IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

JAMES CURTIS McCRAE

APPELLANT,

VS.

STATE OF FLORIDA,

APPELLEE.

CASE NO.: 67,629

INITIAL BRIEF

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INTRODUCTION

The Appellant, JAMES CURTIS McCRAE, will be referred to throughout this appeal as the Defendant. The Appellee, the State of Florida, will be referred to as the State.

The original Record on appeal will be referred to by (R -) and the Supplemental Record on appeal from the 3.850 hearing will be referred to by (SR -). The supplement to the Supplemental Record is a transcript of the hearing held in this cause and will be referred to by (TR -).

SUMMARY OF ARGUMENT

The Defendant received ineffective assistance of counsel in this cause when a young, inexperienced lawyer with no prior experience in the applicable areas of defense completely abandoned significant psychiatric evidence and psychiatric testing and failed to make known to a subsequent doctor the previous psychiatric evidence and tests. The findings by the other doctors and the neurologist were extremely significant and constituted not only a defense to the charge, but numerous mitigating circumstances.

The Trial Court rejected the jury recommendation of life because of the Trial Judge's belief that only the statutory mitigating circumstances applied. There were other unique biases which likewise affected the Trial Court which are now known and which are now shown.

STATEMENT OF THE CASE

The Defendant was convicted on April 19, 1974 of first degree felony murder. He was acquitted of premeditated murder. The jury recommended life. The Trial Judge, the Honorable Lamar Rose, Circuit Judge, sentenced the Defendant to death on May 21, 1974. A direct appeal was taken to the Florida Supreme Court and during that appeal the Court relinquished jurisdiction to the Trial Court for evidentiary hearings on an unrelated 3.850 motion. On October 30, 1980, the Court affirmed the judgment and sentence and by rehearing affirmed the 3.850 denial. See McCrae v. State, 395 So.2d 1145 (Fla. 1981). Certiorari was denied. McCrae v. State, 454 US 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 S.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 and a 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 Trial Court to clarify its reasons for denying relief. See McCrae v. State, 437 So.2d 1388 (Fla. 1983). On remand, a hearing was held on the Defendant's Motion for Post Conviction relief on January 10 and 11, 1985 before the Honorable Thomas S. Reese, Circuit Judge. On August 26, 1985, the Trial Court filed its Order denying the Defendant's Motion to Vacate. (SR - 195)

STATEMENT OF THE FACTS

The facts pertinent to the murder case were outlined by this Court in McCrae v. State, **395** So.2d 1145 (Fla. 1981) and were repeated by the State in their brief at the Trial level (SR **-166-194).** No need is seen for an additional recitation.

As to the hearing in Ft. Myers upon remand, the defense presented several witnesses. Joseph Simpson was the Trial attorney who represented the Defendant at Trial and Sentencing. He was examined primarily regarding his qualifications at the time and the reasons for complete abandonment of the medical and psychiatric evidence that the Court appointed doctors had discovered and that his predecessor counsel had intended to use to show insanity or mitigation.

Nurse Bonita Booth testified that she was currently a nurse at the Lee County jail. She testified that the Defendant was received prior to this hearing from Florida State Prison with the medication of Dilantin and Phenobarbital. (TR - **93)** She also indicated he had been diagnosed as an epileptic and was to be treated as an epileptic in her jail as demonstrated by the medical records which accompanied the Defendant. (SR - 24), (TR **-93)**

Nancy Roff testified that she was presently the jury supervisor for Lee County and that the Defendant had requested certain demographic information as to the make up of the 1973 Grand and Petit Juries. She testified that the information as to the make up of the Grand Jury in 1973, which would indicate addresses, race or sex, was not available as the records were destroyed. (TR - 99,100), (SR - 249)

Robert Jacobs was next called. Mr. Jacobs began as an Assistant Public Defender at the same time as Mr. Simpson. (TR - 104) Mr. Jacobs had remained as Assistant Public Defender and at the time of the hearing was the Deputy or Chief Assistant Public Defender for the Twentieth Judicial Circuit. (TR - 104) Mr. Jacobs testified that he represented an Otis Walker in 1973. (TR - 105), (SR - 250). He acknowledged that he represented Mr. Walker as an Assistant Public Defender when Mr. Walker testified against the Defendant who was likewise represented by an Assistant Public Defender - Mr. Simpson. (TR - 107) Mr. Jacobs also testified that at the time of the Defendant's trial that the office was a very small office with a total of five attorneys for felonies and misdemeanors. (TR - 107) Mr. Jacobs testified that during the time of the Defendant's case he discussed matters with Mr. Simpson and that there was a possibility Mr. Simpson discussed the case with him

but he could not recall. (TR - 113) He also testified that normal procedure would be to withdraw from representation of a Defendant if the Public Defender's office represented a witness in the case. (TR - 112) Following an objection by State (TR - 110), Mr. Jacobs testified during a proffer that the current procedure in the Public Defender's Office in the Twentieth Circuit would not allow an attorney with one year's experience to try a capital case. (TR - 110) He indicated that a person with one year's experience would never be in charge of a capital case and would never try a capital case alone. (TR - 111)

Mr. Jacobs was later recalled to clarify the credentials of Dr. Hoagland - a Court appointed doctor. Mr. Simpson during his testimony had stated that Dr. Hoagland was a psychologist whose credentials were questionable Mr. Jacobs clarified that Dr. Hoagland was a medical doctor who had been qualified as a psychiatrist in a first degree murder sentencing before this Trial Judge in the Miller case. (TR - 120) Another individual named John Donohue was the imposter. (TR - 120)

Myra Starks next testified. She was the Defendant's former wife. She indicated she had known the Defendant since High School and that after High School and the Army, they married. (TR - 124,125) She described him as "always real nice, quiet, shy, almost like an

when they started dating. (TR - 124) She indicated that he went into the Army and that when he returned she began to notice the change in the Defendant's personality. (TR - 125) She indicated that he became aggressive and began to drink alcohol. (TR - 125) She indicated he became violent and that she had never seen this before in the Defendant. (TR - 126) She further stated that after he became violent that he did not remember doing the violent acts. (TR - 126) She stated that initially she thought this lack of memory was feigned, but as time progressed, she realized he did not remember what he had done. (TR - 126) This continued for two years until she left and divorced the Defendant in 1972. (TR - 131) She then stated that years later in 1984 she was able to meet and visit with the Defendant in prison. She had not seen the Defendant since the divorce. She testified that the person she met at prison was "James again". (TR - 131) She indicated that he was like he was before the Army - nice and quiet - and not at all like the violent person she had divorced. (TR - 131) While visiting, she learned for the first time that the Defendant was on medication for epilepsy. (TR - 131) She then arranged another visit with the Defendant and brought the son of the marriage. (TR - 132) She also stated she had never been contacted by any other attorney to testify regarding Mr. McCrae. (TR - 133)

The Defendant next proffered the testimony of Mr. Bill Sloat. A Motion to Perpetuate his testimony had been granted. (TR - 134-136) Mr. Sloat was currently covering the war in Central America and was unavailable. He had previously been a reporter with the Ft. Myers News Press.

Mr. Sloat testified that Judge Rose - the Trial Judge - indicated that a factor that influenced him in sentencing the Defendant to death was that there was probably little likelihood that the sentence would be carried out. Mr. Sloat also testified that Judge Rose had personally confirmed the truth of the "rope incident" wherein in 1972 the Judge had thrown a rope over the limb of a tree in front of the Ft. Myers Courthouse. (Deposition of Sloat, p.6) Mr. Sloat also confirmed that the Defendant was one of the people that the Judge was talking about when the Judge said that the death penalty would not be carried out. (Deposition of Sloat, p.12)

Pat Doherty (referred in the record as Daughtrey) testified as an expert in evaluating the effectiveness or deficiency of capital trial counsel. (TR - 165) The Court treated Mr. Doherty's testimony as a proffer because the Court felt that expert testimony was opinion testimony of a nature that the Court itself was to decide. (TR - 7, 197)

Mr. Doherty found Mr. Simpson to be ineffectual in the guilt stage, ineffective in the second stage within the

meaning of Knight/Strickland and ineffective and basically non-existent in the third stage. He indicated that by not presenting the testimony of Drs. Hoagland and Haber along with the EEG evidence, the attorney failed to create a record sufficient to sustain a jury recommendation on appeal. (TR - 171) He further stated that allowing an attorney with one year's experience to try a capital case where the State is seeking death is tantamount to a child playing with a gun. (TR - 178) He noted that the trial attorney chose not to pursue a reasonable defense of insanity and instead chose to pursue a reasonable doubt defense where no doubt existed. (TR - 195) After having abandoned it in guilt phase, he never adequately pursued it in penalty phase and totally abandoned it in third phase. (TR - 196) The prejudice to the Defendant was clear. (TR - 168)

Theodore Machler, M.D., testified as an expert witness in the field of psychiatry. (TR - 200) Immediately preceding his testimony, the Court took judicial notice of Motion for Rehearing to Determine Competency to Stand Trial (R - 973-974) wherein Mr. Simpson, prior to trial, had stated that the Defendant had taken a polygraph examination and had been truthful when he said he had no recollection of the killing. (TR - 198-199) Dr. Machler had been practicing psychiatry for more that twenty years and was the Chief of

Staff and Medical Director of the Medfield Center Hospital in Pinellas County. (TR - 200) Dr. Machler testified that he had reviewed the reports of the Court appointed doctors, doctors at Florida State Prison, outpatient prison clinic record, psychiatric discharge summary, laboratory reports form the Epilepsy Research Laboratory and the deposition of Myra Starks. (TR - 202,203) He explained the various forms of epilepsy and stated that Mr. McCrae had, based on the reports reviewed from 1973 to present, made the progression from temporal lobe seizure disorder to a grand mal type situation. (TR - 205) He stated this was common. (TR - 205) He described temporal lobe seizure disorder as a disorder that has been documented since the 1800s that involved purposeless activity and physical violence that in about eighty percent of the cases is non-convulsive. (TR - 206) Extreme physical violence with a total lack of memory afterwards is an almost universal diagnostic finding. (TR - 207) He also stated that the use of alcohol by a person suffering from temporal lobe seizure disorder or any form of epilepsy is bad because alcohol is very likely to precipitate the seizure. (TR - 207,208) He testified that the incontrovertible evidence of the illness of temporal lobe seizure disorder is the EEG because the pattern for temporal lobe seizure disorder, unlike the pattern of any other EEG, is the diagnostic end in and of itself.

(TR - 208) He noted that a person having a non-convulsive seizure would have no rational thinking process, but could carry on certain automatic behavior. (TR - 209,210) The person having a seizure would also be unable to conform their conduct to the standards of the law, would be unable to appreciate the criminality of the conduct, would lack any opportunity for moral or ethical considerations and would be unable to premeditate. (TR - 210,211) He likewise noted that EEG results are something that cannot be faked. (TR - 212,213) It was also noted that it was not unusual for this illness to develop in the late teens, early twenties. (TR - 213) He further stated that there are five criteria generally recognized by the medical profession to indicate that a person was suffering from a temporal lobe seizure disorder and that the Defendant met all five criteria. (TR - 215-217) He also stated that the description given by the Defendant's former wife was consistent with the developnent of the disease and that the current result of a peaceful person no longer subject to unprovoked violent attacks was likewise consistent with the long term treatment the Defendant had received. (TR - 218) The doctor stated that the illness and its progression is controllable in most instances and the Defendant appears to have had the illness under control for the ten years he has been treated. (TR - 218) Finally, the doctor indicated that based on his review

of the evidence and the event that the Defendant was suffering from a temporal lobe seizure disorder seizure when he killed the victim. (TR - 245)

ISSUE - I

DID THE DEFENDANT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS TRIAL, PENALTY PHASE AND SENTENCING?

The U.S. Supreme Court, in Strickland v. Washington, 466 US 668 (1984), has enunciated a two-part test to be employed in evaluating claims of ineffective assistance of counsel, either at trial or at a capital sentencing proceeding:

> First, the defendant must show that counsel's performance was deficient . . . Second, the defendant must show that the deficient performance prejudiced the defense.

This two-part test was established, the Court said, at 682, to determine the ultimate question:

> . whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. (Emphasis added.)

The standard for judging a counsel's performance is "reasonably effective assistance" or "reasonableness under prevailing professional norms." Id. at 682,683 In evaluating the reasonableness of an attorney's performance, a Court should be aware that "counsel's function . . . is to make the adversarial testing process work in the particular case." Id. at 684

As to the prejudice component, the Court stated as follows:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

The standards relevant to the trial and sentencing contexts were defined, at 685, as follows:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence . . . the probability that, absent the errors, the sentencer ---- including an appellate court, to the extent it independently reweighs the balance of aggravating and mitigating circumstances did not warrant death. (Emphasis added.)

The Court emphasized that the two-pronged test should not be applied mechanically. It held, at 685:

> . . . the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of the reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. (Emphasis added.)

The Defendant will demonstrate that just such a breakdown occurred in both the guilt and penalty phases of this matter.

The Defendant at trial and sentencing was represented by Assistant Public Defender Joseph Simpson. Joseph Simpson was licensed to practice law in May of 1973. (TR - 15) He had no prior legal experience before this other than a few months of clerking for the Public Defender's Office in Ft. Myers. (TR - 15) Upon becoming licensed he was in the misdemeanor division until January of 1974. (TR - 16) In January, 1974, Steve Wallace, the experienced active felony attorney, left the Public Defender's Office for private practice. (TR - 19) Upon his leaving, Mr. Simpson was assigned to the McCrae case. The McCrae trial occurred in April, 1974. Prior to that trial, Mr. Simpson estimated that he had tried "maybe ten (10) trials," the majority of which were misdemeanors with the "possibility" of two of them being felonies. (TR - 51) At the time Mr. Simpson became a felony attorney in the Public Defender's Office, there was only one other active felony attorney - Bob Jacobs. (TR - 20) The Public Defender - Mr. Midgely - was also present for consultation and guidance but was apparently not carrying an active case load. Mr. Simpson indicated that upon his entry into the felony division that he had a heavy caseload (TR - 21) and that his

best recollection is that he was not relieved of cases in order to work on the Defendant's case. (TR - 22)

The record reflects that significant issues in the McCrae case were the blood and semen analysis, the finger print/ palm print analysis, Williams Rule testimony and the question of mental status/sanity of the Defendant. Prior to the trial of the Defendant, Mr. Simpson had no experience in serology, had never contested a finger print/palm print, had never handled a Williams Rule case and had never seen or tried an insanity issue. (TR - 34)

The sanity issue had been raised prior to Mr. Simpson's involvement by Mr. Wallace. As a result of pre-trial motions, the Court had appointed two doctors to examine the Defendant. Both doctors were medical doctors. (R - 934) Dr. Mordecai Haber concluded his report as follows:

> On the basis of history and mental status examination, it was my initial impression, in view of this chronically repetitive, intensive outbursts of rage and physical aggressiveness, that a clinical picture of organic brain syndrome with epilepsy may possibly account for his untoward behavior. To that end, an EEG (electroencephalogram) was ordered. Donald B. Malkof, M.D., performed the studies which allowed "a mildly abnormal paroxysmal condition consistent with a temporal lobe seizure disorder. There was no evidence to suggest a focal structure lesion". In essence, not correlated with any signs of organic brain damage clinically, or of psychosis, the disorder is an explosive personality. (R - 948)

Dr. Thomas Hoagland stated the following in his report:

> I examined James McCrae at the Lee County Jail on December 6, 1973. At that time, I found historical signs and symptoms that called for more extensive neuropsychiatric evaluation. Accordingly I recommended that Dr. Donald Malkoff, neurologist, evaluate this person in reference to a latent epileptic or epileptic equivalent condition.
>
> The longitudinal history illustrated the possibility of the latent epilepsy which becomes overt when Mr. McCrae becomes intoxicated. My clinical impression was supported by the electroencephalographic evaluation by Dr. Malkoff. He stated the findings will have to be correlated with the clinical picture but would certainly be consistent with a temporal lobe seizure disorder.

The doctor concluded by saying:

> It is my studied opinion that James McCrae, when under the influence of intoxicants releases an underlying epileptic furor which erupts in uncontrolled violent aggressive behavior. When sober he is a very well contained, likeable person who has firm control of his faculties. (R - 949)

No other doctors reported to the Court until Mr. Simpson requested an additional doctor. Dr. Schilt, a medical doctor, was the third doctor. Significantly, while Mr. Simpson states he discussed the case with each doctor, nowhere in Dr. Schilt's report is any mention made of the prior reports of the two previous doctors or of the EEG test

results. (R - 1024) Dr. Machler testified it was inconceivable that if Dr. Schilt had been informed of the EEG or the epilepsy finding, that he would not have mentioned it in his report or opinion. (TR - 252)

Mr. Simpson proceeded to trial and at trial called only the Defendant to the stand. After conviction, he called Dr. Schilt and a James Stephens to the stand. (R - 876,889) Dr. Schilt's testimony made no mention of the prior reports of Drs. Haber and Hoagland and did not mention the EEG. (R - 876-882) The jury returned a recommendation for life (R - 1069) and the Judge sentenced the Defendant to death. (R - 1090-1095) No further evidence was addressed at sentencing and the prior reports of the doctors were not mentioned.[1] Clearly all the information and ramifications of temporal lobe seizure disorder were abandoned.

Temporal lobe seizure disorder is one of three types of epilepsy. (TR - 203,204) Temporal lobe seizure disorder has been recognized medically since the 1800s. (TR - 205) Temporal lobe seizure disorder is also synonymous with the phrase explosive personality, rage epilepsy, psychomotor epilepsy, non-convulsive epilepsy or unsonate fits. (TR - 204) The behavior associated with this form of epilepsy is that of extreme physical violence and certain

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[1] Mr. Simpson indicated that he was informed by the Court informally before sentencing that death would be imposed. He indicated he did not the request a continuance, nor did he recall consulting with anyone regarding how to proceed. (TR - 32)

automatic behavior. Lack of memory or amnesia for the events occurring during seizures from this type of epilepsy is also very common. (TR - 207)

The adverse effects of alcohol use in precipitating a seizure is also well known. (TR - 207,208) When a person is having a temporal lobe seizure there is no rational thinking process occurring. (TR - 209) A person acting during a seizure has no ability to premeditate, has no opportunity for moral or ethical consideration and cannot conform his conduct to the standards of the law. (TR - 210,211) A temporal lobe seizure is also classified medically as an extreme mental or emotional disturbance. (TR - 211) A person's actions during a temporal lobe seizure meets the insanity standard under McNaughten as defined by Florida Law. Gurganus v. State, 451 So.2d 817 (Fla. 1984).

Temporal lobe seizure disorder from a medical, legal and practical point of view is different from other forms of mental illness such as paranoia or schizophrenia. Temporal lobe seizure disorder can be objectively demonstrated and presented to the trier of fact because temporal lobe seizure disorder is visible on an EEG (electroencephalogram). An EEG is incontrovertible evidence of the illness, in that the EEG test is a window to the mind that is recognized as accurate and is measurable.

(TR - 211,212) The EEG is also a test for which the results cannot be faked. (TR - 213) Thus, unlike the diagnosis of other mental illnesses which must be based on observational evidence, the illness of temporal lobe seizure disorder is based upon an objective, visible and measurable test - an EEG - which test in this instance was performed by a neurologist at the request of the Court appointed doctors.

The record in this case is void as to any objection to the clinical findings of the EEG performed by Dr. Malkoff or to the conclusions based on the EEG reached by Drs. Haber and Hoagland. Both doctors recognized the results of the EEG and both doctors reached conclusions consistent with the illness of the temporal lobe seizure disorder. Dr. Hoagland specifically recognized the "underlying epileptic furor which results in uncontrolled, violent aggressive behavior" and Dr. Haber likewise noted that "in view of his chronically repetitive, intensive outbursts or rage and physical aggressiveness, that a clinical picture of organic brain syndrome with epilepsy" could account for the Defendant's behavior. These findings were never contested by the State and the State never requested additional doctors.

Mr. Simpson testified that prior to the Defendant's case, he had no experience whatsoever with any of the forms of epilepsy. (TR - 41) Mr. Simpson admitted

and the record reflects that neither Dr. Haber nor Dr. Hoagland were used at the trial in either guilt or penalty phase. Mr. Simpson indicated that he thought Dr. Hoagland's testimony was damaging to the defense and helpful to the State. (TR - 46) When questioned as to what in Dr. Hoagland's report was damaging to the Defendant and helpful to the State, he replied that he could not recall what was damaging. (TR - 60) As previously mentioned, he could not recall if he had given the temporal lobe information obtained from Drs. Haber and Hoagland[2] to Dr. Schilt and could not explain why that information was not contained in Dr. Schilt's report. When questioned as to the reason why he had only called Dr. Schilt in the penalty phase, he replied that at this point in time he could not say. (TR - 43) Mr. Simpson when questioned as to reasons for not proceeding with an insanity defense based on the epilepsy aspect stated that the decision was based on the experience he had at the time.[3] (TR - 89) His experience at the time was that of one year of practice, maybe two felony trials,

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[2] Mr. Simpson stated during his testimony that he believed Dr. Hoagland's credentials as a psychologist were later shown to be suspect. He then was confronted with the Order of appointment of Dr. Hoagland as a medical doctor. Later, Bob Jacobs testified that Dr. Hoagland was in fact a medical doctor and had been qualified as such before the Court. Another individual named Donohue was the person posing as a psychologist, not Dr. Hoagland. (TR - 46,73,74,119,120)

[3] At the hearing on this cause, Mr. Simpson indicated he could not recall what his defense was at trial. (TR - 83)

no personal experience with an insanity defense and no prior observation of an insanity defense in guilt or penalty phase. Mr. Simpson did indicate that the Christopher Miller trial occurred shortly before the McCrae trial but he did not observe it. (TR - 33) The Christopher Miller trial involved the issue of insanity and was tried by the most experienced public defender. See Miller v. State, 332 So.2d 65 (Fla. 1976).

The Strickland case makes clear that in order for a Defendant to raise a claim of ineffective assistance that there must be showing a deficiency and a resulting prejudice. A Defendant must show that there is a reasonable probability that but for the deficiency a different result would have occurred. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The probability goes toward the guilt phase, the penalty phase and the appellate review stage.

In this instance, substantial and reliable information was not presented to the trier of fact in the guilt and penalty phase and was not likewise made available for appellate review. If the information had been available, the result in this instance most certainly would have been different. The following overview of the omitted evidence demonstrates this:

Myra Starkes was the former wife of the Defendant. (TR - 125) She started dating the Defendant when she was High School. While dating, she described him as a real nice, quiet, shy and almost introverted. (TR - 124) During that time she saw no physical outbursts. (TR - 124) At this point in time the Defendant would have been in his late teens. She indicated that after High School he went into the military. After the military, he returned to her and they were married and moved to California. (TR - 125) She stated that at this point in time she began to notice two major changes in the Defendant: unexplained aggressive behavior and alcohol consumption. She indicated that before the marriage he did not drink and there were no violent outbursts. (TR - 126)

During the marriage there would be sudden unexplained outbursts of physical violence. She described these outbursts as "like he snapped - didn't know what happened." (TR - 126) Following the outbursts the Defendant would indicate that he couldn't remember what happened during the outburst. (TR - 126) Ms. Starkes

indicated that at first she did not believe the Defendant's statements regarding lack of memory and attributed his action to alcohol. (TR - 128) As time went by in the marriage though she began to understand that he did not have a recollection for the events occurring during the unprovoked violent outbreaks. (TR - 127) She told the Defendant that he needed help. (TR - 127) When help was not forthcoming, she divorced him. She also testified that during the marriage he was not taking any prescribed medication. (TR - 133,134) At this point in time, the Defendant was in his early twenties and the year was 1972. One year later this murder occurred.

Ms. Starkes also indicated that twelve (12) years after the divorce she went and visited the Defendant in prison (she had not seen him since the divorce). (TR - 130,131) During those visits she learned of the Defendant's epilepsy and of his being on medication. (TR - 131) She described him as now being like the person she knew before they were married. (TR - 131,132) She also indicated that since the divorce she has entered the military and as part of her military training

she learned CPR and other things which taught her to recognize seizures. (TR - 129) Based on this training, she now realizes that upon reflection back to the marriage that the Defendant was occasionally then having what appeared to be seizures. (TR - 129) Ms. Starkes was never contacted by any lawyer or investigator during the trial even though her mother still lived in Florida and maintained contact with her. (TR - 140,141)

This history given by Ms. Starkes overwhelmingly corroborates the clinical findings of Dr. Haber, Dr. Hoagland and Dr. Malkoff. The history is consistent with the medical information provided by Dr. Machler. Dr. Machler, whose expertise, credentials and findings have not been attacked at the hearing or by another expert, stated that the onset of temporal lobe seizure disorder develops most frequently "in the late teens, early adult life, up to thirty." (TR - 213) He also stated that it often manifests itself initially with acts of unprovoked physical violence. (TR - 206,207) He indicated that alcohol often precipitates the onset of the violent non-convulsive seizure and that after the seizure the almost universal diagnostic finding is that there is no memory for the events occurring during this seizure. (TR - 206-208)

This is totally consistent with Ms. Starkes testimony as to the time the outbreaks occurred;[4] the manner in which they occurred, the use of alcohol as a precipitating factor and the lack of memory. Within a year of this divorce, this murder occurs. The EEG test done after the arrest shows conclusively the existence of this temporal lobe seizure disorder. The test results and the opinions of Dr. Haber and Dr. Hoagland were uncontested by the State. A polygraph examination filed by Mr. Simpson shows that the Defendant had no recollection of the murder for which he was charged. (TR - 198)(R - 973,974) Events occurring after the arrest likewise confirm the existence of the epilepsy. Dr. Machler states that temporal lobe seizure disorder often develops into the other forms of epilepsy which involve seizures. (TR - 205) The prison medical records of the Defendant describes the progression from a temporal lobe disorder to a grand mal disorder. (TR - 205) The prison began treating the Defendant in 1974 with Dilantin and has continued to do so for more than ten (10) years. (TR - 255) The doctor indicated, and common sense supports, that it would not be customary for medical doctors to prescribe Dilantin for a period of ten (10) years without a medical basis for it. (TR - 255) The Defendant, when sent from prison to Ft.

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[4] The Defendant was in his early twenties when they were married.

Myers for this hearing, was still on the medication and was being given the medication while in the Ft. Myers Jail. (TR - 93)

The observation of Ms. Starkes twelve (12) years later is likewise consistent with the development and treatment of the illness. She found the Defendant "to be like the old James" (TR -131); Dr. Machler makes clear that with proper medication this illness would be under control and that it is a controllable illness in most cases. (TR - 218) Dr. Machler made clear that it was his opinion that the Defendant was suffering from temporal lobe seizure disorder at the time of the death of the victim.

This entire issue of the temporal lobe seizure disorder was completely abandoned at the trial level. No explanation has been given other than that the lawyer, based on his experience at the time, decided not to utilize it. There clearly was an existing defense to the charge itself and it was abandoned. The defense abandoned in the guilt phase is realistically the only form of insanity defense for which an objective means exists to show the existence of the illness, The EEG is conclusive evidence that the abnormality exists, One does not have to rely upon the typical observational decisions used in paranoia or schizophrenia, to which doctors usually have differing views, but instead there existed hard objective data -- an

EEG. Clearly the abandoning of such a defense was deficient and the presentation of such evidence allowed a defense which results in a highly probable difference in the guilt phase. It must be remembered that this is not the situation in which one defense is tactically abandoned in order to pursue another valid defense. In this instance at the trial, if a defense was presented, it was reasonable doubt. To abandon a defense supported by history, by doctors' opinions and by an objective test is clearly deficient and obviously resulted in prejudice to the Defendant since an insanity verdict would have ended the proceeding.

Assuming, for the purposes of argument only, that some kind of a legitimate reason existed for abandoning the sanity defense in guilt phase, one must then examine penalty phase. The existence and explanation of the mental illness affecting Mr. McCrae at the time of this incident as supported by Drs. Hoagland and Haber was never placed before the jury. To have done *so* would have offered evidence showing the following mitigating circumstances:

1) existence of an extreme mental or emotional disturbance;

2) an inability to appreciate the criminality of his conduct;

3) an inability to conform his conduct to the standards of the law.

4) a lack of opportunity for moral or ethical consideration; and,

5) an inability to premeditate.

The presentation of this evidence would have also alleviated the problem confronting the Florida Supreme Court on appellate review. That review found nothing in the record to support the life recommendation. (395 So.2d at 1155) Had the above stated information been placed into the record, the Tedder standard would have dictated a different result.[5]

Assuming again for purposes of argument that some valid reason existed for not presenting the evidence of temporal lobe seizure disorder in guilt phase and in penalty phase, one must look then at third phase. In Tedder v. State, 322 So.2d 908 (Fla. 1975), the Florida Supreme Court recognized the trifurcated system used. The third phase is the presentation to the Court. Assuming again a reason existed for abandoning the issue in the first two phases, no reason has ever been hinted at to abandon it in the third phase. Indeed, as the record reflects, Mr. Simpson knew

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[5] This Court noted: "However, it is apparent to us that the jury must have found this mitigating circumstance (6b) to exist. There is no other explanation for their advisory verdict in view of the heinous nature of the killing. We find their recommendation has no reasonable basis under the circumstances of this cause. (e.a. at 1155)

before sentencing that the Judge was going to impose death instead of the jury recommended life sentence. (TR - 32) Indeed the record on appeal reflects that at sentencing no motion to continue was made and no additional information of any nature was made available to the Judge. (R - 916-918) See Bridges v. State, 466 So.2d 348 (Fla. 4th DCA, 1985); also, Mason v. State, 489 So.2d 734 (Fla. 1986).

This Court, as well as the Trial Court, has a duty to not only society but to the Defendant to consider the gravity of the charge, the attorney's skill and experience and his positive appreciation of the attorney's role and its significance. This Court should in this case establish that this type of representation by an inexperienced young lawyer is not permissible. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985)

The trial attorney was similarly deficient in other respects. Mr. Simpson failed to correct a conflict of interest of constitutional magnitude.

The Defendant was initially represented by the Public Defender in Ft. Myers for the Twentieth Judicial Circuit. (R - 927) At trial the Defendant was still represented by the Public Defender for the Twentieth Judicial Circuit. (R - 60)

A key witness against the Defendant was Otis Walker. Otis Walker testified that on October 12, 1973, he was released from jail and at about 3:00 p.m. that day he saw the Defendant. (R - 560) He again saw the Defendant the next night near the vicinity of the victim's residence with what appeared to be bloodstains on the Defendant's arm cast. (R - 565-566,572) Otis Walker also stated that he saw the Defendant the following day (R - 567) at which time the witness stated the Defendant did not have the cast on any longer. (R - 573)

The indictment alleged that the homicide in question occurred between October 13th and 15th. Thus, the witness was placing the Defendant near the homicide with bloodstains on his person during the time frame of the murder. No other witness could definitely place the Defendant there nor could they place the Defendant with bloodstains on his person.

Otis Walker at the time of the trial was on pre-sentence investigation, and had been on PSI for three months. (R - 575) AT his pre-trial deposition, he also stated he was on PSI and he reiterated it at trial. (R - 575) The crime for which he was on PSI was B&E (Record on Appeal from Motion to Vacate, referred to as RV, RV-8, 32). On the B&E charge, Otis Walker was represented by Bob Jacobs of the same Public Defender's office that represented the Defendant. (RV - 16,32)

As testified to at hearing, at the time of the Defendant's trial there were only two attorney's for the Public Defender's Office in Ft. Myers who were trying felony cases - Joe Simpson and Bob Jacobs. (TR - 20) The office was small and they would see each other on a daily basis. (TR - 23) Mr. Simpson also indicated that it was his opinion that the two of them as Public Defenders carried the lion's share of the criminal calendar in 1974. (TR - 24)

The Public Defender's Office of a given circuit is a "firm" within the discipline of Canon 5, Florida Code of Professional Responsibility. Turner v. State, 340 So.2d 132 (Fla. 2d DCA 1976). Further, the 6th Amendment guarantee of assistance of counsel includes the right to counsel whose loyalty is not divided between clients with conflicting interests, and it is immaterial whether such counsel is appointed or retained. Turner, supra. It is also clear that there is no question that an attorney representing a defendant and a key prosecution witness creates a conflict of interest. E.g., Ross v. Heyne, 638 F.2d 979 (7th Cir. 1980); United States v. Martinez, 630 F.2d 361 (5th Cir. 1980), cert. denied, 450 U.S. 922 (1981); United States v. Morando, 628 F.2d 635 (9th Cir. 1980); Cowell v. Duckworth, 512 F. Supp. 371 (N.D. Ind. 1981). A conflict may exist even though the defendant and prosecution witness are represented by different attorneys from the same Public

Defender's Office on unrelated charges. Allen v. District Court in and for the Tenth Judicial District, 184 Co1.202, 519 P.2d 351 (1974).

For a conflict of interest to cause representation to fail 6th Amendment standards, the conflict must be actual as in this case. An actual conflict of interest is presumptively prejudicial to the defendant; the Defendant is not required to show proof that an actual conflict of interest adversely affected counsel's performance or impaired his client's defense. Baty v. Ralkcon, 661 F.2d 391 (5th Cir. 1981). Once the Defendant shows his trial counsel actively represented conflicting interests, he has established a constitutional predicate for an ineffective assistance claim. Cuyler v. Sullivan, 446 U.S. 335 (1980).

In this instance there clearly were competing interests since one-half of the felony office represented a Defendant charged with murder and the other one-half represented a key witness. Bob Jacobs acknowledges that there was possibly some conversation about the case while Mr. Simpson cannot recall any. From a practical point of view, to believe that two people who started practicing law together, who saw each other on a daily basis, who discussed legal matters between them and who comprised the entire felony staff did not discuss one's first upcoming first degree murder trial is inconceivable. Clearly an actual

conflict of interest existed and such conflict is by its very nature prejudicial.

Mr. Simpson by his tactics also allowed inquiry into the previous felony charges of the Defendant. This Court has already viewed that tactic as one desired to "tactfully mislead the jury" (395 So.2d at 1151). The expert at hearing indicated that this tactic was likewise error and clearly prejudicial. (TR - 180) As further noted by the expert, Mr. Simpson in questioning Dr. Schilt elicited the statement that the Defendant was either "very sick or very clever". Mr. Simpson left this statement hanging before the jury and did not further elicit from the doctor that the doctor felt the Defendant was very sick. (TR - 181) He also did not utilize the Defendant's school records from the Ft. Myers public schools (SR - 244-246) which showed the Defendant with an IQ of 88. (TR - 183) In the words of the expert - an IQ of 88 would pretty much dispose of the "very clever" part of that equation. (TR - 183) This statement by the doctor clearly had an impact on the Trial Judge as reflected in his findings and in light of that impact clearly needed to be corrected.

At trial the Court permitted Williams Rule testimony from Faith Gertner and William Smith involving an incident six months before. Counsel failed to request a limiting instruction upon admission of the testimony and

failed again to request a limiting instruction after the close of the evidence. (See Fla. Standard Jury Instructions in Criminal Cases, 2nd Edition, p. 50.)

Numerous doctors saw the Defendant and examined him pursuant to Court order (R-990). Counsel never objected to the lack of confidentiality in these reports and their contents and to their being viewed by both the State and the Court. In attempting to determine whether or not a sanity defense would be appropriate, the trial counsel should affirmatively protect the attorney/client privilege until the listing of expert as a witness. This was not done in Defendant's case. (See Rule 3.126.)

Counsel failed to object when the Court did not instruct the jury that the Defendant was presumed innocent of the underlying felony contained in the felony murder charge and that the felony involved in the felony murder must be proved beyond a reasonable doubt before a conviction for felony murder could result.

Counsel failed to object to the prosecutor's injection of additional felonies into both the trial and penalty phase. The indictment charged felony murder by rape; however, the prosecutor in his closing during guilt phase argued robbery was the motive. (R - 793-794) No

objection was made. Further, in the penalty phase the prosecutor again injected another felony by saying - he killed her, raped her and robbed her. (R - 897) Again, no objection was made.

The type of deficiency which appears in this case is not the standard type. You are not dealing with a lawyer who is not trying hard, you are not dealing with a lawyer under the influence of alcohol or emotional distress and you are not dealing with a lawyer who shows obvious distaste for his client. What has happened is that a lawyer has been placed into a major and serious case without sufficient training or support. This was a tough first degree murder case. The case involved issues of serology, finger prints, Williams Rule and of course, sanity. A case of this nature would be the medical equivalent of brain surgery. The legal system, as it existed then[6], did allow a person with one year of experience to operate. In this case, Mr. Simpson truly was playing with a loaded gun and the damage is to Mr. McCrae. This type of practice is wrong and clearly put Mr. Simpson in an untenable position to the prejudice of Mr. McCrae. Bridges v. State, 466 So.2d 348 (Fla. 4th DCA 1985).

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[6] The Public Defender's Office in Ft. Myers as it now operates likewise recognizes this situation as untenable. Bob Jacobs, now the deputy (formerly titled chief) assistant testified that people with one year of experience would never be allowed to be in charge of a capital case. If a person with one year of experience had any involvement at all, it would only be in a peripheral capacity. (TR - 111)

ISSUE - II

IS THE DEFENDANT ENTITLED TO A NEW SENTENCING PROCEEDING OR TO A LIFE SENTENCE AS RECOMMENDED BY THE TRIAL JURY?

This Court has stated that:

> It is our independent view that an appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute in determining whether to impose a sentence of death or life imprisonment without parole for twenty-five years. See Lockett; Eddings; cf. Jacobs. v. Wainwright, 105 S. Ct. 817 (1985) (Brennan, J.,dissenting); Songer v. Wainwright, 105 S. Ct. 545 (1984) (Marshall,J., dissenting).

Harvard v. State, 486 So.2d 537 (Fla. 1986)

This Court has likewise recognized that a motion for post conviction relief is the proper arena for an inquiry regarding the bias of the Trial Court. Ziegler v. State, 452 So.2d 537 (Fla. 1984).

The Trial Judge in this instance delineated four aggravating circumstances, one of which was ". . . the

Defendant had on the same night of the murder tried to gain entrance to the residence of two other elderly females in the same locality . . " (R - 1093) He also made the following statement at sentencing explaining why he would not follow the jury's recommendation of life. He stated:

> "[S]ociety must be protected and . . . an example must be set forth and made apparent so that our citizens may be secure in their homes and that they may be safe from the experiences that Margaret Mears suffered at the hands of the convicted Defendant." (R - 1094) e.a.

This desire to make an example of the Defendant was also clearly another aggravating circumstance of the non-statutory nature. This Court in its initial review rejected two of the aggravating circumstances found by the Trial Court and noted that three aggravating circumstances existed: previous violent felony, homicide during commission of a rape and cruel, heinous and atrocious.

While the Trial Court apparently did not feel tightly bound by the statutory list of aggravating circumstances the Court clearly felt bound by the statutory list of mitigating circumstances. This feeling is shown by the Court's handling of the mitigation aspect in its findings which read as follows:

> The Court feels that these facts greatly outweigh any mitigating circumstance heard by the Court of the Defendant.

> The Court further feels that the testimony of Dr. Clarence Schilt in its entirety is not sufficient to outweigh the aggravating circumstances as set forth above and as they fully appear in the record in this case. (at 1094)

Dr. Schilt was not the only witness to testify in penalty phase. He was, however, the only witness to testify toward a statutory mitigating circumstance. The other witness was James Stephens, a basketball coach of the Defendant. Mr. Stephens testified that he had known the Defendant for ten years, that the Defendant had captained the basketball team, was an outstanding athlete and a fairly good student. (R-891,892) The coach also stated that as a result of his fourteen years of coaching and his coaching of hundreds of students, he would place the Defendant "right at the top" of the scale of students he had known. (R - 891) On cross-examination, Mr. Stephens indicated the Defendant showed signs of leadership, did not give him any trouble and that Mr. Stephens felt a great expectation for Mr. McCrae's life as far as accomplishing something if he stuck to his goal of going to college. (R - 893) He also indicated he was very shocked when he learned of the Defendant's arrest on this charge. (R - 893)

The Trial Court made no mention at all of the above testimony. The reason he did not is made clear in the final paragraph of his findings. The Court there stated that the aggravating circumstance enumerated in subsection 6

(sic) greatly outweigh any mitigating circumstances set forth in section 7 (sic) of 921.141. (R - 1095) Thus, the Trial Court only considered the statutory mitigating and completely ignored the non-statutory mitigating. The Court clearly did not consider the evidence of Dr. Hoagland and Dr. Haber either, because the Court limited its findings to what occurred at the trial. This is shown by his finding - The Court feels that these facts greatly outweigh any mitigating circumstances heard by the Court at the trial of the Defendant. (R - 1094) This belief of the Trial Judge that mitigation was limited to the statutorily listed ones is further supported by the testimony of Mr. Simpson. Mr. Simpson stated that it was his interpretation that in 1974 he was limited to the statutory mitigating and that he had filed a motion to allow additional non-statutory mitigating factors to be offered and the Trial Judge denied the motion. (TR - 24) He also indicated that while he was allowed to put on the basketball coach, it was clear that the Trial Judge did not mention the testimony in any of his findings. (TR - 75)

Further evidence of the limiting of mitigating circumstances to the statutory list is shown by the jury instructions given. The Trial Judge instructed the jury that "[t]he mitigating circumstances which you may consider, if established by the evidence, are these: . . ." All, and

only, the mitigating circumstances listed in the statute were then read. (R - 903) This charge operated to preclude the jury from considering as mitigating factors any of the circumstances surrounding the offense and any aspects of Petitioner's character and record other than those expressly enumerated in Florida Statute Section 921.141(6) (1977).

The prosecution also believed the mitigation was statutorily bound. The prosecutor in his closing argument reinforced the view that the jury could only consider the specified, statutory mitigating circumstances where he (i) referred to the "very strict guidelines" for the jury's sentencing deliberations, and (ii) admonished the jury "to listen as His Honor tells you what the mitigating circumstances are and what the aggravating circumstances are." (R - 896) The prosecutor also stated to the jury that they should not take into account certain personal attributes of the Defendant. (R - 897)

Because the trial judge instructed the jury in this manner, and because he permitted argument by the prosecution reinforcing the view that the only mitigating circumstances available for consideration were those in the statute, the Trial Judge clearly restricted his own consideration of mitigating evidence to those circumstances.

In rejecting the jury's recommendation of a sentence of life imprisonment, the Trial Judge expressly

found "that sufficient aggravating circumstances exist as enumerated in Subsection 6 (sic) to greatly outweigh any mitigating circumstances as set forth in Subsection 7 (sic) of Section 921.141, Florida Statutes." (R - 1095)

Mitigating factors not enumerated in the statute which were available from the existing record for the Trial Judge' consideration, had he not restricted his consideration to statutory factors, included the following:

1. Defendant had been on the receiving end of a considerable amount of violence and emotiona1 trauma during his lifetime. (R - 880-881)

2. Because of this, Defendant was subject to "attacks or spells when his emotional stress would prevent him from the restrains (sic) that a normal individual has." (R - 881)

3. Again, because of the Defendant's life experience, his thinking could very definitely have been impaired at the time of the homicide. (R - 880)

4. Defendant had made three suicide attempts and was still a "young man" by the time of his trial. (R - 879,883)

5. Despite Defendant's emotional and mental health problems, his life nonetheless had promise, for he was highly respected, demonstrated positive leadership skills, and was a good student in High School. (R - 891-892)

6. The Defendant's military history. (R - 883,1024)

7. The fact that the felony was not committed in a premeditated fashion.

The Trial Judge also applied a standard of proof requirement for mitigating circumstances which unconstitutionally circumscribed his consideration of mitigating facts.

The Trial Judge instructed the jury that mitigating circumstances needed to be established "by the greater weight of the evidence." (R - 904-905)

By applying this standard of proof to his own sentencing deliberations as well, the Trial Judge failed "to listen" to the proof of statutory mitigating circumstances offered by Defendant. See, Eddings v. Oklahoma, supra, 455 U.S. at 110 - 111 and n.10. Thus, while Defendant's psychiatrist testified that it was "very possible that [Defendant] was suffering under extreme mental or emotional disturbance at the time [of the homicide]," (R - 881), the Trial Judge found that this witness could not say "with any degree of medical certainty" that Defendant was so suffering. (R - 1093)

This Court has recognized that at certain times in the past when defendants were sentenced, that the death penalty statute could have reasonably been understood to preclude the introduction of non-statutory mitigating evidence. Harvard, supra. This preclusion of non-statutory mitigating mandates relief. Harvard, supra.

An additional form of bias against mitigating circumstances existed here. Judge Rose sentenced two people to death - John Miller and Doug McCrae. (TR - 49) The sentences occurred in the same general time frame - Miller in February, 1974 and McCrae in May, 1974.

Miller, found at 332 So.2d 65 (Fla. 1976), involved the violent death of a woman during a rape and robbery. The defense in that cause was insanity. The defendant was convicted and the jury recommended death. Judge Rose in his sentencing Order in Miller likewise indicated the aggravating and mitigating were governed by the statute (at page 66 of the opinion). This Court reversed Miller on the basis that the Trial Court prohibited the defense from using the doctors who testified at trial during the penalty phase to prove the statutory mitigating circumstances. On remand, the defendant Miller was again sentenced to death. On appeal, this Court [373 So.2d 882 (Fla. 1979)] recognized three aggravating circumstances (the same three as applicable to Mr. McCrae) and three mitigating circumstances (the same mitigating that the Defendant is now trying to show as applicable to him), but not presented previously.

This Court reversed that death sentence on the basis that the Trial Court, after having reviewed the statutory circumstances concluded that since a life sentence

did not mean life that the Judge had to impose death. (at 885) This Court concluded that the Court's reasoning created an "unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death," (at 885) This Court noted that a strict application of the statute was necessary because the sentencing authority's discretion must be "guided and channeled", thus, eliminating total arbitrariness and capriciousness in its imposition. On remand, Miller was sentenced to life [399 So.2d 472 (Fla. 2d DCA 1981)]. He was represented at this hearing by Bob Jacobs of the Public Defender's Office who utilized the testimony of Dr. Hoagland. (TR - 120)

Numerous factual and legal similarities exist between Mr. Miller and Mr. McCrae. Both were sentenced to death for the rape/murder of a woman. Both exhibited signs of mental illness. Both were also affected by outside factors not proper under the guided and channelled discretion procedure. While Mr. Miller received death because the Trial Judge did not believe life meant life, Mr, McCrae received death because the Trial Judge did not believe death was a possibility. The testimony of Mr. Sloat makes clear that the Judge's goal was to keep the Defendant off the street for life (Deposition of Sloat, p. 17), and that as in Miller, the way to ensure this was with

a death sentence.[7] Further, the Trial Judge's activities toward the decision in Furman v. Georgia of throwing a rope over the oak tree in front of the Courthouse and his enjoyment and lack of regret as stated years later (Deposition of Sloat, pp.13-15) clearly show the input of factors not proper under Florida's sentencing scheme.

This Court now faces a situation similar to that faced in Barclay v. State, 470 So.2d 691 (Fla. 1985). There, after having affirmed the death sentence on appeal, the Court on subsequent review determined it was left with two valid aggravating factors, numerous invalid ones and a jury recommendation of life imprisonment. In this instance,

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[7] A few years after the Judge overrode the jury's recommendation, he gave an interview to a local reporter recounting this sentencing and the other in which he sentenced a person to death. Mr. Sloat spoke fondly of the Judge and indicated that the Judge was from an era which had passed. Significantly, Mr. Sloat related that an important factor that the Judge used in sentencing Mr. McCrae to death was that the Judge felt there was little likelihood that the death sentence would be carried out. (Depo p.11) The Judge had stated that he was of the opinion that he did not want these two people (death sentenced Defendant's) on the street again and that the Judge felt that if he gave them life that they could get back on the street. He related that the Judqe felt that if he gave Mr. McCrae the death sentence that he could keep him in prison for life. (Depo. pp. 12,17) The Judge related that he felt that neither of the people he had sentenced to death would ever be executed. (Depo p. 12) Mr. Sloat also related what he referred to as the Judge's "Davy Crockett philosophy." Mr. Sloat said the Judge referred to stories about Davy Crockett and the Judge noted - "If you think you're right - go ahead and do it." (Depo p.33) (See also, JQK v Rose, 286 So.2d 562 (Fla. 1973)

there are three valid aggravating circumstances, several invalid ones, a jury recommendation of life imprisonment and evidence to show numerous mitigating circumstances. The evidence supporting the mitigation has its foundation in matters shown pre-trial that have now been reinforced by new testimony and subsequent medical treatment and review over a ten year period. Clearly this Court should likewise grant relief to Mr. McCrae. (See also, Magwood v. Smith, 791 F. 2d 1438 (11th Cir. 1986)

Furthermore, this Court should reconsider its prior holding in this case as well as others regarding the discriminatory application of the death penalty. The evidence now available in light of the recent study by Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization (Nov. 1984)(37 Stanford Law Review 27) and the studies included therein. This study is particularly appropriate in this instance in light of the results of Mr. Miller and Mr. McCrae. In both instances the victim was white. Mr. Miller who originally received death has now had his sentence reduced to life. Mr. Miller's mitigation was psychiatric in nature. Mr. McCrae still faces death and his mitigation is likewise psychiatric. Mr. McCrae is black. This Court has consistently rejected this argument. (See Adams v. State, 380 So.2d 423 (Fla. 1980); Riley v. State, 433 So.2d 976

(Fla. 1983); Thomas v. State, 421 So.2d 160 (Fla. 1982); Sullivan v, State, 441 So.2d 609 (Fla.1983); Bundy v. State, 11 FLW 294 (Fla. 1986). This issue is currently before the United States Supreme Court in Hitchcock v. Wainwright, (S.Ct. #85-6756, order granting certiorari).

CONCLUSION

This Court in light of the ineffective assistance in this cause should grant the Defendant a new trial. In the alternative, in light of the existence of the mitigating circumstances clearly shown to exist in this cause, this Court should impose the life sentence recommended by the jury.

Robert H. Dillinger

ROBERT H. DILLINGER

CERTIFICATE OF SERVICE

I, ROBERT H. DILLINGER, do hereby certify that a copy of the within and foregoing has been served upon the Attorney General's Office, Park Trammel Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, by placing same in the United States Mail with sufficient postage affixed thereon, this 8th day of August, 1986.

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