

IN THE SUPREME COURT OF FLORIDA

JAMES CURTIS McCRAE,

Appellant

Case No.: 74,685

v.

STATE OF FLORIDA,

Appellee

FILED
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SUPREME COURT

MAY 2 1990

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REPLY BRIEF OF THE APPELLANT

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ISSUE I

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

The State in its brief only makes mention of the testimony of Dr. Machler. The State then attempts to contradict the testimony of Dr. Machler with some treatise that has never been mentioned in any of the testimony which was written by some doctors which were likewise never mentioned in any of the testimony or evidence at the trial level. The State takes great liberties with the statements of Dr. Machler in that the brief on page 2 says, "on cross-examination however, Machler stated that it was only his assumption that the Appellant was having a seizure during the murder."

A review of the transcript reflects much more. At page 245 of the transcript the following occurred. (Line 16):

Q. Assuming for the moment that Mr. McCrae had a seizure on the day of the offense that this woman was killed, do you have any way of knowing whether he had seizures before he killed the woman, while he was killing the woman, after he killed the woman? Do you have any way of knowing that?

A. Have no way of knowing. The assumption would be that he had the seizures while he was killing her.

Q. Again, that is an assumption?

A. Yes, and is consistent.

Q. You mentioned that Dr. Haber's use of the term "explosive personality" as the synonym for temporal lobe seizure disorder?

A. I said it may be, yes.

Q. And didn't you also say that it is used for the term "behavior disorder"; is that correct?

A. No.

Q. I'm sorry. What is that also used for?

A. I said it may also be used to describe a type of behavior. Most often in adolescents, in children. It has - has another name called tantrums.

Q. Again, you do not for a fact, do you, know how Dr. Haber was using that term?

A. Well, it consistent with what Dr. Haber puts down here:

"On the basis of history and mental status examination, it was my initial impression, in view of his 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. Malkoff, M.D., performed the studies which showed 'a mildly abnormal paroxysmal condition consistent with a temporal lobe seizure disorder'."

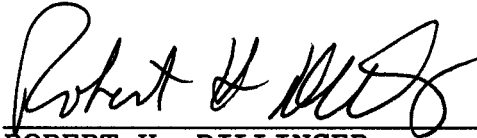
Furthermore, the testimony of Dr. Machler was not offered in a void. The numerous civilians who testified as to the Defendant's nature and character while in high school, plus the numerous civilians who testified as to his nature after he became medicated in treatment cannot be overlooked. Furthermore, the testimony of

Myra Starkes correlates with the expert testimony in a manner that simply cannot be ignored. Ms. Starkes describe a person consistent with the opinions of the other civilians who was a good person, good athlete and a good student. Ms. Starkes, after she marries this person, is suddenly confronted with a different person and disturbed to the degree that she and her minor child leave. She then has a ten (10) year hiatus from Mr. McCrae and when she visits him on death row she concludes that he was like the "James of old". This type of testimony and the medical background provided by all the medical records and the positive EEG clearly indicate what occurred to Mr. McCrae. An EEG cannot be faked and no evidence was ever offered contradicting the civilians who knew Mr. McCrae before the incident and those civilians who knew him after the incident. Clearly substantial mitigation was developed and clearly the trial court erred in overruling the jury's unanimous recommendation of life and imposing a sentence of death upon Mr. McCrae.

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,

A handwritten signature in cursive script, appearing to read "Robert H. Dillinger", written over a horizontal line.

ROBERT H. DILLINGER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Attorney General's Office, Park Trammel Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida 33602, by United States Mail, this 30th day of April, 1990.



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