IN THE SUPREME COURT OF FLORIDA

JAMES CURTIS McCRAE,

Appellant

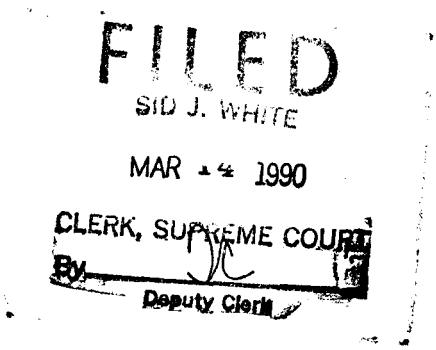
Case No.: 74,685

v.

STATE OF FLORIDA,

Appellee

_____/



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 Clerk's Office in this case did not continue the pagination in preparing the most recent portion of the record. In light of this, the original Record on Appeal will be referred to as (OR-) and the Supplemental Record initially furnished regarding the 3.850 will be referred to by (SR-) and the transcript which was supplemented to that will continue to be referred to by (TR-). The Record provided this time will be referred to by (R-).

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 So.2d 824 (Fla. 1982). A Petition for Writ of Certiorari in the United States Supreme Court was denied. 461 U.S. 939 (1983).

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. On appeal the Florida Supreme Court on June 18, 1987, remanded the case back to the Trial Court to conduct a new sentencing proceeding without a jury. The opinion further directed that on remand the Trial Court would take into consideration the recommendation returned by the original trial jury in this case. McCrae v. State, 510 So.2d 874 (Fla. 1987).

Pursuant to that opinion a hearing was held on February 15th and 16th of 1988, wherein the Defendant presented additional testimony. The State offered no testimony or evidence. On April 22, 1988, the Honorable Thomas S. Reese, Circuit Judge, again sentenced the Defendant to death (R-395-409). This appeal followed.

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).

The facts pertinent to this appeal will have to involve not only the 3.850 testimony presented in January of 1985, but also the testimony presented in February of 1988. Both hearings presented additional statutory and non-statutory mitigating circumstances and all parties proceeded on the basis that the 1985 hearing was incorporated into the 1988 hearing (R-81). The Judge's findings regarding his sentencing likewise incorporated the 1985 and 1988 hearings (R-402 - 417).

Nurse Bonita Booth testified that she was currently a nurse at the Lee County jail. She testified that the Defendant was received prior to the hearing from the Florida State Prison with the medication of Dilantin and Phenobarbital. (TR-93) She also indicated that 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).

Ms. Myra Starkes also testified. She was the Defendant's former wife. She indicated that 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 introvert 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. She states 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 and their infant child left and she divorced the Defendant (TR-131). She then stated that twelve 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 the 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)

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 the Motion for Rehearing to Determine Competency to Stand Trial (OR-973-974) wherein the Defendant's trial lawyer, prior to the 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-198-1999) Dr. Machler had been practicing psychiatry for more than 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 from the Epilepsy Research Laboratory and the deposition of Myra Starkes. (TR-202, 203) He explained the various forms of epilepsy and stated that Mr. McCrae had, based on the reports reviewed from the 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 involves purposeless activity and physical violence and, 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 an EEG because the pattern of any 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 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 temporal lobe seizure disorder and that the Defendant had met all five criteria. (TR-215-217) He also stated that the description given by the Defendant's former wife was consistent with the development 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 more than 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)

Marsha Schwenn testified that she was a graduate of California State at Davis who had majored in English and had done graduate work at the University of Rhode Island, the State University of Stoneybrook, and who was an adjunct professor at John Jay College of Criminal Justice plus a teacher at Riker's Island Prison in New York. Ms. Schwenn testified that her background was in journalism

and that she had been a reporter since 1969. She also indicated that she was a Lutheran lay minister. (R-5,13,14) She indicated that in light of her background in journalism and in light of having been an editor she had the opportunity to begin reviewing correspondence from the Defendant for possible publication. (R-5, 6) She indicated that she found the Defendant's writings to be extremely literate and worthy of publication. (R-6) As a result she met with the Defendant personally eight to ten times over a period of twenty-three to twenty-four days and edited the Defendant's journal which was produced during his second death watch. (R-7) This journal as published by the St. Petersburg Times, Southern Exposure and the Unitarian Community Magazine. (R-7, 8) She indicated that as a result of her contact with the Defendant that she believed the Defendant had a great understanding and concern for the victimization of people in society and the suffering which occurs to those victims. She indicated that the Defendant had expressed great remorse as to the victim in his case and at the Defendant's request she places flowers on the altar of her church on the anniversary of the victim's death. (R-16) She indicated that she had been doing this since 1983 and that she had further met with the minister who had performed the funeral and had gone to the grave site to place flowers at the request of the Defendant. She further indicated that she had personal dealings with an elderly mother and daughter in their nineties and sixties, respectively, who were also communicating with the Defendant. The sixty year old daughter had

brain damage which did not allow her to relate to other people. (R-9) When the daughter began corresponding with the Defendant however, she began communicating and often repeated to Ms. Schwenn her reason for living was communicating with the Defendant and that Ms. Schwenn had personally witnessed the fact that the daughter could only articulate when relating to the Defendant. (R-10) Furthermore, the witness indicated that the Defendant had never solicited funds from her nor had he solicited funds or other types of assistance from any of the other people with whom she had met who had also either corresponded or visited the Defendant. (R-7) She was also familiar with the Defendant's contacts with the Unitarian School in New York and the ongoing communication between the Defendant and the children of the Unitarians. (R-12) She indicated that her familiarity with the Defendant and those children as well as the Defendant's support when her child was injured reflected the sensitivity that she had come to observe in his writings and in his person. (R-12, 13) She also indicated that having taught at Riker's Island Prison and at John Jay College that she had met people who had attempted to manipulate religion or who had found "jail house religion". (R-13, 14) She indicated that the Defendant was a confirmed Christian with a strong depth to his commitment God. (R-13, 14) She likewise felt that the Defendant was a skilled writer whose skill would allow him to function in our society. (R-16)

Michael Radelet indicated that after having obtained a Ph.D. in sociology from Purdue and after having done two years post

doctoral studies at the Psychology Department of the University of Wisconsin Medical School that he went to the University of Florida and since 1979 has been a professor of sociology at the University of Florida specializing in capital punishment and medical ethics. At the time of his testimony Professor Radelet had recently co-authored a 160 page Stanford Law Review article dealing with the death penalty. He pointed out that from a statistical point of view there are manners in which to predict dangerousness as well as to review future dangerousness. (R-29, 37) He extensively outlined the criteria for predicting dangerousness, (R-32,33) and offered that in 1972 when Furman went into effect there were ninety-seven people on death row. He indicated that one-third of those had been released and none had returned to prison. (R-37) His information showed that the Defendant had a low likelihood of dangerousness. He further stated he had established a personal relationship with the Defendant. (R-32) He indicated that the Defendant was one of his closest friends and that the Defendant was different. (R-33) He indicated that he had gotten to know approximately fifty death row inmates and of those fifty death row inmates that only the Defendant and one other appeared truly remorseful. (R-33, 34) He indicated that the Defendant had acted as a teacher to him. (R-33) He indicated that he could say that if the Defendant was in fact released that day, that the Defendant could come to his home. (R-34) He indicated that there are very few people of whom he could speak in that nature, particularly in light of his familiarity with the people on death row. He further

indicated that he thought the Defendant had an extremely high potential for making a contribution to the community. (R-35) On cross-examination he made clear that the Defendant never asks for favors including money or supplies and that the Defendant is not a person he would consider manipulative. (R-36) Professor Radelet indicated that he was well aware of manipulative people not only on death row but in the University setting and that based on his experiences the Defendant was not manipulative. (R-36)

Rolland Hopper testified that he was an ordained minister working in the jail and other community areas. (R-39) He indicated that he had met the Defendant in 1984 and baptized the Defendant that same year (R-40) Mr. Hopper also indicated that he met a lot of people in the various jails who attempt to use religion for their own selfish purposes, but the Defendant was not one of them. (R-41)

Mr. Mildred Kanavel, an elderly white woman, testified that she had begun corresponding with the Defendant on her own volition. She indicated the correspondence was religious in nature and writing to him was something that she had wanted to do after Florida's first execution. She indicated that the Defendant in her opinion was not bitter with the world and was a very good writer. (R-48, 49) She further indicated that the Defendant never asked for money and that she had never testified on anyone's behalf before and had volunteered to do so this time. (R-53)

Willie B. Green testified that he owned a local sod company since he had moved to Ft. Myers in 1956. (R-53) He further said

that from 1959 onward, his children had grown up in the same neighborhood and along with the Defendant. (R-54) He indicated that the Defendant seemed to be a normal young man who attended school and was quite an athlete. (R-54) He indicated that the Defendant, to him, appeared normal until shortly before he started getting into trouble. (R-54) He indicated that prior to that time the Defendant had not ever been a trouble maker and Mr. Green indicated that he had given Mr. McCrae his first job which was in landscaping. He indicated that he was a good worker. (R-55) Mr. Green also indicated that shortly before the incident in question, the Defendant had begun drinking and that he noticed this change in the Defendant and believes that the Defendant was drinking shortly before the incident in question. (R-55) He further stated that he was shocked when the Defendant was charged with this crime. (R-57)

Nancy Simms is an occupational placement specialist at Cape Coral High School who had known the Defendant over a period of approximately twenty-eight years since they had grown up together in the Dunbar neighborhood. (R-60) She had indicated that the Defendant was a good student, a well liked athlete and a person not known as a trouble maker. (R-60) She had indicated that she knew many of the friends of the Defendant and that all people she knew likewise liked the Defendant. (R-61) She indicated that the Defendant had dated a close girlfriend of hers and that they had often doubled dated. She indicated this is how she knew him the best and that while dating there had been no problems and no

violence of any nature. (R-61) She indicated that he was considered a good athlete and was taking advanced courses to her knowledge. (R-61) She further indicated that she was shocked when she heard of his arrest for this offense. (R-61)

Levone Simms was a coach and teacher in Ft. Myers and the husband of Nancy Simms. (R-63) He had indicated that he had met the Defendant because the Defendant was dating his wife's best friend and they often double dated. (R-63) Mr. Simms indicated that the Defendant was in the college preparatory program at school and was a good athlete who was not violent. (R-63) Mr. Simms indicated that he had always assumed that the Defendant was going to be the type of person that succeeded and he was totally shocked and couldn't imagine the Defendant having committed a crime of this nature. (R-63)

Theodore Greddick testified that he had taught in the public school system for twenty-seven years and had taught the Defendant in football and track. (R-68) He indicated the Defendant was a better student than normal and was a coachable individual whom he enjoyed coaching. He indicated that the Defendant was never a discipline problem and had great potential in athletics. He indicated the Defendant had lettered in football, basketball and track and was a leader at the school. (R-69) He likewise indicated that he was shocked when the Defendant was arrested for this offense.

Reverend Joseph Ingle likewise testified as a character witness on behalf of the Defendant. Reverend Ingle is an ordained

minister of the United Church of Christ who had graduated with a bachelor's degree in philosophy from Andrew's College and then graduated from Union Theological Seminary. At the time of his testimony he was a nominee for the Nobel Peace Prize of 1988. (R-74) He stated that he had met the Defendant in 1977 and had immediately noticed the Defendant to be one of the more sensitive and caring people on death row. (R-76) He indicated that he had travelled death rows throughout the South and had taken a liking to the Defendant because of his good relations with the inmates as well as the Defendant's expression of remorse for the victim and the victim's family. (R-76, 77) He likewise indicated that he often spoke to the Defendant about coming to his farm if the situation ever improved. (R-77)

The State offered no testimony or evidence at the 1985 or the 1988 hearings.

SUMMARY OF ARGUMENT

The trial court overrode the jury recommendation of life. Substantial mitigation was presented on the Defendant's behalf consisting of numerous people who knew the Defendant before the incident as well as numerous people who have come to know the Defendant since the incident. The witnesses spoke of a quiet, well mannered young man who in high school lettered in football, basketball and track and captained his basketball team. He was one of the people "you just always assumed would succeed". Other witnesses spoke of a deeply religious, well read articulate man who has considerable talent as a writer.

Medical testimony and evidence was presented which showed that the Defendant, in his early twenties, developed a brain disorder. This disorder was confirmed by an EEG and by a witness who related the factual circumstances surrounding the changes in his personality and actions.

The trial court found all of the mitigation offered by the Defendant to be "...speculative, indefinite and woefully inadequate". Clearly there was substantial and significant mitigation to support the life recommendation.

ISSUE

DID THE TRIAL COURT ERR IN OVERRIDING THE JURY RECOMMENDATION OF LIFE IN LIGHT OF THE SUBSTANTIAL AND NUMEROUS MITIGATING CIRCUMSTANCES OFFERED BY APPELLANT?

The trial court sentenced the Defendant to death based on three aggravating circumstances: previous conviction of a violent felony [§921.141(b)], felony murder [§921.141(d)], and heinous, atrocious and cruel [§921.141(h)]. These aggravating circumstances are generated from a four month period in the Defendant's life, a time during which this court has previously recognized the Defendant was affected by "certain mental and emotional problems and even a mild brain disorder." McCrae v. State, 510 So.2d 874 (Fla. 1987) at p. 876. The aggravating circumstances of prior violent conviction resulted from an incident occurring on June 8, 1973 while the other two aggravating circumstances occurred as a result of this incident which occurred between October 13 - 15 of 1973. (R-410, see also McCrae v. State, 395 So.2d at 1148). The trial court in its sentencing order referred to possible mitigation but did not specifically find any mitigating circumstances and specifically rejected certain statutory mitigating circumstances.[1] The trial court summed up his feelings towards the four days

1. While the three aggravating circumstances found by the trial judge have previously been upheld by this court, the trial court's factual findings are in error. The trial court found the sexual battery occurred while the victim was alive and apparently consciously aware of what was occurring (R-402). This is not the case since the medical examiner's testimony indicated the sexual contact may have occurred even after death. See McRae v. Wainwright, 439 So.2d 868 (Fla. 1983) at 871, McRae v. State, 395 So.2d 1145 (Fla. 1981) at 1153, (OR-519). Death resulted from the blows to the ribs within a matter of minutes and no longer than four minutes. (OR-505).

of evidence presented by the Defendant by stating:

> The court, considering all of the evidence presented in mitigation, does not reject such evidence but finds that, when weighed against the aggravating factors, it is so speculative, indefinite and woefully inadequate that it is simply insufficient to overcome the aggravating factors.

A review of the evidence presented will clearly show that the evidence presented was not "woefully inadequate" or "indefinite" or "so speculative."

The evidence presented by the Defendant consisted of witnesses who knew the Defendant before the murder, witnesses who knew Defendant after it, witnesses who knew the Defendant both before and after and medical testimony regarding the Defendant brain disorder. The before and after testimony was an essential predicate to the medical testimony. The trial court completely overlooked the significance of the lay testimony when taken in conjunction with the expert testimony.

Numerous witnesses testified regarding the Defendant's character and background prior to this incident. At the original trial, Coach James Stephens testified that he had coached the Defendant in junior high and senior high as a basketball coach. He indicated that Mr. McCrae was the captain of the varsity, a good athlete, a good student, and a person who he believed was college bound. He also indicated that Mr. McCrae was at the top of the list regarding the students who stuck out in his mind as being good. He likewise indicated on cross-examination that because of the type of person he knew the Defendant to be that he was shocked

when the Defendant was arrested for this offense (OR-888 - 894). Nancy Simms also testified as a witness who was familiar with the Defendant through high school. Ms. Simms, who was an occupational placement specialist at a local high school at the time of her testimony, had known the Defendant for many years since they had grown up together in the Dunbar area of Fort Myers. She indicated that the Defendant was a good student, well liked, well mannered, and a good athlete who was not known to be violent or a trouble maker. She indicated that the Defendant had been dating a good girlfriend of hers and that it was during this dating period that she got to know the Defendant the best. She indicated that there were no dating problems such as violence, etc., and that of the friends that she knew who likewise knew the Defendant, they all liked him. She indicated she was shocked when she heard of the Defendant's arrest (R-60 - 62). Levone Simms had likewise known the Defendant during the dating posture since he was dating Nancy while the Defendant dated Nancy's best friend. Mr. Simms, currently a coach in a high school in Fort Myers, knew the Defendant as a person working towards going to college who was not violent and a good athlete. Mr. Simms indicated that he "always assumed the Defendant was going to succeed" in light of his experiences with the Defendant. Mr. Simms indicated that he was shocked when he heard of the Defendant's arrest for this offense because he couldn't imagine the Defendant committing this type of offense (R-63, 64). Theodore Greddick testified that he had experience with the Defendant since he had coached the Defendant

in football and track. Like Coach Stephens, Mr. Greddick indicated that the Defendant was a better student than most, was a very coachable individual, and that he enjoyed coaching the Defendant. He indicated that the Defendant was never a discipline problem and was a leader. He indicated he was shocked when he heard of the Defendant's arrest for this offense (R-67 - 69). Willie Green was a businessman in Fort Myers whose children grew up with the Defendant. Mr. Green indicated he had seen the Defendant as he grew up and that the Defendant seemed to be a normal young man who attended school and was quite an athlete. Mr. Green had also given the Defendant his first job doing landscape work and Mr. Green indicated that the Defendant was a good worker and not a troublemaker. Mr. Green did indicate that within a few days of the incident in question he had noticed that the Defendant was drinking or was high (R-55). Mr. Green indicated that this was the first time he had really seen the Defendant acting this way (R-53 - 55). Mr. Green stated that he was shocked when the Defendant was charged with this offense (R-57).

Even though the trial court never mentioned the testimony of Myra Starkes, Ms. Starkes' testimony is crucial in the understanding of the circumstances surrounding Mr. McCrae's brain disorder. Ms. Starkes was the former wife of the Defendant (TR-125). She indicated that she started dating the Defendant while she was in high school and that while dating, she described Mr. McCrae as a nice, quiet, shy and almost introverted person (TR-124). While dating, she never saw any physical outbursts. She

indicated that after high school, he went into the military and upon his return, they were married and moved to California (TR-125). At this point, she began to notice two major changes in the Defendant: unexplained aggressive behavior and alcohol consumption. She indicated that before the military, he did not drink and there had been no violent outbursts (TR-126).

During the marriage, however, 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 these outbursts, the Defendant would then indicate to her that he couldn't remember what had happened during the outbursts (TR-126). Ms. Starkes indicated that at first she simply did not believe the Defendant's statements regarding his lack of memory and attributed his actions to consumption of alcohol (TR-128). As time went by in the marriage, however, she began to understand that the Defendant did not have a recollection for the events which occurred during these unprovoked violent outbreaks (TR-127). She stated that she had told the Defendant that he needed help and when the Defendant did not seek the help, she and the child left him. She also indicated that during the marriage, he was not on any type of prescribed medication (TR-133, 134). This separation and divorce was in 1972. As previously mentioned, the violent acts which formed the basis for the aggravating circumstances in this cause occurred in June and October of 1973.

Ms. Starkes indicated that after the divorce she did not see the Defendant for twelve years (TR-130, 131). After that twelve-

year period, she had occasion to go and visit the Defendant in prison. During the visits, she learned of the Defendant's diagnosis of epilepsy and of his being placed on medication (TR-131). She described the Mr. McCrae she met in prison as now being like the person she knew before they were married (TR-131, 132). She further indicated that since the divorce she had entered the military and as part of her military training, learned CPR and other techniques which taught her to recognize seizures (TR-129). She indicated that now, based on this training, she realized that the Defendant was apparently having seizures during the time of their marriage (TR-129).

A nurse, Bonita Booth, likewise testified at the Defendant's hearing that the Defendant was received from the state prison with medication of Dilantin and Phenobarbital (TR-93). She indicated that the Defendant had been diagnosed as an epileptic and was to be treated as an epileptic in her jail.

The significance of the lay witnesses who knew the Defendant as they grew up and through high school and the testimony of Ms. Starkes became apparent during the testimony of Dr. Machler. Dr. Machler, an expert with more than twenty years of practice in the field of psychiatry, explained what was occurring to Mr. McCrae at the time of this incident. Dr. Machler noted that during the pre-trial proceedings of the Defendant that documents were filed indicating the Defendant had taken a polygraph examination and that the Defendant had been found to be truthful when he said he had no recollection of the killing (TR-198, 199). Dr. Machler also

reviewed the reports of the doctors who had examined Mr. McCrae in 1973. He noted that Dr. Haber had concluded that a clinical picture of organic brain syndrome with epilepsy could account for the Defendant's behavior and that Dr. Haber had been concerned enough to order an EEG. The EEG result confirmed a condition consistent with temporal lobe seizure disorder (OR-948). Likewise, Dr. Machler noted that Dr. Hoagland in his examination in 1973 had likewise found a clinical picture that would be consistent with the Defendant suffering from a temporal lobe seizure disorder (OR-949). Dr. Machler noted that immediately following the Defendant's arrest, he began receiving the normal medication for epilepsy, i.e., Dilantin and Phenobarbital, and was still being treated by these medicines at the time of the testimony as demonstrated by Nurse Booth's testimony. Dr. Machler noted that based on the medical reports reviewed since 1973 to the present time that the Defendant had made the progression from temporal lobe seizure disorder to a grand mal situation (TR-205). The doctor noted that this was common (TR-205).

In explaining temporal lobe seizure disorder, the doctor stated that this particular brain disorder has been documented since the 1800s and that it involves purposeless activity and physical violence that in almost 80% of the cases is nonconvulsive (TR-206). A total lack of memory following outbreaks of extreme physical violence is an almost universal diagnostic finding of this disorder (TR-207). Furthermore, the use of alcohol by the person suffering from this disorder is very likely to precipitate further

problems (TR-207, 208). He also noted that unlike many other mental illnesses and disorders, temporal lobe seizure disorder can be objectively diagnosed by means of an EEG, and that this EEG determination is incontrovertible evidence of the illness of temporal lobe seizure disorder (TR-208). These EEG results are also something that cannot be faked (TR-212, 213). Regarding treatment of a person with temporal lobe seizure disorder or a grand mal type seizure disorder, the doctor stated that the illness and its progression is controllable in most instances and in the Defendant's situation, it appears that the illness has been under control for the time that he has been treated since his arrest. He noted that the current result of the Defendant being a peaceful person no longer subject to unprovoked violent attacks was consistent with the Defendant's long-term treatment (TR-218). The doctor concluded that on the basis of his review of the medical history and the medical records, that the Defendant was suffering from a temporal lobe seizure disorder when this killing occurred (TR-245).

The trial court's response to the testimony of Dr. Machler was to call it "abstract theorizing in response to a hypothetical question posed to the doctor" and that the trial court could not consider the medical testimony "without resorting to subjective manipulation of the evidence." (R-407). The court's statements in this regard are clearly without foundation based upon the evidence. This is not a situation where opposing factual viewpoints were put before the court since no opposing evidence of

any nature was offered regarding the civilian and medical witnesses. The civilian witnesses who either grew up with the Defendant, went to school with the Defendant, or coached the Defendant, all presented a picture of a young man who was not violent, was not a troublemaker, was a good student, and a very successful athlete. As noted by Mr. Simms, the Defendant was one of those person whom you always assumed was going to succeed (R-63). Furthermore, every single lay witness who testified stated that they were shocked when the Defendant was arrested and accused of this murder. When the testimony of the friends, neighbors and coaches is taken into account with the before and after testimony of Myra Starkes, it becomes quite clear that something abnormal occurred to the Defendant which resulted in this conviction. The description given by Ms. Starkes should be sufficient to demonstrate a significant problem at the time even without the medical evidence and medical testimony. The factual basis developed by these witnesses is certainly not abstract theorizing, nor subjective manipulation of the evidence. The civilians clearly document a young man with much potential, who suddenly has problems with unexplained violent activity to such a degree that his wife leaves him, divorces him, and only communicates with him twelve years after this event.

As previously indicated, the civilian testimony alone should have been sufficient to demonstrate a significant problem with the Defendant at the time of this offense which should have been taken into account as a mitigating circumstance. The lay testimony,

however, when taken in conjunction with the medical evidence and medical testimony generated in both 1973 and at later dates, demonstrates conclusively the problems which resulted in this offense and clearly demonstrates appropriate mitigating circumstances.

Ms. Starkes indicated that after high school and after the military she started being confronted by a young husband subject to unexplained violent outbursts. Dr. Machler stated that the onset of temporal lobe seizure disorder develops most frequently "in the late teens, early adult life up to 30" (TR-213). Ms. Starkes indicated that the Defendant would indicate he had no recollection of the violent outbursts. The Defendant in this instance took a polygraph examine which indicated the Defendant had been truthful when he said he had no recollection of the killing. Dr. Machler testified that it was almost a universal diagnostic finding in temporal lobe seizure disorder cases that there was extreme physical violence with a total lack of memory afterwards (TR-207). The doctor also indicated that these events could be precipitated by alcohol or drugs. Willie Green states that the Defendant, who was either drinking or taking drugs, was unusually high just before this incident (R-55,56). Lastly, an EEG done at the request of the court appointed doctors following the Defendant's arrest, confirmed the abnormality in the Defendant's brain which led to the sudden violent outbursts for which the Defendant has now been sentenced to die. The treatment and control of these violent outbursts was explained by Dr. Machler and

consisted of treatment by Dilantin and Phenobarbital. The end result was confirmed by Ms. Starkes when she indicated the Defendant, when seen twelve years after the incident, was the way he used to be prior to the problems. The treatment and control of the problem is likewise demonstrated by the lack of evidence to suggest any additional violent outbursts since the incident in 1973. The State offered no evidence of disciplinary reports or of physical confrontations on death row for the fifteen years that the Defendant has resided at that location.

Clearly the determination that the Defendant was suffering from temporal lobe seizure disorder and that that disorder led to violent, unprovoked outbursts which resulted in problems for which the Defendant now faces execution, cannot be considered "abstract theorizing" and certainly did not occur as a result of any "subjective manipulation of the evidence."

The effects of the treatment on the Defendant as well as the rehabilitatible nature of the Defendant was likewise demonstrated by the testimony of other civilian witnesses. Marsha Schwenn confirmed the Defendant's writing ability and potential for contribution to society. Ms. Schwenn indicated that she was an English and Spanish major who had graduated from the California State University at Davis who had also performed graduate work at the University of Rhode Island and the State University at Stoneybrook. She indicated that with her background in journalism, she started reviewing correspondence from the Defendant for possible publication. She found the Defendant to be of above

average intelligence and very well read (R-5, 11). She found the Defendant's letters to be extremely literate and worthy of publication and had assisted in obtaining the publication of the Defendant's journal regarding his second death watch (R-7). The journal of the Defendant had required very little editing and had been published by the St. Petersburg Times and other publications (R-8). She likewise noted that the Defendant relates sensitively to children and that she was personally familiar with his ongoing communications with the Unitarian Fellowship in upstate New York (R-11). She noted that the Unitarian Fellowship was similar to the Amish and had a contained school in their community which had an ongoing corresponding relationship with the Defendant. She had spoken with the students of that school and the students had related to her that the relationship was very meaningful to them (R-11). She had likewise personally met with an elderly mother and daughter and had noticed the affect that Mr. McCrae's writings had upon the brain damaged daughter. The brain damaged daughter, age 60, could not relate to other people until she began corresponding with the Defendant. The daughter had related to Ms. Schwenn that her correspondence gave her a purpose for life (R-10). Ms. Schwenn, also a Lutheran lay minister, indicated that she had met with the Defendant personally on many occasions and had a lengthy correspondence with the Defendant (R-13). She indicated she had discussed the Defendant's religious beliefs and based on her experience, she felt that the Defendant was a confirmed Christian with a strong depth to his commitment to God (R-13). Her

conclusions regarding the Defendant's depth of his commitment were based on her personal observations and also based on the experiences she had had with other people who had attempted to manipulate religion (R-13). She indicated she had been on several death rows throughout the nation and had taught at Rikers Island as well as being an adjunct professor at John Jay College. She felt comfortable in being able to distinguish between manipulation and sincere belief. Another sincere belief of the witness was the depth of the remorse felt by the Defendant (R-15). At the request of the Defendant, the witness places flowers on the altar of her church on the anniversary of the death of the victim (R-16). She has been doing this since 1983 at the request of the Defendant (R-16). She has likewise visited the gravesite and placed flowers on the gravesite at the request of the Defendant (R-15). Clearly the testimony of Ms. Schwenn demonstrated a person consistent with the young man described by the coaches and friends who knew him in high school. Her testimony likewise could not be considered speculative, indefinite or abstract theorizing.

Another witness who demonstrated the effective treatment and control of the illness as well as the potential for rehabilitation was Professor Michael Radelet. Professor Radelet was qualified as an expert and discussed the science of predictions regarding dangerousness (R-29). He indicated there were primarily the clinical predictions and statistical predictions (R-29). Based on the criteria for predicting dangerousness, the Defendant fit within the criteria of a high statistical probability for no future

dangerousness (R-30 - 32). The Professor confirmed the aspect of a belief in lack of dangerousness with his statement that the Defendant would be welcomed in his home (R-34). Professor Radelet indicated that the Defendant was one of his close friends and was different than the other people he had gotten to know on death row (R-33). He indicated that the Defendant felt remorse as a result of the death and that the Defendant had an extremely high potential for making a contribution to the community (R-35, 36).

Other civilians likewise confirmed the religious acceptance of the Defendant. Rolland Hopper, an ordained minister, met the Defendant in 1984 and baptized the Defendant in the Lee County jail at that time. Mr. Hopper indicated that in his opinion the Defendant had accepted the Lord and that in working in the jails he had met a lot of people who attempt to use religion to their own benefit (R-41). He indicated that the Defendant was not one of those people (R-41). Mrs. Mildred Kanavel likewise indicated she had initiated correspondence with the Defendant regarding his religious beliefs (R-48). She indicated that she had corresponded with him on a regular basis and that he "writes beautiful letters and he has never said a thing where he was mad at anyone or held anything against anyone." She indicated that she later had occasion to go and visit the Defendant and that her beliefs based on their correspondence was confirmed when she met him (R-49).

The character and nature of the Defendant was likewise brought to the attention of the court by the Reverend Joseph Ingle. Reverend Ingle, a nominee at the time of his testimony for the

Nobel Peace Prize, had met the Defendant in 1977 (R-75). Reverend Ingle, who travels extensively throughout the death rows of the South, indicated that he had come to know certain people that either develop a sense of religion or indicate that they have accepted Christ for their own selfish benefit when it fits the occasion; however, Mr. McCrae was not one of those individuals (R-76, 77). He indicated he found Mr. McCrae to be a sensitive and caring person and that these personality traits had manifested themselves not only in the relationship with him over the years, but in several mutual relationships that he had shared with Mr. McCrae and other death row prisoners (R-76). He further related that even though Mr. McCrae still could not recollect whether he actually had committed the crime, that Mr. McCrae had a "lot of remorse for the victim and the victim's family" (R-77). In describing the character of Mr. McCrae, Reverend Ingle indicated that he would feel totally secure with Mr. McCrae being in his house with his wife and children (R-77).

The person portrayed by the civilian witnesses and the person portrayed in the judge's order are clearly worlds apart. Furthermore, the civilian testimony, when taken in conjunction with the medical evidence developed in 1973, the medical testimony developed in 1973, and the medical testimony subsequently developed, made quite clear that the brain disorder and the problem that was affecting Mr. McCrae was not a problem that was "so speculative and indefinite." The standard by which this court must judge the actions of the trial court in determining the

appropriateness of the trial court's override was set forth in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975):

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Despite the findings by the trial court, numerous statutory and nonstatutory mitigating circumstances were developed. In the original McCrae opinion (395 So.2d 1145), this court indicated that the jury must have found the existence of Subsection 6b (defendant under the influence of extreme mental or emotional disturbance). The court found no basis under the circumstances at that time. However, in light of the subsequently developed testimony of the civilian witnesses who grew up with the Defendant, the testimony of Ms. Starkes, the former wife, and the medical evidence and testimony which existed at the time and the ten years of subsequent treatment, that statutory mitigating circumstance does now exist. Furthermore, in light of the testimony developed since the original opinion, Subsection F should likewise be found to exist, i.e., the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. In looking at the testimony from an overall prospective, one sees a "normal" person developing through high school who gives no indication of problems in the future, followed by a person who after leaving high school, enters the military, and upon leaving the military begins drinking and begins

experiencing unexplained violent episodes. These episodes continued to the point that in 1972, his wife divorces him and takes custody of the minor child. The extent of the deterioration of this relationship is shown by the fact that the former wife doesn't communicate with her former husband and the father of her child for twelve years. Within a year of Ms. Starkes leaving, the incident in question occurs. Within months of the incident, a polygraph confirms lack of memory and an EEG confirms an abnormality recognized even then by the doctors as temporal lobe seizure disorder. Furthermore, both doctors at the time correlate the Defendant's violent acts with the mental disorder. The Defendant was subsequently put on a treatment program for this disorder consisting of the recognized medicines of Dilantin and Phenobarbital and the Defendant is no longer subject to violent outbursts. A ten-year post-incident history confirms the treatment regimen as well as the initial diagnosis. The trial court's finding that the evidence suggesting mitigation and in particular Subsection E as so speculative, indefinite and woefully inadequate is ludicrous. This is particularly true in light of the numerous witnesses who testified to the normalcy of the Defendant up to a year before the incident, the numerous witnesses who now confirm the same normalcy subsequent to the treatment, and in light of the medical evidence and testimony of the disorder which occurred within months of this incident. The type of person described by James Stephens, Theodore Greddick, Nancy Simms, Levone Simms, Willie Green, and Myra Starkes is simply not the type of person who

suddenly becomes a person violently oriented and who, after the violent actions, returns to a state of normalcy with no further violence or problems. Common sense dictates that something was wrong with Mr. McCrae to make him act the way he did. The initial jury was astute enough to grasp this based on the testimony of a doctor and in particular, the testimony of Coach Stephens.

Additional mitigating circumstances likewise existed. The testimony of Dr. Machler made it quite clear that the Defendant would have lacked any opportunity for moral or ethical considerations and would have been unable to premeditate. Furthermore, the testimony of Marsha Schwenn shows the capacity of the Defendant to meaningfully participate in society in rehabilitation with his talents as a writer. His communication skills with children and with an elderly brain damaged daughter, combined with the deep sense of remorse felt for not only the victim in his case, but victims in general shows his character. The clear result of the testimony of Ms. Schwenn, Mr. Hopper, Mrs. Kanavel, and Reverend Ingle is that the Defendant has a deep religious commitment.

The above-described mitigating circumstances are sufficient to outweigh the three aggravating circumstances.

In reviewing the case law on jury overrides by circuit court judges, it appears that the trial court judges are affected either by the nature of the crime itself, the type of person involved in committing the crime, or both. Because of this type of involvement at the trial level, the trial court's sentencing order is not

bathed with a presumption of correctness in a jury override situation since the Court must review the record to determine if the recommendation of life was reasonably based on valid mitigating factors. Ferry v. State, 507 So.2d 1373 (Fla. 1987). Factual situations such as occurred in Ferry, wherein the defendant was convicted of five counts of first degree murder, are clearly an example of a trial court being affected by matters outside the statutory scheme. A review of other cases would likewise show that type of reaction which ultimately has to be corrected by this Court. In Morris v. State, 15 FLW S82 (February 23, 1990), an eighteen month old boy died. The medical examiner testified that his examination of the child showed the following evidence of recent abuse: his penis had been tightly encircled with tape and then taped to his abdomen; he had massive bruising on his buttocks; his liver had been lacerated from a blow; he had numerous bruises on his head and a fractured skull; he had neck injuries indicating strangulation. The jury recommended life and the trial judge, even though finding only a single aggravating factor, overrode the jury recommendation. This Court noted the mitigation in the record and reinstated the life sentence. Several other cases likewise reflect numerous aggravating circumstances with a trial court finding of either no mitigation or weak mitigation in situations similar to Mr. McCrae. A brief review of those jury override cases in which this Court reinstated the life sentence follows:

Perry v. State, 522 So.2d 817 (Fla. 1988) (Two aggravating circumstances: previous violent attack on another female, this Court noted the defendant had no previous signs of violence, was good to his family; this Court also noted defendant's age of 21

years.)

Amazon v. State, 487 So.2d 8 (Fla. 1986) (Double murder, four aggravating and no mitigating; this Court noted the mitigation and the age of the defendant as 19 in reinstating the life sentence.)

Masterson v. State, 516 So.2d 256 (Fla. 1987) (Double murder, four aggravating and no mitigating; this Court noted that the defendant appeared to be a good father and provider and also suffered from PTSD.)

Huddleston v. State, 475 So.2d 204 (Fla. 1985) (Numerous aggravating circumstances, one mitigating circumstance; this Court noted that his age as 23 and in light of his background which consisted of a troubled personal life and a pregnant girlfriend, along with a history of drug abuse.)

Brookings v. State, 495 So.2d 135 (Fla. 1986) (Five aggravating, three mitigating.)

Harmon v. State, 527 So.2d 182 (Fla. 1988) (Three aggravating and no mitigating.)

Burch v. State, 522 So.2d 810 (Fla. 1988) (Three aggravating and one weak mitigating based on impairment which the trial judge indicated was speculative and remote and could not be conclusively established.)

Brown v. State, 526 So.2d 903 (Fla. 1988) (Three aggravating and one mitigating in a shooting of a police officer; this Court noted that potential for rehabilitation constitutes a valid mitigating factor.)

The Tedder principle has been consistently interpreted by this Court to mean that when there is a reasonable basis in the record to support a jury's recommendation of life, an override is improper. Harmon v. State, 527 So.2d 182 (Fla. 1988). Furthermore, as noted in the Ferry case, when there are valid mitigating factors discernable from the record upon which the jury could have based its recommendation, an override may not be warranted. This record is replete with mitigation which would justify the jury recommendation of life. Coaches Stephens and

Greddick noted the Defendant to have been a good student, an athlete who lettered in football, basketball and track, a person who was not a discipline problem, a leader and a person right at the top of the list of young men that stood out in these coaches' minds. Furthermore, Nancy Simms, Levone Simms, and Willie Green 2all likewise testified to the quality of the character of the Defendant as a person, a student and a worker. Marsha Schwenn related the Defendant's potential for rehabilitation in documenting and explaining the talent he had as a writer, discussed his character in terms of helping individuals who were less fortunate, discussed his character regarding his helping young children, discussed his strong deep religious convictions and outlined his genuine remorse for the victim in this case. Mike Radelet explained how the Defendant was different and how the Defendant assisted in teaching not only him but others on death row. He likewise demonstrated the Defendant's remorse. He also noted that the Defendant had an extremely high potential for making a contribution to society and thus felt the Defendant was certainly rehabilitatible. Reverend Ingle, who had known the Defendant since 1977, noted the Defendant's deep remorse for the victim and the victim's family, and outlined the character of the Defendant not only in his personal dealings with Reverend Ingle, but in the Defendant's personal dealings with other inmates on death row. One of the most telling and reflective aspects of one having to go back and having to review the Defendant's life has to be the shared reaction of every person who knew the Defendant before this

incident occurred. Every single person, whether a fellow student, a coach, or a neighbor, had the same reaction - they were shocked. They were all shocked because they could not believe that the person they knew as James McCrae could commit the crime for which he was charged. The explanation for this shock though is available to this Court in light of the testimony of Ms. Starkes and the numerous doctors' reports and medical evidence. This evidence certainly is not speculative or indefinite and clearly indicates that a reasonable basis exists in this record to support the life recommendation of the jury. This is not the situation wherein the State and the citizen have presented differing views of the same person. No testimony of any nature has ever been offered by the State against the witnesses and evidence presented on Mr. McCrae's behalf. Counsel submits that there has been nothing offered because there is nothing that could be offered because once the facts become known, they speak for themselves. Mr. McCrae was a promising young man with a bright future who now sits on death row. Hopefully this Court will correct that error and at least allow some of the potential and some of the talent to be used at some point in the future.

CONCLUSION

Substantial and significant mitigation exists in this record to support the life recommendation of the jury. The trial court's override was improper and should be reversed.

Respectfully submitted,

ROBERT H. DILLINGER, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Attorney General's Office, Park Trammel Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida 33602, by U.S. Mail, this 12th day of March, 1990.

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