IN THE SUPREME COURT OF FLORIDA

CLARENCE EDWARD HILL,

Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

CASE NO. SC05----
(SC68706)
DEATH WARRANT SIGNED
EXECUTION SET JANUARY 24, 2006 at 6:00 p.m.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

STATEMENT OF THE CASE

Clarence Hill and his accomplice, Cliff Jackson, robbed a Savings and Loan Association in Pensacola, Florida, on October 19, 1982. In Hill's attempt to escape and prevent the immediate apprehension of his co-defendant, Hill stealthily approached the police officers attempting to handcuff Jackson, drew his gun and shot both officers, killing one and wounding the other. Hill was indicted on November 2, 1982, for the first-degree murder of Officer Stephen Taylor, attempted first-degree murder of Officer Larry Bailly, three counts of armed robbery and possession of a firearm during the commission of a felony. Hill's trial began on April 25, 1983, and concluded on April 29, 1983, with the jury finding Hill guilty of both first-degree murder and felony murder as alleged in Count I. The sentencing phase began on April 29, 1983, and as a result, the jury returned a 10-2 death recommendation. On May 17, 1983, the trial court concurred. The salient facts regarding the murder conviction can be found in Hill v. State, 477 So.2d 553, 554 (Fla. 1985), however, the Court reversed the death sentence and remanded for a new sentencing proceeding with a newly empanelled jury. Resentencing proceedings were held on March 24-27, 1986. The record reflects that most of the witnesses presented at the trial were called at the resentencing proceeding and they

testified with regard to what occurred the day of the robbery. A number of witnesses testified in behalf of Hill in mitigation. At resentencing, the defense presented five character witnesses besides Hill's parents. Additionally, Dr. James Larson, a psychologist who examined Hill on December 22, 1982, to ascertain whether Hill suffered from any mental disability; whether there was any need for involuntary hospitalization and for purposes of discovering any evidence in mitigation, was called. Dr. Larson concluded Hill was of average intelligence (84) but scored borderline retarded when it came to verbal ability (76); he found no evidence of mental disorder of psychosis; he reviewed a plethora of school and medical records and found nothing in the records that Hill suffered from any mental dysfunction. Following all of the testimony at resentencing, the jury returned an 11-1 recommendation for death. The trial court determined death was the appropriate sentence based upon five (5) statutory aggravating factors and only one (1) mitigating factor, that Hill was twenty-three years old at the time the crime was committed. The Florida Supreme Court, on appeal from resentencing, affirmed the reimposition of the death penalty in Hill v. State, 515 So.2d 176, 179 (Fla. 1987), cert. denied, 485 U.S. 993 (1988), but struck the CCP aggravator.

On November 9, 1989, the Governor signed a death warrant scheduling Hill's execution for January 25, 1990. As a result, Hill filed his initial motion for post-conviction relief in the trial court on December 11, 1989, asserting fifteen (15) claims. The motion was ultimately denied without evidentiary hearing on January 18, 1990, and the resulting appeal was decided adversely to Hill. Hill v. Dugger, 556 So.2d 1385 (Fla. 1990). On January 7, 1990, Hill filed his federal petition for writ of habeas corpus asserting 18 claims. (That court stayed Hill's scheduled execution on January 28, 1990.) Relief was denied as to all claims except for two issues. (Order of August 31, 1992, pps. 72-74, 75-83. August 31, 1992, District Court Judge Stafford granted Hill's federal Petition for Writ of Habeas Corpus, in Hill v. Singletary, Case No. TCA 90-40023-WS. Hill continued to prosecute his appeal in the Eleventh Circuit Court of Appeals, however, when the time came for filing his Initial Brief, he filed a motion to have the matter held in abeyance in that Court until such time, as the issues upon which he prevailed, were resolved by the state courts.

The Florida Supreme Court reopened the direct appeal on a limited basis in Hill v. Florida, 643 So.2d 1071 (Fla. 1995), as a result of the District Court's grant of relief. The case was returned to the federal court following the Florida Supreme Court's review and ultimately, the Eleventh Circuit affirmed the

district court's denial of all relief on "all grounds" in Hill v. Moore, 175 F.3d 915 (11th Cir. 1999), cert. denied, 528 U.S. 1087 (2000).

On June 20, 2003, Hill filed a successive motion for post-conviction relief, which was denied May 26, 2004, on a Ring v. Arizona, 536 U.S. 584 (2002) claim. Rehearing was denied on that motion June 21, 2004. On May 15, 2005, the Florida Supreme Court affirmed the trial court's denial of the Ring claim. Hill v. State, 904 So.2d 430 (Fla. 2005).

The Governor signed a new death warrant on November 28, 2005, setting the warrant week to run from noon, Monday, January 23, 2006, through noon, Monday January 30, 2006, with **the execution set for Tuesday, January 24, 2006, at 6:00 P.M.**

On December 15, 2005, Hill filed the latest postconviction litigation in the trial court, raising six (6) claims. The State responded and, following the Huff hearing December 19, 2005, the trial court denied an evidentiary hearing on all claims. On December 23, 2005, the trial court denied all relief. The Court found Claims I (Lethal Injection), II (Mental Retardation), III (Mental Age - Roper v. Simmons), V (Shackling), and VI (Reconsideration of prior 3.850), procedurally barred; and Claim IV (Public Records) Hill's request was satisfied or no colorable basis for postconviction

relief was presented, based on the additional public records request outside Rule 3.852(h).

Rehearing was filed on December 30, 2005, and denied on January 3, 2006, by the trial court.

SUMMARY OF ARGUMENT

Hill has raised six issues which where the subject matter of his successive postconviction motion. Each issue was rejected by the trial court without an evidentiary hearing because the claim was either procedurally barred and/or refuted by the record. The State relies on procedural bar for rejecting each claim, but also argues that as to each claim Hill is entitled to no redress.

Sims v. State, 754 So.2d 657 (Fla. 2000), is still valid case law and there has been no credible evidence presented that would bring into question the constitutionality of Florida's execution method of lethal injection (Issue I).

Hill brings to the court two attacks to the imposition of the death sentence, his mental retardation (Issue II), and mental age (Issue III) at the time of the offense. The trial court properly rejected these claims as procedurally barred. Additionally, the record before the trial court and before this court absolutely refutes any suggestion that Hill has valid arguments. There is no question but that Hill's full scale I.Q. hovers around 84 to 87. His own mental health expert testified that Hill's mental age was normal. Hill is not entitled to any further review under Atkins or Roper.

He also continues to assert that he was denied access to public records (Issue IV) from a number of sources. This

argument is groundless in that Hill had public records proceedings wherein his counsel voiced satisfaction with the responses tendered under Rule 3.852(h). To the extent he now asserts further public records entitlement under Rule 3.852(i), he has not identified a colorable claim warranting further public records.

In light of the recent decision in Deck v. Missouri, 125 S.Ct. 2007 (2005), Hill argues he should be permitted to raise a shackling claim. He has never before raised such a claim and therefore since he did not preserve this issue at trial or on direct appeal he is not able to rely on Deck. Moreover, the only record evidence of any shackling is from the 2005 affidavit (Attachment V) of cohort Clifford Jackson, who, for the first time, states that at Hill's resentencing, "Jackson{" was shackled. (App. Brief p 63). Hill has failed to preserve this issue.

Hill finally argues that he is entitled to an evidentiary hearing on his last postconviction motion under "due process", because the trial court did not cite to any portions of the record for denying relief. Hill already raised the lack of an evidentiary hearing on appeal to his successive postconviction motion. The Court found the trial court properly determined an evidentiary hearing was not justified. See Hill v. Dugger, 556

So.2d 1385, 1389 (Fla. 1990). He is not entitled to further review on this issue.

ARGUMENT

PRELIMINARY STATEMENT

Rule 3.851(h)(6), Fla.R.Crim.P., provides for dismissal of second or successive motions if the motion, files, and records in the case conclusively show the movant is entitled to no relief. In 2001, the Florida Supreme Court[1] defined "successive motion" to mean, "[A] motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence." Hence, successive motions continue to be viewed in a different light than initial motions for postconviction relief. Zeigler v. State, 632 So.2d 48 (Fla. 1993) (successive motion may be dismissed for failure to allege new or different grounds and a prior determination was made on the merits. Or, if new and different grounds are alleged, it can be shown that the failure to raise those issues in a prior motion constitutes an abuse of the process.) Procedural bar can be overcome if a defendant can show that the grounds asserted were not known or could not have been known to him at the time of the earlier motion. Foster v. State, 614 So.2d 455 (Fla. 1992); Roberts v. State, 568 So.2d 1255 (Fla.

[1] Adopted Amendments to Fla.R.Crim.P. 3.851, 3.852 and 3.993, and Fla.R.Jud.Admin. 2.050.

1995). For example, the court has recognized that a successive motion on an ineffective assistance of counsel claim will not be permitted where the ineffectiveness of counsel claim is litigated on a piecemeal basis. Lambrix v. State, 698 So.2d 247 (Fla. 1996); Pope v. State, 702 So.2d 221 (Fla. 1997); Bolender v. State, 658 So.2d 82 (Fla. 1995); Stewart v. State, 632 So.2d 59 (Fla. 1993).

As to those claims that could have or should have been raised at trial and upon direct appeal or those claims that were raised on direct appeal, further collateral review is likewise barred. Muhammad v. State, 603 So.2d 488, 489 (Fla. 1992). Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000): "…The defendant bears the burden of establishing a *prima facie* case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. See Kennedy v. State, 547 So.2d 912 (Fla. 1989). However, in cases where there has been no evidentiary hearing, we must accept the factual obligations made by the defendant to the extent they are not refuted by the record. See Peede v. State, 748 So.2d 253 (Fla. 1999); Valle v. State, 705 So.2d 1331 (Fla. 1997). Each claim must be examined to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record." See also Thompson v. State, 759 So.2d 650 (Fla. 2000).

The trial court, in rejecting all of Hill's claims except IV, based upon procedural bar, correctly discerned that the record either refuted the claim or the claim had previously been raised and decided adversely to Hill.

ISSUE I: LETHAL INJECTION

Hill contends that new evidence has come to light which brings into question the holding in Sims v. State, 754 So.2d 657 (Fla. 2000). Albeit, the Sims Court rejected Professor Radelet's and Dr. Lipmann's testimony about the parade of "horribles that could happen if a mishap occurs during the execution…" Sims 754 So.2d at 668. Hill claims to have "recent" empirical evidence of the "infliction of cruel and unusual punishment" of execution by lethal injection based on research letters by Dr. Davis A. Lubarsky, published in the April 16, 2005, issue of THE LANCET. Specifically, Hill argues that "the scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed." Unfortunately for Hill this is a "generous reading" of what is concluded in the research letters. Rather the concluding paragraph of the "study" provides:

> "Our data suggest that anaesthesia methods in lethal injection in the USA are flawed. Failures in protocol design, implementation, monitoring and review might

> have led to the unnecessary suffering of a t least some of those executed. Because participation of doctors in protocol design or execution is ethically prohibited, adequate anaesthesia cannot be certain. Therefore, to prevent unnecessary cruelty and suffering, cessation and public review of lethal injections is warranted."

Koniaris L.G., Zimmers T.A., Lubarsji D.A., Sheldon J.P., Inadequate anaesthesia in lethal injection for execution. Vol. 365. THE LANCET 1412-14 (April 16, 2005).

Hill is entitled to no relief on this claim. First, although he had ample opportunity to challenge execution by lethal injection, he has failed to explain why he did not do so in his 2003 successive motion.[2] He is procedurally barred from raising this claim in this successive motion. Second, the research letters of Dr. Lubarsky and colleagues, are not new as far as any objections to the use of lethal injection as a method

[2] Lethal injection became the method of execution in January 2000. There was a full-blown evidentiary hearing on this issue in Sims v. Moore, 754 So.2d 657 (Fla. 2000). After the hearing, the trial court determined that lethal injection is constitutional and that finding was upheld by the Florida Supreme Court. See also Provenzano v. State, 761 So.2d 1097, 1099 (Fla. 2000) (concluding that "execution by lethal injection does not amount to cruel and/or unusual punishment"); Provenzano v. Moore, 744 So.2d 413, 415 (Fla. 1999) (stating that "Florida's electric chair is not cruel or unusual punishment"), cert. denied, 528 U.S. 1182, 145 L.Ed.2d 1122, 120 S.Ct. 1222 (2000); Power v. State, 886 So.2d 952 (Fla. 2004) (rejecting constitutional challenge to execution by lethal injection and electrocution); Johnson v. State, 804 So.2d 1218, 1225 (Fla. 2001) (rejecting constitutional challenge to execution by lethal injection and electrocution); Jones v. State, 701 So.2d 76, 79 (Fla. 1997) (same); Medina v. State, 690 So.2d 1241, 1244 (Fla. 1997) (same), and most recently in Suggs v. State, 30 Fla.L.Weekly S812, 2005 Fla. LEXIS 2288 (Fla. Nov. 17, 2005).

of execution. In Sims, 754 So.2d at 668 footnote 19 (Emphasis added), the testimony showed:

> n19 Professor Radelet testified that lethal injection is the most commonly "botched" method of execution in the United States, with Virginia and Texas being the two states with the highest number of mishaps. He claims that 5.2 percent of the lethal injections encountered unanticipated problems. He also provided examples of what could go wrong during the lethal injection, citing to specific examples throughout the country. The professor admitted, however, that the documented occurrences in his study came from newspaper accounts of the execution and did not come from first-hand, eyewitness accounts or formal findings following a hearing or investigation into the matter.
>
> **Dr. Lipman, a neuropharmacologist, provided examples of what could happen if the drugs are not administered properly or if the personnel are not adequately trained to administer the lethal substances. For example, if too low a dose of sodium pentothal is administered, the inmate could feel pain because low dosages of such drug have the opposite effect--it makes the pain more acute. In addition, if the drugs are not injected in the proper order, the inmate could suffer pain because he would not be properly anesthetized. Dr. Lipman further noted that if the drugs are not administered in a timely manner, the sodium pentothal could wear off, causing the inmate to regain consciousness. However, Dr. Lipman admitted that lethal injection is a simple procedure and that if the lethal substances to be used by DOC are administered in the proper dosages and in the proper sequence at the appropriate time, they will "bring about the desired effect." He also admitted that at high dosages of the lethal substances intended be used by the DOC, death would certainly result quickly and without sensation.**

Unless Hill can demonstrate that the latest research letters either are so new as to not be unearthed or are so unique that new light is shed on this issue, the trial court was

and is bound by the rulings finding execution by lethal injection constitutional. Robinson v. State, 30 Fla.L.Weekly S576, 2005 Fla. LEXIS 1452 (Fla. July 7, 2005)(affirming summary denial of claim that execution by lethal injection is unconstitutional, holding that Supreme Court has repeatedly rejected the claim as being without merit); Elledge v. State, 911 So.2d 57 (Fla. 2005) (affirming summary denial of claim that execution by electrocution or lethal injection is unconstitutional because it constitutes cruel and unusual punishment, noting that Supreme Court has repeatedly rejected the claim as being without merit); Johnson v. State, 904 So.2d 400 (Fla. 2005)(holding claim that execution by lethal injection constitutes cruel and unusual punishment in violation of both the Florida and United States Constitutions is without merit and was properly denied without an evidentiary hearing that); Parker v. State, 904 So.2d 370 (Fla. 2005) (upholding summary denial of claim that execution by lethal injection or electrocution is cruel and unusual punishment because the Court has repeatedly held that neither form of execution is cruel and unusual punishment).

In denying a stay of execution in a Missouri capital case recently, the Eighth Circuit rejected Dr. Lubarsky's paper, in Brown v. Crawford, 408 F.3d 1027 (8th Cir. May 17, 2005), cert. denied Brown v. Crawford, 162 L.Ed.2d 310, 125 S.Ct. 2927, 2005

U.S. LEXIS 4806 (June 13, 2005). See: Beardslee v. Woodford, 385 F.3d 1064 (9th Cir 2005) (denied challenge to California's protocols and drugs); LeGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998) (Arizona's use of lethal injection constitutional); Williams v. Bagley, 380 F.3d 932 (6th Cir. 2004).

The trial court found that:

> The Court notes that this is the first time Defendant has raised the instant issue. Defendant has provided no convincing reason to the Court why this claim could not have been raised in Defendant's previous successive motion filed in 2003. Although Defendant alleges that the instant information regarding lethal injection is "new," this Court disagrees. As demonstrated by Attachment B to Defendant's motion, the conclusion of the study in question was that anaesthesia methods in lethal injection are flawed, in that failures in protocol design, implementation, monitoring, and review might have led to the unnecessary suffering of "at least some" of the inmates executed. The study suggests that because doctors may not participate in protocol design or executions, the administration of adequate anaesthesia "cannot be certain." In the Sims case, the Court considered evidence detailing examples of what errors could occur during lethal injection and regarding the administration of lethal injection by personnel who were not physicians. See Sims, 754 So.2d at 668, n.19. This Court finds that Defendant's "new" evidence is not so unique as to shed new light on the issue of lethal injection and overcome the procedural bar. Therefore, because the constitutionality of lethal injection has been fully litigated, and because Defendant has provided no convincing reason as to why this claim could not have been raised previously, the instant claim is procedurally barred.

Hill's claim must be summarily denied based on Zeigler, supra. He is entitled to no further review. Sims, supra.

ISSUE II: MENTAL RETARDATION

Hill contends he is mentally retarded and therefore cannot be executed based on Atkins v. Virginia, 122 S.Ct. 2242 (2002). Citing Dr. Pat Fleming's evaluation of him in 1989, he now contends that his "brain damage rendered him mentally disabled, and his behavior at the time of the offense was marked by impulsivity, lack of judgment, inability to foresee consequences and confusion."

Interestingly, there is nothing in the trial record at trial to reflect that Hill is retarded. In order to meet an Atkins claim, Hill must demonstrate that he meets the definition set forth in Florida. See Zack v. State, 911 So.2d 1190 (Fla. 2005):

> The evidence in this case shows Zack's lowest IQ score to be 79. Pursuant to Atkins v. Virginia, 536 U.S. 304, 317, 153 L.Ed.2d 335, 122 S.Ct. 2242 (2002), a mentally retarded person cannot be executed, and it is up to the states to determine who is "mentally retarded." Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below. See §916.106(12), Fla.Stat. (2003) (defining retardation as a significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age eighteen, and explaining that "significantly subaverage general intellectual functioning" means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the department); Cherry v. State, 781 So.2d 1040, 1041 (Fla. 2000) (accepting expert testimony that in order to be found retarded, an individual must score 70 or below on standardized intelligence test).

> Zack does not dispute the facts in the record. Zack argued at the Huff n4 hearing that although this Court did a proportionality analysis on direct appeal, it is unclear whether it considered all the factors that render Zack effectively mentally retarded. As stated in our opinion on direct appeal, this Court reviewed the evidence of Zack's brain damage and his mental age in considering mitigation. Postconviction counsel admitted there was no new evidence to support the argument that Zack is mentally retarded. Additionally, at the postconviction hearing, the State pointed out that Zack's mental health was explored at trial and nothing in the evidence offered at trial establishes that he is mentally retarded under the Florida statute. The prosecutor stated that if there was any new or different evidence than that presented at trial, it should be explored in the evidentiary hearing. Zack's postconviction counsel offered no new or different evidence.

Hill's resentencing proceedings were held on March 24-27, 1986. A number of witnesses testified in behalf of Hill, including Dr. James Larson, a clinical psychologist who examined Hill on December 24, 1982 (RTRVol.3 500-529, 506),[3] administered an assortment of tests including an individualized intelligence examination, to ascertain whether Hill suffered from any mental disability; whether there was any need for involuntary hospitalization and for purposes of discovering any evidence in mitigation. (RTRVol.3 504).

Dr. Larson spoke to Hill's parents and his sisters and other family members (RTRVol.3 504); and familiarized himself with Hill's background, such as school records. (RTRVol.3 504-

[3] RTR refers to Resentencing Trial Record.

505). As a result of Hill's completing an IQ test, Dr. Larson concluded that he "scored an overall I.Q. score in the low average range of "84"… (RTRVol. 3 508). On the performance section…he scored in the average range of "101."… (RTRVol.3 509). On his verbal skills he scored below the average range, a "76" (RTRVol.3 509). Dr. Larson opined that Hill's verbal skills were in the borderline range "…it's above retardation, but it's lower than the low average range. (RTRVol.3 508). Hill's school records showed that he performed "fairly mediocre", and that when tested early on in school in 1969, Hill had a verbal I.Q. of 67 on the California test for mental maturity—that test relied heavily on verbal skills. (RTRVol.3 510). Dr. Larson testified that the score on the California test was consistent with his testing as to the verbal part of the two-part I.Q. score. (RTRVol.3 510-511). Dr. Larson also gave Hill an MMPI (RTRVol.3 507, 511), which showed that Hill fell "well within the normal range." (RTRVol.3 511). He concluded that Hill was the type person who would readily use drugs, was impulsive, who would enjoy the experience of being high. (RTRVol.3 512). He was asked to assess Hill psychological age, ergo, his mental age and testified that for "mental age, our brain basically matures pretty much at the age of 17, 18 or 19." Our mental age really doesn't go much beyond the age of 18 or 19, even though our chronological age does.

(RTRVol.3 513). Dr. Larson concluded that **Hill's mental age corresponded to his actual age of 25.** (RTRVol.3 515).

On cross, Dr. Larson testified "I mean to leave the jury with the impression that when it comes to practical matters of perception, putting things together, he's average. But when it comes to matters of verbal ability, he's one step above retarded range." (RTRVol.3 515). Dr. Larson also admitted that he did not find any mental illness or disease; that Hill could adequately engage in normal communications. (RTRVol.3 518). Although Dr. Larson did not speak to any of the police that day, Hill was able to recall and tell him about robbing a bank". (RTRVol.3 518-519, 523). Hill was not under any type of emotional or mental disturbance that day and he knew what he was doing, he was an average man. (RTRVol.3 525-526).

Dr. Larson testified that **Hill's "mental age" was the same as his chronological age of 25.** (RTRVol.3 515). Dr. Larson testified Hill's I.Q. of 84 meant globally--"**overall he is of low average intelligence**. (RTRVol.3 508).

A different conclusion from a "new doctor" at postconviction, in this instance Wyoming's Dr. Pat Fleming, who evaluated Hill December 9, 1989,[4] does not make out a case of

[4] In Hill's Attachment C, the 1989 report of Dr. Fleming discusses Hill's history, **but does not state that Hill is mentally retarded.** In fact Dr. Fleming attributes Hill's circumstances to his drug usage and organic brain impairment.

ineffective assistance of counsel or a claim that entitles Hill to an evidentiary hearing regarding his allegations. Pietri v. State, 885 So.2d 245, 265-66 (Fla. 2004):

> We noted that the defendant had failed to demonstrate, at the postconviction hearing, an inadequacy in the penalty phase testimony of the defendant's mental health expert, and the defendant had simply presented additional mental health experts who came to different conclusions than the penalty phase expert. See id. at 320. There, we reasoned: "The evaluation by Dr. Anis is not rendered less than competent, however, simply because appellant has been able to provide testimony to conflict with that presented by Dr. Anis." Id. Further, we held that the defendant had failed to demonstrate that he suffered prejudice because "although the court found no statutory or nonstatutory mitigation, by virtue of the testimony of Dr. Anis, the sentencing jury was aware of most of the nonstatutory mitigation regarding appellant's impoverished and abusive childhood. The jury was also aware of appellant's abuse of alcohol and excessive use of marijuana." Id. at 321; see also Brown v. State, 755 So.2d 616, 636 (Fla. 2000) (Strickland standard not satisfied where mental health expert testified during postconviction hearing that even if he had been provided with additional background information, his penalty phase testimony would have been the same); Rose v. State, 617 So.2d 291, 295 (Fla. 1993) ("The fact that Rose has now obtained a mental health expert whose diagnosis differs from that of the defense's trial expert does not establish that the original evaluation was insufficient."); Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990) (holding prejudice not demonstrated where mental health testimony would have been largely repetitive; also, fact that defendant had secured an expert who could offer more favorable testimony based upon additional background information not provided to the original mental health expert was an insufficient basis for relief).

See also Davis v. State, 875 So.2d 359, 371 (Fla. 2003).

Based on Atkins, Hill, in his successive litigation, tries to present a "stand alone" claim, not tied to either an ineffectiveness of counsel or ineffective mental health expert challenge. Hill has not acknowledged that he presented evidence of mental acumen and mental age at his resentencing and the jury was able to judge that evidence. He further has not admitted that he raised these claims in his 1989 motion for postconviction review. They were denied on their merits. See: Hill v. Dugger, 556 So.2d 1385, 1386 (Fla. 1990).

Hill is entitled to no relief on this unsupportable Atkins claim, because he cannot meet the standard for retardation and as evident from the transcript of the Huff hearing held December 19, 2005, he is not retarded. Postconviction counsel stated that his latest doctor examined Hill on December 15, 2005, in prison, and that doctor, Dr. Eisenstein, found Hill to have an I.Q. of "87". (T. Dec. 19, 2005 pps. 30, 32).

Moreover he was not entitled to an evidentiary hearing, since he developed "no evidence" that would suggest "[E]ven if it is determined that Mr. Hill does not fall within the technical definition of mental retardation, Mr. Hill suffers from an equivalent and equally paralyzing affliction that must be entitled to the same protections under Atkins…." (Pet. Motion p 17.)

The trial court properly found the claim procedurally barred, but also noted:

> The instant claim is procedurally barred. The Atkins decision was rendered in 2002, and Defendant has provided no reason as to why he could not have raised this claim in his successive motion filed in 2003. Additionally, Defendant is procedurally barred from raising the instant claim pursuant to Fla.R.Crim.P. 3.203 (enacted in response to the Atkins decision). When the Court invited defense counsel at the December 19, 2005 hearing to offer a reason as to why he was not procedurally barred from asserting the instant claim under rule 3.203(d)(4)(F), defense counsel stated "[m]y argument is that we're not governed by [rule] 3.203 because I can't meet [rule] 3.203 because he doesn't have an I.Q. that's two deviations below the mean." The Court finds that Defendant's argument does not overcome the procedural bars as to this claim of mental retardation, and therefore, he is not entitled to relief on this ground.

ISSUE III: MENTAL AGE

Hill also argues that because he suffers from low I.Q., brain damage and a mental and emotional age of less than 18 years, under Roper v. Simmons, 125 S.Ct. 1183 (2005), he is entitled to relief. The resentencing record reflects that Dr. Larson in 1983, testified that Hill's "mental age" was the same as his chronological age—25. (RTRVol.3 515). In 1989, Dr. Fleming reported that on the Peabody Picture Vocabulary Test (PPVT-R), a "receptive language test", Hill "earned a mental age of 10 years, 11 months, indicating a severe delay in his ability to understand conversation and process information." She concluded this explains a "left hemisphere dysfunction" and

"suggests disturbance of muscular control which results from damage to the central or peripheral nervous system." (Pet. Attachment C p 6).

This claim is procedurally barred from further review. Post his 1990 litigation, Hill never raised this issue again, although he did raise a successive 3.851 in 2003. And in spite of the recent decision in Roper, he did not need Roper to develop this claim. Roper does not involve mental age at the time of the offense. See: Kimbrough v. State, 886 So.2d 965, 975-77 (Fla. 2004).

Moreover, this testimony is contrary to the testimony of Dr. Larson, who testified at both sentencing proceedings in 1983 and 1986. Dr. Larson provided to the jury a detailed explanation of what mental health meant on redirect (RTRVol.3 520-522), and concluded that Hill's mental age was normal. (RTRVol.3 515).

The trial court properly concluded this claim was procedurally barred finding:

> The Roper Court considered only the question of whether it is constitutionally permissible to execute those individuals who were under the chronological age of 18 years when they committed their offenses. The Court based its ultimate ruling on findings that juveniles lack maturity, are more susceptible to "negative influences and outside pressures," and have characters which "are not as well formed as that of an adult." Id. at 1195. The Court further opined that, because of this "diminished capacity," the dual penological purposes of the death penalty – deterrence

and retribution – applied to juveniles with "lesser force." Id. at 1196. Having considered these factors, the Court concluded, "The Eighth and Fourteenth Amendment forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." Id. at 1199.

Defendant was 24 years old at the time of his crime. Although Roper has been applied retroactively, it is not directly applicable to Defendant, because the holding is limited to those offenders who were under the chronological age of 18 at the time of their offense. This Court is not inclined, nor is it authorized, to extend the holding of Roper. Therefore, Defendant is not entitled to relief solely on the basis of the Roper holding, and his third claim is procedurally barred.

Defendant filed an initial postconviction motion in 1989, and a successive postconviction motion in 2003. Florida Rule of Criminal Procedure 3.851(h)(5) dictates that "[a]ll motions filed after a death warrant is issued shall be considered successive motions and subject to the content requirement of subdivision (e)(2) of this rule." Florida Rule of Criminal Procedure 3.851(e)(2)(B) provides that a successive motion "shall include . . . the reason or reasons the claim or claims raised in the present motion were not raised in the former motion or motions." Other than Defendant's reliance on Roper, Defendant has presented no reason why he could not have raised the instant claim in an earlier motion. Indeed, Defendant points in the instant motion to the 1989 report of Dr. Fleming, which "stated Mr. Hill's mental age was approximately ten years old and he functioned as such." Assuming this fact to be true, Defendant could have raised the same claim under Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), which rendered unconstitutional, for many of the same reasons expressed in Roper, the execution of any offender who was under the age of 16 at the time of his offense. Since Defendant has not demonstrated why the instant claim could not have been raised previously, the Court holds that Defendant's third claim is procedurally barred.

Besides not having a mental age below his normal age, Hill has failed to show how he is entitled to raise this claim under the guise of Roper.

ISSUE IV: PUBLIC RECORDS

Hill maintains that he has been denied effective postconviction representation because his counsel has been forced to proceed in postconviction without fully securing all the "public record" requests he made pursuant to Rule 3.852(h)(3), Fla.R.Crim.P. All parties responded below and counsel at the public records hearing held December 19, 2005, averred that he was satisfied with the responses. In those circumstances where additional motions to compel were fairly asserted, the trial court granted Hill access to any available, existing documents. There was nothing revealed that would have impacted the issues raised.

The trial court also held "Defendant has made no representation regarding what records he believes are in the possession of these agencies which would support a colorable claim for postconviction relief, nor has he demonstrated that these records could not have been requested at an earlier date. Defendant has further failed to establish that he could not have timely sought production of the documents, or that the documents were previously requested but unlawfully withheld. See Buenoano

v. State, 708 So.2d 941, 953 (Fla. 1998)." (Order Denying Relief dated December 19, 2005.)

Hill also sought additional public records traveling under Rule 3.852(i), Fla.R.Crim.P., wherein he asserts entitlement to public records or compel production from the Medical Examiner, Eighth District, and the Pensacola Police Department and the State Attorney's Office for the First Judicial Circuit. (See Requests dated December 23, 2005).

In the "Public Records" demand of the Medical Examiner, Eighth District, at the hearing held on public records December 19, 2005, p. 13, the State argued that Hill would additionally, not be entitled to any public request under Rule 3.852(i) because he was under an active warrant and only Rule 3.852(h) controlled.[5] Moreover the Court in Tompkins v. State, 872 So.2d 230 (Fla. 2003), observed that an inmate is not required to wait until a warrant to make additional public records request; presuming he could satisfy Rule 3.852(i).

> Tompkins argues that he could not have made this public records request earlier because at the time this Court issued its decision in Buenoano v. State, 708 So.2d 941 (Fla. 1998), making it clear that any such claim will be barred if counsel fails to exercise

[5] Objections were made in the responses to the first public records request as to any later assertion that Hill would argue under Rule 3.852(i), he was entitled to additional public records, see, footnote 3, Response To Public Records for the Medical Examiner, Eighth District, and response from Attorney General's Office.

due diligence, Tompkins was litigating in federal court and then was precluded by the adoption of Florida Rule of Criminal Procedure 3.852 from filing his request before his death warrant was signed. This argument fails for three reasons.

First, although a request for public records under rule 3.852(h)(3) is contingent upon the signing of a death warrant, rule 3.852(i) "allows collateral counsel to obtain additional records at any time if collateral counsel can establish that a diligent search of the records repository has been made and 'the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence.'" Sims, 753 So.2d at 70-71 (quoting Rule 3.852(i)(1)). Accordingly, Tompkins was not required to wait until the death warrant was signed to make an additional public records request, provided he could have made the required showing under rule 3.852(i).

Second, Tompkins' request for information from the Division of Elections related to Judge Coe's campaign contributions could have been made years ago, and Tompkins has not indicated any good cause as to why he did not make this request until after the death warrant was signed. Similarly, Tompkins' request for juror criminal records could also have been made years ago. As noted by the trial court, counsel conceded that this issue was known to trial counsel in 1985 and provided no explanation as to why the requests were not made until after the death warrant was signed. Accordingly, we conclude that the trial court did not abuse its discretion in denying Tompkins' motion to compel the production of public records. n19

n19 We do not address Tompkins' requests to the Hillsborough County Sheriff's Office, the Department of Corrections, the Florida Parole Commission and the Board of Executive Clemency in further detail because Tompkins has failed to present any argument as to how the trial court erred in denying the motion to compel with respect to these agencies. See Shere v. State, 742 So.2d 215, 217 n.6 (Fla. 1999) (stating that where defendant did not present any argument or allege on what grounds trial court erred in denying claims in his postconviction motion, claims were "insufficiently

> presented for review"); Coolen v. State, 696 So.2d 738, 742 n.2 (Fla. 1997) (explaining that the defendant's "failure to fully brief and argue" specific points on appeal "constitutes a waiver of these claims").

The trial court ascertained from Hill's counsel that he was satisfied with the responses submitted on the initial public records demands, and counsel acknowledged satisfaction. As to any additional public records demands, the trial court held that in particular as to the Medical Examiner, Eighth District, Hill made no representation regarding what records he believed were in the possession of these agencies which would support a colorable claim for postconviction relief, nor demonstrated that these records could not have been requested at an earlier date. Further Hill's failure to establish that he could not have timely sought production of the documents, or that the documents were previously requested but unlawfully withheld, was evident. See Buenoano v. State, 708 So.2d 941, 953 (Fla. 1998).

Hill sought to secure public records regarding the autopsies from the past 16 executions.[6] Those records have been available since February 23, 2000 through April 5, 2005. Hill

[6] Moreover on December 23, 2005, this Court held in it's order denying postconviction relief that "[T]herefore, because the constitutionality of lethal injection has been fully litigated, and because Defendant has provided no convincing reason as to why this claim could not have been raised previously, the instant claim is procedurally barred." P. 5-6.

provided no basis to overcome the procedural default in securing records under Rule 3.852(i).

The trial court correctly denied Hill's subsequent request holding that:

> Defendant now makes bare allegations under rule 3.852(i) that the "records are reasonably calculated to lead to the discovery of admissible evidence," and that the request is not overly broad or burdensome, but has made no showing as to how these records "relate to a colorable claim for postconviction relief or to a focused investigation into some legitimate area of inquiry." Glock v. Moore, 776 So.2d 243, 254 (Fla. 2001). Neither has Defendant demonstrated why these new records requests were not made until after the death warrant was signed. Id., *citing* Bryan v. State, 748 So.2d 1003, 1006 (Fla. 1999); Buenoano v. State, 708 So.2d 941, 947 (Fla. 1998). Therefore, although Defendant has filed the instant motion pursuant to a different section of rule 3.852 than his most recent request for these records, the Court's opinion remains unchanged. Rule 3.852 is not intended for use by defendants as . . . *nothing more than an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate area of inquiry.* Glock v. State, 776 So.2d 243, 253 (Fla. 2001) (quotation marks omitted), *quoting* Sims v. State, 753 So.2d 66, 70 (Fla. 2000) (emphasis added). Defendant is not entitled to the records which he seeks, and the Court declines to order their production.

As to the Motion to Compel Production of Public Records from the Pensacola Police Department and the State Attorney's Office, Hill was provided the letters transmitted between the

State Attorney's Office,[7] the Pensacola Police Department to the Governor's Office regarding inquiry as to whether any DNA evidence existed. He stated he was satisfied with these agencies' responses. (Hearing December 19, 2005, T. p. 8.)

Hill now alludes to the fact there currently is available evidence from the crime scene that could be tested under Rule 3.853 – regarding DNA. Whether there is evidence that could have been tested is of no moment because, Hill made no further assertion that DNA would absolve him of the crime or sentence. Plus, he is procedurally barred from asserting any entitlement to DNA testing since he has never acted upon the rule albeit he had the wherewithal to do so.

Moreover, no relief is warranted, in light of the later request under Rule 3.852(i) because (1) Hill never demanded or sought to have any evidence tested under Rule 3.853 albeit it was always, readily available to him; (2) the evidence listed in the police reports have been in existence since 1982, and he could have always obtained them; (3) under Rule 3.853, Hill cannot satisfy, in particular, subsection 3.853(3) which provides "(3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the

[7] On December 27, 2005, the State Attorney's Office filed an additional Notice of Compliance By The State Attorney's Office, attached hereto on the requested correspondence.

movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime." He has not asserted "he is innocent of the murder" and "has not shown how the sentence could be mitigated simply because there is evidence that could be DNA tested". See Tompkins v. State, 870 So.2d at 242-43 (not innocent of murder); Van Poyck v. State, 908 So.2d 326 (Fla. 2005) (not innocent of sentence); Sireci v. State, 908 So.2d 321 (Fla. 2005) (failure to grant DNA tests harmless-not innocence of crime or sentence); Cole v. State, 895 So.2d 398 (Fla. 2004); Hitchcock v. State, 866 So.2d 23, 27 (Fla. 2004).

As observed in Robinson v. State, 865 So.2d 1259, 1264-65 (Fla. 2004):

> Robinson also appeals the trial court's denial of his DNA Motion. It was not until these latest postconviction proceedings that Robinson moved to have evidence consisting of cigarette butts, beer cans, the victim's clothing, hair, and the rape kit tested for the presence of DNA. The trial court denied the DNA Motion, finding that such testing is not now probative because Robinson does not dispute his involvement in this case, including the facts that he had sex with the decedent and that he fired the shots that killed her. The trial court concluded, "The results of any DNA test would not in any way exonerate the Defendant, nor mitigate his sentence." Pursuant to Florida Rule of Criminal Procedure 3.853, the defendant must allege with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. See Fla.R.Crim.P. 3.853(b)(1)-(6); Hitchcock v. State, 866 So.2d 23, 2004 Fla. LEXIS 4, 29 Fla.L.Weekly S13 (Fla. Jan. 15, 2004). It is the defendant's burden to

> explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence. Id.
>
> However, Robinson failed to state in the motion how DNA testing of all the items listed would exonerate him of or even mitigate his sentences for robbery, sexual battery, and first-degree murder. Notably, Robinson stipulated that he shot the victim twice in the head, but claimed that the first shot was accidental and took place after the two engaged in consensual sex. See Robinson v. Moore, 300 F.3d 1320, 1323-26 (11th Cir. 2002). Thus, his identity and physical contact with the decedent are not at issue. See Marsh v. State, 812 So.2d 579, 579 (Fla. 3d DCA 2002) (holding that DNA testing of rape kit would be superfluous because the defendant's unsuccessful defense at trial was consensual sex and not identity). Because Robinson failed to meet his burden under rule 3.853 to allege with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence, we affirm the trial court's denial of relief in this claim.

Hill did not overcome his burden of demonstrating that he was entitled to additional public records under Rule 3.852(i), because he did not and cannot demonstrated how, with due diligence, he was unable to unearth the demanded public records--existing since 1982 from the Pensacola Police Department.

The trial court likewise rejected Hill additional demand for records from the Pensacola Police Department. The trial court held in its December 27, 2005, Order:

> While the letter of inquiry from the Governor’s office and the State’s responses may be recent, the underlying DNA evidence, if it in fact exists, has been available since the time of Defendant’s crime in 1982. Defendant has not demonstrated how the

> requested documents "relate to a colorable claim for postconviction relief or to a focused investigation into some legitimate area of inquiry." Glock v. Moore, 776 So.2d 243, 254 (Fla. 2001). Defendant's request for additional public records is also untimely. The Court announced a deadline of December 22, 2005, for amendment of the pending postconviction motion. Defendant did not request an extension of the deadline, nor did he file an amendment to his postconviction motion. Therefore, the Court entered an order denying Defendant's motion for postconviction relief on December 23, 2005. As Defendant has failed to demonstrate that the requested records are related to a colorable claim for postconviction relief, and has also failed to file the instant request in a timely manner, the Court declines to compel production of the requested documents.

There have been no public records violations in Hill's successive postconviction trek.

ISSUE V: SHACKLING

The trial record is totally silent as to any complaint by Hill that he was shackled at trial or sentencing or resentencing, yet, he maintains he can "show that Mr. Hill and Clifford Jackson were shackled and handcuffed during his penalty phase testimony…." The only "evidence" presented below that would impact this claim was the affidavit of his cohort, Clifford Jackson, who signed a 2005 affidavit stating that "he was shackled at Hill's resentencing proceeding in 1986", when he testified. (See Attachment V--Clifford Jackson's 2005 Affidavit.)

First, there is no evidence that even assuming *arguendo* that he was shackled that he preserved the issue for

postconviction review. Although, Hill was resentenced in 1986, Hill did not need the Supreme Court's decision in Deck, to develop this issue in his initial postconviction motion-see Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987) (granted a new penalty phase where the issue was preserved.) Clearly, a preserved issue might have provided redress on direct appeal.

Second, the instant litigation is Hill's third successive postconviction litigation and he readily admits that he has never tried to perfect this claim. He is procedurally barred from attempting to argue it now. See: LeCroy v. Fla. Dept. of Corr., 421 F.3d 1260 (11th Cir. 2005).

Third, as announced in Marquard v. Fla. Dept. of Corr., 2005 US App. LEXIS 24333 (11th Cir. 2005), Deck, is not retroactive; Deck, was on direct review of a preserved claim. As observed in Marquard, supra, "Deck did not involve an IAC-shackling claim on collateral review but instead involved a direct appeal where trial counsel objected to shackling before the jury. While Deck shifted the burden to the state on direct appeal to prove that routine shackling without a specific-needs inquiry did not contribute to the verdict…."

Clearly Hill cannot prevail on this procedurally barred claim, nor should he be permitted to try and develop it in his "third round of postconviction proceedings".[8]

The trial court's determination that the shackling issue was procedurally barred should be affirmed. Gudinas v. State, 879 So.2d 616, 618 (Fla. 2004).

ISSUE VI: REVISITING PRIOR POSTCONVICTION MOTION

Hill boldly claims that a postconviction litigant is entitled to an evidentiary hearing therefore, he is urging that he should be able to revisit his first rule 3.850 from 1989, and have those claims reviewed again—however he does not identify what claims he was erroneously denied a hearing. Freeman v.

[8] See also Marquard, supra, "As noted earlier, this Court ordered supplemental briefs setting forth the factual basis for Marquard's shackling claims, including citations to the record. The government's brief submits that the state trial record contains no evidence or indication of Marquard's ever being shackled at any time during the trial. The government emphasizes that Marquard also presented no affidavit or proffer in his state post-conviction proceedings as to his ever being shackled during the trial. In response, Marquard's brief provides only one citation in the state trial record where he alleges shackling occurred during the trial. As noted earlier, Marquard's record citation is to the jury-selection proceedings in the guilt phase, not in the penalty phase. Even as to jury selection during the guilt phase, the record citation, given by Marquard and quoted earlier, also does not show that Marquard was shackled in the presence of the jury.

At the outset, we thus conclude that there is no evidence in this record that Marquard was ever shackled before the jury during the penalty phase. Accordingly, Marquard's due process claim based on shackling during the penalty phase is without merit."

State, 761 So.2d at 1061 (Defendant required to identify claims). Moreover, although he had an opportunity to litigate any claims he chose to raise in 2003, when he argued his Ring claim, he did not take that opportunity to seek further evidentiary hearing of a claim previously raised. See: Peede v. State, 748 So. 2d 253 (Fla. 1999); Valle v. State, 705 So.2d 1331 (Fla. 1997)

To suggest that he has been denied a due process right is wanting, since the only deprivation has been the failure of Hill to present his claims in a timely fashion. He is procedurally barred from even asserting any due process claim herein. See: Ventura v. Sec. Dept. of Corr., 419 F.3d 1269 (11th Cir. 2005).

The trial court held that Hill was procedurally barred because he "has already raised the lack of an evidentiary hearing in the appeal pertaining to his initial postconviction motion in the Florida Supreme Court. The Supreme Court of Florida found, as stated in Defendant's motion, that the trial court properly determined an evidentiary hearing was not justified. See Hill v. Dugger, 556 So.2d 1385, 1389 (Fla. 1990). Additionally, Defendant's claim regarding the Court's failure to attach portions of, or to cite to, the record in support of its findings is also procedurally barred, as this claim should have been raised on direct appeal of this Court's order. Defendant has provided this Court with no reason as to

why he should be allowed to assert this claim some fifteen years after it should have been raised." (Order, December 23, 2005 p. 12).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

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 email and U.S. Mail to D. Todd Doss, 725 Southeast Baya Drive, Suite 102, Lake City, Florida 32025, this 3rd day of January, 2006.

_____
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CERTIFICATE OF TYPE SIZE AND STYLE

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