

IN THE SUPREME COURT OF FLORIDA

WILLIAM MICHAEL SQUIRES,

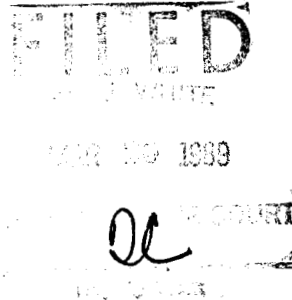
Petitioner,

v.

Case No. 72,776

STATE OF FLORIDA,

Respondent.



BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

An evidentiary hearing was held before the Honorable John P. Griffin on April 8, 11, 12 and 13, 1988 pursuant to this Court's mandate in Squires v. State, 513 So.2d 138 (Fla. 1987). The mandate limited the hearing to two claims: ineffective assistance of counsel and discovery violations.

The two claims of ineffective assistance of counsel concerned defense counsel's failure to interview Donald Hynes and to challenge incriminating statements made by the defendant. The discovery violation claims were limited to whether the state should have furnished the defense a police report containing a statement from Donald Hynes and whether Detective Peterson's deposition was misleading to the defense.

The first witness called was Donald Hynes. Hynes testified he met Squires in prison in 1978 at Avon Park. (R 8 - 10) While there, he met Terry Chambliss, who was a good friend of Squires. (R 13) Hynes turned down custody reduction because he didn't want to transfer from his two man cell with Mr. Squires. He was the cell mate of Mr. Squires for over a year. When he came up for another hearing Squires told Hynes it would be best for Hynes to move out of his room. Hynes then moved next door with a friend of his named Nick Ficarrota. He lived there for two or three months before Squires talked him into accepting the custody reduction. (R 14)

Hynes was released in 1979 and went to live with his mother at , Tampa, Florida. He did not have any contact with Squires until Squires made work release. (R 15) Squires called him on the phone and they talked a couple of times. Once Squires escaped Hynes would see him for a day and be gone for a month and then would come back. (R 16)

Hynes testified that during this period of time, he and Mr. Squires did not commit a murder. And that to his knowledge Mr. Squires did not commit a murder. Hynes and Squires committed the Thoni robbery. After the robbery, they pushed Squires' car behind Terry Chambliss' house. (R 17) During this period Squires called him and said he had to meet with him. They met at the Shell Station at Westshore. Hynes was unsure of the date. (R 18) Squires had a guy named Ed Fowler with him. Hynes had met Ed Fowler before, but he was not sure if it was a couple of days or a month before. (R 19) They went to Phillippi Park and had a six pack of beer. Ed stayed in the car, while Squires and Hynes went for a walk. (R 20)

Squires said that Ed had killed somebody, that he had used his car and that Ed was a nuisance and Squires told him:

"Remember the time I told you about the cop, you know, I have already had to keep him from getting arrested once. Now he had killed somebody, you know? That guy is going to get me in trouble. He is bad news."

Squires asked Hynes if he should kill Fowler or just get rid of him. (R 21) Hynes talked Squires out of killing Fowler and instead Squires agreed to just drop Ed off somewhere. They

-dropped him off at the Hillsborough Drive Inn saying they would be back to pick him up after the movie. That was the last time they saw Ed. Hynes and Squires then went to Terry Chambliss' house. (R 22)

At Chambliss', they discussed robbing the Thoni Station. Hynes went with Squires and they robbed the Thoni Station. (R 23) Hynes drove the car, he was a nervous wreck. Hynes testified there were so many things going on in his mind at the same time that he was just jumpy. (R 24) They had Squires' Camaro or Firebird. They left the Thoni Station about dusk. It was four or five blocks from Chambliss' house, less than five minutes. (R 25) After the robbery, they went back to Terry's house and went inside. Squires counted the money out. Hynes received thirty something bucks out of the deal. They had to hide the car: Terry said they could push it behind the house, so he, Mike and Terry pushed the car between the trees behind the fence. Then Terry took him home. Hynes was unsure of this point. He testified, "[O]r did we. I don't remember, I might have, I remember pushing the car twice if I'm not mistaken. We pushed it twice. I think we pushed it back out to where it could be gotten out." (R 26) Hynes never told the officers about hiding the car in Chambliss' house. (R 53) Hynes testified that he had seen the station numerous times; he lived in Tampa all his life. The station just sold gas. It was located off Sligh Avenue and Dale Mabry. (R 56)

Hynes testified that a day or two before the robbery, Squires and a few other people went with him to a motel off Dale Mabry just past Kennedy. (R 59) Squires signed the register, and they stayed overnight in the motel. They stayed there all night and part of the next day. The next time he saw Squires was the day that the Thoni Station was robbed; there was a day in between the two periods. They were in the motel room, they were all friendly and after they left the motel room, Mike came back a couple of days later. (R 28 - 29, 60)

Hynes was on parole, and he reported to his officer every month to fill out a report. After he was released, he was contacted by Squires' attorney. But, he never had an opportunity to actually talk to him; he was supposed to meet him upstairs in the courthouse. If he had been subpoenaed by Squires' attorney he would have testified. (R 44) Hynes testified that the reason he was testifying now was because "If I know something that keeps a man from dying and I know that I'm wrong for not saying it, I can't live with myself and knowing that because I didn't speak up a man has to die because of me." (R 49) He cares deeply about Mr. Squires, but there is no point in lying because a lie would only hurt him. (R 50)

Hynes stated that he was coming forward now because he didn't want Squires to die. He also admitted that he knew that Squires had been charged with murder in 1981, and yet, he had not come forward to give any information he may have had. (R 64)

With regard to the Thoni Station robbery, he remembers a white brick wall, blue on top and stalling the car several times. He actually walked up to the Thoni Station because he saw everything that happened. (R 70) He denied committing the Thoni robbery in the polygraphic examination. (R 71) It was about five minutes for the robbery and three minutes after the robbery occurred they were back to the Chambliss'. It was dark at that point though. (R 75)

Allen Dayton is a polygraph examiner; he did the polygraphic examination of William Squires. (R 92) He also did the polygraph examination of Donald Hynes to determine if he had any knowledge of who participated in the homicide of September 2, 1980. (R 102) A report indicates that he was the examiner on the polygraph on Terry Chambliss. Dayton does not remember giving Chambliss a polygraph. (R 102) The Chambliss report indicates that at one point Chambliss was not being truthful during the course of that examination. (R 105)

The report indicates that Chambliss was lying in respect to having knowledge of this particular robbery/homicide. (R 106) The report does not say what the knowledge was. Chambliss could have been telling Dayton that they don't have any knowledge; he could have been telling Dayton that they had limited knowledge; the report doesn't say. (R 110)

It is customary in the course of a pretest examination for the examiner to determine the examinee's basic health. Dayton didn't remember any specific details other than if there had been

a problem with Squires' mental or physical state he would not have tested him. (R 112) Dayton acknowledged that there is always a possibility a person can deceive a polygraph examiner. Squires' polygraph examination responses indicated, in the examiner's opinion, that he was not truthful during the administering of the examination and had falsified information concerning the murder and robbery. Squires' responses were indicative of deception. (R 113)

If Squires had been on any pain medication, Dayton claimed he would have been aware of it at the time of the examination because it is customary at the beginning of the test for an examiner to establish whether the person is feeling well. (R 118) Alcohol could affect the results of the test. Dayton would have no problem testing somebody medicated with codeine or Darvocet depending upon the injury or what they are being treated for, as long as they were comfortable enough to take the test and the test wouldn't create any type of either mental or physical discomfort. (R 120) At the time of the test, Mr. Squires would have made Dayton aware that morning as to what he had taken in the previous 24 hour period. This would be indicated in Dayton's work sheet. (R 121)

It would have been relevant to know that Mr. Squires had been taken off his medication including codeine, Darvocell, Percodan, morphine, etc., two days before the examination only if he was visibly showing any type of pain or discomfort and needed it. Again, Dayton would not have administered the test under

.those circumstances. (R 124) Dayton's experience with regard to physiology and physical aspects of medication relating to the body included courses that applied to his profession. (R 125)

Richard (Rick) Charles Edwards, the defendant's trial attorney in 1982, was also called as a witness. (R 129) Rick Edwards recalled that Terry and Charlotte Chambliss testified that on September 2nd, Squires came to the residence in a black Camaro, stating he had some trouble, that he had more or less had pulled a robbery off, had trouble with a particular person there, and that somebody had to be dusted off. He took down the fence at the side of the house and hid the Camaro. Charlotte Chambliss also stated that Mr. Squires told them not to worry because there was no witness to it. (R 130)

Edwards also testified that he took the deposition of George Peterson on September 23, 1981. (R 131) Edwards said that somewhere along the line he was informed that the state talked to Mr. Hynes and actually gave him a polygraph. On that polygraph they asked Hynes if he was involved in the September 2nd robbery, and Hynes' answer was, "No" and he passed that polygraph. Edwards couldn't remember if he was ever provided with the polygraph itself. (R 135 - 136) A copy of Detective Peterson's report concerning the polygraph and Donald Hynes' statement was produced from the public defender's records.

Edwards also testified that he was concerned Mr. Benito was going to call Hynes as a witness. The reason they didn't pursue Hynes is because he thought Hynes might bring out something that

could be detrimental to their alibi defense. They received some feedback that Squires was in Tampa on the 2nd of September: they couldn't confirm the date at the time. They were concerned that Donald Hynes could maybe hurt Squires' alibi if he stated in any way, shape or form he was around Squires on the 2nd of September. (R 207) Rick Edwards did not believe that Hynes had committed the Albritton murder with Squires. At that time they were under the impression that Squires did it with Ed Fowler. Defendant's Exhibit 7 has a notation that Hynes would not be able to confirm the alibi story of September 2nd. (R 210, 211) During the case, Mr. Squires informed them that he would prefer them to stay away from Mr. Hynes and also a girl named Liza. Just before they went to trial, Squires told Kane to go out and interview Hynes, but Kane couldn't find him. (R 212)

Squires appeared to be in excellent physical form. He was coherent and tried to aid counsel to the best of his ability. Edwards couldn't see any medical problems whatsoever. He saw no need to have medical records brought in. Squires' leg was amputated before Edwards met him. (R 217) At the time he defended Squires, Edwards had seventeen years' experience and probably 15 or 20 trials. (R 219)

With regard to the motion to suppress, the strategy at trial was to go ahead and let all of the statements come in because they wanted to show the jury that Mr. Squires had made all kinds of confessions. Squires testified at trial that to almost everybody, in order to get back to Tampa, Squires planned to get

medical treatment at Tampa General, and there he hoped he could perfect an escape. Edwards did not believe they could suppress every confession Squires made. He thought it a better strategy to go ahead and say, "Yes" he made these confessions, and give the reason why rather than to limit it to one or two confessions.

Knowing they could not exclude Fain or Seimer's testimony, Edwards thought if a jury heard the defendant had made numerous confessions, that it might dilute the veracity of the confessions because somebody normally would not give nine confessions in a first degree murder trial. Accordingly, the jury might believe the admissions were all a part of the larger plan for him to be able to get down to Tampa. At no time whatsoever did Squires make any statements when he was not in complete control of his faculties at the time he made them. He never complained that he was under any kind of medication at the time or that medication hindered his thinking. (R 223, 246 - 49)

Edwards was sure that Squires knew what he was saying and doing, and he certainly had an average or above normal intelligence. (R 245)

On the 31st of August, Squires said he and Ed Fowler had committed a robbery in Foley Beach, and they left there and went to South Carolina, then they went to Dothan, Alabama. There they stopped in a motel, the Walker motel. They were in Dothan until the 2nd of September. (R 224) Squires' testimony at trial indicates on the 4th, he spent the night at the Chambliss' residence and on the 3rd, he was in New Port Richey. (R 227) He

spent the night again at the Chambliss' residence on the night of the 5th. (R 228) Squires testified that on September 4th, he and Hynes went to the park with Mrs. Hynes and Ed Fowler. (R 230) Edwards said due to the fact that Donald Hynes stated that they went to Phillippi Park on the 7th, whereas his client's testimony was they went on the 4th, he would not have wanted Mr. Hynes to testify on this issue because it conflicted with Mr. Squires. And also given the fact that Donald Hynes said he and Squires went to the park to discuss killing Ed Fowler because Ed Fowler killed the man, he would not have wanted Hynes to testify at trial with regard to that. (R 232) He would not want to put on the stand a statement that his client wanted to kill somebody. (R 233) Mr. Edwards did not remember talking to Donald Hynes personally and he certainly did not want to use him at trial. He could not see where Hynes could help him anyway. (R 240)

Mike Benito, the prosecutor of record for the Squires case, testified to the best of his recollection he showed all of his police reports to Mr. Edwards. (R 152) He never saw Donald Hynes prior to the 1988 evidentiary hearing. (R 154) From Chambliss' testimony that Hynes looked like a ghost, Benito gleaned that Hynes was more than likely involved in the killing and robbery of Jesse Albritton. (R 155) He was not concerned with Mr. Hynes since Hynes denied any knowledge of this particular offense. In Benito's opinion, the only way he could have convicted Hynes would have been to make a deal with Michael Squires. (R 155) With reference to the Peterson report and the

Hynes polygraph, Benito stated that if they were in his file he would have given them to Edwards. (R 157) He was not aware that Terry Chambliss failed a polygraph. (R 158) Hynes was never charged with the Thoni robbery. Benito could not remember why. He was probably just so concerned about getting the case to trial against Mr. Squires, that he wasn't concerned about Mr. Hynes at all. (R 159) Fowler was not prosecuted because he denied any knowledge of Michael Squires or Jesse Albritton. In order to prosecute Ed Fowler, Benito would have had to make a deal with Michael Squires. Terry Chambliss received ten years in state prison on a robbery charge; he agreed to testify against Squires in exchange for a negotiated plea of ten years followed by some probation. Charlotte Chambliss was never charged with anything. Terry and Charlotte Chambliss received reward money prior to trial. (R 166)

Benito never felt the need for correcting the impression Peterson's deposition may have given, because it never dawned on him the statement needed correcting. From his review of the police report, it was obvious that Rick Edwards had Donald Hynes' name and knew essentially what Donald Hynes told Detective Peterson. Benito's opinion was that Squires committed the murder with both Fowler and Hynes. (R 175)

Squires was wounded in a shoot-out in Carrollton, Georgia, but nevertheless, he was able to escape the county jail in Carrollton, Georgia and made his way back to Tampa. Squires was found in the Days Inn based on a tip from the Chamblisses that Squires was in the Days Inn with a bad leg injury. (R 178)

Benito admitted the alibi defense gave him some problems, he was really concerned about it. He thought it was a solid alibi defense he had to overcome. (R 187) Benito felt that if Mr. Squires had not talked to so many people, there was a good chance he would have walked. (R 188)

Dr. Afield was qualified as an expert in the field of psychiatry and the effect medication can have on an individual's state of mind. (R 252) Afield thought there was a question about the voluntariness of the statements. He opined the defendant was under the influence of the medication, and his ability to voluntarily make a statement was impaired. He did not think that the statements were knowingly, rationally or intelligently made. (R 260) He believed the medication would have an effect on the ability to waive one's rights, the right to keep silent or have an attorney present. (R 263)

Afield said it doesn't matter if it's been seven years since this happened; he can give a report just by looking at records. (R 272) He agrees that each person has their own threshold of pain. He was not aware that Mr. Squires was a former boxer; he was not aware that Mr. Squires escaped within three or four days after having been shot in Carrollton, Georgia. (R 274) He later changed his mind and stated that he believed he did know of the escape and that the defendant was gone for several weeks. He admits that evidence of Squires' escape with this injury and his seeking a veterinarian to cut off his leg may be evidence the defendant has a higher tolerance of pain. (R 275) The doctor

was asked if it was poor judgment for an escapee, serving three life sentences, to not seek medical attention to avoid being turned in. Afield argued that if it were him, he would have figured out a way to get antibiotics before he got somebody to try to cut off his leg. The witness admits it is rational to try to escape when you are serving three life sentences and about to be returned to Florida for those sentences. (R 276)

The doctor was asked whether it is rational to deny being involved in a murder during a polygraph examination. Afield contended that it may show rationality if not considered in the context of drugs and medication. (R 279, 288) Afield admitted that Squires knew his Miranda rights and absolutely understood that anything he said could be used against him. (R 285)

George Peterson, a sergeant with the Tampa Police Department, testified concerning his contact with William Squires during the relevant time periods. Through a confidential informant, the witness learned of Squires being at the Days Inn on Highway 534 and Interstate 75 after his escape from Carrollton, Georgia. (R 305 - 306)

Sergeant Peterson got with the Pasco County sheriffs Office and arrested the defendant. The information concerning the defendant was obtained from the Chamblisses who were paid two thousand (\$ 2,000.00) dollars, one thousand from Carrollton, Georgia and one thousand from F.D.L.E. (R 306)

Sergeant Peterson was given the name of Donald Hynes by the defendant. (R 309) During one of their conversations, the

defendant told Peterson he and Hynes had robbed the Thoni Station. (R 309 - 310) Squires never told this officer he and Hynes murdered Jesse Albritton, nor did he confess to robbing the 500 station with Hynes. (R 310) A polygraph of Donald Hynes indicated he was being truthful on questions concerning the 500 station and Jesse Albritton. (R 310 - 311) A polygraph was also done on Terry Chambliss, but the results were inconclusive because Chambliss had been smoking marijuana. (R 314 - 315) A supplemental report by Peterson indicates the polygraph examiner thought Chambliss was being deceptive in his answers. (R 316)

During January and February of 1981, Hynes was not a suspect in the Albritton murder. (R 319) It was later in August or September after Chambliss related information concerning the defendant and Hynes being together on the night of the murder that Hynes was suspected to have involvement in the murder. Prior to that, Hynes was not questioned as a suspect. (R 320) When Sergeant Peterson was questioned in his deposition concerning Hynes' denial of being in the car at the time of the murder, Peterson's response that he had not talked with Hynes about the murder meant the officer had not questioned him as a suspect about the murder. (R 321)

On cross-examination, Sergeant Peterson indicated defense counsel questioned him during his deposition concerning his interview of Donald Hynes. (R 326 - 327) This interview included information of Hynes' involvement with Squires, including the Thoni Station robbery. (R 327 - 328) The witness

stated, in his deposition as clarification, he had not spoken with Donald Hynes about the murder since Chambliss stated Hynes was with Squires on the night of the murder. (R 329)

Although Squires never said he and Hynes committed the 500 robbery and murder, Squires did confess to having done it. (R 329 - 330) Just prior to trial, Squires wanted to make a deal for a life sentence. Squires stated he had shot the guy, and someone else shot him also. (R 330) The defendant was told any deal would have to come from the State Attorney's Office. The prosecutor said he had to get in touch with the family, but would be back in touch in a few days. (R 331) Squires then became upset and said all deals were off. (R 331 - 332) This was only one of many times the defendant had admitted his involvement in Jesse Albritton's murder. (R 332)

Sergeant Peterson talked with Squires on a number of occasions; each time he was given Miranda warnings. The first interview occurred on December 24, 1980 when Squires was recaptured in Dade City. (R 332) Since the defendant was in a lot of pain, they did not talk a lot, Peterson left and went back the following day. The next day, Squires was better and was then booked, but no details were elicited about the robbery/murder. (R 333) The defendant was later sent to Lake Butler. There he received treatment and was very coherent when seen there by Sergeant Peterson. He was not in the kind of physical pain he had been in when recaptured. (R 334 - 335) On the occasion when the defendant wanted to make a deal, he gave details about the

.robbery and murder. Those details included the actual routes taken and the confrontation with Albritton; details which could only be known if you were there. (R 335 - 338)

When the defendant was captured in Carrollton, Georgia, he said he had robbed a small service station on Sligh. (The Thoni Station is not on Sligh, but on Waters, some 10 - 15 blocks from Sligh.) (R 346 - 347)

Gerald Nelms, with the Hillsborough County Sheriff's Office, stated he interviewed the defendant on a number of occasions. (R 364) He first talked with the defendant in Carrollton, Georgia on November 16, 1980. (R 365 - 366) At that time, Detective Nelms had with him two photos of the United 500 gas station; there were no pictures of the homicide scene. (R 366 -367) The defendant said he did not rob either place. (R 367)

Detective Nelms indicated the defendant provided him with various statements; Squires was very cunning and manipulative. (R 369) The first time the defendant admitted involvement in the murder was when the polygraph was done. He, however, recanted the statements. (R 370) The witness was unaware of the defendant's medication. (R 370 - 371)

When Nelms talked with Donald Hynes, he got the same story about the Thoni Station. (R 371 - 372) The witness was aware of polygraphs of Hynes and Terry Chambliss. (R 376) Nelms stated he had no evidence connecting Hynes with the United 500 robbery murder. (R 379 - 382)

In all of the conversations, Detective Nelms had with the defendant, the defendant always appeared to be coherent. The officer never had any trouble communicating with Squires. (R 382) The defendant never complained of pain, nor was he staggering or slurring words. Squires was usually in a good mood, smiling a lot. (R 383) The defendant was in the same kind of mood when he took the polygraph. (R 384)

After the defendant flunked the polygraph, Detective Nelms advised him of his constitutional rights, and the defendant indicated the examiner had "gotten him." (R 384 - 385) This was the defendant's first acknowledgment to being on the scene, however, he also said he did not pull the trigger. In the same conversation, he backtracked and said he was only in the area. (R 385) Squires said Fowler and some other person committed the United 500 robbery/murder.

On the day following this statement, the defendant was readvised of his rights, and he did not seem to be in pain, intoxicated, etc. (R 386 - 387) The defendant again denied being present, but indicated he had knowledge of the crime. He knew who the third person was and where the gun was, but the defendant would not tell; he wanted to consult with a lawyer. (R 387) Dr. Afield never called Detective Nelms concerning his observation of the defendant in 1980 - 1981. (R 389)

Edward Kane, an investigator with the Public Defender's Office, investigated the Squires case. (R 396) When Kane first saw the defendant, Squires' leg had been amputated, The

'defendant had no problem conversing. (R 398) Squires told him he had an alibi, and the witness did extensive follow-up work. (R 398 - 400) Early in the investigation, Squires told the witness not to bother with a girlfriend or Donald Hynes. (R 402) Later on, Kane attempted to locate Hynes, but could not.

On June 8, 1988, the trial court entered an order denying the motion for post-conviction relief, stating that Squires was afforded effective assistance of counsel and there was no Brady violation. (R 437) In particular the court specifically found that:

" . . . the alibi defense of Attorney Edwards was well-directed and strongly supported by the evidence of Squires' travels in several southern states just prior to the robbery which resulted in the death of Albritton. The alibi defense was so effective that it palced the state in the position of offering a plea of life imprisonment to Mr. Squires."

SUMMARY OF THE ARGUMENT

As to Issue I - With regard to the ineffective assistance claims, this Honorable Court must only determine two issues:

(1) Whether counsel's failure to interview Donald Hynes as a possible defense witness renders counsel ineffective, and

(2) Whether counsel's failure to challenge Squires' incriminating statements made to law enforcement and correctional officers renders counsel ineffective.

As to Issue II - Squires alleged the state withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). The two Brady claims to be explored as indicated by this Court were whether the defense should have been given the police report containing Donald Hynes' statement and whether Detective Peterson's deposition statements about Hynes were misleading to the defense. The first inquiry can be answered quickly and concisely. The defense was in fact, given a copy of the police report which outlined Donald Hynes' statements and polygraph result.

Further, as the defense knew of the officers' questioning of Donald Hynes in January, 1981 and that the police had not talked with Hynes since receiving information from the Chamblisses that Hynes was present on September 2nd, there is no reasonable probability that Peterson's deposition statement misled defense counsel. The deponent immediately explained what was meant by his statement. No Brady violation has been demonstrated.

ISSUE I

WHETHER SQUIRES RECEIVED EFFECTIVE ASSISTANCE
OF COUNSEL.

With regard to the ineffective assistance claims, this Honorable Court must only determine two issues:

(1) Whether counsel's failure to interview Donald Hynes as a possible defense witness renders counsel ineffective, and

(2) Whether counsel's failure to challenge Squires' incriminating statements made to law enforcement and correctional officers renders counsel ineffective.

The evidence presented during the evidentiary hearing shows conclusively that these were tactical decision, and that appellant has failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Strickland, the Supreme Court has articulated a two-prong analysis to show ineffective assistance of counsel: the defendant must show that his counsel's performance was deficient, that is, below an objective standard of reasonableness, and second, the defendant must affirmatively prove that he was prejudiced by the alleged incompetence. The reviewing court need not address these two considerations in any particular order or even address both points if the defendant makes an insufficient showing on one. A reviewing court may only consider those acts or omissions of an attorney that are not classifiable as an attorney's tactics. Arrowood v. Clusen, 732 F.2d 1364, 1369 (7th Cir. 1984); United States v. Dyer, 784 F.2d 812 (7th Cir. 1985). See also Washington v. State, 397 So.2d 285 (Fla. 1981).

(1) Donald Hynes

Trial attorney Rick Edwards testified that at the time he represented Squires he had seventeen years experience and had tried fifteen to twenty murder trials. (R 219) Edwards testified that the defense strategy was geared toward the alibi defense which would place Squires in Dothan, Alabama at the time of the murder. (R 236) Edwards wanted to stay away from Donald Hynes because they had received some feedback that Squires was in Tampa on the day of the murder (September 2nd) and they were afraid Hynes would undermine the alibi defense. (R 207) And, in fact, Hynes' testimony was inconsistent with Squires' trial testimony.

At trial, Squires testified that he, Donald Hynes and Ed Fowler went to Phillippi Park on the 4th of September to discuss getting rid of Ed Fowler. (R 514) Whereas, Hynes testified that they went to the Park on the same day they committed the Thoni gas station robbery. (R 20 - 23) It was after this robbery that they hid Squires' Camaro in Chambliss' back yard. (R 26) The Thoni robbery was on September 7th.

Hynes also admitted that he, Squires and Fowler spent one entire night at a motel on Dale Mabry a few days before robbing the Thoni station. (R 29) Whereas, Squires claimed that during this period every night he spent in Tampa he was at the Chamblisses. (R 227 -230, 509) Hynes also testified Squires told him on the 7th of September that:

"Remember the time I told you about the cop, you know? I have already had to keep him from getting arrested once. Now he has killed somebody you know? The guy is going to get me in trouble. He is bad news."

Squires then asked Hynes if he should kill Fowler. (R 21)

In light of the numerous inconsistencies between Squires' and Hynes' testimony, counsel's concern that Hynes would undermine the solid and very complex alibi defense and in light of Squires' own direction to counsel to stay away from Hynes, it cannot reasonably be said that counsel's performance was deficient or that the deficient performance prejudiced the defense insofar as there is a high probability that the outcome of the proceeding would have been different but for the actions of defense counsel. (R 212) See Strickland v. Washington, supra.

(2) Suppression of Statements

Trial counsel testified that he did not believe a motion to suppress would have been successful. He saw no evidence of incompetency nor did Squires ever suggest to him that he made the statements because he was under the influence of drugs. (R 223) Accordingly, they determined that since it would not be possible to exclude all of Squires numerous statements it would be a better strategy to go ahead and let all the statements come in. They wanted to be able to argue to the jury that he simply made all of these outrageous statements to aid him in getting transferred to Tampa General Hospital where he could get better medical treatment and possibly escape. (R 220 - 223)

That counsel's strategy may not have been successful does not support a claim of ineffective assistance of counsel. A defendant is not entitled to error-free representation. Hayes v. Maggio, 699 F.2d 198, 201 (5th Cir. 1983); Williams v. Maggio, 695 F.2d 119, 123 (5th Cir. 1983) In reviewing the quality of counsels' representation this court must take care that the "finely ground lens of 20/20 hindsight" does not affect its vision. Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985); Williams, 695 F.2d at 123; accord Tijereina v. Estelle, 692 F.2d 3, 7 (5th Cir. 1982); Washington v. Watkins, 655 F.2d 1346, 1356 (5th Cir. 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 479 (1982).

Even if Edwards' strategy could be deemed ineffective, counsel's failure to object to admissible statements is not a basis for relief. Messer v. Kemp, 760 F.2d 1080 (11th Cir. 1986). Squires allegation that his statement to law enforcement and correctional officers would have been suppressed is not supported by the facts or the law.

The United States Supreme Court has concluded, "coercive police activity is a necessary predicate to finding that confession is not 'voluntary'." See Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 522, 93 L.Ed.2d 475 (1986). In Connelly, the Court determined that a confession made in response to instructions from the "voice of God" was not involuntary. It reasoned that "[a]bsent police conduct casually related to the confession, there is simply no basis for concluding that any

-state action has deprived a criminal defendant of due process of law." Consequently, in the absence of coercive police activity, the medical condition of which Squires complains cannot render his confessions involuntary. Copeland v. Wainwright, 505 So.2d 425 (Fla. 1982); United States v. Scheigert, 809 F.2d 1532 (11th Cir. 1987).

Further, it is the state's contention that the evidence adduced in the instant case does not support Squires' claim that his medical treatment precluded him from making a voluntary statement. Of the witnesses who testified, only Detective Peterson, Sergeant Nelms and Al Dayton knew the defendant during the period in question.

Detective George Peterson testified that he talked with Squires on a number of occasions. Before each interview Squires was given his Miranda warnings. (R 332) On the few occasions when Squires was not up to talking, Peterson would leave. (R 333) Generally, Squires appeared to be very coherent. (R 332, 334 - 335)

Sergeant Gerald Nelms also interviewed Squires on a number of occasions. (R 364) Squires provided him with numerous statements. Nelms believed that Squires was very cunning and manipulative. (R 369) During all of the conversations Nelms had with Squires, Squires always appeared to be coherent. The officer never had any trouble communicating with Squires. (R 382) The defendant never complained of pain nor was he staggering or slurring words. Squires was usually in a good

-mood. (R 383) The defendant was in this same condition when he took the polygraph. (R 384)

After the defendant flunked the polygraph, Detective Nelms advised him of his constitutional rights, and the defendant indicated that the examiner had "gotten" him. (R 384 - 385) This was the defendant's first acknowledgment to being on the scene; however, he also said he did not pull the trigger. In the same conversation he backtracked and said he was only in the area. (R 385) Squires said Fowler and some other person committed the United 500 robbery/murder.

On the day following this statement, the defendant was readvised of his rights, and he did not seem to be in pain, intoxicated, etc. (R 386 - 387) The defendant again denied being present but indicated he had knowledge of the crime. He knew who the third person was and where the gun was, but the defendant would not tell: he wanted to consult with a lawyer. (R 387) This was the last time that Nelms spoke to Squires.

Al Dayton, the polygraph examiner, testified that if there was a problem with Squires' mental condition or health he would not have tested him. (R 112) If Squires had been on any pain medication Dayton would be aware of it at the time of the examination. (R 118) There was no evidence that Squires was suffering from a mental defect or debilitating pain.

It is also important to note that while Squires made many statements, the only time Squires made any statement close to be inculpatory was immediately after the polygraph examination and

-immediately prior to the trial when he was attempting to work out a "deal." (R 385)

Even the defense's medical expert Dr. Afield testified that Squires absolutely understood his Miranda rights and that anything he said could be used against him. (R 285)

There is no evidence that Squires exhibited any mental defect which would render his statements suspect and the law does not require law enforcement to make "sweeping inquiries into the state of a mind of a criminal defendant who **had** confessed." Connelly, 93 L.Ed.2d at 484. Without evidence of police coercion (and there was none), there is no constitutional prohibition against the admission of this type of confession.

"Moreover, the defective mental condition of the accused, even when clearly established in a timely manner in support of an effort to exclude statements does not by itself render the statements involuntary within the meaning of the due process clause of the United States Constitution. Colorado v. Connelly, ___ U.S. ___, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)."

Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987).

As the statements were clearly admissible, counsel's determination to not seek suppression and to allow all of the confessions to be admitted in an attempt to dilute their effect does not render counsel ineffective.

ISSUE II

WHETHER THE STATE WITHHELD EXCULPATORY
EVIDENCE IN VIOLATION OF BRADY V. MARYLAND,
INFRA.

Squires alleged the state withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). The two Brady claims to be explored as indicated by this Court were whether the defense should have been given the police report containing Donald Hynes' statement and whether Detective Peterson's deposition statements about Hynes were misleading to the defense. The first inquiry can be answered quickly and concisely. The defense was in fact, given a copy of the police report which outlined Donald Hynes' statements and polygraph result.

At the evidentiary hearing, the defendant's trial counsel was called as a witness. During Mr. Edward's testimony he stated at some point he knew the state had talked with Donald Hynes and administered a polygraph. (R 135) The public defender's record on Squires, which had been reproduced from microfiche, was brought to the courtroom. A copy of Detective Peterson's report with the Donald Hynes information was contained in that file. (R 139) There certainly can be no Brady violation when the defense has the alleged exculpatory information.

Brady v. Maryland, supra, requires the prosecution to disclose evidence which is both favorable to the accused and material either to issues of guilt or punishment. See, United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481

(1985). In order to establish a Brady violation, the defendant must show (1) that the prosecution suppressed evidence, (2) that was favorable to the defendant or exculpatory, and (3) that the evidence was material. United States v. Blasco, 702 F.2d 1315 (11th Cir. 1983). Implicit in the requirement of materiality is a concept that the suppressed evidence might have effected the outcome of the trial. Accord, United States v. Agurs, 427 U.S. 97 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Our courts have held there is no Brady violation where the defendant has within his knowledge the names of witnesses from whom exculpatory information may be extracted. Likewise, the state is not required to furnish information a defendant already has or can obtain with due diligence. See, United States v. Torres, 719 F.2d 549 (2nd Cir. 1983); United States v. McMahon, 715 F.2d 498 (11th Cir. 1983) and United States v. Prior, 546 F.2d 1254 (5th Cir. 1977).

The State of Florida submits Detective Peterson's statement during his deposition to the effect that he had not talked to Hynes about the murder was not misleading to the defense since they knew Hynes had been questioned on the subject and any ambiguity concerning the statement was cleared up with further questioning. The beginning of the Peterson deposition is a chronology of the detectives' contacts with the defendant. The next area of questioning concerns the recent statements made by Terry Chambliss, statements which included information about Donald Hynes. **As** a natural consequence, the officers' contact with Hynes was the next area of inquiry.

The essential portions of questions involving Donald Hynes are contained in the Peterson deposition, pages 23 - 238. That segment begins with the detective stating he in fact talked with Donald Hynes. Hynes talked about his relationship with Squires and Fowler. He informed Peterson that Squires had said Fowler killed a guy. In addition, Hynes related having been with Squires on the 7th of September and either the last of August or beginning of September. Thereafter, defense counsel asked the deponent about Hynes being in the car on the night of the murder.

It is at this point Peterson says he has not talked to Hynes about the murder. But immediately thereafter, he explains that the Chambliss information concerning the car was obtained only recently, long after they talked to Hynes.

Q. But Terry Chambliss had told you that Hines was in the car, too, didn't he, when he came up that night?

A. Yes, sir. That's as of recent. Now, I'm talking about the last six, seven days, eight days.

Q. Oh, he just recently told you that?

A. Uh-huh.

Q. Okay. Did Hines relate anything to you then pertaining -- well, you said you didn't talk to him about the murder.

A. The last time I talked to Hines, my goodness, and, it's been months. I guess January of last year or this year -- January, February, somewhere in there.

Q. Why were you questioning Hines at that time, for what purpose?

A. Well, I'm going to get these names mixed up. Squires had copped out to us that he and Hines had done that smaller service station, the Thoni station on Waters.

And we, in fact, had contemplated, at the time, charging him. But we did not charge him with that since we exceptionally cleared it to him and to Squires 'cause Squires copped out to us.

Q. I see. So, really, at that time, you were -- you were investigating this robbery at the Thoni station; is that correct?

A. No, not per se. Of course, it was a robbery in the city. It was a service station. It just fell into the realm of the murder charge.

Q. At this particular charge -- point, I haven't been in touch with the State Attorney's Office. What it basically boils down to is this is Hillsborough County case, although I received the information. It's left up to Detective Nelms who I've also been in touch with and told him what Chambliss has been saying. Now, to what degree he's gone from there, I don't know. I'm talking about Jerry Nelms.

A. All right.

Q. He may be tied up on other murders that can't get to him. I don't know. But the information has been passed on. And whether there is going to be forthcoming arrests, I don't know.

(Petersons Deposition p. 26 - 28)

And at the evidentiary hearing, Peterson made it clear that at the time they talked with Hynes, he was not a suspect in the Albritton murder. (R 319) They talked to Hynes basically because he knew Squires. It was only after Terry Chambliss and his wife said Hynes was with Squires on the night of the murder was there suspected involvement by Hynes. (R 320 - 321)

▪ The defense knew of the officers' questioning of Donald Hynes in January, 1981 and that the police had not talked with Hynes since receiving information from the Chamblisses that Hynes was present on September 2nd. There is no reasonable probability that Peterson's deposition statement misled defense counsel. The deponent immediately explained what was meant by his statement. No Brady violation has been demonstrated.

CONCLUSION

Based on the foregoing this Court should affirm the lower court's denial of the Motion for Post-Conviction relief.

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 U.S. Regular Mail to Billy H. Nolas, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 17 day of March, 1989.



COUNSEL FOR APPELLEE.