IN THE SUPREME COURT OF FLORIDA

(Orig. Br. filed 10-6-87)

STATE OF FLORIDA,

Appellant/Cross Appellee,

v. CASE NO. 70,658

JOHN MICHAEL,

Appellee/Cross Appellant.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY

Corrected

BRIEF OF APPELLANT/CROSS APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee Application for Relief:

On April 10, 1985 Appellee, then facing death at 7 A.M. April 16 pursuant to a warrant signed by the governor of Florida, filed an application for stay of execution in the circuit court that had pronounced his death sentence. (R. 1) He accompanied this with a memorandum in support of stay that outlined claims he was contemplating for assertion in an application for post conviction relief under the provisions of Florida Rule of Criminal Procedure 3.850. (R. 3-218) He also filed a Notice of Hearing for 2:00 o'clock that afternoon on his Motion for Stay of Execution. Prior to that hearing, this court issued a Writ of Prohibition to the circuit court precluding it from issuing a stay of execution in the absence of a pleading seeking relief. State ex rel. Russell v. Schaeffer, 467 So.2d 698 (Fla. 1985).

The next day appellee filed an application for relief under Rule 3.850 and moved for a stay of his execution. (R. 219-352) (motion and exhibits) 353-54 (application for stay) The state opposed the stay (R. 371-74) and filed a Memorandum In Opposition to appellee's Motion for Post Conviction Relief. (R. 385-400) The circuit court granted appellee a stay of execution. (R. 401-0)

On July 5, 1985, the circuit court entered an order disposing of many of appellee's claims and setting others for evidentiary hearing. (R. 437-440) Among the claims reserved for the evidentiary hearing was appellee's claim that he had not received the effective assistance of counsel at the sentencing

phase of his trial.

The Trial Court's Order regarding the Effective Assistance of Counsel at the Penalty Phase:

The circuit court held a hearing on the issues. It rejected all but appellee's claim that he had not received the effective assistance of counsel in the sentencing phase of his trial. (R. 649-57) The court found trial counsel's decision to enter into a stipulation with the state whereby Dr. Mitchell's report on appellee's mental and emotional condition (R. 131-39) would go to the jury although not be read to it unrebutted by either the reports of Doctors Smith (R. 140-43) and Chambers (R. 144-46) or their live testimony.

The order then went on to find facts regarding counsel's performance in the area. Although Dr. Mitchell was prepared to testify to the existence of one mental mitigating factor, his written report did not address the statutory mental mitigating factors. (R. 652) (citing to record on direct appeal) The reports from the other doctors did not address the existence of the mental mitigating factors either. The circuit court concluded that trial counsel had not investigated the existence of the mental mitigating factors. (R. 654) And, it found that trial counsel's decision could not be characterized as sound trial strategy because counsel did not know what the state was relinquishing because he had not asked those doctors their opinion on the mental mitigating factors. (R. 654) It concluded that counsel's performance was deficient.

The court's order then addressed the prejudice question

finding that counsel's performance undermined her confidence in the outcome of the penalty phase. (R. 656) On denying the state's Motion for Rehearing, the court elaborated on it language in keeping with the Strickland v. Washington, 486 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) standard. (R.672-73) It reasoned that if there had been proof of a mental mitigation factor there was no way to say that this court would not have reduced the death sentence pointing to decisions of this court it characterized as reversing death sentences "when mental mitigating factors have not been accorded proper weight or have not been explored." (R. 656)

The Background Facts on the Penalty Phase:

Reference to Mitchell's letter shows that based on appellee's story about his commencement of a fairly open homosexual relationship with a young man in the presence of the victim and the emotional impact it had on her followed by her decision to leave he concluded the following about appellee's mental condition at the time around the death of the victim:

> For a person such as the defendant with almost no emotional resources and few sustaining relationships, such losses from his life could only represent a fundamental threat to his identity and very existence, and create a sense of desperation. (R. [illegible])

Appellee called Dr. Mitchell at the evidentiary hearing. (R. 1224-[illegible]) He testified that appellee was a "very troubled individual." (R. 1230) When asked to assume the information regarding appellee's background developed since the sentencing was credible and asked what he would have said if called to

testify he said that he would testify exactly the same way then as he was doing for the then current proceeding. (R. 1232) When asked whether appellee was under the influence of extreme mental or emotional disturbance at the time of the killing assuming he had done it, the doctor said:

> A I would think he was under -- again, I want to make the point here that living with that woman was not normal. Okay. That was the last desperate attempt in the life of a man that had failed at everything he had done. He had failed in two marriages. He had failed in his education. He had failed in everything. Even his mind had failed. When he took -- when he moved in with that old woman, he took refuge with that old woman with the hope of staying there he would not lose it again. Okay.

The doctor was not asked about any preparation he had done for the penalty phase. Nor, was he asked about being on standby to come and testify in the eventuality of a penalty phase in appellee's trial.

Trial counsel for appellee testified at the evidentiary hearing. (R. 1239-96) It was his opinion that the bodies of the reports by the mental health experts touched on the mental mitigating factors. (R. 1267) He said that while he had not had Dr. Mitchell under subpoena he did have him on standby for a penalty phase. (R. 1269) And, it was his testimony that he had discussed sentencing with the doctor. (R. 1296)

After the presentation of the evidence in the penalty phase of the trial (DR. 2092-2103) * the trial court instructed the

* Reference indicated by DR are to the record on direct appeal from appellant's judgment and sentence.

jury with regard to its deliberations in the penalty phase. DR. 2103-07 The court instructed the jury that among the mitigating circumstances it could consider were; the appellee had no significant history of prior criminal activity; the crime had been committed under the influence of extreme mental or emotional disturbance; that appellee's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially imparied and any other aspects of appellee's character or record and any other circumstances concerning the offense. DR. 2105-06

During the state's closing argument, the prosecutor found it necessary to address mitigating factors that he expected appellee's trial counsel to argue. He pointed out that any claim that appellee's ability to appreciate the criminality of his conduct was impaired was inconsistent with the fact that appellee had made arrangements to get Morin out of the house prior to the murder and then started establishing an alibi. (DR. 2111) He pointed out that the facts indicated that appellee was not suffering with any diminished capacity to appreciate what he was done; that he knew full well why he cleaned up the blood, hid the body and constructed an alibi. (DR. 2112) He went on to say that the record would not indicate that appellee was acting under the influence of extreme mental or emotional disturbances. (DR. 2112)

When appellee's trial counsel argued, he went to the heart of the concept at the core of the mental mitigating circumstances. In essence, he told the jury that appellee's capacity to act responsibility was sufficiently impaired that

while it was proper to hold him criminally responsible for his actions, holding him responsible at the expense of his life was not justified.

He pointed out that he killing for profit argument advanced by the state was inconsistent with the mechanism of the victim's death, the beating, the choking and the stabbing. (DR. 2115) He told them that a killing for profit would involve a quick death not the kind of killing that took place in this case. (DR. 2112)

Trial counsel urged the jury that "something snapped" reminding the jury that appellee had no history of violence. (DR. 2115, 2116) He told them that he thought that there would be no question in their minds that appellee needed psychiatric help after reading the report. He told them he regreted that the report did not go into greater depth that was all that was available. (DR. 2116) He told them that a reading of the report would demonstrate that appellee's capacity to appreciate the criminality of his conduct or to conform it to requirements of law was substantially impaired. (DR. 2117) Trial counsel asked the jury to consider the state's argument that he wanted his homosexual lover so bad that he suddenly decided to kill the victim. (DR. 2117) He argued that the jurors could see that the killing had to have been done in some type of rage in the photographs. And, he argued that a careful reading of the report would show the appellee had acted under the influence of extreme mental or emotional disturbance.

The Institution of This Appeal:

Both appellee and the state sought rehearing in the trial

court. (R. 658-660) (attorney general's motion) 661 (appellee's motion) 662-64 (state's supplemental motion) 665-67 (appellee's reply to state's motions and supplemental motion) The court denied all the motions. (R. 672-74) (order denying state's motion and supplement) 675 (order denying appellee's motion) The state filed its notice of appeal in a timely fashion after the denial of its motion for new trial and supplement but prior to the denial of appellee's Motion for New Trial. (R. 1139) Appellant filed a timely Notice of Cross Appeal after the denial of his motion and its supplement. (R. 1145-46)

SUMMARY OF THE ARGUMENT

Appellee's trial counsel's performance regarding the penalty phase of his trial was neither deficient nor did it prejudice him. Appellee's trial counsel had no professional obligation to seek an opinion from the mental health experts appointed for the purpose of assessing appellee's competency to stand trial and whether an insanity defense was available in their initial communications. Having sought an opinion on the mental mitigating factors in his first communication from the confidential mental health expert, Dr. Mitchell, would have been of no benefit to appellee and might well have worked to his disadvantage. There would be plenty of time for the confidential exploration of the penalty phase issues after the competency and sanity evaluations were concluded. With regard to the other two experts, appellee's trial counsel was well advised wait for their initial responses regarding competency and sanity. It gave him a chance to see whether these experts were as likely to view appellee as a deeply disturbed and troubled individual as did Dr. Mitchell. And, it avoided either the actual creation of a "Dr. Death" or giving the state an opportunity to seek out an expert that might fill that role. There was no need fore arm the state by fore warning its representative as to how the defense case for mitigation would be made if the actual trial of the case resulted, as it did, in that eventuality.

The circuit court's legal error was to second guess trial counsel's strategic and tactical decision about what evidence was to be presented in the penalty phase. That decision was

legitimately within trial counsel's discretion. He gave up the opportunity to present live testimony from the expert whom he had prepared and had on standby. But, he gained an opportunity to have all the raw material he needed to make an argument for both statutory and non statutory mental mitigating circumstances go to the jury without having those conclusions subjected to cross examination. And, he structered the situation such that the jury would return to the jury room for deliberations with a written report and pictures that served to support his argument that there were mental mitigating factors or great weight arguing for appellee's life.

The circuit court erred in its analysis of the prejudice prong by citing a number of cases for a proposition that to the extent it is true is so broad and general as to have no real application. An examination of the cases on which the circuit court relied shows that each turned on its own peculiar facts and that the facts in those cases are simply no apposite to the factual pattern presented in this case. Were there any merit to the circuit court's position, then this court would have granted appellee relief on issue V in his brief on direct appeal in this court.

In reaching its conclusion on prejudice, the court below overlooked and failed to consider that a reasonable person might conclude that there were two contradictory, if not mutually exclusive, ways of assessing this appellee, that he was a cold and calculating killer out for profit or an extremely troubled individual whose emotional turmoil led him to take the life of

the only significant other in his life at a time he may have felt he was losing her and thus being forced to confront that in himself from which he had been hiding for so many years. This court found that the evidence supported the aggravating factors beyond a reasonable doubt. There was no basis for the circuit court's conclusion that more specifically articulated evidence that appellee met statutory criteria for mental mitigating circumstances would or might even have changed the result in this court. It can not be said with confidence that this court would have decided any differently if such evidence had been presented.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN FINDING THAT COUNSEL'S DECISION TO ENTER INTO A STIPULATION WITH THE STATE THAT HE SAW AS ALLOWING HIM TO PRESENT MENTAL MITIGATING EVIDENCE ALTHOUGH NOT IN THE TERMS OF THE STATUTORY MENTAL MITIGATING FACTORS TO THE JURY WITHOUT GIVING THE STATE A CHANCE TO EITHER CROSS EXAMINE HIS EXPERT OR PRESENT ITS EXPERTS WAS DEFICIENT AS THAT TERM IS USED IN STRICKLAND V. WASHINGTON, 466 U.S. 668, 104, S.Ct. 2052, 80 L.Ed.2d 674 (1984) AND WHETHER ASSUMING, ARGUENDO, THAT THE PERFORMANCE WAS DEFICIENT THAT DEFICIENT PERFORMANCE IN LIGHT OF THE ABUNDANT EVIDENCE TO SHOW THAT APPELLEE SUFFERED SIGNIFICANT MENTAL HEALTH PROBLEMS PREJUDICED HIM IN THIS COURT'S RESOLUTION OF HIS CLAIM THAT DEATH WAS NOT APPROPRIATE FOR HIS PUNISHMENT?

The court below found that appellee's trial counsel's performance at the penalty phase proceedings was deficient and that that deficient performance prejudiced the appellee. It is the state's position that appellant failed to show any more than a belated difference with trial counsel over a tactical decision. The court below failed to recognized in faulting trial counsel for not having written reports regarding the statutory mental mitigating factors that there were good reasons for not doing so at the time of the request for the preparation of the reports. The court below overlooked unimpeached and unrebutted evidence that trial counsel had prepared his expert for testimony in the penalty phase. The court below erred in faulting counsel's decision to accept the stipulation on the ground that he did not know what the state's experts might or might not say regarding the existence of the mental mitigating factors because appellee offered no proof that appellant had not gained by the

choice to enter into the stipulation. And, the court below erred in its assessment of prejudice because of a faulty understanding of the decisions of this court on which it relied in reaching that conclusion.

PERFORMANCE

Tactical decisions within counsel's discretion will not serve as a basis a claim of deficiency on the performance prong of the Strickland v. Washington, test. Choices about whether to present certain mitigating evidence are within counsel's discretion. Porter v. State, 478 So.2d 33, 35 (Fla. 1985); Quince v. State, 477 So.2d 535 (Fla. 1985); Brown v. State, 439 So.2d 872, 875 (Fla. 1983) (collecting earlier cases). Counsel in this case made a tactical decision. There was already an abundance of evidence before the jury that appellee's mental health was substantially impaired. They are collected in volumes VI and VII of the record on appeal in this case together with other documents and sources indicating the same. Instead of calling Dr. Mitchell whom he had on standby, trial counsel accepted the state's offer to allow the letter to go to the jury unrebutted. This gave him all the basis he need to argue to the jury the existence of both statutory and non statutory mental mitigating factors. His claim about appellee's suffering significant emotional problems went to the jury unrebutted. And, appellee failed to demonstrate below that it would not have been rebutted if the state had called its doctors. Nor, because of his decision, did the state have an opportunity to try weakening the doctor's conclusions by cross examining him.

There is no specific way in which counsel must go about making a case for mitigation. Trial counsel's decision about how to proceed was as much within his discretion as was trial counsel's decision in Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983)[1] Foster had complained, like this appellee, that his trial counsel had not used his expert witness properly in trying to establish that his offense had been committed when his capacity to appreciate the criminality of his conduct was impaired because of his mental illness. Foster's trial counsel had used only appellee's exwife to testify about his disturbed emotional state and a doctor who corraborated her testimony as well as documenting his mental illness with written records evidencing Foster's poor emotional health. He chose to make an appeal to emotion rather than a complicated medical case. The court found that it was not deficient. This trial counsel's performance was not more deficient that was Foster's.

Trial counsel was in the best position to know whether the jurors and particularly the most likely opinion leaders among them were literal minded rule oriented people or more flexible types likely to look at the values and concepts embodied in specific formulations and apply those. There is simply no reason to believe that counsel was not counting on the jurors in this case to be of the more flexible type and pour the raw material developed during trial and the penalty phase into the open shell of the mental mitigating factors on which they had been

1/ Foster v. State, 400 So.2d 1 (Fla. 1983) in this court.

instructed and about which counsel had argued to them. Counsel's decision had resulted in their taking in to the jury room only tangible evidence, the photos documenting that the murder had been carried out in a rage and Dr. Mitchell's extensive report on appellee's mental health, evidence that would support his argument for the existence of mental mitigating factors.

The trial court's order faults counsel for not seeking opinions from the doctors regarding the available mental mitigating factors in their initial reports. It is the state's position that counsel was very wise in not doing so. Dr. Mitchell had been appointed to act as a confidential advisor. It certainly would not have been wise to ask for an opinion on the mental mitigating factors at the juncture. When counsel asked for that initial evaluation, there was the possibility that he would have to reveal that report to obtain additional expert services. If the expert had found such factors to exist at that point, there was certainly no point in giving away the information that early and providing the state with an opportunity to shop for an expert who could call those findings into question. And, it certainly would not have helped appellee if the answers to those questions would have made him a doctor death useful to the state in its pursuit of a capital sentence.

The course of action followed by trial counsel was definitely the better course. He got his opinion on competency and sanity from Mitchell. And, he learned that Mitchell unlike the other two mental health experts who examined appellee was disposed to see appellant as an extremely mentally and

emotionally disturbed inidvidual undergoing an experience at the time of the victim's death that represented "a fundamental threat to his identity and very existence" thereby creating a "sense of desperation" in him. (R. 138)

As shown by the statement of fact, appellee had investigated the mental mitigating factors. He had Dr. Mitchell on standby. He was certainly prepared to argue both statutory and non statutory mental mitigating factors to the jury and he did so with little or no time for preparation between the verdict of guilty and the commencement of the penalty phase.

The trial court also faulted counsel for entering into the stipulation without knowing what the state's doctors' might have to say. The state submits that a reading of these doctor's reports shows that they were not inclined to view appellee in the same light as Dr. Mitchell. Both reports minimized the nature of appellee's mental health problems. It certainly would not have been wise to depose these witnesses and give away his penalty phase and give the state a head start on rebutting it. The benefits of the choice were readily apparent. There was no deficiency in not preparing witnesses who appeared unpromising into witnesses who might very well turn out to be very damaging. The trial court's conclusions ever step along the way are nothing more than a second guessing of tactical choices that were well within trial counsel's discretion.

PREJUDICE

The court below reasoned that dppellee was prejudiced on the ground that if he had presented evidence specifically

establishing the existence of the statutory mental mitigating factors she could not conclude that this court might not have reversed in light of a number of cases she cited. (R. 656) The court cited these cases as supporting its conclusion that this court "has often reversed a death sentence or remanded for a new sentencing hearing when mental mitigating factors have not been accorded proper weight or have not been fully explored." (R. 656) This court had never formulated such a general proposition. And, examination of the decisions to which the lower court cited shows that they really do not support such a broad proposition but that each turned on their own particular facts and circumstances, facts and circumstances which differ materially from those in this case.

Unlike the counsel in Holmes v. State, 429 So.2d 297 (Fla. 1983) counsel in this case did present "available expert opinion pertaining to . . . [appellee's] mental and emotional condition." 429 So.2d at 300 And, again unlike the counsel whose performance was found deficient in Holmes trial counsel in this case did concentrate on the "particular mitigating aspects of the case" not making an argument voicing "general and philosophical objections to capital punishment." 429 So.2d 301 and 298 respectively. And, unlike counsel in Holmes trial counsel in this case did not concede the existence of a questionable aggravating circumstance. Reference to trial counse's closing argument shows that he made a powerful case against the existence of the aggravating circumstances urged with the very evidence that the state had relied on to obtain the conviction as well as

the evidence, the photographs the state had introduced at the penalty phase.

The reversal in Perri v. State, 441 So.2d 606 (Fla. 1983) came because of the trial court's error in denying a motion for psychiatric evaluation prior to penalty proceeding where there was evidence to show prior psychiatric hospitalizations. There is no similar error in this case. There was an abundance of evidence which if credited would serve to support the existence of both statutory and non statutory mental mitigating factors.

This court remanded for resentencing in Mann v. State, 420 So.2d 578 (Fla. 1982) because the trial court improperly found two aggravating circumstances and its finding on mental mitigating on the basis of unrebutted and uncontradicted evidence establishing two mental mitigating circumstances were ambiguous. The evidence before the court below was open to the interpretation that appellee was either a man in poor mental health who acted in desperation under the influfence of overwhelming emotional pressures or a heartless criminal who coldly and carefully planned this murder for his own financial benefit. That the sentencing court rejected the former and adoped the latter clearly distinguishes this case from Mann. And, it makes the facts of this case more akin to the situation presented in Quince v. State, 414 So.2d 185, 187 (Fla. 1982) where this court found no error in the trial court's decision to give little weight to medical evidence that indicated that the offender had carried out the crime at time when this ability to appreciate the criminality of his conduct was impaired in light

of other contradictory evidence.-

This is certainly not a case like Simmons v. State, 419 So.2d 316 (Fla. 1982) where the exclusion of evidence of rehabilitative capacity from jury's consideration in penalty phase requred new sentencing hearing.

Nor, can there be any claim that this is a case like Mines v. State, 390 So.2d 332 (Fla. 1980), a case this court understands as calling for reversal when the record makes it obvious that the trial court used the insanity standard to evaluate the mental mitigating factors. See e.g. Ferguson v. State, 474 So.2d 208 (Fla. 1985) Unlike this case, prior to bench trial appellee had actually been found incompetent to stand trial for a period of time, an insanity defense had been offered and rejected and the experts were all in agreement that appellee chronic paranoid scizophrenic and clains that appellee had committed offense under influence of extreme menal or emotional disturbance, was under extreme duress or substantial domination of another, that defendant's capacity to conform his conduct to the requirements of law and appreciate the criminality of his conduct and that victim was a participant in defendant's conduct or consented to the act were all rejected on the basis of a sanity type analysis by the trial court. The trial court in this case certainly did not reject appellee's proffered mental mitigating factors on the basis of a sanity analysis. The record is clear that it chose between two competing views of appellee's character.

Burch v. State, 343 So.2d 831 (Fla. 1977) is clearly

distinguishable. There this court ruled that an override was improper where the trial court found as a mitigating circumstances that the offender's capacity to appreciate the criminality of his conduct and conform it to the requirements of the law was substantially impaired and there was evidence to established thes mitigating factors. In this case, the jury as well the judge rejected appellee's view of his mental health or accorded it so little weight as to find that it was not established at all.

Huckaby v. State, 343 So.2d 33 (Fla. 1977) reversed a death sentence for capital where the trial court ignored unrefuted and unimpeached evidence establishing that the offender had acted under extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct and conform it to the requirements of the law was substantially impaired where there was almost unanimity of expert opinion regarding offender's mental illness, its function as the motivating factor for the offenses and its controlling influence on the offender. This is another case which simply does not address a situation like the one presented here where there were competing views of appellee's character.

Messer v State, 330 So.2d 137 (Fla. 1976) is another case like Simmons This court found that the exclusion from the jury's consideration during penalty phase plea of the bargained reduced charge and attendant sentence for a codefendant as well as psychiatric testimony proffered as establishing that that offender committed the offense under the influfence of extreme

mental or emotional disturbance required new sentencing. The court below did not erroneously exclude anything.

Finally, in Halliwell v. State, 323 So.2d 557 (Fla. 1975) this court ruled that the death penalty not warranted where trial court had improperly found the one aggravating factor and there were mitigating factors including the offender's emotional strain cause by the mistreatment of his lover by the victim. There were valid aggravating factors in this case.

Appellee sought to convince this court that the sentencing court had erred in not finding the existence of mental mitigating factors on direct appeal. See Issue V Brief for Appellee, Michael v. State, No. 60,712 By finding prejudice in this regard the court below engaged in a simple second guessing of this court. It this case fit the category described in the order granting relief then this court would have reversed on direct appeal. The trial court's ruling with regard to counsel's performance and any prejudice it might have cause in the penatly is little more than a thinly disguised reevaluation of the weight that should have been accorded to appellee's mental health problems in assessing the degree to which he should be held accountable for his murder of the victim.

Counsel's performance with regard to the penalty phase was neither deficient nor did it prejudice appellee. The jury recommended death and the sentencing court imposed it because of the existence of the aggravating factors which contradict appellee's past and current attemps to paint himself as an emotional cripple whose violence grew out of emotional turmoil

arising from the circumstances of his life at the time of the murder. Accordingly, the state asks this court to reverse the order of the court below setting aside appellee's death sentence and remand with directions to reinstate appellee's sentence of death.

CONCLUSION

WHEREFORE appellant asks the court to reverse the decision of the circuit court setting aside appellant's death sentence and remand with instructions to reinstate that sentence on the basis of the above and foregoing reasons arguments and authorities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Capital Collateral Representatiave, 225 West Jefferson Street, Tallahassee, Florida 32301 and Kevin H. O'Neill, Esq., Foley & Lardner, One Tampa City Center, Suite 2900, Tampa, Florida 33602 on this 5th day of October, 1987.

COUNSEL FOR APPELLANT/CROSS APPELLEE