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IN THE SUPREME COURT OF FLORIDA

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JAMES CURTIS McCRAE,

Appellant,

v. CASE NO. 67,629

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The defendant, James Curtis McCrae, was convicted on May 21, 1974 of first degree felony murder. Appeal was taken to the Florida Supreme Court raising the following grounds:

> THE TRIAL COURT ERRED IN ALLOWING THE STATE TO QUESTION McCRAE ABOUT A PRIOR UNRELATED FELONY ON CROSS-EXAMINATION.
>
> THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF EDITH VEAL, MURIEL BERGNER, FAITH GERTNER AND WILLIAM SMITH.
>
> THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY BY DENYING DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW AND VIOLATING THE MANDATE OF FURMAN V. GEORGIA, BECAUSE THERE IS NO RATIONAL DISTINCTION BETWEEN FIRST DEGREE MURDER, FLORIDA STATUTE §782.04(1)(a) AND SECOND DEGREE MURDER, FLORIDA STATUTE §781.04(2).
>
> FLORIDA STATUTE $921.141 VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION UNDER THE MANDATE OF FURMAN V. GEORGIA ON ITS FACE AND AS APPLIED TO McCRAE.
>
> THE TRIAL COURT ERRED IN OVERRULING THE ADVISORY VERDICT OF THE JURY FOR A LIFE SENTENCE.
>
>> THE TRIAL JUDGE WAS INFLUENCED BY FACTORS NOT CONTAINED IN FLORIDA STATUTES $921.141 AS AGGRAVATING OR MITIGATING CIRCUMSTANCES AND BY FACTORS WHICH WERE NOT PROVED BEYOND A REASONABLE DOUBT.
>>
>> THE TRIAL COURT RELIED INCORRECTLY UPON EVIDENCE OF A PRIOR OFFENSE.
>>
>> THE TRIAL COURT'S FINDINGS ON THE MITIGATING CIRCUMSTANCES ARE NOT BY COMPETENT, SUPPORTED SUBSTANTIAL EVIDENCE.

While the appeal was pending, the defendant filed a Motion for

New Trial and a Motion to Amend Brief of the appellant. These new motions claim newly discovered evidence and a violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The Supreme Court entered an order relinquishing jurisdiction to the trial court to entertain a 3.850 motion. A motion was filed and the court held an evidentiary hearing. The motion was denied, appeal taken and briefs filed.

On October 30, 1980, the Supreme Court issued an opinion affirming the finding of guilt and upholding the sentence of death. A motion for rehearing was filed, and on rehearing the court addressed the issues raised in the 3.850 appeal. See Mc-Cray v. State, 395 So.2d 1145 (Fla. 1981). Defendant sought relief via a Petition for Writ of Certiorari in the United States Supreme Court, certiorari was denied. McCrae v. Florida, 454 U.S. 1041 (1981).

On March 4, 1982, the Governor signed a death warrant on McCrae. A Petition for Writ of Habeas Corpus and Application for Stay of Execution was filed in the Florida Supreme Court. After argument, the court issued an opinion granting a stay and finding appellate counsel ineffective for failing to raise on appeal the trial court's failure to give an instruction defining rape. On rehearing, the court again reversed finding the failure to instruct not fundamental and further indicating rape was adequately defined otherwise. McCrae v. Wainwright, 422 So.2d 824 (Fla. 1982). A Petition for Writ of Certiorari in the

United States Supreme Court was denied.

Governor Bob Graham signed a second death warrant on May 27, 1983. Petitioner filed both a motion pursuant to Rule 3.850, Florida Rule of Criminal Procedure, and a second state habeas petition. Habeas relief was denied. McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983). On appeal from the denial of 3.850 relief, the Supreme Court reversed and remanded to the trial court to clarify its reasons for denying relief. See McCrae v. State, 437 So.2d 1388 (Fla. 1983). On remand, the trial court held an evidentiary hearing on the motion. After briefing by the parties, 3.850 relief was denied. This appeal followed.

STATEMENT OF THE FACTS

The following facts are taken from the Florida Supreme Court opinion on direct appeal, McCray v. State, 395 So.2d 1145 (Fla. 1985).

On October 15, 1973, Margaret Mears, a sixty-seven-year-old woman, was found dead in her apartment. Her body, unclothed from the waist down, had been brutally beaten about the head and chest and her vaginal area was covered with blood. A bloody palm print lifted from her apartment was identified as that of the appellant, James Curtis McCrae. McCrae was subsequently indicated for two counts of murder in the first degree, one count charging a premeditated killing, and the other charging felony murder.

In order to determine his competency to stand trial, appellant was examined by three court-appointed psychiatrists. While all three doctors concluded that appellant's mental disorders created violent and uncontrolled behavior, appellant was found competent to stand trial. Specifically, Dr. Mordecai Haber observed that McCrae suffered from a disorder which contributed to an explosive personality. The doctor concluded that McCrae was mentally competent, but too dangerous to be at liberty in society. Dr. Thomas Haagland found that McCrae was capable of giving aid to his counsel, and when sober, was a well-contained individual who had firm control over his faculties. However, when under the influence of intoxicants, appellant released an underlying epileptic furor which erupted into uncontrolled violent

behavior. Dr. Clarence Schlit, who testified during the bifurcated phase of the trial, stated that McCrae was subject to attacks when under emotional stress which prevented him from exercising the restraint which would be present in a normal individual. Although the doctor stated that appellant was not insane, he did determine that McCrae suffered from a chronic schizophrenic illness and that he was unlikely to cooperate with defense counsel.

At trial, the state introduced the testimony of four witnesses for the alleged purpose of showing identity or establishing a common scheme or plan. Edith Veal testified that she lived near the victim. At the purported hour of the crime's commission, she stated that a young black male with a cast on his arm fitting the same general description as appellant, knocked on her door and asked for Wayne Miller. Mrs. Veal stated that no one by that name lived at her residence. The man then asked if her husband was home. While Mrs. Veal was unable to identify appellant at pre-trial lineup, she was able positively to identify him upon being recalled to the witness stand.

Muriel Bergner similarly testified that she lived in close proximity to the victim. According to her testimony, on October 14, 1972, the day before the victim's body was found, a young black male also fitting McCrae's general description approached her while she was walking her dog to ask directions. The man walked away, but returned, again asking questions. At that

point, Mrs. Bergner walked hurriedly to her home and locked the door. She succeeded in fastening the lock just before the man arrived at her doorstep. The state also called Dorothy Hendley who testified that while walking her dog, a man whom she positively identified as appellant approached her and asked questions similar to those asked of Muriel Bergner.

Faith Lederman Gertner and William Smith testified that McCrae came to Mrs. Gertner's apartment on June 8, 1973, searching for Randy Williams. When informed that Williams did not live there, McCrae left, but returned shortly thereafter and asked Mrs. Gertner to accompany him downstairs. She refused, but William Smith agreed to go in her place. Once they walked downstairs, McCrae took a swing at Smith and fled. Later that evening, appellant returned and forced the door open. He drew a gun and shot Smith. He then beat Gertner about the face with the gun and choked her before fleeing again.

After the state rested, appellant took the stand in his own behalf. During direct examination, he was asked if he had been convicted of misdemeanors and if he had pleaded guilty to those charges. Appellant responded in the affirmative to both questions. His counsel then asked if he was ever convicted of a felony, to which appellant again answered affirmatively. On cross-examination, the state attorney sought to elicit the nature of the felony charge. Overruling defendant's objection, the court required McCrae to disclose to the jury that he had pleaded guilty to assault with intent to commit murder on the

ground that appellant's counsel had "opened the door" to such questioning.

After the close of the evidence, the jury returned a verdict of guilty on the felony-murder count, but recommended a life sentence. As required by §921.141(3), Florida Statutes (1975), the trial judge made findings of fact wherein he rejected the recommendation of the jury and entered a judgment calling for the death sentence.

The following facts were adduced at the hearing held on petitioner's 3.850 motion. The first witness called was Joseph A. Simpson, petitioner's trial counsel. Mr. Simpson testified he began working for the Office of the Public Defender in March, 1973, as a law clerk. He became a member of the bar in May of 1973. During that time, and prior to representing this defendant, Mr. Simpson assisted Mr. Midgley, the Public Defender, in a capital case. In the period between May, 1973 and December, 1973, counsel was assigned to the misdemeanor division, but worked on a few felony cases. He had approximately ten jury trials prior to the McCrae trial.

Petitioner's case was originally assigned to Steve Wallace, the Chief Assistant Public Defender. Prior to being assigned McCrae's case, Mr. Simpson had been reassigned to the felony division. When Steve Wallace left the office, the case was assigned to Mr. Simpson, probably in January, 1974. This was the first capital case for which Mr. Simpson had primary responsibility.

Although Mr. Simpson had a a caseload which included other felonies, it was possible to spend more time on a capital case than on a "routine" felony. Mr. Simpson had not seen a capital case from start to finish before the McCrae case, but he consulted with other attorneys on how to handle a capital case. Counsel primarily discussed the case with Doug Midgley, who showed him other capital cases and actually advised him about how to handle the McCrae case. Mr. Midgley had just finished trying a capital case himself. Additionally, counsel had the services of an investigator who sometimes would sit and assist in court as well as do things out of court.

Mr. Simpson testified that prior to trial, hearings were held on petitioner's competence. Counsel had conversations with medical experts at their office. He was accompanied by either an attorney or an investigator. Mr. Simpson indicated he did not, however, recall the specifics of these conversations. The competency issue was initially started by Steve Wallace. The decision to abandon the insanity defense was based on medical opinions that he was sane.

During the course of counsel's representation, he talked with petitioner's parents and siblings. Counsel did not speak with a wife or former wife. He did talk with petitioner's former football coach. Mr. Simpson also testified he did a lot of research and preparation of this case. This research included the issue of Williams Rule testimony. Objection was made to this type of evidence. Dr. Schilt was called during the penalty

phase; Dr. Haber was not called because his testimony would have been more helpful to the state than the defense. Dr. Haber was of the opinion that petitioner's conduct was the result of his hatred for white people.

Mr. Simpson's testimony was based on his recollection. The public defender file on this case had been destroyed, and counsel had been unable to refresh his recollection by looking at notes, etc. On the allegation of ineffective counsel based on failure to have an independent fingerprint analysis, counsel testified McCrae admitted to being in the apartment, supposedly to meet some females there.

Counsel stated it was not always best to move for a mistrial when objectionable comments are made during a trial. One must weigh the factors involved in having another trial, such as, the prosecutor having more time to patch up holes, how the trial has gone so far and whether you have a good jury. Additionally, even asking the comment be stricken or disregarded may serve to emphasize the comment. At no time during counsel's representation of petitioner was counsel aware that his office had represented Otis Walker, a state witness. Defense counsel went into petitioner's prior criminal record to minimize the impact of the Williams Rule evidence by pointing out the other convictions were misdemeanors.

Despite counsel's belief the mitigating was restricted, he was allowed to present non-statutory mitigating evidence. Counsel researched areas of the law where he had no prior experience.

Robert Jacobs, a public defender since January, 1973, was called to testify. He stated he represented Otis Walker on more than one occasion. Mr. Jacobs also stated he did not recall having any conversations with Mr. Simpson about the McCrae case.

Petitioner's ex-wife, Myra Starks, testified on his behalf. She stated when she started dating him, he was very nice, quiet and shy. Prior to their marriage in 1970, petitioner told her he had been in the service. After the marriage, petitioner's personality changed; he was aggressive and drank beer. Petitioner began to be violent with her, but would say he did not remember the episodes.

The violence would occur when the petitioner was drinking. The violence was always directed to her and not any third person who might be present. During the marriage, there was no indication that petitioner had epilepsy and Ms. Starks said she never saw petitioner have a seizure.

Mrs. Starks also testified she moved to California after her divorce. One of the reasons she moved was to prevent petitioner from knowing where she was. There was no contact between the witness and petitioner from the divorce until sometime after the trial.

Patrick Doherty, a Florida attorney, was allowed to proffer testimony on the issue of effective assistance of counsel. He stated essentially that he believed defense counsel at trial was ineffective because he abandoned a viable insanity defense. The witness also indicated a person with a year or less of trial

experience should not be allowed to handle a capital case, although he had handled such cases with less than a year's experience.

Also called as a witness was Theodore J. Machler, Jr., M.D., a psychiatrist. The court found him qualified to give opinions in the area of psychiatry. Dr. Machler testified that based on the records from doctors and medical facilities, he reviewed, petitioner has epilepsy. Also based on these records, it appears petitioner's epilepsy progressed from the temporal lobe type to grand mal type. With the temporal lobe disorder, a person may lash out with physical violence, including destruction of property. The lashing out would be indiscriminate. This type of behavior is also characterized by a loss of memory of the event. The use of alcohol would increase the frequency and intensity of the seizures. A person in such a seizure would not have the ability to premeditate a crime. Such a person would be unable to control his actions and could not appreciate the nature of the act.

Dr. Machler did not personally examine petitioner, but based his opinions on the records he received. He had no knowledge of a EEG being done, nor had he seen one. The witness agreed it was possible for two physicians to disagree on the interpretation of an EEG. It was pointed out on cross-examination that the records used by Dr. Machler contain various inconsistencies including, inter alia, when his epilepsy began. Dr. Machler testified he did nothing to check the accuracy of any of

the records.

The doctor acknowledged that none of the prison records indicate anyone actually observing a fit or seizure. Dr. Machler also states his knowledge of the facts of the murder were obtained from defense counsel, not from the trial transcript or police reports, etc. Dr. Machler testified the school records would not be helpful in determining temporal lobe epilepsy. Dr. Machler also testified that every act of violence by a person with temporal lobe disorder is not necessarily due to a seizure.

SUMMARY OF THE ARGUMENT

Under the standard announced by the Supreme Court in Strickland v. Washington, infra., appellant received reasonably effective assistance of counsel. Counsel investigated the possibility of an insanity defense. To that end, he talkedwith and had the reports of several psychiatric experts. After discussing these reports with his superior, counsel made an informal decision not to pursue that line of defense.

Additionally, since there was no active conflict of interest arising from the public defender's office representation of a state witness, counsel cannot be held ineffective for failing to correct same. The limiting instruction concerning Williams Rule evidence was not in effect in 1973. Counsel cannot be held ineffective for failing to anticipate a change in law. Likewise, the law in 1973 did not provide for appointment of a psychiatric expert to report only to the defense. See, Muhammed v. State, infra.; and Funchess v. Wainwright, infra.

Appellee submits issues which could have been and should have been raised on appeal cannot be considered on a 3.850 motion. Appellant is not entitled to a new sentencing hearing. The principles espoused in Harvard v. State, infra., are not applicable here since counsel was prepared to and did present nonstatutory mitigating evidence. The fact that the court does not discuss nonstatutory mitigating evidence in the sentencing order does not indicate the evidence was not considered.

<u>ISSUE I</u>

APPELLANT RECEIVED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant's claim of ineffective counsel must be addressed in light of the United States Supreme Court's legal standard for reviewing ineffective assistance of counsel claims as outlined in <u>Strickland v. Washington</u>, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The determination of whether the assistance rendered by counsel is reasonably effective is not to be based solely upon his performance at trial; effectiveness must be based on the totality of circumstances. <u>Corn v. Zant</u>, 708 F.2d 549 (11th Cir. 1983); <u>United States v. Gibbs</u>, 662 F.2d 728 (11th Cir. 1981). This Court has on numerous occassions adopted and applied the <u>Strickland</u> standard. See, i.e., <u>Soreci v. State</u>, 469 So.2d 119 (Fla. 1985); <u>Witt v. Wainwright</u>, 465 So.2d 510 (Fla. 1985); <u>Jackson v. State</u>, 452 So.2d 533 (Fla. 1984); <u>Shriner v. State</u>, 452 So.2d 929 (Fla. 1984); <u>Downs v. State</u>, 453 So.2d 1102 (Fla. 1984); <u>Dobbert v. State</u>, 456 So.2d 424 (Fla. 1984); <u>Adams v. State</u>, 456 So.2d 888 (Fla. 1984); <u>Smith v. State</u>, 456 So.2d 1380 (Fla. 1984); <u>Clark v. State</u>, 460 So.2d 886 (Fla. 1984); <u>Mikenas v. State</u>, 460 So.2d 359 (Fla. 1984); <u>Tafero v. State</u>, 459 So.2d 1034 (Fla. 1984).

The benchmark for judging claims of ineffectiveness is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a ~~first~~ just result." <u>Strickland v. Washington</u>,

U.S. ___, 104 S.Ct. 2052, 2064 (1984). In order for a defendant to succeed on a claim of constitutionally deficient representation so as to obtain a reversal of conviction on death sentence, the United States Supreme Court held that he must first show both that counsel's performance was deficient; that is, a showing that the attorney was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that there is a reasonable probability that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial the result of which is reliable. 104 S.Ct. 2064, 2068. Prejudice does not embrace errors which are merely deterimental to defendant's case. Corn v. Zant, supra, at 561; Adams v. Balkcom, supra, 739; Washington v. Watkins, 655 F.2d 1346, 1360 (5th Cir. 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982).

The court in Strickland v. Washington, supra, rejected the motion that rigid guidelines are to be utilized when assessing such a claim and instead held that the measure of an attorney's performance should be predicated upon reasonableness under prevailing professional norms. The court provided clear direction to lower federal and state courts requiring that judicial scrutiny of counsel's performance must be highly deferential. The lower courts were clearly directed that every effort must be made to eliminate the distorting effects of hindsight and to try and reconstruct circumstances and evaluate conduct based on those circumstances as they existed at the time. Requirements

were imposed that <u>strong</u> presumptions be afforded to the idea that counsel acted reasonably and thus effectively. Emphasis was placed on strategic choices made after thorough investigation and that those choices were virtually unchallengable, and a particular decision not to investigate must be assessed for reasonableness considering all the circumstances and applying a heavy measure of deference to the attorney's judgments.

Most importantly, it was stated that when a defendant challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In this context, to the extent that an appellate court independently reweighs the evidence, it too was bound by that process. "[A] court making the prejudice inquiry must ask if the defendant has ~~not~~ met? the burden of showing that the decision reached would reasonably likely have been different absent the errors." 104 S.Ct. 2069.

In <u>Ford v. Strickland</u>, 696 F.2d 804 (11th Cir. 1983) (en banc), the Eleventh Circuit Court of Appeals addressed the issue as follows:

> In reviewing ineffective assistance of counsel claims, we do not sit to second guess considered professional judgments with the benefit of 20/20 hindsight. Washington v. Watkins, 655 F.2d at 1355; Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980). We have consistently held that counsel will not be regarded constitutionally deficient merely because of tactical decisions. See United States v. Guerra, 628 F.2d 410 (5th Cir. 1980), cert. denied, 450 U.S. 934, 101

> S.Ct. 1398, 67 L.Ed.2d 369 (1981); Buckelew v. United States, 575 F.2d 515 (5th Cir. 1978); United States v. Beasley, 479 F.2d 1124, 1129 (5th Cir.), cert. denied 414 U.S. 924, 94 St. Ct. 252, 38 L.Ed.2d 158 (1973); Williams v. Beto, 354 F.2d 698 (5th Cir. 1965). Even where an attorney's strategy may apppar wrong in retrospect, a finding of constitutionally ineffective representation is not automatically mandated. Baty v. Balkcom, 661 F.2d 391, 395 n.8 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); Baldwin v. Blackburn, 653 F.2d 942, 946 (5th Cir. 1981).
>
> (22, 23) That counsel for a criminal defendant has not pursued every conceivable line of inquiry in a case does not constitute ineffective assistance of counsel. Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980). This is not a case in which counsel allegedly failed to prepare and investigate adequately. Ford's counsel was reasonably likely to render and did render reasonable effective assistance. See Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974). Because the record reveals Ford received constitutionally adequate representation and no prejudice resulted to him by any action or inaction of counsel, see Washington v. Watkins, 655 F.2d at 1362. Ford has not carried his burden of proving ineffective assistance of counsel. See United States v. Killian, 639 F.2d 206, 210 (5th Cir.), cert. denied, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981).

(Ford v. Strickland, supra at 820)

See also <u>Stanley v. Zant</u>, 697 F.2d 955 (11th Cir. 1983), in which the Eleventh Circuit Court of Appeals again emphasized that a defendant must demonstrate prejudice:

> (1) The framework for analyzing claims of constitutionally ineffective assistance of counsel in this circuit was set forth in the en banc opinion in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982)(Unit B en

> banc). Under Washington v. Strickland, a petitioner asserting that counsel failed to conduct an adequate pretrial investigation has the initial burden of making a dual showing. As a threshold requirement, he must show that his counsel was in fact, ineffective, that counsel's conduct was not within the "range of competence demanded of attorneys in criminal cases," McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); Mylar v. State, 671 F.2d 1299, 1301 (11th Cir. 1982) pet. for cert. filed, ___ U.S. ___, 103 S.Ct. ___, 74 L.Ed.2d ___, 50 U.S.L.W. 3984 (U.S. June 7, 1982)(No. 81-2240). This is an objective assessment of whether trial counsel fell below acceptable professional standards in not advocating the underlying claim. This portion of the analysis may ask, for example, whether counsel conducted a reasonable pretrial investigation and whether counsel's failure to investigate certain lines of defense was part of a strategy based on reasonable assumptions. A petitioner has the additional burden of proving that his counsel's ineffectiveness caused "actual and substantial prejudice" to his case. Because we hold that Stanley has failed to prove that his trial counsel was ineffective, we need not reach the issue of prejudice.

See also United States v. Valenzuela-Barnal. 102 S.Ct. 3440 (1982).

Appellant asserts that his trial counsel rendered ineffective assistance at both the guilt and penalty phases of the trial. We turn to these contentions.

The thrust of appellant's claim of ineffective counsel seems to be that trial cousnel was ineffective because he had been practicing law for only a year, and this inexperience led him to abandon a viable defense. It has been held that inexperience alone is not per se ineffective assistance. See Griffin

v. Wainwright, 588 F.2d Supp. 1549 (M.D. Fla. 1984) and *United States v. Cronie*, ___ U.S. ___, 104 S.Ct. ___, 80 L.Ed.2d 657 (1984). That is certainly true in this case since the record indicates counsel made extensive preparations for this trial.

Trial counsel had been with the public defender's office for approximately one year when he was assigned the McCrae case. He had worked in the misdemeanor and felony divisions of that office. Counsel was, in fact, assigned a felony load at that time, but the case load was not overwhelming. Mr. Simpson had conducted about ten jury trials. While this was the first capital case for which Mr. Simpson had primary responsibility, he had assisted Mr. Midgley, the Public Defender, on a capital case.

In preparing for this trial, counsel ~~dismissed~~ discussed ? the handling of capital cases with other attorneys. His primary source of help and assistance was Mr. Midgley, who had just tried a capital case himself. Mr. Midgley not only discussed the particulars of the McCrae case, but also showed him the case files from other capital cases to familiarize him to this type of case. Mr. Simpson also had the services of an investigator who assisted him both in and out of court. Counsel also stated he did research and prepared on various issues of law he had not been exposed to before, including the issues of fingerprint identification, serology, Williams Rule testimony and the defense of insanity.

The first inquiry into defendant's competency was made by

Steve Wallace, who handled this case prior to his departure from the public defender's office. Mr. Simpson was aware of the possiblity of an insanity defense and investigated that possiblity. He requested the appointment of a third psychiatric expert to assist in this effort. Two other experts had previously been appointed. Counsel personally talked with each of the three experts in regards to the defendant's sanity and competency. Thus, counsel had the benefit of both the psychiatric reports filed by these doctors, as well as face to face conversations. At no time did these experts say the defendant was insane or incompetent.

After the defendant was examined by the doctors and reports were made and after discussion with the Public Defender, defense counsel made an informed ~~discussion~~ decision? not to pursue an insanity defense. Contrary to the assertion being made by the defendant, this was not an arbitrary decision made by an inexperienced attorney. This was a considered decision based on reports of experts in the particular field and made after full discussion and preparation of the issue.

Even though the reports of Dr. Haber and Dr. Hoagland indicated the defendant's examination was consistent with temporal lobe seizure disorder, it was still a reasonable decision to not present an insanity defense when these reports are viewed in the context of the totality of the circumstances surrounding this offense. Strickland v. Washington, supra. The theory the defendant seems to be espousing is he had an epileptic seizure triggered by alcohol. The defendant's ex-wife testified he

became violent with her when he was drinking. First and foremost it must be kept in mind that there is nothing in the record to support a conclusion that petitioner was drinking on the night of the offense. Additionally, counsel did not have the benefit of Mrs. Starks observations. She had divorced the defendant and did not let him know of her whereabouts; she only knew of the case after trial.

Mrs. Starks' testimony of appellant's violence, which was directed toward her, was inconsistent with Mr. Machler's testimony of the behaviorial pattern of one with temporal lobe seizure disorder. The ex-wife stated the defendant's violence was directed or channelled toward her even when others were present. She also stated she could sometimes bring appellant out of a violent episode by calling his name. Dr. Machler testified however, that a person with temporal lobe epilepsy will go into an uncontrolled rage and attack anything and anyone. Additionally, one cannot be brought out of a seizure by calling his name.

Dr. Machler testified it was his opinion that appellant had a temporal lobe seizure at the time of the crime. He acknowledged, however, that he had never personally examined the defendant. All of his conclusions and/or opinions were formulated based on records he had received which included reports from doctors and medical facilities. Dr. Machler further acknowledged these documents contained inconsistencies which he did not attempt to verify. Of particular interest is the fact that Dr. Machler never read the trial or police account of the murder and

murder scene; he obtained his version of the events from defense counsel. Yet, the nature of the murder and the murder scene were significant factors the doctor considered in reaching his conclusions.

Petitioner attempts to make much of the fact that defense counsel indicated he could not recall various conversations or reasons for making specific decisions. The trial of the case occurred in 1974, and the evidentiary hearing on the 3.850 motion occurred in January of 1985. Some eleven (11) years have elapsed since counsel prepared for and tried this case. Counsel did not have the benefit of refreshing his recollection from the case file because that file had been destroyed. One can readily understand that a person's, including an attorney's, memory would fade after such a long period of time.

Mr. Simpson stated he could not recall why Dr. Hoagland was not called as a witness during the penalty phase. He did not call Dr. Haber because his testimony would have been more helpful to the state than to the defense. Dr. Haber was of the opinion that petitioner's conduct was the result of his hatred for white people. Counsel cannot be faulted for making a tactical decision not to call a particular witness when the witness' testimony could be a two-edged sword. See Songer v. State, 419 So.2d 1044 (Fla. 1982).

At the penalty phase, counsel did present psychiatic testimony from Dr. Schilt. Testimony of a non-statutory mitigating nature in the form of personal history and character came in

from Coach Stephens, the defendant's high school coach. Trial counsel argued and presented enough mitigating evidence to convince at least six (6) members of the jury that the defendant should not be given the ultimate punishment. The jury, in fact, recommended life in prison.

The trial judge had the benefit of not only the testimony at the guilt and penalty phases of the trial, but also the benefit of all of the psychiatric reports. A trial judge can also consider items not presentable to the penalty jury, such as a presentence investigation report, in determining the appropriate sentence.

Given the totality of the circumstances which existed at the time of the murder, eliminating the distorting affects of hindsight, the State of Florida submits petitioner received reasonably effective assistance of counsel. Counsel had psychiatric reports which indicated the defendant was sane and competent to stand trial. The psychiatrist had said the findings were consistent with temporal lobe epilepsy, but neither of the three experts opined the defendant was having a seizure at the time of the offense. Furthermore, there was no indication the defendant was intoxicated. It is also significant to note that the defendant admitted being on the murder premises and gave an explanation of how his prints got on the wall. Even Dr. Machler had to agree that you cannot attribute every act of violence of a person with epilepsy to an epileptic seizure.

The defendant has not carried his burden of demonstrating

any acts or omissions of counsel that were measureable below what is expected of competent counsel. There has also been no showing that the result of the trial would have been different but for any deficiencies by counsel. Strickland v. Washington, supra.

Appellant also argues his counsel was ineffective for failing to correct a conflict of interest arising from counsel's office representing a state witness, Otis Walker. Appellee submits counsel cannot be held ineffective since there was no actual and substantial conflict of interest and defense counsel was unaware of such representation.

Joseph Simpson, defense counsel at trial, testified at the evidentiary hearing held on the 3.850 motion that he was not aware of the public defender's representation of the state witness. Robert Jacobs, also a public defender in the office with Mr. Simpson, stated he represented Otis Walker on more than one occasion. While the public defender's records from 1973 had been destroyed, records from the clerk's office indicates Jacobs' represented the witness in that year. However, Jacobs further stated he did not recall having any conversation with Mr. Simpson concerning the McCrae case.

In order for a conflict of interest to be a denial of the defendant's constititional right, there must be shown actual, not merely speculative, conflict. Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981) and United States v. Alvarez, 696 F.2d 1307 (11th Cir. 1983). The mere fact that attorneys in a law office

represent two co-defendants is not per se an actual conflict. In Burger v. Kemp, 753 F.2d 930 (1th Cir. 1985), the court addressed a situation wherein two law partners represented co-defendants. Even though the two attorneys assisted each other to a certain extent on the two cases, the court found that was not enough to show actual conflict. See also, Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

The state courts have likewise indicated there must be an actual conflict of interest. Foster v. State, 387 So.2d 344 (Fla. 1980). In Foster, an actual conflict was found based on the fact that the same attorney represented a defendant and a state witness and that witness was herself charged with the same crime. Sub judice, there had been no showing of actual conflict.

Defense counsel did not know his office was representing the witness. There has been no indication of allegation that counsel did or failed to do some act based on his office's represention of Walker. It should also be noted that while Otis Walker testified for the state, he was not a "key" witness in the sense of his testimony being crucial. The state had abundant evidence of the defendant's guilt. Other witnesses put the defendant at or near the scene of the crime, and there was, of course, the defendant's bloody palm print.

This case is not unlike the situation addressed by this Court in Porter v. State, 478 So.2d 33 (Fla. 1985). The defendant in Porter claimed one of his attorneys labored under a

conflict of interest because he had previously reperesented a state witness. In ruling there had been no meaningful conflict, this Court said:

> The claim that one of Porter's trial counsel labored under a conflict of interest is belied by the record. No meaningful conflict of interest impeded Porter's counsel. Cf. **Webb v.** State, 433 So.2d 496 (Fla. 1983). Counsel acted quickly to withdraw from the representation of the witness who had been charged with a crime completely unrelated to the events of this homicide. That witness testified as to statements that Porter made to him while in jail. Counsel cross-examined him, and there is no indication that the prior representation limited that cross-examination.

(text at page 35 - 36)

Sub judice, counsel likewise cannot be held ineffective for failing to correct a situation which was not an actual conflict of interest.

It is also being argued that counsel was ineffective for failing to request a limiting instruction on the use of the Williams Rule evidence. While the current standard jury instructions contains an instruction on the use of Williams Rule evidence, these instructions were not in use at the time of appellant's trial. The instructions in use in 1973 were those promulgated in 1970; that edition did not contain the present Williams Rule instruction. See, In Matter of Standard Jury Instructions, 431 So.2d 594 (Fla. 1981). Counsel cannot be held ineffective for failing to anticipate the change in jury instructions. Cf. Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985).

In a like vein, counsel cannot be held ineffective for failing to anticipate the change in law regarding appointment of experts on the issue of insanity. Rule 3.216, Fla. R. Crim. P., providing for the appointment of an expert to report only to defense counsel was adopted in 1980. As the committee note to the rule points out, this rule was based on the decision in Pouncy v. State, 353 So.2d 640 (Fla 3 DCA 1977). Prior to the enactment of this rule, insanity was regulated by former rule 3.210; that rule did not provide for the giving of the expert report only to defense counsel. Counsel is not required to bare the burden of anticipating changes in the law. Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982).

A close reading of the entire jury instructions indicated the jury was properly instructed on the presumption of innocence and burden. Additionally, the jury was told the defendant was only on trial for the crimes charged. (R 836 - 838, 846) The court also instructed the jury on the statutory definition of first degree felony murder, a murder committed during arson, rape, robbery, burglary, etc. (R 823, 830) These instructions were proper; therefore, counsel cannot be ineffective for failing to object to unobjectionable instructions.

Defense counsel testified he went into the subject of appellant's other convictions to minimize the impact of the Williams Rule evidence. Even if this tactic was deficient, counsel was not ineffective since the result of the trial could have been the same without this evidence. Strickland v.

Washington, supra.

There is a presumption of validity and regularity that attaches to a judgment of conviction and sentence. Nelson v. State, 208 So.2d 506 (Fla. 4 DCA 1986); Coleman v. State, 193 So.2d 699 (Fla. 1 DCA 1967). Thus, on petition to vacate or set aside judgment of conviction (3.850 Motion), the burden of proof is upon the appellant to prove his allegations, and such proof must overcome the presumption of validity which attends the judgment. Harris v. State, 177 So.2d 543 (Fla. 3 DCA 1965). In order to prevail on a motion for post conviction relief, the defendant must establish a recognized ground for relief by clearing and convincing evidence. State v. Gomez, 363 So.2d 624 (Fla. 3 DCA 1978).

In Florida, the burden of proof on one petitioning to set aside a judgment of conviction is to prove the facts relied upon by strong and convincing evidence. Meeks v. State, 382 So.2d 673 (Fla. 1980); Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert. denied, 41 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1975); Russ v. State, 95 So.2d 594 (Fla. 1957). Likewise, the Federal Courts have also placed a heavy burden of proof on the petitioner. Hill v. Linahan, 697 F.2d 1032 (11th Cir. 1983); Hanson v. Estelle, 641 F.2d 250 (5th Cir. 1981); cert. denied, 454 U.S. 1056, 102 S.Ct. 603, 70 L.Ed.2d 593 (1981); Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). Applying either of the above standards to the instant facts, it is clear to the state that appellant's claim of ineffective assistance of counsel must ultimately fail.

ISSUE II

APPELLANT IS NOT ENTITLED TO A NEW SENTENCING PROCEEDING.

To the extent that this issue explores the bias of the trial judge as outlined in appellant's memorandum ot the trial court, appellee will address the merits. While the 3.850 motion alleges the trial judge restricted his consideration of mitigating evidence to the statutory factors, that point was not argued in the memorandum. Additionally, a number of the points addressed with this issue should have been raised on appeal and were not. Procedural default procludes their consideration now. Wainwright v. Sykes, 433 U.S. 72, (1977)

Appellant has attached a copy of the deposition of William Sloat in support of his claim that Judge Rose was biased. It is respectfully submitted that this deposition is hearsay and should not be admitted. Section 90.801(1)(c), Florida Statutes (1983); §90.802, Florida Statutes (1983). The state also questions whether a reporter's recollection of an interview he did ten years ago covering a judge's reflection on his legal career can have any relevancy at all to the issues before the court. A judge may not be asked to testify about his mental processes in reaching a decision. Washington v. Strickland, 693 F.2d 1243, 1263 (5th Cir. Unit B 1982) reversed on other grounds; Strickland v. Washington, __ U.S. __, 104 S.Ct. __, 80 L.Ed.2d 674 (1984); Fayerweather v. Ritch, 195 U.S. 276, 25 S.Ct. 58, 49 L.Ed. 193 (1904). This court properly refused to permit Judge

Rose to testify in this cause. The deposition of William Sloat is equally inadmissible.

McCrae argues that Judge Rose's comments at sentencing that society must be protected from McCrae coupled with his comments to William Sloat are sufficient to show bias. This is incorrect and not supported by the record. The Florida Supreme Court having fully reviewed the record, affirmed the judgment and sentence, finding that the trial judge's override of the jury's recommendation of life met the Tedder[1] standard. McCrae v. State, 395 So.2d 1145 (Fla. 1981). This court cannot inquire into Judge Rose's mental processes. Washington v. Strickland, supra.

In Zeigler v. State, 452 So.2d 537 (Fla. 1984), the Florida Supreme court indicated that the trial court should have conducted an evidentiary hearing on Zeigler's 3.850 motion where allegations had come to light that the trial judge had expressed his intent to impose a death sentence on Zeigler prior to trial. The instant case is factually inapposite. Sub judice, McCrae wants us to interpret hearsay evidence about the trial judge's general approval of the death penalty, as evidence that he was biased against McCrae and that the death sentence is therefore tainted. Zeigler does not mandate this result.

This court should decline to admit the Sloat deposition into evidence, and should deny relief on this issue because McCrae

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[1] Tedder v. State, 322 So.2d 908 (Fla. 1975).

has failed to establish any factual bias to his claim of judicial bias.

It is ironic that appellant now argues the mitigating was limited when he argued both pre-trial and on direct appeal that the mitigating was unlimited. On appeal, the defendant said:

> First, the statute does not limit the aggravating and mitigating circumstances to those identified in its terms. Matters not contemplated by the legislature as being legitimate influences upon the determination of a life or death sentence may be considered, especially in view of the relaxed evidentiary rules which are to be employed. See, Fla. Stat. $921.141(1). Because the determination is not necessarily based on finite and known considerations, the discretion to impose the death penalty can be unlimited and even whimisical (Brief of Appellant on Direct Appeal. **p.** 20).

Appellant now tries to say everyone believed the mitigating was limited.

One factor appellant says proves his contention, is the jury instruction on mitigating. This is the same type of instruction which has been the subject of much litigation. The Eleventh Circuit discussed a similar instruction in <u>Ford v. Strickland</u>, 696 F.2d 804 (11th Cir. 1983) saying:

> . . . ., the trial court read the statute as written, setting forth the entire list of statutory mitigating circumstances, which statute omits the word "only". The Supreme Court has recognized the Florida Statute does not limit a jury's consideration of mitigating circumstances to those listed in the statute. (Citations omitted)

(text at page 812)

Accord, <u>Alvord v. Wainwright</u>, 564 F.Supp. 459 (U.S.D.C.,

M.D. Fla. 1983) and Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978).

The argument is also being made that the trial judge failed to consider the nonstatutory mitigating evidence that was presented. Defendants have presented this argument on a number of occasions where the sentencing order does not mention or analyze the particular mitigating evidence. Both the state and federal courts have held the fact that the evidence is not specifically mentioned does not mean it was not considered. In Woods v. State, 490 So.2d 24 (Fla. 1986), this court said:

> As his final point on appeal, Woods argues that the trial court failed to consider unrebutted nonstatutory mitigating evidence regarding Woods' low intelligence and his past life7 That the trial court did not articulate how he considered and analyzed the mitigating evidence is not necessarily an indication that he failed to do so. We do not require that trial courts use "magic words" when writing sentencing findings, and we recognize that some findings are inartfully drafted. Davis v. State, 461 So.2d 67 (Fla. 1984), cert. denied, __ U.S. __, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985).

(text at page 28)

The Eleventh Circuit held similarily in Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985); Raulerson v. Wainwright, 732 F.2d 803 (11th Cir. 1984) and Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984).

Defense counsel's testimony at the 3.850 hearing that he believed mitigating evidence was restricted does not aid appellant's claim since counsel, in fact, was allowed to present

non-statutory mitigating evidence. Such evidence has been pointed out in appellant's brief to this court.

Appellant's argument on incorrect standard of proof for mitigating circumstances is an issue which could have been and should have been raised on direct appeal. The contention that the court found a fourth aggravating circumstance which was non-statutory, was raised on direct appeal and rejected. Issues which could have been, should have been or were raised on direct appeal cannot be litigated on post-conviction motion. McCrae v. State, 395 So.2d 1145 (Fla. 1981); Palmes v. State, 425 So.2d 4 (Fla. 1983) and Meeks v. State, 382 So.2d 673 (Fla. 1980).

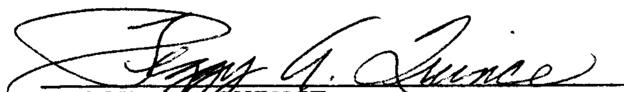
The record in this case indicates while defense counsel believed the statute limited the presentation of mitigating, he was allowed to present nonstatutory mitigating evidence. Appellant has failed to demonstrate that the evidence was not considered. Thus, the situation as addressed in Harvard v. State, 486 So.2d 537 (Fla. 1986) is not present here.

CONCLUSION

Based on the arguments above and the record, the denial of 3.850 relief should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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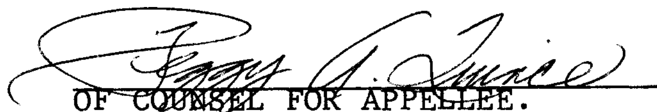
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert H. Dillinger, DILLINGER & SWISHER, P.A., 5511 Central Avenue, St. Petersburg, Florida 33710, this 3rd day of September, 1986.



OF COUNSEL FOR APPELLEE.