

FILED

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APR 14 1997

CLERK, SUPREME COURT

By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ERVIN McCRAY,

CASE NO.

Petitioner,

vs.

STATE OF FLORIDA, and
HENRY K. SINGLETARY, JR.,
Secretary of the Florida Department
of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
Seventeenth Judicial Circuit, in and for
Broward County, Florida

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Ervin McCray
Defendant/Petitioner

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PETITION

Petitioner, Ervin McCray, **seeks** a writ of **habeas** corpus directed to the State of Florida and Harry K. Singletary, Jr., as Secretary of the Florida Department of Corrections. **This** basis for the petition is Mr. McCray's claim that he received ineffective assistance of appellate counsel in his direct appeal to this court from his conviction in the Circuit Court of Broward County. The parties are referred to as they stood in the trial court, the Defendant/Petitioner, Ervin McCray, and the prosecution, State of Florida.

JURISDICTION

This Court **has** jurisdiction pursuant to Article **V**, Section 3(b)(9) of the Florida Constitution **and** Rule 9.030(a)(3) of the Florida Rules of appellate Procedure. A claim of ineffective assistance of appellate counsel is to **be addressed** via a petition of writ of habeas corpus in the appellate court which heard the direct appeal. *State v. District Court of Appeal, First District*, 569 So.2d 439 (Fla. 1990); *Knight v. State*, 394 So.2d 997 (Fla. 1981).

RELIEF SOUGHT

Petitioner/Defendant, Ervin McCray, requests this Court issue a Rule to **show** Cause and, after appropriate response from counsel for the Respondents, issue a Writ of **Habeas** Corpus directing the trial court to afford Mr. McCray a new trial or alternatively to authorize a new direct appeal.

PROCEDURAL HISTORY

Ervin McCray **was** indicted for the offense of murder in the first degree, burglary of a conveyance and attempted armed robbery. The burglary count was dismissed prior to trial. At jury trial, Mr. McCray was acquitted of attempted robbery but convicted of first degree murder. (App. Ex. A) **A** direct appeal to the court **as** a result of the imposition of a death sentence resulted in an affirmance of Ervin McCray's conviction but a reduction in sentence to one of life imprisonment in accordance with the jury's recommendation. *State v. McCray*, 416 So.2d 804 (Fla. 1982). Defendant is currently incarcerated in the Florida Department of Corrections where he is serving his life sentence.

No other post conviction pleadings or petitions have been filed on behalf of Petitioner/Defendant, Ervin McCray.

ARGUMENT

ERVIN McCRAY RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN **HIS** DIRECT APPEAL TO THIS COURT; APPELLATE COUNSEL FAILED TO RAISE AS AN ISSUE ON APPEAL THE TRIAL JUDGE'S REFUSAL TO DECLARE A REQUESTED MISTRIAL FOLLOWING TESTIMONY REGARDING A PRIOR ARREST OF DEFENDANT.

During its case-in-chief, the state called Detective Ellory Richtarcik **as** an expert in the field of fingerprint identification. (App. ex. **B**) Richtarcik testified that he was the Broward Sheriffs Office chief latent fingerprint examiner and as a result he was submitted fingerprints from numerous police agencies in the county for comparison purposes with standard rolled fingerprints of a particular individual. In connection with this prosecution, Detective Richtarcik received twenty-three latent cards for comparison purposes with Ervin McCray's standard prints which were also submitted. Regarding the receipt of those known prints of Mr. McCray the following exchange was had:

Q. How many cards did he submit in this case for your examination?

A. There were twenty-three latent cards submitted to me by Detective

Bosse.

Q. Against those did he submit the known inked prints of four

people?

A. **Yes**, he did.

Q. The defendants in this cause?

A. Yes, he did.

Q. Did you make examination of each and every one of these latent prints and the cards?

A. **Yes**, I did.

Q. And compare them with the known inked fingerprint **cards**?

A. Yes, I did.

Q. Let me **ask** you this: Do you have the known fingerprint cards of the defendant McCray?

A. **Yes**, I do.

Q. Do you have those that were taken on the 18th of December, 1979?

A. I have a copy that was taken on, back in '71. ✓

Q. Just the 18 December, '79.

A. Yes, do.

Q. May have those?

MR. KERN: Mark these exhibits.

MR. SMITH: May we approach the bench, Your Honor?

THE COURT: Approach the bench.

Because of the witness' unresponsive answer wherein he in essence advised the jury of a prior 1971 arrest of Ervin McCray, defense counsel moved the trial court for a mistrial. The trial judge denied this request while instructing Detective Richtarcik not to mention the 1971 fingerprints.

In his motion for a new trial, counsel reiterated the trial court's error in allowing Detective Richtarciks testimony regarding defendant's 1971 arrest. (App. ex. C) This alleged error was also argued orally in court but was again rejected by the trial judge. (App. ex. D) Further, in trial counsel's statement of judicial acts to be reviewed, mention was made of the trial court's failure to grant defendant's motion for a mistrial. (App. **ex.** E)

Thereafter, new counsel was appointed for purposes of Ervin McCray's direct appeal to this court. (App. ex. F) Despite trial counsel's designation of this particular judicial error, appellate counsel failed to brief or argue this issue in defendant's direct **appeal**. (App. ex, G) Had he done **so**, this court would have likely reversed Mr. McCray's conviction inasmuch as the trial judge's refusal to grant **a** mistrial was clearly harmful error.'

It **is** improper for the prosecution to adduce testimony about a crime committed by

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The state's case against defendant was anything other than overwhelming. In essence it relied upon eyewitness Thomas Cartwright and co-defendants Sammy Walker, and Jerry Davis. Mr. Cartwright testified that the man he saw shoot the decedent was clean shaven except for a mustache and he could not explain how a photograph of McCray taken the very night of the incident could show him with a full beard. Additionally, Mr Cartwright said the person **he** identified as the shooter in a photo spread had plaited hair when in fact the photographs of the line-up show that the plaited hair was worn by a person in the line-up other than Ervin McCray. Finally, when a police officer showed photographs to Cartwright and he could make no identification, the officer then drew a mustache on McCray's photograph and then asked Cartwright if that helped him any in identifying someone. (App. ex. H)

the defendant that is unconnected with the crime for which the defendant is on trial and which is not relevant to a material fact at **issue**. *Rhodes v. State*, 638 So.2d 920, 926 (Fla. 1993) The admission of evidence of a defendant's prior arrest is generally **so** prejudicial **as** to require reversal. e.g. *Atwell v. State*, 658 So.2d 184, 185 (5th DCA 1995)(reversible error for arresting officer, when asked if he saw anything on defendant charged with possession of cocaine, to respond "not this time" **as** that response could imply to the jury that officer had previously observed defendant doing something illegal concerning drugs); *Russell v. State*, 445 So.2d 1091 (3rd DCA 1984)(question and answer regarding defendant's photograph being in a "mug photo album" of persons previously arrested was highly prejudicial and thus reversible error); *Wilding v. State*, 427 So.2d 1069, 1070 (2nd DCA 1983)(an accused's right to a fair trial is violated when the jury is improperly made aware of the defendant's prior arrest for an unrelated crime); *Harris v. State*, 427 So.2d 234 (3rd DCA 1983)(police officer's testimony that defendant had a "prior felony past" was inadmissible as its **sole** relevance was to attack the defendant's character or to show his propensity to commit crime.); *Dixon v. State*, 426 So.2d 1258, 1259 (2nd DCA 1983)(admission of evidence of accused's prior arrest **is** ordinarily deemed **so** prejudicial that it automatically requires reversal of conviction); *Marrero v. State*, 343 So.2d 883, 884 (2nd DCA 1977)(it is error for a witness to testify about the defendant's arrest for an unrelated crime in that the jury would bound to be unfairly prejudiced against the accused by reason of that knowledge).

The improper admission of collateral crimes committed by an accused that are unconnected with the crime for which he is on trial is presumptively harmful. *Czubak v.*

State, 570 So.2d 925, 928 (Fla. 1990). Such an error is harmless only “if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error”. *Cicarelli v. State*, 531 So.2d 129, **132** (Fla. 1988) In view of the tenuous nature of Ervin McCray’s identification by the sole non-party witness and the obviously questionable testimony of two co-felons, it cannot be said beyond a reasonable doubt that the verdict was not affected by the revelation that Mr. McCray had a prior arrest.

Under *Strickland v. Washington*, **446 U.S.** 688, 104 S.Ct. 205 (1984), claims of ineffective assistance of counsel must show specific errors or omissions of such magnitude that they deviated from the norm or were outside the range of professionally accepted performance and that failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence of fairness and correctness of the outcome. A failure to raise on appeal, an issue which went directly to Ervin McCray’s credibility, was clearly such an error or **omission**. see, *Thompson v. State*, 655 So.2d 1282 (4th DCA 1995)(appellate counsel’s failure to raise the issue of whether the trial court erred in refusing to grant his challenge for cause of a prospective juror, which challenge should have been granted by the trial judge, met the requirements of *Strickland*.)

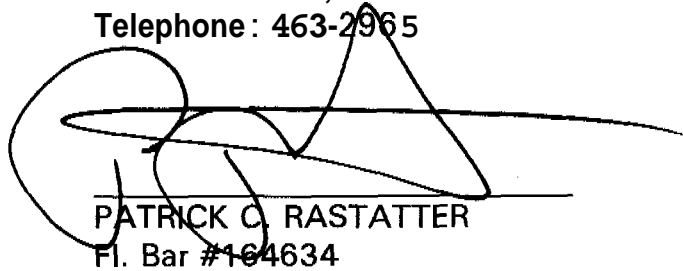
Consequently, it is respectfully requested that this Court grant Ervin McCray appropriate habeas corpus relief based on the ineffectiveness of his appellate counsel in his direct appeal. This Court should either vacate defendant’s conviction and sentence and remand for a new trial or alternatively, order that Ervin McCray be given a new direct appeal regarding the denial of his mistrial motion.

CONCLUSION

Based on the foregoing, it is submitted that the trial judge should have granted Ervin McCray's motion for a mistrial following the detective's unresponsive answer regarding defendant's prior arrest. This improper judicial action should have been presented to this Court during Mr. McCray's direct appeal but was not. The failure to **do so** renders appellate counsel to **be** ineffective and requires that Ervin McCray **be** given either a new trial or be given a new direct appeal.

Respectfully submitted,

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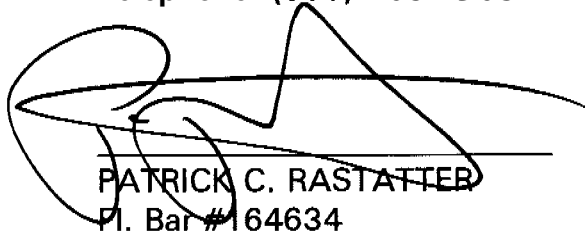


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been furnished to the Office of the Attorney General, 1655 Palm Beach Lakes, Suite 300, West Palm Beach, Fl 33401-2299; State Attorney Office, 201 SE 6 Street, Fort Lauderdale, Fl 33301 by US Mail this *April 11*, 1997.

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