.2d 1243 (5th Cir. 1982); Armstrong v. State, 429 So. 2d 287 (Fla. 1983); and Straight v. Wainwright, 422 So. 2d 827 (Fla. 1982) (Brief of Appellee, p. 17).

The more precise rule extracted from these cases is that only reasonable trial strategies and tactics are approved: Stanley (reasonable strategy); Strickland (reasonable choices based on reasonable assumptions); Armstrong (trial tactics within the standard of competency); and Straight (within the range of reasonable tactical choices).

CONCLUSION

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

Respectfully submitted,

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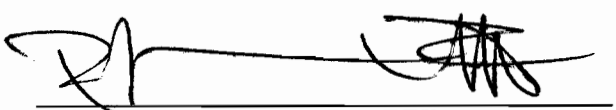
CERTIFICATE OF SERVICE

I certify that a true and correct copy of this reply brief has been furnished by hand to JIM SMITH, Attorney General, State of Florida, 401 South Monroe Street, Tallahassee, Florida on April 30, 1984.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