IN THE SUPREME COURT OF FLORIDA

DARIOUS MARK KIMBROUGH,

Appellant,

vs. **CASE NO. SC02-1158**

STATE OF FLORIDA

Appellee.

_____/

ANSWER BRIEF OF APPELLEE
ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

References in this brief are as follows:

Direct appeal record will be referred to as "TR.", followed by the appropriate page number. Post conviction record will be referred to as "PCR", followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

The appellant's brief is devoid of facts developed during the evidentiary hearing below. Consequently, the State adds the following statement of facts relevant to a disposition of the issues raised in this appeal.

I. TRIAL

On direct appeal, this Court recited the following facts:

> Kimbrough was convicted of first-degree murder, burglary of a dwelling with a battery therein, and sexual battery with great force and was sentenced to death consistent with a jury recommendation of eleven to one. The victim, Denise Collins, was found nude and semi-conscious in her bathroom by paramedics; she was covered with blood. The sliding glass door to her second floor apartment was partially open, and there were some ladder impressions under the balcony. Collins was rushed to the hospital, where she died soon thereafter.
>
> The officers took semen evidence from the bedsheets, took blood evidence from the victim, and found pubic hairs in the bed and in a towel. The samples were sealed in a bag and sent to the Florida

Department of Law Enforcement lab for analysis.

A resident of the apartment complex--Lee--told officers that he had twice seen a man in the vicinity of the apartment and had seen a ladder on the apartment's balcony. Officers were unsuccessful in searching for the man, but later Lee identified Kimbrough from a picture lineup. A workman in the complex--Stone--identified Kimbrough as a man who had watched him putting away a ladder in the complex around the time of the murder.

The DNA evidence showed that the semen taken from the bedsheets was compatible with Kimbrough's, and some of the pubic hairs matched his. There were, however, additional pubic hairs from another unidentified black man and a caucasian male. The DNA evidence indicated that the blood samples taken from the bed matched Kimbrough's.

The medical examiner testified at trial that the victim had a fractured jaw and fracturing around her left temple. The cause of death was hemorrhaging and head injury in the brain area resulting from blunt injury to the face. There was also evidence of vaginal injury, including tears and swelling consistent with penetration. There were bruises on her arms.

The defense's theory suggested that the victim's ex-boyfriend--Gary Boodhoo--had committed the crime since he was with the victim shortly before, had used a ladder before at her apartment, had a key, and had beaten her previously. The evidence of prior beating was excluded.

Kimbrough v. State, 700 So. 2d 634, 635-37 (Fla. 1997), cert. denied, 523 U.S. 1028 (1998).

This Court provided the following summary of the trial court's penalty phase findings:

In the sentencing order, the judge listed three aggravators: prior violent felony, committed during

> the course of a felony, and heinous, atrocious, or cruel (HAC). To support the prior violent felony aggravator, the judge cited Kimbrough's prior convictions for both burglary of a dwelling with battery therein and sexual battery. The court found that the murder here was committed during sexual battery or attempt to commit sexual battery, citing DNA evidence and bruising, as well as evidence that the victim and defendant did not know each other. HAC was supported by the size of the victim, the three blows to her head causing fracture by blunt force, evidence of a struggle (the room was in disarray), and the amount of blood found around the room.
>
> The judge considered age as a statutory mitigator (Kimbrough was nineteen), but rejected it because there was no evidence establishing that he was immature or impaired. The court considered the following nonstatutory mitigation: Kimbrough had an unstable childhood, maternal deprivation, an alcoholic father, a dysfunctional family, and a talent for singing. The court found that the mitigation did not temper the aggravators.

Id.

II. Evidentiary Hearing

A. Trial Attorneys Testimony

Appellant was represented at trial by two attorneys, Patricia Cashman and Kelly Sims. Ms. Cashman first went to work for the Public Defender’s Office in 1984 and worked her way into the felony division within 10 months. (PCR-14, 558-559). While in the felony division, she “second chaired probably 12 to 15 capital cases.” (PCR-14, 559). In the fall of 1987, Ms. Cashman was “promoted to the Special Defense Division” where she was “responsible for trying capital cases and other high profile

cases." (PCR-14, 559). Within a few years, Ms. Cashman was promoted to division chief. (PCR-14, 560). She was apparently division chief when this case was tried. (PCR-15, 795). Ms. Cashman has an extensive history in both actual capital litigation and teaching others how to engage in it. (PCR-4, 688). She is presently an adjunct professor at the University of Central Florida. (PCR-4, 688). She recently taught a course at the death seminar on "resentencing and investigating mitigation and then helped run a workshop." (PCR-4, 689).

Prior to testifying, Ms. Cashman reviewed her deposition and some notes provided by the prosecutor relating to the investigative issues, mental health issues, and the jurors observation of her client in shackles. (PCR-14, 561). However, she did not review the entire public defender file prior to testifying and her independent recall of the case was limited. (PCR-14, 597).

Ms. Cashman did not recall when she was assigned to appellant's case. (PCR-14, 561). Kelly Sims was assigned to the case before she was. (PCR-14, 561). He was in the Special Defense Unit at the time and was "[a]lmost exclusively handling capital cases." (PCR-14, 572). Mr. Sims left the public defender's office to set up his law practice shortly before appellant's case went to trial. (PCR-14, 564). However, he was

appointed back to the case as a private attorney by the court shortly before trial. (PCR-4, 574, 612).

Ms. Cashman described how she and Mr. Sims typically handled a case together:

> Mr. Sims and I were in the same division and tried capital cases and had contact on a regular basis in the office and would have conversations about, you know, I got this in discovery or what do you think about this and, you know, as well as you would have contact with the other lawyers in the office and bounce ideas off of them and have conversations with them.

(PCR-14, 577). "We had been trying cases together since '88 you know. We didn't worry about who got designated lead and who got designated second chair." (PCR-15, 810). Even though Mr. Sims left the office she would have repeated contact with him in January, February of 1994. (PCR-14, 593). Mr. Sims was hired back to represent appellant in late February of 1994. (PCR-14, 612). They had a cordial relationship and talked about their cases on an almost daily basis. They certainly talked about important events and kept each other up to date. (PCR-14, 690-91).

Ms. Cashman was provided a document authorizing costs to retain Doctor Mings. (PCR-14, 566). The document dated November 16, 1992, authorized 15 hours of work as a consulting expert. Id. Although Ms. Cashman had no independent recollection of it, she agreed the file reflects that in March

of 1993 an additional five hours was approved for Dr. Mings. (PCR-14, 582). A letter in the defense file reflected Dr. Mings needed the extra time "in order to conduct interviews with family and other relevant persons prior to testimony and/or preparation of any report." (PCR-4, 716). This suggested that the defense had provided "the names and phone numbers and people to contact." (PCR-4, 718).

It was the Public Defender's Office's policy to have every defendant charged with a capital offense seen by a mental health expert. (PCR-14, 580). It was the trial attorney's responsibility to find an expert who was willing to take the case and make sure the expert was willing to work for fees the county was willing to pay. (PCR-14, 580).

Dr. Mings was originally listed as a defense witness, but was struck from the list prior to trial. (PCR-14, 584). Dr. Mings was retained in November of 1992 to conduct a psychological evaluation of a client facing the death penalty. Such an evaluation would encompass the following:

> ...One, that your client is competent to proceed.
>
> And, two, that he wasn't insane at the time of the offense.
>
> And you want to explore as to whether you have any mental health mitigation to put on in front of the jury should there be a conviction of first degree murder and should you be forced to have a penalty phase.

(PCR-14, 585).

Ms. Cashman reviewed a handwritten note made by her of a telephone conference with Dr. Mings on February 9th, but the year was not listed. (PCR-14, 588). The note reflected that appellant denied any problems, his relatives lived in Tennessee, "Kenny Ray Smith biological father, Julius stepfather, raised him, no history of abuse." (PCR-14, 589). A note regarding the worst thing that happened to him was his cousin was killed at age of 16, Julius and Annie split up. He won talent show trophies for singing. Id. The second page of the notes reflect an IQ of 76, WAIS fifth percentile, MMPI valid, but defensive, spike on "scale four, psychopathic deviant endorsing items consistent with family discord, other scales normal." (PCR-14, 589).

Although she had no independent recollection of discussing the phone call with Mr. Sims, she believed as a matter of course that she "would have." (PCR-14, 594). Ms. Cashman might also have discussed the conversation with the defense investigator, Pizzaroz. (PCR-14, 594-95). On February 11, 1994, she filed a notice striking Dr. Mings from the witness list. (PCR-14, 595). Dr. Mings was removed from the list quickly to avoid the State deposing him. (PCR-4, 735). Ms. Cashman filed the notice because "of the things Doctor Mings said about my client being a psychopathic deviant and the fact that I thought that would

hurt him in front of the jury." (PCR-14, 595). She thought that was the reason from her review of the notes, but was "sure it was not the only reason." (PCR-14, 595). Ms. Cashman testified:

> ...I am sure that I consulted with Mr. Sims and probably Mr. Derocher and Mr. Lorincz and reviewed the possible cross-examination that might come from the State if we used Doctor Mings as a witness and what his findings might open the door to.
>
> My notes are, obviously, not a complete record of the conversation I had with Doctor Mings and there may have been other things that he said that I thought would hurt Mr. Kimbrough.

(PCR-14, 596).

Ms. Cashman did not recall what exactly Dr. Mings told her about the psychopathic deviant scale. (PCR-14, 598). She had no independent recollection of the other reasons she might have struck Dr. Mings. (PCR-14, 599). "One of the things I would have done was ask Doctor Mings whether he thought he could help and the bad things he believed would come out if I used him as a witness." (PCR-4, 616). The psychopathic deviant score was significant because the state can cross-examine our expert, "and what started out to be mental health mitigation can turn into sort of non-statutory aggravation because the way the jury might view the findings of the doctor." (PCR-4, 722). Whether you called psychopathic deviate scale 4 a diagnosis or a nomenclature used to describe a particular scale, Ms. Cashman

testified:

> What would matter is what the doctor's interpretation of it was and what the doctor's testimony to the jury would be with regard to making that finding and whether he felt it was nomenclature or a diagnosis.

(PCR-15, 791).

Ms. Cashman was familiar with Jeff Ashton, the prosecutor in this case, and how he would likely cross-examine a mental health expert like Dr. Mings. (PCR-14, 724-25). She had tried a number of cases with Mr. Ashton dating back to 1987 or 1988. (PCR-14, 726). Ms. Cashman was also familiar with his tactics from having watched other cases tried by members of her division. (PCR-14, 727). Mr. Ashton liked to use a spike on the scale four of the MMPI: "To make my client look really dangerous and make the jury scared of him and want to kill him." (PCR-14, 728). Also, Ms. Cashman was aware that listing a mental health professional as a witness enables the prosecutor to depose the witness and in the past the prosecutor has gained access to materials provided to the mental health expert which has been used to her client's detriment. (PCR-14, 733). She utilized her past experience in considering whether or not to present Dr. Berland or Dr. Mings. (PCR-14, 734).

It was also the practice of prosecutors to look at details of a crime to determine if it was impulsive or planned to address any assertion of mental health mitigation. (PCR-15,

766). The ladder being obtained and placed next to the balcony to gain entry to the victim's apartment suggested some degree of planning, a perspective that certainly would be argued by the prosecutor. (PCR-15, 766-67). Any indications of deliberate conduct can be used by the prosecutor to argue against the jury finding mental illness. (PCR-15, 767). Further, she would have considered that Dr. Mings said appellant was normal on the other scales of the MMPI. (PCR-4,728-29). That was something else that could be used by a trained prosecutor [lack of mental illness]. (PCR-4, 729).

The record reflects that they moved quickly in order to find another expert who might be more favorable to their client. (PCR-14, 739). The defense retained Dr. Berland in February of 1994. (PCR-14, 736). Ms. Cashman gained approval for 12 hours of his time at $150 an hour. (PCR-14, 738). "Obviously, what we were doing was going forward and trying to find a way to present mental health mitigation that we had in a positive way." (PCR-15, 797). There was a limit however on how many experts you can get approval to hire. She would have to consider that her boss, the Public Defender, "always wanted to save money and have you not spend it." (PCR-15, 813). This was a factor they had to consider in representing the appellant. Id.

Dr. Berland gave appellant a WAIS test which showed some

left hemispheric variation and an MMPI which, according to Dr. Berland, might show hidden craziness. (PCR-14, 741). There was a possible history of brain injury but appellant was denying symptoms. (PCR-14, 741). The MMPI showed mental illness but it would be difficult to present. (PCR-4, 742). Although she lacked independent recollection of her conversation with Dr. Berland, Ms. Cashman testified:

> I mean, there were some mental health issues that could have been presented but, you know, it was –- I would have written difficult to present based on what the doctor told me and his input on whether he thought he could put together a good presentation for the jury or not.

(PCR-14, 742). Dr. Berland thought that appellant's mental status would be difficult to present to the jury. (PCR-14, 743). Ms. Cashman was certain they discussed other things, but, did not have any recollection of what they were. (PCR-14, 743).

The hidden profile concerned her somewhat, Ms. Cashman testified:

> The profile would be what the doctor meant by what symptoms he showed and what mental illness he might have and the fat that it's hidden is, you know, tied in with the fact that the client was denying some symptoms in the doctor's opinion and, you know, so you have that all, the issue of the client not being honest enough with the doctor and, you know, what might happen with the prosecutor cross-examining on that.
>
> You know, there is that whole body of the different issues about clients faking good and faking

> bad, you know, and you have to be concerned what they can do with that.

(PCR-15, 754). There was something wrong with appellant, but he was hiding it. Ms. Cashman therefore called Dr. Berland for details. (PCR-15, 755).

Ms. Cashman was familiar with the MMPI from her work on other cases utilizing mental health experts. Presenting appellant's mental illness to the jury would be difficult. (PCR-15, 756). She obviously made the decision not to call Dr. Berland, but had no independent of the exact factors or reasons for that decision. (PCR-15, 757). Ms. Cashman would have to consider that Dr. Berland's intelligence testing, the WAIS, placed him in the normal range of intelligence. (PCR-15, 764). That would tend to diminish the significance of Dr. Mings' IQ score. (PCR-15, 765). Ms. Cashman made the best strategic decision she could and decided that it was not a good idea to call Dr. Berland. (PCR-15, 758).

Ms. Cashman was aware that the cutoff for mental retardation was 70 and that 76 reflected a low IQ. A low IQ is something that can be presented to the jury in mitigation. (PCR-14, 600). Ms. Cashman noted that while a low IQ might be something you can present to the jury, you must also consider the witness presenting it and what the State might be able to present in rebuttal. (PCR-14, 602). Ms. Cashman has presented

psychologists in mitigation and presented evidence of IQ but did not recall what the IQ scores were. (PCR-14, 604). She agreed that a low IQ might have some significance to mental age. (PCR-4, 686).

Ms. Cashman did not recall who talked to appellant about Doctor Mings' evaluation. (PCR-4, 645). She thought it was standard practice to talk to a client about a decision on whether or not to call an expert like Dr. Mings. (PCR-4, 645).

Although the penalty phase transcript suggested it was Mr. Sims' decision not to call a mental health expert, Ms. Cashman testified that it was a joint decision, one which she agreed with. (PCR-4, 721). When asked about a colloquy on the record between Mr. Sims and the trial court addressing potential mental health mitigation, Ms. Cashman testified: "...Mr. Sims then responds as he should that there was a strategic decision and that we were objecting to them going into any confidential communications with our client." (PCR-15, 780). Further, Ms. Cashman noted that there were no specific questions about who made the decision about Mings, or who made the decision about Berland. Mr. Sims objected to anyone asking questions about how decisions were made with respect "to how we present our client's mitigation." (PCR-15, 780). Ms. Cashman objected to any characterization of Mr. Kelly or her being

inaccurate in court with regard to the colloquy. (PCR-15, 782). If she heard Mr. Kelly say something wrong or inaccurate in court she would have corrected him. (PCR-15, 783).

Ms. Cashman ensured the mental health expert had adequate background information: "We would send the mental health expert a copy of discovery and whatever information we had with regard to a social history that had been gathered at that point." (PCR-14, 618). Ms. Cashman would send over relevant information from the extensive client interview form, and, testified: "I also ask the mental health expert after sending them discovery and whatever in my mind they may need, I asked them what else do you need, what witnesses do you need to talk to, what else do you need to do an effective evaluation." (PCR-14, 619). Ms. Cashman explained: "The doctor is an expert in his own field, the field that is different from mine, and may ask me can you track down this, can you track down that, and if so, I am going to try and get it for him." (PCR-14, 653).

She could not recall if she procured the school records or whether Dr. Mings had those records. (PCR-4, 622). However, her file reflected that either she or her investigator obtained those records. (PCR-14, 661). The school record reflects that appellant repeated the first grade. (PCR-14, 663). She did not recall various records placing him in the "23.4 percentile"

or other indications of poor performance according to the Memphis School records. (PCR-14, 664).

Ms. Cashman did not recall the sequence of events leading up to appellant pleading no contest to the "Claypool" rape. (PCR-14, 669). Although it may be true another aggravator was in effect conceded, Ms. Cashman testified:

> You would want to look at the evidence in the Claypool case and the fact that if you go to trial and lose, they are going to have, as you refer to it as an automatic aggravator, and that strategically it might be better to plea and argue to the jury how the client accepted responsibility for something that he did do and that he was guilty of and how to lessen what weight that aggravator might be given, you wouldn't make a decision to plead someone guilty solely on the fact that you believe mitigation would outweigh aggravation based on one witness.
>
> That would never –- you would consider all kinds of different things in making a strategic decision as to whether to plead a client to what would then be a prior violent felony.

(PCR-14, 676).

Although Ms. Cashman did not recall appellant's prior criminal record, she and her office knew of appellant's juvenile charge of selling cocaine. (PCR-14, 678-79). It would be her policy to look into drug related charges for possible mitigation. (PCR-14, 679). Based upon her client interview, this reflected a sale and delivery and that he didn't use cocaine. "So we didn't have that as mitigation." (PCR-14, 683).

The defense investigator apparently talked to 22 witnesses, obtained school and medical records and talked to Dr. Berland in an attempt to find some supporting data for brain damage. (PCR-14, 706). The defense investigator traveled to Memphis as part of her penalty phase investigation. (PCR-14, 718). Ms. Cashman recalled the family members were not particularly cooperative in this case. (PCR-15, 761-62).

Kelly Sims testified that he has been a criminal defense attorney since 1985 when he started in the Public Defender's Office. (PCR-15, 817-18). He worked his way up until he was doing "nothing but capital cases along with Miss Cashman." (PCR-15, 818). He did that for four or five years until he left the office in 1993 to begin his own practice. He still handles capital cases and presently represents two capital defendants. (PCR-15, 818).

Although Mr. Sims examined some items relating to the case, he did not have access to his public defender file and did not review it prior to testifying. (PCR-15, 819-20). Ms. Cashman assigned this case to him as head of the Special Defense Unit. (PCR-15, 823). Initially, Ms. Cashman was not assigned as second chair as she had her own case load. The initial second chair was Miss Tuck. (PCR-15, 824).

Mr. Sims used his investigator Barbara Pizarroz extensively:

"We used her up. I mean, we used her all of the time and she had a lot of contact with everybody involved in the case." (PCR-15, 823). Miss Cashman was familiar with the case from the early stages. One of the great things about the division according to Mr. Sims, were the monthly meetings where they would all meet with senior defenders and the chief investigator, along with the Public Defender, "and spend a half a day or a day discussing all of our pending cases and how to attack them." (PCR-15, 826).

Within one month of appellant's arrest, they retained Dr. Mings. (PCR-15, 826). He was retained to determine competency and examine any "mental health issues that might be important to either defending or mitigating either one of these cases [the murder of , the Claypool rape]. (PCR-15, 829-30). He did not recall the specific background material he provided Dr. Mings, but stated that typically he provides the most detailed arrest affidavit, discusses any important information contained in the PD intake interview form, and, always asked the psychologist to go through their investigator. (PCR-15, 830-31). He testified that the investigator is particularly important: "...[W]e always ask our psychologist to go through our investigator in determining the social context of different events and the family relationships and she usually had a connection with the

family and was kind of the conduit between the family, the psychologist, and the client." (PCR-15, 831).

The investigator on this case had contact with and interviewed some 21 witnesses, family, and friends of the appellant. (PCR-15, 914). The investigator is much better talking with people than either he or Ms. Cashman. (PCR-15, 914). The attorneys took her work into account when making decisions in this case. (PCR-15, 914). "We always tried to run down her leads because they were generally good ones." (PCR-15, 915).

Mr. Sims was certain that he had telephone conversations with Dr. Mings prior to the note in the file in February 1994 taken by Ms. Cashman. (PCR-15, 832-33). His practice at that time was not to write notes that could prove harmful to his client out of fear they could fall into the wrong hands. (PCR-15, 833). Mr. Sims testified: "...If something was very harmful, you certainly aren't going to find it in my files prior to about '96." (PCR-15, 834). As a public defender doing the most serious cases, "you didn't write down things that later on somebody could read and in case there was post-conviction and they could read it and say, oh, this guy doesn't deserve any breaks because right here it says he did, he enjoyed it, he would do it again if ever released. We just didn't write stuff

down that could be harmful." (PCR-15, 838-39). Although Ms. Cashman was better at taking notes than he was, "she was specifically never going to put anything down that may hurt her client." (PCR-15, 839). Mr. Sims explained any absence of notes from Ms. Cashman, "is that something bad happened because she is a prolific note-taker." (PCR-15, 840). Also, Mr. Sims testified that his secretary is "very close to Berland, Doctor Berland, and had grown to know Dr. Mings, so a lot of information went back and forth" through his secretary. (PCR-15, 841).

At the time this case was tried, Mr. Sims that he had a good relationship with Dr. Mings:

> I mean, at that point I think we were trying to bring Doctor Mings into the fold or at least I was and I was using a couple of cases and he had an office off of Edgewater, and so he was close to our office right down here off of Central back then and he got into the habit of kind of dropping by and we would visit some.
>
> We would talk and have coffee and so we had very open communications.
>
> I don't recall feeling that I needed to document everything we did or anything.
>
> I really didn't write a lot of notes back in '92 and '93 and you can well see from reviewing the file.

(PCR-15, 834).

The public defender's office was aware that Mr. Sims was leaving by the end of the year and they tried to have him appointed as private counsel. (PCR-15, 836). When that was

unsuccessful, Ms. Cashman took over. She knew it was her case by December when the judge indicated she wasn't going to appoint Mr. Sims at the County's expense. (PCR-15, 836). However, Mr. Kelly and Ms. Cashman were "close," she was very familiar with the case, and they "were chatting about what needed to be done and what couldn't be done during that period." (PCR-15, 836). Ms. Cashman was his chief, his friend, and had a good understanding of the case. (PCR-15, 836-37). When Mr. Sims started in private practice, he spent a lot of time in the Public Defender's Office downtown and they would have discussed the case prior to his appointment. (PCR-15, 837).

After Ms. Cashman talked with Dr. Mings she would have immediately talked to him, "that's just the way it happened back then." (PCR-15, 838). He did not recall any specific information about striking Dr. Mings from the witness list [he was not appointed at that time], but "know we must have talked about it and I was in agreement with it." (PCR-15, 842). "But I can tell you this, once I was appointed back to the case only two weeks later, if I thought that was a mistake, then we would have relisted him." (PCR-15, 842). When they initially listed Dr. Mings they thought, or Ms. Cashman thought, he would have something positive to provide. (PCR-15, 853).

Mr. Sims reviewed the notes taken by Ms. Cashman after a

phone call from Dr. Mings, noting the 76 IQ, the worst thing that ever happened to him [cousin died], winning talent shows for singing, and the MMPI. The MMPI was valid, but defensive, spike on scale 4, psychopathic deviant, endorsing items consistent with family discord, other scales normal. (PCR-15, 846).

Although he could not recall the particular conversation, he knows he would have discussed striking Dr. Mings from the witness list with Ms. Cashman. They were concerned about the term "sociopath" and "what doors might this open and we don't want them opening." (PCR-15, 861-62). His feeling from that conversation was that "Doctor Mings believes that if we put him on, he is going to say well, he is a sociopath. He may be a psychopath. He has no morals. He is going to do what he wants to do when he wants to do it without any thought that it would be, you know, that he should be punished or that it would somehow be wrong." (PCR-15, 862, 863).

They were worried that once they had an expert, Ashton might "get[] somebody on board that will be able to point this out [sociopath]. It seemed like a big land mine that someone could step on." (PCR-15, 864). They were trying to bring Dr. Mings "into the fold." "It seemed like he could help us and we could help him." (PCR-15, 864-65). They obtained a second expert,

Dr. Berland, who Ms. Cashman had "worked with a lot" and decided they did not want Dr. Mings exposed to the prosecutor in this case, Jeff Ashton. (PCR-15, 863-64).

"I think Dr. Berland got involved when we needed what we thought was a second opinion to see if we could take another tack to try to develop some mental health issues and I don't know if that was my idea or Miss Cashman's." (PCR-15, 905-06). Ms. Cashman was quite familiar with Dr. Berland and Mr. Sims had used him in the past as well. In fact, the Public Defender's Office in Orlando frequently utilized Dr. Berland. (PCR-15, 863-64, 868).

There was nothing in the PD file that would tell him why Dr. Berland was not used, but, Mr. Sims testified: "I can only assume that Berland told us because this is what he does every day, you know, mitigation work for capital cases, that we made our determination based on what he said or where the pitfalls with his testimony would be, but nothing I can see in that letter and nothing that I can recall right now." (PCR-15, 877-78).

Apparently, Dr. Berland found appellant to be in the normal range of intelligence, with a full scale IQ of 94. (PCR-15, 900). That average range IQ would not be mitigating or aggravating in Mr. Sims opinion. (PCR-15, 901). The fact that

appellant was apparently denying symptoms of mental illness and the fact he might be hiding symptoms would not be much mitigation. Moreover, there was the chance someone on the jury would be unhappy that appellant was not being straightforward even with his own doctors. (PCR-15,902). Mr. Sims did not have any independent recollection of talking with Dr. Berland, but if he found an elevation on scale 4, Mr. Sims would have the same concern as with Dr. Berland as with Dr. Mings. (PCR-15, 904).

With regard to the colloquy in the record about potential mental health mitigation, Mr. Sims testified that while others may have had input on the decision, ultimately someone has to be responsible, and, that "there was a reason we didn't do this and it was my choice and my decision." (PCR-15, 881). When asked if he recalled discussing the decision not to present mental health mitigation with appellant, Mr. Sims testified as the transcript reflects, that he did not remember discussing it with him. (PCR-15, 882). Mr. Sims testified: "Mr. Kimbrough is not a defense attorney or psychologist. I thought he was no mitigation. I don't know what that sentence means. I thought he was no mitigation whatsoever. Perhaps I meant that the psychologist was no mitigation whatsoever." (PCR-15, 882). Mr. Sims did not want any record discussion of the issue,

testifying: "...I just did not want to bury any hope for Mark Kimbrough later down the line. And I think that's what Ashton was trying to do. And that's not my job to help clean up the State's case." (PCR-15, 910).

Mr. Sims testified: "I know that in my relationship with Mr. Kimbrough I had laid out everything that we did and talked about the pros and cons of it and thought I would make some coherent cohesive argument about why we had to do A., B., or C. and spent hours talking about it..." (PCR-15, 885). But, he thought they did not have a very good level of communication between them, referencing his attempt to get appellant to agree to a continuance. Mr. Sims stated that he took a long time to lay everything out on why they needed more time with the DNA issue, but, appellant insisted that he did not want a continuance. (PCR-15, 885-86). They never seemed to have a meeting of the minds. (PCR-15, 886). The available mitigation was limited in this case. Mr. Sims testified:

> I recall that the theme was thread bare, that the main theme was that it didn't seem Mark had all that high of an IQ with respect to just dealing with figuring out problems in his life.
>
> It seemed like he had a lot of people that loved him and a lot of family that embraced him and that kind of can be contra to finding good mitigation going because people were kind of, I mean, his family wanted him and wanted to help him and I guess there was a little bit of, back when he was a teen, I can recall that some of the family members saying we wanted him to live with us and they said, no, we want him to live

> with us.
>
> I know he was a skilled singer.
>
> He had gifts to share in that field.
>
> But as far as being able to show physical abuse or sexual abuse and some kind of brain injury or organic brain dysfunction, I don't recall us having any of that.

(PCR-15, 854).

He thought that low IQ was a potential mitigator, but, "there are plenty of folks on death row with that IQ or lower and they are still there and have been found to be you know, ripe for execution despite those limits." (PCR-15, 855). Moreover, part of his argument during the guilt phase was how dumb would appellant have to be to rape and murder a girl in his own apartment complex, "right across the way," letting another individual see you with a ladder, and "watching the next morning while all of the crime scene investigators and detectives were there." (PCR-15, 856). He worried about eliminating lingering doubt and the jury figuring "well, he might be a dope, so he would do something that would be so easy to capture, easy to catch him." (PCR-15, 856).

Mr. Sims thought that they had obtained school records. The records did reveal appellant repeated the first grade and was generally behind his peers with regard to standardized testing. (PCR-15, 859). Such records could possibly be used to develop non-statutory mitigators. (PCR-15, 860).

Collateral counsel asked Mr. Sims about appellant's plea to the Claypool rape and, in effect, conceding an aggravator. Mr. Sims testified that they simply ran out of continuances and the trial court would not allow them to continue the case any longer. (PCR-15, 889). They received a favorable deal and they still hoped, DNA or not, to get a favorable verdict on the murder case. (PCR-15, 889). It was going to be an aggravator either way whether they pled to the rape charge or lost it at trial. (PCR-15, 889-90). When asked to tie in remorse about the Claypool case, Mr. Sims pointed out, "[n]one was found in the Collins case." (PCR-15, 890).

The State called Jeffrey Ashton who testified that he has been an Assistant State Attorney for the Ninth Judicial Circuit since 1981. (PCR-18, 1250). He was a felony division chief by 1987 or 1986. (PCR-18, 1254). Mr. Ashton was familiar with the defense attorneys assigned to appellant's case, Trish Cashman and Kelly Sims. They were both public defenders' assigned to the unit that handles homicide cases. (PCR-18, 1254-55). Mr. Ashton had tried more than a few cases with Ms. Cashman and Mr. Sims at the time of appellant's trial. As a result, they were familiar with how Mr. Ashton handled his cases. (PCR-18, 1255).

In June of 1990, Mr. Ashton was either head of the homicide division or the only attorney in it. (PCR-18, 1262). By that

time Mr. Ashton was familiar with the MMPI and in, particular, scale four on that test. (PCR-18, 1263). Mr. Ashton testified that an elevation on scale 4 was the one he hoped for on an MMPI. Mr. Ashton testified: "...It is the one which, just by its name, is most appealing to a prosecutor. Because, when you can argued to a jury that this man has a high psychopathic deviant (sic) scale, just those words alone are a wonderful argument for a jury." (PCR-18, 1264). The words alone have a negative connotation. (PCR-18, 1265). "Also, my experience generally is that when you ask for a definition of what does psychopathic mean, the definition you get is on of someone, you know, who lacks a well-developed conscience, you know, does not feel remorse, guilt, things of that general way. So it's something that it's hard to spin that as positive or sympathetic in my experience." (PCR-18, 1265).

If Mr. Ashton knew a scale 4 would come up, he would ask the doctor to first explain what the scale means. Then, he would ask the expert to define the terms, what psychopathic meant, what psychopathy meant. (PCR-18, 1265). Mr. Ashton did some research on psychopathy prior to trying appellant's case. He would have used the expert to characterize the defendant as dangerous, testifying:

> ...I would have asked him to define psychopathy. I would have gone into some of the characteristics of

> psychopathy. I would have gone into his familiarity with the work of Dr. Hare. I would have probably pulled the book out, assume - - knowing he acknowledged familiarity with it and, you know, quoted some of the less favorable descriptions of psychopaths in Dr. Hare's book. I would then have probably equated psychopathy to antisocial personality disorder.
>
> Again, I don't know in this case what the diagnosis - - what the diagnosis, if it was or was not made. Assuming it wasn't made, my normal practice, at that point, if I felt it was a good faith basis of doing it, would have been to go through the diagnosis criteria with the doctor and basically argue to him and with him about his diagnosis. I would have gone through the extent to which he was aware of criminal acts of the defendant, both charged and uncharged. I would have questioned about, the extent to which he investigated perhaps, uncharged or known acts of violence pursuant to that diagnosis, and just sort of seen where I got, going that way.

(PCR-18, 1273).

If a defendant brings up remorse during a penalty phase Mr. Ashton testified that you have to look at the context of the "remorse." In particular, it depends upon when that expression is made. (PCR-18, 1275). "[E]xpressions of remorse, when you're in jail, after you've been convicted, you know, are risk for argument of the insincerity of the supposed remorse." (PCR-18, 1276). Also, it opens up the door to discuss actions or conduct of the defendant that are inconsistent with remorse. (PCR-18, 1276). Finally, Mr. Ashton testified that questions of character and the like generally open the door to the full range of the defendant's possible misconduct with the defense

expert. For example, it might open up evidence in this case that appellant was involved in a gang fight using a pipe. (PCR-18, 1283-85).

On the colloquy with the judge below regarding mitigation, Mr. Ashton said that he has always personally believed a defendant has the right to be an active participant in his case, to control the "process of his case." (PCR-18, 1287). However, Mr. Ashton did not believe the court had any authority to inquire of the defendant about the decision not to present a mental health expert. (PCR-18, 1290). "In fact, the objection that Mr. Sims makes in this document to my recollection in 1994 was the objection that we always got when we raised this issue." (PCR-18, 1290).

Mr. Ashton recalled that a defense expert was listed early on this case, but thought that since Dr. Mings was not deposed, he was listed prior to completing his work. Mr. Ashton testified:

> When you said that it struck - - and I could be completely wrong about this - - but it struck a memory that he may - - that when he was listed, he may not have been finished. And I don't know if that's a recollection from this case or from what I would frequently see in cases, which was they would be listed and there would be discussions about depos and I would get, well, he's not done yet. But again, I don't know if that's a memory from this case or if it's a memory from some other case. But depending on - - and again, I don't know what the record showed about when he finished his work, but that frequently

did happen.

(PCR-18, 1293-94). Mr. Ashton testified that in trial practice it was not at all uncommon for witnesses to be listed and for them not be ready until a week before trial, or even after the trial, before penalty phase. (PCR-18, 1294-95).

B. Defense Investigator

The State called Barbara Pizarroz, who was the investigator assigned to appellant's case by the public defender's office. (PCR-19, 1315-16). Prior to working for the Public Defender's Office, she worked in drug and alcohol abuse for the "TASK" program for the Center for Drug Free Living. (PCR-19, 1316). She worked on the street as a "tracker" someone who was assigned a client who had just come out of jail or had pending cases. (PCR-19, 1317). Her position as a tracker and supervisor led her to do extensive background investigations for the client she was working with. (PCR-19, 1318). In 1981, she began working for the Public Defender's Office. (PCR-19, 1318).

By 1992, Ms. Pizarroz had been assigned to the Special Defense Unit which worked high profile cases and first degree murders. (PCR-19, 1319). By that time, she had a good working relationship with Ms Cashman and Mr. Sims. (PCR-19, 1321-22).

By the time appellant's case went to trial, Ms. Pizarroz had

also worked on a number of cases with Dr. Berland. (PCR-19, 1325). She obtained information that he needed to make his evaluation. In general, she was familiar with what information a mental health expert would need in a first degree murder case. (PCR-19, 1325-26). By the time Kimbrough had come up, she had worked dozens and dozens of cases where the mental health aspect of a case was important. (PCR-19, 1326). Also, when Kimbrough was tried, Ms. Pizarroz was familiar with Dr. Ming and had supplied information to him for past evaluations. (PCR-19, 1326-27).

In preparing the Kimbrough case, Ms. Pizarroz visited appellant on a number of occasions. (PCR-19, 1332). There were frequent meetings among members of the team as well as client meetings:

> ...I mean, we've had meetings that are probably not even in here, because we discussed things so often. But I, can't tell you how many times they did. I would say they certainly visited him often, especially Mr. Sims.

(PCR-19, 1333). They worked as a team and discussed appellant's case "probably on a daily basis." (PCR-19, 1347).

Ms. Pizarroz met with family members, friends, investigated schools, "just about everything that made up his background." (PCR-19, 1337). The Memphis trip occurred in April of 1993. (PCR-19, 1364). She talked to his teachers, met with coaches.

(PCR-19, 1346). She went to Memphis to talk with family members. Ms. Pizarroz testified:

> For the most part, and I just don't want to get personal, but for the most part he has a family who just absolutely loves him. They spoke well of him, very caring. They were, you know, all totally devastated by this incident. And for the most part, you know, he had a family that absolutely loved him. But he was kind of shuffled from family member to family member, you know, when he was young.
>
> As far as his parents are concerned, that was a situation where Mark, um, learned as a young boy that he, ut, was fathered by someone other than who he believed to be his father. And then he became involved with another gentleman who was with his mom for, I don't know, six or eight years who took on a father figure.

(PCR-19, 1338).

Evidently, appellant had a good relationship with a father figure, Julius MacIntosh. (PCR-19, 1338). Appellant's biological father was an alcoholic and appellant's mother was very little help. (PCR-19, 1339). The mother was not cooperating for the penalty phase and even took off on vacation before closing arguments. (PCR-19, 1339). Most of the family however, were cooperative and good people. (PCR-19, 1340). She clashed with the mother over her opinion as well that since appellant was black and poor he wasn't getting good representation. (PCR-19, 1342). An opinion that Ms. Pizarroz took issue with, stating we "worked our butts off" for Kimbrough. (PCR-19, 1342).

C. Mental Health Experts

Dr. Eric Mings testified that he specializes in forensic criminal psychology. (PCR-15, 917-18). He could not find his records on this case which he worked on in 1992. (PCR-15, 918). Dr. Mings recalled working with Mr. Sims on the appellant's case, but had no recollection of talking with Ms. Cashman. (PCR-15, 922-23). Based upon the notes provided by CCRC's expert, Doctor Mosman, Dr. Mings was aware he administered at least an MMPI, a WAIS-R, "at least as well talked with him." (PCR-15, 923).

Referencing only the notes taken by Ms. Cashman from their phone conversation, Dr. Mings testified that the spike on scale 4, psychopathic deviant, is not a formal DSM diagnosis. (PCR-15, 928). He could not recall diagnosing appellant with anti-social personality disorder. (PCR-15,929). He could not recall their phone conversation or his diagnosis: "I just don't recall." (PCR-15, 929). Dr. Mings knows that he did not prepare a report and that he did not testify in this case. (PCR-15, 930). Since he had no recollection of the work he did on the case, he could not say whether appellant had an antisocial personality disorder.

Assuming a lack of criminal history, getting along with family and siblings, lack of problems in school, such

information would not lend itself toward an antisocial personality disorder diagnosis. (PCR-15, 932). A scale 4 elevation on the MMPI alone is not sufficient to render such a diagnosis. (PCR-15, 932-33). However, it was possible that he discussed antisocial personality as a possible diagnosis for appellant with Ms. Cashman. (PCR-16, 957).

Pursuing an illegal occupation is one of the criteria mentioned in the DSM-IV for antisocial personality disorder. [appellant sold cocaine]. (PCR-16, 962). So is aggression toward other people, such as raping somebody. (PCR-16, 962-63). An irresponsible work history is also consistent with antisocial personality disorder. (PCR-16, 963). Rationalizing your behavior, blaming others, would also be consistent with antisocial personality. (PCR-16, 964). So, an individual faced with strong evidence of guilt and blaming a conviction on racism, could be, but is not necessarily consistent with antisocial personality disorder. (PCR-16, 965).

Dr. Mings agreed that scale 4 of the MMPI measures traits which are found in persons with antisocial personality disorder. However, such traits can also be found in normal people. (PCR-16, 963-64). It was possible, since Dr. Mings had no recollection of it, that he was leaning toward an antisocial personality diagnosis for the appellant and communicated that to

Ms. Cashman. (PCR-16, 965-66). The comment on defensive MMPI suggests that appellant was trying to appear normal. Also, in his very limited recollection, it appeared to Dr. Mings "he tended to minimize any kind of problems or contributing issues." (PCR-15, 933-34). "And my limited recollection was is that he was basically denying anything that contributed to his problems." (PCR-15, 934).

An IQ score would enable a psychologist to come up with a mental age, stating: "It could have been" calculated. (PCR-15, 936). However, Dr. Mings did not have the manual in front of him and did not know the calculation. (PCR-15, 936). Whether or not a defendant qualifies for a mental age mitigator is a legal issue. (PCR-15, 936). Moreover, any such calculation would have to take into account daily life activities and social history to determine their functioning as a person. (PCR-16, 951).

It was possible to fake bad on an intelligence test, but it was not possible to fake good, or appear more intelligent than you are. A 76 score and 81 are not so far apart that it shows the individual was malingering on the lower score. (PCR-15, 941-42). He thought that a practitioner like himself, could detect someone who is malingering. (PCR-15, 941-42). There could be variability factors that might explain the difference,

we just don't know. (PCR-15, 943). A score of 94 on the WAIS and a score of 76 on the WAIS-R might show he was malingering or ill on the first test. However, Dr. Mings said the tests have different norms, but it possibly meant the lower score was the result of malingering or illness, we just don't know. (PCR-15, 950).

Dr. Mings did not know of any reason why, in his limited recollection that he could not have been called. "Unless you were to consider the absence of a major mental illness as something that would be adverse to my testimony but from the other things you have said, no." (PCR-15, 939). The notes from Ms. Cashman are not indicative of any major mental illness. (PCR-15, 940).

Although the limited record did not indicate, Dr. Mings agreed that he probably spent about 8 hours with Mr. Kimbrough in testing and then another 7 hours or so scoring the tests, reviewing background materials, talking to attorneys. (PCR-16, 955-56). Dr. Mings requested an additional 5 hours for background material, and, while he had no clear recollection, his impression was "that I didn't get much from him and wanted to talk to other people to find out more details." (PCR-16, 956).

Dr. Bill Mosman testified that he was a forensic

psychologist and practicing attorney from the Miami, Florida area. (PCR-16, 986). Dr. Mosman is not board certified in any area. (PCR-16, 985). Dr. Mosman did not personally examine Mr. Kimbrough prior to testifying and did not administer any tests. (PCR-16, 987). Dr. Mosman described his retention as an expert by CCRC to help defense counsel understand potential mental issues in the case and "develop anything that has to do with mitigation, statutory and non-statutory." (PCR-16, 990). Dr. Mosman reviewed various materials provided by Dr. Berland, reviewed Dr. Merin's work, reviewed the sentencing transcript, school records and had conversations with Dr. Berland and Doctor Frank "Mayner." He reviewed the defense investigator's file, recognizing that Pizarroz "did voluminous amounts of work, pages of stuff that she generated." (PCR-16, 995).

From his review of the materials, Dr. Mosman thought that "from a statutory point of view, there were 5 statutory mitigators that were available and well reasonably could have been argued." (PCR-16, 1002). "From a hyper technical point of there were three, but two of those are disjunctive." (PCR-16, 1002). Dr. Mosman testified:

> ...They are a felony committed while under the influence of extreme mental disturbance, felony committed while under the influence of extreme emotional disturbance, and the mental is different than emotionally, capacity to appreciate the criminality of his conduct was substantially impaired,

> capacity to conform his conduct to the requirements law was substantially impaired.
>
> Age of the defendant at the time of the crime clearly, clearly, multiple severe impairments in that area these are the statutory ones.

(PCR-16, 1003). Dr. Mosman separated the two statutory mental mitigators, into separate components, finding four separate mental mitigators. (PCR-16, 1002).

Dr. Mosman testified that his review of the record and applicable case law reveled some thirty non-statutory mitigators that could have been argued to the jury. (PCR-16, 1003). According to Dr. Mosman, those thirty are:

> The 30 are clearly a potential, an ability to be rehabilitated. There is a lack of family life that's separate. And background. Those are not the same ones. To collapse them is a complete misunderstanding of what the mental health process and the development of the child is all about.
>
> There was history of neglect, disadvantage or deprived childhood, clearly educational deficits, emotional impairments, and results of any emotional disturbance.
>
> Those are separate and separately found in forensic materials and training in cases, emotional disturbance, even if not extreme.
>
> There is extreme mental or emotional disturbance which is separate again, mental impairments, both cognitively and intellectually in the record. It's right in the data base.
>
> Medical problems or history of injuries that is in the records, utilization, drugs or alcohol, previous contributions to the community or society.
>
> That was, is, and existed in the records.
>
> Psychological difficulties.
>
> There is another one that's recognized and it's a tongue twister. It's called iatrogenises from the systems and it's spelled "iatrogenises."
>
> Forensically, that's described as systems aware of

problems and fail to deal with it.

And we'll get into what that means later.

Remorse, positive confinement record, excuse me, and because I am testifying today and all of those record we would add another one, a good prison record.

There is another one, behavior during trial.

Those are disjunctive, not the same thing at all.

Non anti-social personality, cannot be diagnosed, and that has to be a non-statutory mitigator in these types of situations.

Can function in a structured environment. That's a separate one.

Crime, itself, was out of character to the preincident situation.

Another one, he lost his cousin several years ago. Any impact that had on him.

Failure to maintain relationship with family members that is in the records and it has been separately to be found mental health related non-statutory mitigators.

Mild brain abnormality. I will say that again. Mild brain abnormality. M.V.D. mental, grew up without a father is separate from the background issue and lack of family life, educational difficulties, positive traits and I can't even read my handwriting here.

Yes.

I can.

Mental and emotional handicaps, so those in a summary and while I understand some sound similar, they are actually different but the last one or two perhaps from a real technical mental health perspective, they are separate they enter play out on what was going on here so I think that If you count them up, that would be 30 non-statutory and 5 statutory from a mental health perspective.

(PCR-16, 1004-08).

Dr. Mosman found an extreme emotional disturbance at the time of the crime by looking at various stressors which were acting on appellant's life. (PCR-16, 1027). Given appellant's

immature level to begin with you add in environmental stressors:

> And at the time of the crime, itself, with the other things I have added to you and talked to you about, occupation, job, all of these other things, girlfriends, he was having girlfriend problems, too, then that would give you the emotional disturbance, not reaching a point as near as I could tell, clearly, not reaching a point as near as I could tell, clearly, not reaching the point of any insanity issue.
>
> That's not where we are.
>
> We are not talking about that.
>
> We are talking about there was extreme emotional disturbance.
>
> Having said that, I hope that would answer your question related to the first two.

(PCR-16, 1030-31).

Next, Dr. Mosman explained his finding that the crime was committed while appellant's capacity to conform his conduct to the requirement of the law was substantially impaired. (PCR-16, 1031). Dr. Mosman thought that the issue of rape is "heavily implicated potentially with mental health issues." (PCR-16, 1032). On a good day Dr. Mosman thought there was an impairment based upon the lack of "stability" or "consistency" in appellant's upbringing. (PCR-16, 1033). Appellant learned that if he had emotional needs he had to "take care of them" himself. (PCR-16, 1033). The rapes were similar and Dr. Mosman referenced an FBI manual describing the various types of rapes, and, concluded that appellant's fit "expressions of relationship fantasies." (PCR-16, 1033).

Going to the rape of Ms. Claypool, which occurred some three

or four months after the rape and murder of Miss Collins, Dr. Mosman testified what you are "really dealing with here is a rape fantasy issue." (PCR-16, 1034). That these people are going to enjoy it. (PCR-16, 1035). The rape has to do with a request for "reassurance." (PCR-16, 1041). When such a rape takes the form of violence, "it's a reflection of displaced anger and buildup of anger through a long multiple year history of situations that would cause anger that have not been resolved." (PCR-16, 1041). He thought that testing and interviews that "could have been done" to really "pull[] this out." (PCR-16, 1042). He thought a mental health professional could really have looked at these two crimes and how they are connected to the mental and emotional functioning. (PCR-16, 1043).

Dr. Mosman explained why appellant's ability to conform his conduct to the requirements of the law was impaired. (PCR-16, 1044). Dr. Mosman went back to his general analysis of rape, "when we get into these rape fantasies and these rape issues, that this heightened sense of hypersexuality and all of this buildup of aggression that that was done to Denise Collins is not light weight." (PCR-16, 1044). "That was one powerful, powerful amount of aggression that was perpetrated and generated upon her." (PCR-16, 1044). He thought the crime scene

reflected a steam engine out of control adrenaline, aggression, hypersexuality, combine to inhibit "the ability to conform conduct." (PCR-16, 1045). According to Dr. Mosman, the emotional deficits combined with the stressors and "we know that stress affects anybody." (PCR-16, 1046).

Dr. Mosman testified that the statutory age mitigator applied in this case. Dr. Mosman explained that "[a]ge has to do with mental age developmental age, social age, intellectual age, moral age." (PCR-16, 1050). Appellant rated a 10 percentile rating "from all the years of academic functioning." (PCR-16, 1055). The school records also reflected annual testing at a ".24" percentile where "76 out of 100 of his same age peers were educationally much more sophisticated and skilled than he." (PCR-17, 1106). "On the intellectual side, appellant was on the cusp of mental retardation, but, admittedly, "not the adaptive level prong." (PCR-16, 1055). Based upon an IQ of 76, Dr. Mosman calculated appellant would have the intellectual efficiency of a 13 year old child. (PCR-16, 1056). Appellant's ability to relate and engage in mature interpersonal relationships––emotional age–was also low. (PCR-16, 1061).

On the non-statutory side, Dr. Mosman found that appellant had an unstable family life and unstable childhood and lack of family life. (PCR-16, 1070-72). His mother was a "wild

woman" he had 13 different family members, women, in his life by the time he was 18. (PCR-16, 1073). Dr. Mosman acknowledged that Dr. Berland talked with family members by telephone, concentrating on the area of brain damage and injuries. (PCR-17, 1083).

Dr. Mosman agreed that none of the various IQ test scores in this case, the test administered by Dr. Mings, Dr. Merin, or, Dr. Berland, place appellant even in the mild mental retardation range. (PCR-17, 1178). Dr. Mosman agreed that appellant was not mentally retarded: "I would agree with you on that. He's not mentally retarded. I would agree with you, yes." (PCR-17, 1178). Although Dr. Berland did administer a WAIS intelligence test, Dr. Mosman agreed an expert may use an out of date test if the clinician has a particular reason for administering it. (PCR-17, 1178).

Dr. Mosman noted that the defense investigator found notes from a long term girlfriend of appellant's who said that he was well-mannered, and, that therefore you may conclude the rape and murder, followed by one other rape was out of character for the appellant. (PCR-17, 1132). Moreover, appellant was able to maintain relationships with "cousins, aunts, uncles, people that he met." (PCR-17, 1133).

Mild brain abnormality might be found in the frontal lobe

and "could have been argued." (PCR-17, 1138). He thought the Weschler and MMPI could be used to argue brain damage or abnormality even though the PET scan rendered a normal reading. (PCR-17, 1139-40). Although Dr. Mosman did not administer any tests to the defendant, he thought referrals could have been made to obtain additional testing. (PCR-17, 1140-41).

Dr. Mosman noted that he had no evidence of a conduct disorder prior to the age of 15, he as not aggressive, he was not a disciplinary problem in school, good behavior with his family. Consequently, you could not diagnose antisocial personality disorder in this case. (PCR-17, 1147).

The only formal diagnosis of a mental condition for the appellant made by Dr. Mosman based upon his review of Dr. Berland's work and what could be surmised from Dr. Ming's work was borderline intellectual functioning based upon an IQ of 84 or less.[1] (PCR-17, 1156-57).

On cross-examination, Dr. Mosman asserted that he has been called to testify in thirty to thirty five homicide and capital post-conviction cases in Florida since 1990. (PCR-17, 1159).

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[1]None of the various IQ scores talked about in this case, the 76 on the WAIS-R obtained by Dr. Mings, the 94 obtained by Dr. Berland on the WAIS, or, the more recent 81 on the WAIS-III, administered by Dr. Merin, placed appellant in the mentally retarded range. (PCR-1176-1178).

In none of those cases was he called to testify by the prosecution. (PCR-17, 1159). Dr. Mosman charged $150 for his services in this case. (PCR-17, 1160). Dr. Mosman, a Miami based expert, also charged CCRC for travel and his hotel expenses. (PCR-17, 1160).

Dr. Mosman acknowledged that this is not the first time he has testified in a capital case that a defendant's mental age does not match his chronological age. (PCR-17, 1163). In fact, in the James Ford case he testified that a 38 year-old man had the mental or developmental age of a 14 year-old. (PCR-17, 1163). He was not aware that the Florida Supreme Court upheld the trial court's rejection of this proposed mitigator because his opinion was contradicted by the other 25 witnesses called by the defense during the penalty phase. (PCR-17, 1163-64).

Dr. Mosman agreed that appellant did not tell anyone what he was thinking or feeling at the time he raped and murdered Denise Collins. (PCR-17, 1180). Dr. Mosman was aware that some experts refuse to apply or address the statutory mental mitigators when a defendant denies responsibility for a crime. In other words, some clinicians will not apply the statutory mental mitigators because they can't tell what he was thinking or what a defendant's thought processes were at the time of the crime. (PCR-17, 1180).

Dr. Mosman agreed that appellant displayed some goal directed behavior at the time of the rape and murder of Denise Collins. He apparently staked out the apartment, retrieved a ladder from the maintenance shed, and used the ladder to gain entrance to her apartment between the hours of 12:00 and 3:00 in the morning. Appellant was apparently aware that he could not just knock on the victim's door in some kind of "emotional date fantasy" and gain admission to the apartment. (PCR-17, 1181). Also, the two rapes suggested that appellant targeted young females who lived alone or were alone. (PCR-17, 1182). Appellant also knew enough to leave the apartment and had the capacity to understand what he did was wrong. He didn't stay around in some type of "relationship fantasy." (PCR-17, 1183). However, Dr. Mosman explained that certainly appellant had the capacity to understand what he was doing was wrong otherwise we would be talking about insanity. (PCR-17, 1183).

In an affidavit submitted to the trial court Dr. Mosman indicated a PET scan was critical. Dr. Mosman agreed the affidavit stated "it was not clinically possible to render a precise and definitive opinion regarding brain damage, or to differentiate between several competing diagnostic and functional possibilities which would be associated with specific types of brain injury impairments, unless neuro-imaging studies

are done[].” (PCR-17, 1172-73). Dr. Mosman acknowledged that a PET scan was conducted on the appellant and no brain abnormality was found. (PCR-17, 1175). Dr. Mosman agreed that his testimony concerning relationship “fantasy rape” in the Claypool case was made without having talked to appellant about what he was thinking at the time he raped her. (PCR-17, 1184). Dr. Mosman’s findings were based upon “indicators that you can clearly draw parallel, but, no, I don’t have a word for word, you know, frame-by-frame description from the defendant.” (PCR-18, 1190). Consequently, the underlying support for his opinion of “substantial impairment” did not come from facts about the offense provided from the appellant. (PCR-18, 1191). When asked about the underlying data to support his opinion that the statutory mental mitigators applied at the time of the crime, Dr. Mosman asserted he relied upon appellant’s traditional level of functioning. (PCR-18, 1192-93). However, Dr. Mosman agreed that going back to the time of the Collins murder, he did not talk to appellant’s mother, other relatives, his friends, his girlfriend, to see if appellant was somehow disordered in his thoughts. (PCR-18, 1193). Dr. Mosman said that he would not have because, he explained: They “would not have known of his IQ level. They would have, in all probability, no information on that issue at all.” (PCR-18, 1194).

Dr. Mosman asserted that the issue was appellant's mental impairment, relating to his low IQ and low test scores, dating back from first grade to 1990, "in the five to 10 percentile." (PCR-18, 1194). However, Dr. Mosman admitted that appellant was smart enough to know it was wrong to rape and murder Denise Collins. (PCR-18, 1195). If he didn't, according to Dr. Mosman, you would have a sanity issue. (PCR-18, 1195). Dr. Mosman thought that his low level of intellectual functioning coupled with stressors with his mother and lack of a job, financial problems, combined to substantially impair the appellant. (PCR-1196). Although not having talked with the appellant to determine whether these "stressors" were on his mind when he raped and murdered Denise Collins, Dr. Mosman pointed to a police report which said that appellant was worried his mother was going to throw him out, he didn't have a job and didn't know where he was going to get money. (PCR-18, 1198).

Dr. Mosman agreed that the MMPI administered by both Dr. Berland and apparently Dr. Mings registered a significant elevation on the psychopathic deviate scale. (PCR-18, 1202-03). Although Dr. Mosman mentioned that remorse could have been argued as a mitigator to the jury, he agreed the only expression of any remorse was for the Claypool rape. Appellant has not expressed remorse for the rape and murder of Denise Collins.

(PCR-18, 1203).

Dr. Mosman admitted the defense team generated a tremendous amount of information on appellant's family background. (PCR-18, 1204-05). Dr. Mosman agreed that the fact appellant moved a lot as a child was brought out during the penalty phase and argued to the jury during closing by Ms. Cashman. (PCR-18, 1207-08). The family members, his friends, his peer group did not consider appellant shy, slow, or stupid. (PCR-18, 1209). Dr. Mosman agreed that on the majority of occasions appellant can apparently control his criminal impulses. (PCR-18, 1213).

Although Dr. Mosman asserted he found alcohol and drug use as one of his thirty non-statutory mitigators, Dr. Mosman testified:

> ...It's plausible that he did, with the indicators at the age that he did. That's why I said it needed to be investigated further. I couldn't say it existed, I couldn't say it didn't. But when - - excuse me. When you've got a defendant that young with these kind of issues and this kind of record and requests, that minimal responsible response to that would be to investigate it.

(PCR-18, 1217). Dr. Mosman said that appellant's drug use needed to be investigated, but admitted that he did not do so. "I didn't investigate it. It's unknown quantity. That's one of the issues that needs to be looked at." (PCR-18, 1218-19).

On the HRS report generated on the sale of cocaine, appellant denied using drugs but admitted to experimenting with beer. (PCR-18, 1221). In that report, appellant said that he had a good relationship with both parents and that he maintained regular contact with his father. (PCR-18, 1221). Dr. Mosman agreed from his review of the data that appellant felt he was loved and cared for by his family members. (PCR-18, 1221-22). Appellant had at times three different girlfriends. (PCR-18, 1223). As far as we know he did not use violence against them. (PCR-18, 1223). When asked if that showed appellant could channel and target his "energy" in a manner of his own choosing, Dr. Mosman agreed, but only under "certain conditions." (PCR-18, 1223). However, again, Dr. Mosman thought the major stressors coupled with low intellect established a substantial impairment. (PCR-18, 1223-24).

Dr. Mosman agreed that on the Claypool rape, appellant put socks on his hands in order not to leave fingerprints, pushed a pillow over the victim's face to conceal his identity, told the victim not to look at him, threatened her and told her not to struggle or scream. (PCR-18, 1224). Dr. Mosman agreed that the victim in this case, Ms. Collins, was probably murdered because she resisted appellant's sexual assault. If she just laid back and allowed appellant to violate her she might have survived.

(PCR-18, 1225). He was not aware of any fingerprints being left in the Collins apartment and that appellant apparently took the ladder away after the murder. (PCR-18, 1226-27).

Dr. Mosman agreed that the large majority of persons with borderline intellect do not have significant impairment in adaptive behavior. (PCR-18, 1227). Dr. Mosman did not talk to any family members or the mitigation witnesses presented by the defense at trial. (PCR-18, 1233). But, he agreed from his review of the records, that the lay witnesses and family members were more than somewhat difficult to work with, "they were blatantly almost impossible..." (PCR-18, 1233).

In rebuttal, the State called Dr. Sidney Merin who is a psychologist specializing in clinical psychology and neuropsychology.[2] (PCR-19, 1370-71). Dr. Merin was one of the original members of the American Board of Neuropsychology. (PCR- 19, 1374). Dr. Merin has been qualified as an expert in neuropsychology in more than a thousand cases. (PCR-19, 1377).

Dr. Merin was contacted by the State and asked to examine the appellant to determine the presence or absence of brain damage

[2]Dr. Merin's report was introduced into evidence as state exhibit 13 during the hearing below. (PCR-19, 1382, 1390, 1393). The report was not, however, included in the record on appeal. A copy is attached to the State's Answer Brief as an appendix for this Court's convenience. [Appendix].

which might have contributed to the offenses. (PCR-19, 1379). Pursuant to a court order, Dr. Merin conducted a neurological, and psychological examination of the appellant. (PCR-19, 1379). He also reviewed a large amount of background materials relating to appellant and the criminal proceedings against him. (PCR-19, 1379-88). Dr. Merin reviewed the deposition of Dr. Wood and reviewed material from Dr. Berland which included some of his original testing and notes. (PCR-19, 1383).

Dr. Merin interviewed and tested Mr. Kimbrough for just over six hours. (PCR-19, 1388). He also reviewed other background material developed in the case. (PCR-19, 1389-90). Dr. Merin's testing and examination of background material was designed to determine whether or not appellant suffered from brain damage and whether or not appellant suffered from any major mental illness. (PCR-19, 1394).

Dr. Merin administered the WAIS-III to assess appellant's intelligence. The findings gave appellant a verbal IQ of 85, which places him in the low end of the average range. (PCR-19, 1396-97). Appellant's performance IQ was 80, which is somewhat lower, but a five point difference was not clinically significant. (PCR-19, 1397). That gave appellant a full scale IQ of 81, again in the low average range. (PCR-19, 1397). Dr. Merin discussed the various cluster scores, involving memory and

spatial relationships. (PCR-19, 1398-1401). Dr. Merin thought that appellant had a learning disability and that his "fund of information" was low.[3] (PCR-19, 1400-1401). However, the appellant did score well on abstract thinking tests, the executive functioning, on which an IQ value of 95 or 96 would be placed. (PCR-19, 1403-04). Dr. Merin concluded: "So overall, I would conclude that he's probably in the low average range overall." (PCR-19, 1404).

Dr. Mings test result of 76 was significantly lower, in the borderline range, but Dr. Merin thought that stress or illness could be a factor in the test, especially the performance part of the testing. (PCR-19, 1404-05). It is much easier to get a poor score on an IQ test, looking less intelligent than you are for whatever reason, than it is to fake a higher IQ. (PCR-19, 1404). "[I]t's much more difficult, unless we're over achievers and we have special skills, to move above what the brain is capable of doing." (PCR-19, 1404).

Dr. Merin did not agree with Dr. Mosman's assessment that the WAIS administered by Dr. Berland could be roughly equivalent to the score obtained by him or Dr. Mings. Dr. Merin testified:

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[3]Appellant scored poorly on some tests of memory, 67, with slow processing speed. (PCR-19,1398-99).

> That's an awful lot of points to deduct. We don't actually do that. That's the gimmick you may use in a courtroom or for some speech, but scientifically you don't do that. You may consider that as a consideration, if you want to. I was going to use the phrase, play a game with it. But if you want to look at it in that light, you may consider - - I would probably consider – I would consider probably about a six point difference.

(PCR-19, 1406). Dr. Merin also provided a Wonderlic test which yielded an equivalent IQ result in the 80's. (PCR-19, 1407). The intelligence testing did not support a finding of brain damage. (PCR-19, 1407-08).

Dr. Merin administered a receptive language comprehension test which revealed a result in "the lower end of the average range." (PCR-19, 1407-08). Other tests show appellant's processing skills in certain areas "is not real rapid." (PCR-19, 1410). However, other tests reveal that appellant's memory ability is not "as low as indicated on this examination. It may have been a motivational type of thing." (PCR-19, 1411).

Dr. Merin discussed the results of his personality testing. The Millon exam showed that appellant was trying to look "real good" which, Dr. Merin explained, is not an "uncommon human characteristic." (PCR-19, 1416). Dr. Merin discussed the results of the MMPI-II, which appeared to render a valid result; that is the validity scales did not indicate deception. (PCR-19, 1420-21). The test revealed a statistically significant

elevation in the psychopathic deviate scale. Dr. Merin testified that such a test result, although not alone sufficient for an antisocial personality diagnosis, generally reveals:

> ...What you're more likely to say is this represents a significant degree of real rebelliousness in the personality, a significant degree of superficiality, an inclination not to become deeply, emotionally involved with others, although on the surface they can appear very nice. They make a good first impression. And after you talk with them a while, you begin to see what they're saying doesn't fit together, doesn't seem to - - it's not that it doesn't make sense, but it seems to be self-serving. Also found with people who have conflict with authority, who are manipulative, who are confidence people, who can act impulsively, who can defy the rules, who can be insensitive to the feelings of others, have a lot of difficulty with empathy. These are people who sometimes have a history of being under-achievers. Or, again, they may be impulsive, may have a tendency to blame their family for whatever occurs to them or blame other people for whatever occurs to them, although projection on this scale is not necessarily a prominent feature.

(PCR-19, 1424-25).

The other scale which was elevated was the hypomania scale, which refers to energy level. (PCR-19, 1425). With this kind of energy, "you increase the probability that they're gonna act on whatever the other scales might be." (PCR-19, 1426). So, if he is a rebellious individual, as appellant describes himself on the test, there's "an increased probability that it's gonna be acted upon." (PCR-19, 1426). Dr. Merin also found the scale on over-controlled hostility elevated. These people want to

look good on the surface but never really learn how to deal with angry feelings. (PCR-19, 1427).

After reviewing the tests and background data, Dr. Merin was able to come up with some diagnoses applicable to the appellant. Dr. Merin testified that he did not find that appellant suffered from a serious emotional or mental disorder. (PCR-19, 1434). However, he did find an Axis II, or behavioral disorder, a general personality disorder, "NOS" or "not otherwise specified." (PCR-19, 1436). Appellant's personality disorder has borderline and antisocial features. (PCR-19, 1436).

Dr. Merin also diagnosed a learning disability. This was not due to brain damage, but based upon appellant's personality characteristics. (PCR-19, 1436). While appellant apparently had a learning disability, Dr. Merin cautioned, we should not confuse grades with intelligence. "Grades sometimes do not correspond to general intelligence. Much has to do with teachers, motivation, things of that sort." (PCR-19, 1437). But, as far as brain functioning, "I didn't see any problem as far as the brain went." (PCR-19, 1440).

Dr. Merin would not have found any statutory mitigating circumstances. (PCR-19, 1466). As a single non-statutory mitigator, Dr. Merin might have found a Borderline Personality Disorder which had its underpinnings possibly in his unstable

early childhood, “that’s a rather mild non-statutory.” (PCR-19, 1466-67).

Dr. Merin did not find any evidence that appellant suffered from an extreme mental or emotional disturbance at the time of the crimes. (PCR-19, 1440). Nor, did Dr. Merin find any evidence of or any indication that appellant’s capacity to appreciate the criminality of his conduct at the time of the crime was substantially impaired. (PCR-19, 1441). Dr. Merin explained:

> Not at all. According to some of the records, in the one event, criminal event, he had the forethought enough to put socks on his hands to avoid leaving fingerprints. Very smart. Very self-serving. So he knew what he was doing. So he understood the criminality of whatever was going on.

(PCR-19, 1441).

Dr. Merin did not find evidence to support a conclusion that appellant’s developmental or emotional age was less than his chronological age. When people have inclinations of impulsivity Dr. Merin explained, we might say they are immature, but they know right from wrong. Also, “after 12, 13 years of age, the hormones flow and very often those are the driving forces rather than the level of an individual’s emotional life. And those driving forces apparently were very strong in him.” (PCR-19, 1442).

It would be difficult to find a mental mitigator applied at the time of the crime when there is no information about what the subject was thinking at the time. (PCR-19, 1442). However, Dr. Merin explained:

> Well, it, it may be difficult, but then you have to rely on witnesses who have seen his behavior, who have known how he has behaved up to that time, and people who may have been witnesses to his behavior at about that time, and whether that behavior was goal directed, whether he was moving in the direction of what he wanted to ultimately achieve.

(PCR-19, 1442).

Dr. Merin did not agree that appellant qualifies for a borderline intellectual functioning diagnosis, stating:

> Well, first of all, I don't agree with your definition of borderline because - - I don't agree with it because he's got many areas where he's perfectly average. So I would not in any way –
>
> I would not in any way suggest that he has a borderline, whatever it was, diagnosis that you're referring to. And you asked which ones? Well, let's just take a look at it. I referred to them earlier. We can take a look at it again. Average vocabulary, average verbal abstraction scores, average visual reasoning, average nonverbal comprehension skills and several of those are just a smidgin below average. So I would not in any way suggest that he's got that borderline intellectual deficit. If you're just gonna use a number - - which doesn't really mean anything, any psychologist will tell you those IQ numbers don't mean anything, because next week it could change. What you look for are levels and the way it's distributed.

(PCR-19, 1465).

Any additional facts necessary for disposition of the issues

presently before this Court will be discussed in the argument, *infra.*

SUMMARY OF THE ARGUMENT

ISSUE I-The two experienced defense attorneys in this case provided extensive background evidence regarding appellant to the jury and hired two well qualified experts to examine Kimbrough prior to the penalty phase. That the two mental health experts did not find any significant mitigation as a result of their examinations is not the fault of trial counsel. The defense attorneys made a reasonable strategic decision not to present expert testimony during the penalty phase. Any minimal benefit from presenting such testimony was outweighed by its risk.

ISSUE II-The trial court properly denied several of appellant's claims without a hearing. Several of appellant's claims are nothing more than an attempt to litigate direct appeal issues under the guise of ineffective assistance.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT HIS WAS DENIED THE ASSISTANCE OF A COMPETENT MENTAL HEALTH PROFESSIONAL UNDER AKE V. OKLAHOMA? (STATED BY APPELLEE).

Appellant claims that he was denied the right to mental health assistance under Ake v. Oklahoma, 470 U.S. 78 (1985), due to counsel's ineffective assistance. The State disagrees. The trial court properly rejected this claim after an evidentiary hearing below.

A. Standard Of Review

This Court summarized the appropriate standard of review in State v. Reichmann, 777 So. 2d 342 (Fla. 2000):

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See Rose v. State, 675 So.2d 567, 571 (Fla. 1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

An appellate court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court." Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)(citing Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955)).

B. Preliminary Statement On Applicable Legal Standards For Ineffective Assistance Of Counsel Claims

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 688 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight. Id. at 696. "The Supreme Court has recognized that because representation is an art and not a science, "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Waters v. Thomas, 46 F.3d 1506 (11th Cir.)(*en banc*), cert. denied, 116 S.Ct. 490 (1995)(citing Strickland, 466 U.S. at 689).

The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had

counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was unfair or unreliable. Lockhart v. Fretwell, 113 S.Ct. 838 (1993). With regard to the penalty phase, this Court observed that a defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000), cert. denied, 122 S.Ct. 179 (2001) (quoting Strickland, 466 U.S. at 695). The Defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

An unfortunate fact of litigating capital cases at the trial level is that defense counsel's performance will invariably be subject to extensive post-conviction inquiries and hindsight miasma. This Court has stated that ineffective assistance claims should be the exception, rather than the norm:

> Criminal trials resolved unfavorably to the defendant have increasingly come to be followed by a second trial of counsel's unsuccessful defense. Although courts have found most of these challenges to be without merit, defense counsel, in many of the cases,

> have been unjustly subjected to unfounded attacks upon their professional competence. **A claim of ineffective assistance of counsel is extraordinary and should be made only when the facts warrant it. It is not a claim that is appropriate in every case. It should be the exception rather than the rule.**

Clark v. State, 460 So. 2d 886, 890 (Fla. 1984)(quoting Downs v. State, 453 So. 2d 102 (Fla. 1984))(emphasis added). Unfortunately, despite this Court's admonition in 1984, it has become the rule, not the exception in capital cases.

With these principles in mind, the State submits that the circuit court properly denied appellant's motion for post-conviction relief.

C. Appellant Failed To Establish His Two Defense Attorneys Rendered Ineffective Assistance During The Penalty Phase

The trial court below rejected appellant's assertion that he received inadequate mental health assistance under Ake v. Oklahoma due to counsel's ineffectiveness. After extensively discussing the facts introduced during the evidentiary hearing below, the trial court stated:

> Collateral counsel argues that Ms. Cashman grossly misunderstood Dr. Ming's references to the MMPI Scale 4 as a diagnosis that Defendant was a "psychopathic deviant," when in fact there was no such diagnosis. The Court agrees that Ms. Cashman's repeated references to the "psychopathic deviant" scale suggest that she did not fully appreciate the significance of the MMPI Scale 4 results. Perhaps it would be more appropriate to say that she did not fully appreciate the *lack* of significance of the results, because the

undisputed testimony establishes that Dr. Mings was referring to the "psychopathic deviate" scale, one which has nothing to do with deviant behavior. Therefore, her fears that Dr. Mings' testimony would hurt Defendant in front of a jury appear to have been based in part on a technical misunderstanding.

It is significant that Ms. Cashman's fears were shared by Mr. Sims, who did not demonstrate any misunderstanding of the psychopathic deviate scale, and those fears were not unfounded. Mr. Ashton's testimony corroborates concern that he would have deposed Dr. Mings thoroughly and analyzed any data used by the doctor in arriving at a diagnosis or opinion. Significantly, he would have attempted to use this data to its fullest advantage for impeachment purposes and portray Defendant in a negative light.

Defendant used Dr. Berland's affidavit to support his request for PET scan, but he did not call Dr. Berland to testify at the evidentiary hearing. This is not surprising in light of Dr. Mosman's acknowledgment that the PET scan showed that Defendant has no brain abnormalities. Despite Ms. Cashman's vague reference to Dr. Berland's opinion that Defendant suffered from "hidden craziness," there was insufficient testimony presented at the evidentiary hearing to establish either deficient performance or prejudice on the part of defense counsel for failing to call Dr. Berland at trial.

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. at 689. Here, counsel made the decision not to call the doctors as mitigation witnesses after considering the evidence which could have been presented versus the potential risks, and strategic decisions do not constitute ineffective assistance when alternative courses of action have been considered and rejected. *State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987).

In light of the counter-strategy Mr. Ashton would have employed against Dr. Mings (a strategy he would have employed against any other doctor who was offered as an expert witness), this Court concludes that counsel's decision not to call Dr. Mings or Dr. Berland as witnesses was a reasonable trial tactic.

Defendant simply fails to show otherwise. He argues counsel did not provide the doctors with sufficient background material to conduct proper evaluation, but at this late date, no one - not Ms. Cashman, Mr. Sims, or Dr. Mings - can recall exactly what records were provided or withheld. Therefore, the supporting facts required for an ineffective assistance of counsel claim are glaringly absent, and the State's argument is well-taken: Defendant has failed to meet his burden of proof. In the absence of these facts, it is impossible to say that there is a reasonable probability that the outcome of the proceedings would have been different if the doctors had been otherwise "prepared." Defendant's arguments are, as the State correctly points out, mere speculation. He cannot establish that additional materials or preparation would have enabled Dr. Mings or Dr. Berland or any other doctor to conduct a more thorough mental health evaluation or to provide mitigation testimony sufficient to outweigh any of the potential risks associated with their testimony.

This Court also agrees with the State's argument that Defendant, through the actions and inactions of collateral counsel, has contributed to his inability to meet his burden of proof. The Florida Supreme Court tolled the postconviction time limitation in this case until September 1, 1998, but the testimony and arguments presented demonstrate that the Office of the Capital Collateral Representative did not engage in due diligence. Instead of immediately attempting to obtain statements and records from trial counsel and examining doctors only 5 years after the trial, when recollections would have been fresher and records less likely to be missing, CCRC engaged in one delay tactic after another. Although CCRC's dilatory conduct made its job more difficult, CCRC has exhausted every conceivable avenue of relief on Defendant's behalf. Late in the proceedings, collateral counsel requested first DNA testing, then at the last possible moment, counsel also requested a PET scan. They were allowed to conduct these tests on little more than speculative grounds, but found no evidence worthy of presenting at the evidentiary hearing.

Moving from the mental health factors to other

potential mitigating factors, this Court's conclusions remain much the same. In his predominantly narrative testimony, Dr. Mosman asserted that his review of Dr. Mings' and Dr. Berland's work demonstrates that there were numerous statutory and non-statutory mitigators which should have been presented, including a developmental disadvantage resulting from frequent moves and a lack of continuity, school records showing learning problems as early as fourth grade, childhood anxiety and depression, a lack of emotional connection with mother, lack of a father, witnessing chronic domestic violence, the death of a cousin with whom Defendant had a close relationship, positive confinement record in county jail, good dating relationship with a woman named Candy Bell, a series of closed-head injuries, the lack of an anti-social personality disorder, and remorse for the crime. However, Dr. Mosman did not conduct any independent testing. While he reviewed a considerable number of documents prepared for both the trial and postconviction proceedings, there were no witnesses at the evidentiary hearing who could have presented direct evidence regarding these potential mitigators. In short, there was no evidence presented to support the existence of these proposed mitigators or to establish the weight they would have carried if presented to the jury during the penalty phase. Therefore, this Court concludes that Defendant has also failed to meet his burden of proof with respect to ineffective assistance of counsel arising from counsel's alleged failure to present all mitigating factors other than mental health.

Furthermore, this Court concludes that many of the mitigators cited by Dr. Mosman would have been given little or no weight. For example, although it is undisputed that Defendant was moved around frequently as a child as a result of his mother's somewhat erratic lifestyle, it is also undisputed that he had many family members who loved him and supported him. Instead of lacking a father figure in his life, he had more than one "father figure" on whom he could rely. The most significant of these was Julius McIntosh, who was, by all accounts, devoted to him.

Ms. Cashman may have misunderstood Dr. Mings; Mr. Sims may have had difficulty communicating with

> Defendant; and both attorneys might have presented additional mitigating evidence or presented it in a different way. Counsel's performance in this case may not have been perfect, but the legal standard is competent counsel, not error-free counsel. *Teffeteller v. Dugger*, 734 So. 2d 1009, 1022 n. 14 (Fla. 1999). In other words, the standard is "reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987). Even if this Court were to conclude that counsel should have presented all of the mitigating evidence for which Defendant now argues, which it does not, that mitigation would not have made a difference in the outcome of the penalty phase proceedings by outweighing the aggravating factors which were established. Therefore, Defendant ultimately fails to establish prejudice.

(PCR-23, 2192-96).

The presumption of effectiveness is even more difficult to overcome when addressing the conduct of experienced defense attorneys such as Mr. Kelly and Ms. Sims. See Chandler v. United States, 218 F. 3d 1305, 1316 (11th Cir. 2000), *en banc,* ("When courts are examining the performance of an experienced trial counsel, the presumption of that his conduct was reasonable is even stronger."). They possessed extensive capital trial experience at the time they represented the appellant. (PCR-14, 559-60, 688; PCR-15, 818). In particular, they had experience in dealing with experts and presenting mental health mitigation testimony. (PCR-14, 580, 585).

Mr. Sims and Ms. Cashman did not ignore potential mental

health issues. Mr. Sims retained Dr. Mings to examine the appellant in order to explore and develop potential mental health issues for mitigation. (PCR-14, 585; PCR-15, 826). Dr. Mings was brought into the case only one month after appellant's arrest. (PCR-15, 826). Mr. Sims had previously worked with the conveniently located Dr. Mings and was attempting to "bring him into the fold." (PCR-15, 834).

The notes taken by Ms. Cashman reveal that Dr. Mings' evaluation was less than favorable. The MMPI was essentially normal with an elevated psychopathic deviate or deviant scale. They were concerned that such information might "open doors" to the prosecutor and attempt to characterize appellant as a someone with no morals and that he may be a sociopath. (PCR-15, 861-62). Mr. Kelly's impression from talking to Ms. Cashman was that Dr. Mings would not have much to say to help the appellant and might be harmful. (PCR-15, 862-63). They were familiar with the prosecutor in this case, Mr. Ashton, and were concerned how he might use the elevated scale 4 and how he would rebut any mental health mitigation evidence they tried to present. A well founded fear as demonstrated by Mr. Ashton's testimony during the evidentiary hearing below. (PCR-18, 1263-70).

Dr. Merin's report discusses some of the unfavorable

characteristics of individuals who have the 4, 9 combination found in Mr. Kimbrough. Dr. Merin observes:

> A description of this 4-9 pattern reveals individuals who have a marked disregard for social standards and values. They are often in trouble with the law because of antisocial behavior. Mr. Kimbrough's behavior would fit this pattern and would include a poorly-developed consci[ience] and fluctuating values.
>
> Features of narcissism and self-indulgence are included in this description of Mr. Kimbrough. Difficulty delaying gratification with resultant impulsive acts are included in this description. Mr. Kimbrough's test results would reflect poor judgment and acting out without considering the consequences of those acts. Mr. Kimbrough failed to learn from experience and is not always willing to accept responsibility for his own behavior. He will rationalize his failings and will project responsibility for his difficulties onto others...

(Appendix at 24). Ms. Cashman testified that Mr. Ashton would use scale 4 "[t]o make my client look really dangerous and make the jury scared of him and want to kill him."[4] (PCR-14, 728).

When Dr. Mings proved insufficiently beneficial and potentially detrimental to appellant's cause, they sought a second opinion. They retained Dr. Berland, an expert who Mr. Sims and Ms. Cashman were both familiar with in an attempt to develop some positive mental health mitigation. (PCR-15, 905-06). Dr. Berland found appellant to be in the average IQ range

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[4]The only misunderstanding Ms. Cashman was shown to have about about the elevated scale 4, was the name, psychopathic "deviant" as opposed to the proper psychopathic "deviate." She was well aware it represented unfavorable characteristics and that Mr. Ashton would use it to the State's advantage.

and that he was apparently denying symptoms of mental illness on the MMPI. (PCR-15, 901-02). Moreover, in Dr. Berland's opinion, presenting evidence of appellant's mental illness would be difficult. (PCR-14, 743). Trial defense counsel made the strategic decision not to call Dr. Berland. Interestingly enough, collateral counsel made the decision not to call Dr. Berland during the evidentiary hearing below. There is no reason to believe he could have provided any significant mitigation testimony.[5] See Spencer v. State, 28 Fla. L. Weekly S35 (Fla. 2003)("Reversible error cannot be predicated on such conjecture.")(citing Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)).

Defense counsels' decision not to present mental health testimony during the penalty phase constituted deficient performance. The defense attorneys clearly considered presenting such testimony, but, in light of limited mitigation

[5]In his affidavit seeking a PET scan prior to the evidentiary hearing, Dr. Berland indicated that at the time of his original examination he had little to support his theory of brain damage and that presenting such testimony posed "a great risk of offending the jury with lame arguments of mitigators if I testified based on these data." (PCR-21, 1676). The WAIS, intelligence testing, was not dramatic, and overall, placed appellant in the average range. (PCR-21, 1674, 1676). Dr. Berland sought a PET scan in order to obtain some credible evidence that appellant suffered from brain damage. (PCR-1679-80). The test revealed no abnormality and collateral counsel chose not to call Dr. Berland during the evidentiary hearing.

value of such testimony [no major mental illness], the risk of exposing the defense experts to damaging cross-examination was too great. As the trial court found below, this was a well considered tactical decision on the part of counsel. See Gaskin v. State, 822 So. 2d 1243, 1248 (Fla. 2002) ("Trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony.") (citing Ferguson v. State, 593 So. 2d 508 (Fla. 1992) and State v. Bolender, 503 So. 2d 1247 (Fla. 1987)). Such a tactical decision is almost immune from post-conviction attack.

The test for determining whether counsel's performance was deficient is whether some reasonable lawyer at trial could have acted under the circumstances as defense counsel acted at trial; the test has nothing to do with what the best lawyers would have done or what most good lawyers would have done. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992). See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2001) ("Counsel's strategic decisions will not be second guessed on collateral attack."). "Even if in retrospect the strategy appears to have been wrong, the decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it."

Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983), cert. denied, 464 U.S. 1663 (1984). Here, collateral counsel has not even shown using the prohibited "20/20 hindsight" that counsel's decision was a poor one. Given the limited to non-existent value of the mental health mitigation evidence available to trial counsel, the decision not to call Dr. Berland or Dr. Mings was wise choice. See Valle v. State, 778 So. 2d 960 (Fla. 2001) ("This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected.") (citing Shere v. State, 742 So. 2d 215, 220 (Fla. 1999)).

Appellant failed to establish that any material mitigation would have been derived from calling Dr. Berland or Dr. Mings, except, perhaps, by showing that appellant has a low average IQ. The fact that two well qualified mental health experts had little or no positive mental health mitigation to provide was not the fault of trial defense counsel. Appellant's assertion that the trial court's ruling "completely ignored the evidence of the separate abandonment of each expert before the expert's work was understood or finished" is not supported by the record. (Appellant's Brief at 25). Appellant failed to establish any deficiency in the background materials provided to the mental health experts--much less a deficiency of such magnitude that it

would have changed their opinions. See e.g. Engle v. Dugger, 576 So. 2d 696, 701 (Fla. 1991) ("Counsel had Engle examined by three mental health experts, and their reports were submitted into evidence. There is no indication that counsel failed to furnish them with any vital information concerning Engle **which would have affected their opinions.**")(emphasis added).

The defense attorneys were well aware that experts required background information to conduct an appropriate examination. (PCR-4, 619). It was Ms. Cashman's practice to send over relevant material and ask them if they need any additional information. Ms. Cashman testified: "I also ask the mental health expert after sending them the discovery and whatever in my mind they may need, I asked them what else do you need, what witnesses do you need to talk to, what else do you need to do an effective evaluation." (PCR-4, 619). The defense attorneys utilized an investigator who conducted an extensive background investigation.[6] (PCR-14, 706). The evidence reflects Dr. Mings requested an additional five hours of time to contact and interview background witnesses as part of his evaluation of the appellant. (PCR-14, 716, 718). Although Dr. Mings records

[6]In February of 1994, Defense Investigator Pizarroz met with Dr. Berland for a discussion regarding potential head injuries. (Appendix at page 8).

were lost, it is clear from the limited material available that he was investigating appellant's background and contacting witnesses as part of his examination.

Appellant's reliance upon Ragsdale v. State, 798 So. 2d 713 (Fla. 2001), is misplaced. In Ragsdale, this Court noted that the penalty phase "was not subjected to meaningful adversarial testing" and that defense counsel "essentially rendered no assistance to Ragsdale" during the penalty phase. Ragsdale, 798 So. 2d at 716. This Court noted a large amount of evidence could have been introduced through family members relating to a severe history of child abuse, neglect, and impoverishment. "The Ragsdale brothers were frequently beaten by their father with fists, tree limbs, straps, hangers, hoses, walking canes, boards, and the like, until bruises were left and blood was drawn. Id. at 717. The father even fired a pistol twice at Ragsdale. Without advancing past the seventh grade, Ragsdale ran away from home at the age of fifteen or sixteen.

In addition, defense counsel in Ragsdale presented no mental health evidence during the penalty phase, whereas collateral counsel procured and presented an expert to testify that Ragsdale was psychotic at the time of the offenses and that the statutory mental mitigators applied. The doctor also offered a list of non-statutory mitigators, including "organic brain

damage, physical and emotional child abuse, history of alcohol and drug abuse, marginal intelligence, depression, and a developmental learning disability." Ragsdale, 798 So. 2d at 718. This Court noted that even the State mental health expert could have provided some useful mitigation. In this case, unlike Ragsdale, collateral counsel did not present a single additional family member or lay witness to testify during the evidentiary hearing below. Trial counsel did a thorough job addressing appellant's childhood and somewhat dysfunctional early years. Collateral counsel did not uncover any childhood abuse or other significant mitigation which was not presented to the jury as in Ragsdale. Moreover, while defense counsel in Ragsdale largely ignored potential mental health mitigation, here, the defense attorneys sought an expert almost immediately after being appointed to the case. When Dr. Mings told defense counsel he had little positive mitigation to offer and a potentially damaging MMPI result [elevation on scale 4], the defense attorneys immediately sought approval for, and obtained a second expert, Dr. Berland, in an effort to develop more favorable mental health mitigation. (PCR-14, 738-39). That the experts findings were not particularly helpful to the appellant cannot be blamed on trial counsel.

Appellant asserts that Dr. Mosman's testimony established

a wealth of mitigating factors, both statutory and non-statutory. However, trial defense counsel had no specific duty to locate Dr. Mosman, a Miami based attorney and licensed psychologist, at the time of trial. Defense counsel used a local expert, Dr. Mings, whose qualifications as a forensic psychologist have not been challenged by collateral counsel. In any case, when Dr. Mings proved insufficiently favorable, and, potentially damaging to appellant's case, the defense attorneys sought a second opinion. They retained Dr. Berland, to examine the appellant in an effort to develop favorable mental health mitigation. Dr. Berland too, however, proved insufficiently beneficial to risk calling during the penalty phase. The public defenders in this case simply did not have unlimited public funds to pursue experts. (PCR-15, 813). Strategic decisions about when to forego further investigation must be made in every case, as lawyers can "almost always do something more," and do not enjoy the benefit of endless time, energy or financial resources. Rogers v. Zant, 13 F.3d 384, 387 (11th Cir.), cert. denied, 513 U.S. 899 (1994), quoting Atkins v. Singletary, 965 F.2d 952, 959-960 (11th Cir. 1992).

The Orlando defense attorneys had no duty to scour the State, hiring potentially dozens of experts, until they happen

to find Dr. Mosman in Miami.[7] It is by now well settled that "counsel's reasonable mental health investigation is not rendered incompetent "'merely because the defendant has now secured the testimony of a more favorable mental health expert.'" Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002)(quoting Asay v. State, 769 So. 2d 974, 986 (Fla. 2000)). See Downs v. State, 740 So. 2d 506 (Fla. 1999)("The fact that Downs has found experts willing to testify more favorably concerning mental mitigating circumstances is of no consequence and does not entitle him to relief.")(citations omitted); Jones v. State, 732 So. 2d 313, 317-318 (Fla. 1999)(finding no deficient performance for failing to procure Doctors Crown and Toomer noting that trial counsel is not "ineffective merely because postconviction counsel is subsequently able to locate experts who are willing to say that the statutory mitigators do exist in the present case.").

In any case, the trial court found that Dr. Mosman's testimony was largely unsupported and most of the mitigators he claimed to have found, if present at all, would be given little

[7]Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985) provides only that where a defendant's mental condition is at issue during the guilt or penalty phase a defendant must have access to a competent psychiatrist. "This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." Ake, 105 S.Ct. at 1096.

or no weight. The credibility and weight to be given a witness's testimony is a matter uniquely within the province of the trial court. Porter v. State, 788 So. 2d 917, 923 (Fla. 2001); Stephens v. State, 748 So. 2d 1028, 1034-35 (Fla. 1999).

For example, Dr. Mosman's assertion that appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, was not linked to any underlying mental disturbance or illness. Further, Dr. Mosman did not interview the appellant and had no idea what appellant was thinking at the time he raped and murdered Denise Collins. In fact, according the records he reviewed, appellant denied committing the offense. (PCR-17, 1180, 1191). Dr. Mosman presumed some type of capacity impairment based upon appellant's low IQ and stressors, such as lack of a job, to opine that appellant's capacity was substantially diminished. (PCR-16, 1027, 1031, 1046). Yet, Dr. Mosman acknowledged that most of the time, appellant is apparently able to control his criminal impulses. (PCR-18, 1213). Moreover, the facts surrounding the offenses indicate a degree of planning, and, recognition of the criminality of his conduct which is inconsistent with finding substantial impairment.

On the rape and murder of Denise Collins, appellant staked

out the victim's apartment, retrieved a ladder from a maintenance shed, used the ladder to enter the victim's apartment through a window stealthily at night, raped and murdered the victim, before leaving the apartment, and, placing the ladder back in the maintenance shed. Moreover, when appellant raped Ms. Claypool some months after murdering Ms. Collins, appellant again displayed a degree of planning and goal directed behavior. In each case, appellant targeted young women who he apparently thought or believed would be alone and made a stealthy entry at night or the early morning hours. Dr. Mosman admitted appellant wore socks on his hands during the Claypool rape to prevent leaving fingerprints and took steps to ensure that the victim could not identify him. (PCR-17, 1181-83). Dr. Mosman's opinion to the contrary, there was simply no evidence to support finding by a preponderance of the evidence––the defense burden during the penalty phase--that either the extreme mental/emotional disturbance or substantially diminished capacity mitigators could be found at the time of the offenses. See Bertolotti v. Dugger, 883 F.2d 1503, 1518 (11th Cir. 1989)("Before we are convinced of a reasonable probability that a jury's verdict would have been swayed by the testimony of a mental health professional, we must look beyond the professional's opinion, rendered in the impressive language of

the discipline, to the facts upon which the opinion is based.")(citing Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987)). In addition to lacking support, Dr. Mosman's opinions were contradicted by the expert called by the State.

Dr. Merin testified that after interviewing the appellant, extensively testing him, and, reviewing materials relating to the offense and his background, he could find no statutory mitigators.[8] (PCR-19, 1466). In particular, he found no evidence to suggest appellant was impaired at the time of the offenses. (PCR-19, 1441). See Connor v. State, 803 So. 2d 598, 611, 612 (Fla. 2001)(affirming rejection of the statutory mental mitigators found by **Dr. Mosman** and Dr. Eisenstein, noting that a "trial court may reject a statutory mental mitigator if "mental health experts are in disagreement regarding whether the mitigator exists.")(emphasis added). Of the four experts who were retained at various times in this case [Doctors Mings, Berland, Mosman, and Merin], apparently only Dr. Mosman, the one expert who never interviewed or personally tested the appellant,

[8]Dr. Mosman did not interview the appellant, test the appellant, or render a written report encompassing his findings. Had he done any of these things, a prehearing discovery order would have been triggered. The State was confronted for the first time during the evidentiary hearing with his opinions regarding a large number of statutory and non-statutory mitigators.

would find the statutory mental mitigators.[9] As for the age mitigator, Dr. Mosman made a mathematical calculation based upon appellant's IQ and came up with an intellectual age of 13. However, Dr. Mosman admitted that appellant was not viewed by those in his family or peer group as shy, slow, or stupid. (PCR-18, 1209). He did not relate that opinion to any lay witness testimony or observations of the appellant. See Ford v. State, 802 So. 2d 1121, 1135 (Fla. 2001)(affirming trial court's decision not to give any weight to **Dr. Mosman's** opinion that a thirty eight year old man had a developmental age of 14 where his testimony was contradicted by an extensive number of witnesses testifying that Ford functions well as a mature adult).[10] (emphasis added).

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[9]Appellant offered no evidence to suggest that either Dr. Mings or Dr. Berland found the statutory mental mitigators applied to the appellant. From this record, it is quite apparent that they did not.

[10]In her concurring opinion in Ford, Justice Pariente provided some additional information relating to this proposed mitigating circumstance and Dr. Mosman's opinion:

> Turning to the trial court's findings in this case, the trial court accorded no weight to the proposed mitigator that the defendant had a developmental age of fourteen. In its sentencing order, the trial court stated: "The Court finds this mitigating circumstance was proven but for the reasons previously stated above, the Court affords this no weight whatsoever." Despite the expert testimony that the defendant's mental age at the time of the crimes was fourteen, the

Dr. Merin testified that you cannot take an IQ number and simply extrapolate a mental age or diagnose borderline intellectual functioning. Dr. Merin noted that the overall IQ test score means little and that appellant on many IQ sub-tests scored either average or just below average: "I don't agree with it because he's got many areas where he's perfectly average." (PCR-19, 1465). In any case, the trial court's sentencing order addressed the age mitigator and stated that "even if this mitigator did exist and were given any weight, it would not change the balance between the aggravating and mitigating circumstances." (R-14, 598).

Similarly, many of the non-statutory mitigators testified to by Dr. Mosman lacked any evidentiary support. As for remorse, Dr. Mosman admitted he found no expression of remorse for the rape and murder of Denise Collins. (PCR-18, 1203). The

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> trial court stated that "[n]otwithstanding Dr. Mosman's testimony, the twenty-five witnesses which preceded hm during the penalty phase of this trial clearly refuted several of the opinions advanced by Dr. Mosman. Although it may be said the Defendant is not a particularly bright man, certain observations made by the lay witnesses plainly refute Dr. Mosman's testimony." Thus, it appears that the trial court rejected this proposed mitigator because it had not been established in this case by the preponderance of th evidence–-the second step in ***Campbell***.

Ford, 802 So. 2d at 1139 (Pariente, J., concurring in the result)

remorse appellant evidently expressed was for his subsequent rape of Miss Claypool. However, it would be foolish for a defense attorney to open up the issue of remorse to an experienced prosecutor in this case. Especially where the remorse was expressed only for the subsequent rape, not the rape and murder for which the jury had just convicted the appellant. A prosecutor would probably point out that just a few short months after raping and murdering Denise Collins, appellant was at it again, raping another young woman. Moreover, appellant did not turn himself in to authorities. His remorse was only expressed after being caught for the second rape. Hardly a compelling mitigator under the facts of this case.[11]

Dr. Mosman asserted that appellant's drug abuse constituted a non-statutory mitigator. (PCR-16, 1006-07). However, when asked to support his assertion that appellant used or abused drugs or alcohol, Dr. Mosman equivocated, asserting that it was an issue which required further development. Dr. Mosman said that possible drug use needed to be investigated, but admitted

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[11]Similarly, appellant's ability to be rehabilitated is not established based upon this record. Dr. Merin found appellant's personality characteristics unfavorable and maladaptive. Moreover, appellant never accepted responsibility for the charged rape and murder despite compelling and uncontradicted evidence of his guilt. Dr. Merin, who actually interviewed and tested the appellant, found that appellant tends to blame others for his problems. (Appendix at 26).

that he did not do so. "I didn't investigate it. It's unknown quantity. That's one of the issues that needs to be looked at." (PCR-18, 1218-19). This proposed mitigating circumstance was not established through Dr. Mosman's testimony.

Finally, the factual basis for many of the non-statutory mitigating circumstances listed by Dr. Mosman has already been presented to the jury below in the form of lay mitigation witnesses. Of the list mentioned by appellant on appeal (Appellant's Brief at 23-24), those representing appellant's asserted dysfunctional family life, unstable or deprived childhood, maternal deprivation, and, alcoholic father, were presented and addressed during the penalty phase. So too, was the fact that appellant had a family who supported and cared for him during his lifetime. The trial court extensively analyzed this information in its sentencing order. (R. 598-600).

In sum, appellant was represented by two experienced defense attorneys who conducted extensive research into appellant's background and mental health. They hired two well qualified mental health experts to examine the appellant. That the two experts could not render sufficiently beneficial opinions was not the fault of the trial attorneys. Moreover, any limited benefit of calling such experts would be countered by potentially damaging revelations regarding appellant's

unfavorable personality characteristics and past conduct.[12] The defense attorneys made a reasonable tactical decision not to call the experts during the penalty phase. Nothing presented during the evidentiary hearing below suggests that this was an unreasonable decision. Accordingly, the trial court's denial of relief should be affirmed.

Appellant cryptically asserts that trial counsel were ineffective during the penalty phase for failing to move to strike the venire or request inquiry of the jurors when appellant was brought in with handcuffs and a belly chain. (Appellant's Brief at 11). The trial court below held a hearing on this issue and the jurors were questioned about any possible exposure to appellant in shackles. The trial court noted that few jurors observed appellant in shackles and they said it would not have affected their decision in this case. (PCR-23, 2211-12). The trial court concluded:

> Brief exposure to a defendant in prison clothing or restraints is not unduly prejudicial. *See Singleton v. State*, 783 So. 2d 970 (Fla. 2001); *Neary v. State*, 384 So. 2d 881 (Fla. 1980). This is particularly true in the instant case, where Defendant had already been convicted of first-degree murder and the penalty phase

[12]Appellant's selling crack cocaine and involvement in a gang fight would no doubt be explored by the prosecutor. Appellant apparently admitted to the police investigating him for the Claypool rape that he dealt drugs, but denied that he used drugs. (Appendix at 9).

> of the trial was beginning. Here, the record is clear that the brief sight of Defendant in handcuffs and/or shackles and belly chains (on the part of the few jurors who actually noticed and remembered seeing these restraints) did not affect the jury's decision to recommend a death sentence. Therefore, Defendant fails to demonstrate either deficient performance or prejudice on the part of counsel or error on the part of the trial court.

(PCR-23, 2212-13). Appellant has failed to argue how the trial court erred in deciding this issue below.

Appellant next asserts that Mr. Sims was ineffective for failing to predict this Court's decision in Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), where this Court announced a prospective rule to be applied when a defendant waives presentation of evidence during the penalty phase. (Appellant's Brief at 11). In response, the State notes that a "defense counsel cannot be held ineffective for failing to anticipate the change in the law." Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992). Moreover, Koon only applies to the situation where a defendant waives presentation of all penalty phase evidence and does not apply to defense counsel's tactical decisions on what evidence to present.

Sub judice, defense counsel presented extensive mitigation evidence from appellant's family members. The defense attorneys made a tactical decision not to present mental health experts because their testimony was not sufficiently beneficial to

overcome the risks. Such a tactical decision does not require inquiry of the defendant or his approval.[13] See generally Gore v. State, 784 So. 2d 418, 438 (Fla. 2001)("Despite Gore's assertions, the record reflects that defense counsel acted reasonably in seeking out and evaluating potential mitigating evidence and that counsel made strategic decisions in declining to call certain defense witnesses.").

D. Failure To Establish Prejudice

As the trial court found below, even if collateral counsel has identified some deficiency on the part of trial counsel, appellant has not established any resulting prejudice.[14] Collateral counsel has not been able to uncover any significant mitigation that might have altered the jury recommendation in

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[13]"Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client. The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds." Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 2510 (1977)(Burger, C.J., concurring).

[14]Assuming for a moment defense counsel could be considered ineffective for failing to find the defense oriented Dr. Mosman in 1992, appellant still has not established any prejudice. This Court should consider that any favorable mental health testimony was effectively countered by the more credible state expert, Dr. Merin.

this case. Appellant stealthily broke into a young woman's apartment in the middle of the night, raped her, and, brutally murdered her. There are three strong aggravating circumstances in this case, the murder of Denise Collins was heinous atrocious and cruel, was committed during the course of a sexual battery, and appellant had a serious and related prior violent felony conviction, the subsequent sexual battery of Heather Claypool. The jury voted for death by a margin of 11-1. See generally Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989) (postconviction evidence of abused childhood and drug addiction would not have changed outcome in light of three aggravating factors of HAC, during a felony, and prior violent convictions); Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997) (no reasonable probability of different outcome had mental health expert testified, in light of strong aggravating factors); Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997) (three aggravating factors of during a burglary, HAC, and prior violent felony overwhelmed the mitigation testimony of family and friends offered at the postconviction hearing). Confidence in the outcome of appellant's penalty phase has not been undermined. Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a

deficient performance and a reasonable probability of a different result”).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING SEVERAL CLAIMS IN APPELLANT'S MOTION FOR POST-CONVICTION RELIEF? (STATED BY APPELLEE).

Appellant next asserts that the trial court erred in summarily denying several claims below. The State disagrees. The record supports the trial court's summary denial of each claim.

I. Applicable Law On Summary Denial

"Procedural bars repeatedly have been upheld as valid where properly applied to ensure the finality of cases in which issues were or could have been raised." Atkins v. State, 663 So. 2d 624, 627 (Fla. 1995). Whether or not a claim is procedurally barred is reviewed *de novo*. West v. State, 790 So. 2d 513, 514 (5th DCA 2001) (stating that a finding of a procedural bar is reviewed *de novo* citing, Bain v. State, 730 So. 2d 296 (Fla. 2d DCA 1999)). See also Bailey v. Nagle, 172 F.3d 1299, 1302 (11th Cir. 1999) (stating that whether a petitioner is procedurally barred from raising particular claims is a mixed question of law and fact that we review de novo); Greer v. Mitchell, 264 F.3d 663, 673 (6th Cir. 2001) (stating that whether a state court rested its holding on procedural default so as to bar federal habeas review is a question of law that we review de novo).

Similarly, the question of whether counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984), is reviewed *de novo*. Stephens v. State, 748 So. 2d 1028 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel.)

In Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993), cert. denied, 502 U.S. 834 (1994), this Court observed that "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion. However, an evidentiary hearing is not a matter of right, a defendant must present "'apparently substantial meritorious claims'" in order to warrant a hearing. State v. Barber, 301 So. 2d 7, 10 (Fla.), rehearing denied, 701 So. 2d 10 (Fla. 1974)(quoting State v. Weeks, 166 So. 2d 892 (Fla. 1960)). The motion must assert specific facts which, if proven, would warrant relief. Fla.R.Crim.P. 3.850(c)(6). To properly raise an allegation of ineffective assistance, a defendant must allege specific facts that, when considering the totality of circumstances, are not conclusively rebutted by the record, and demonstrate that counsel's performance was so deficient that but for the deficiency, the outcome of the trial would have been different. Kennedy v. State, 547 So. 2d 912, 913-14 (Fla. 1989).

II. Analysis of Appellant's Claims

A. Failure To Challenge The Credentials Of FDLE Forensic Serologist Charles Badger

The trial court rejected appellant's claim that defense counsel was ineffective for failing to challenge the credentials of an FDLE Forensic Serologist. The trial court stated:

> Defendant alleges counsel failed to adequately challenge the credentials of state witness Charles Badger, an employee of the Florida Department of Law Enforcement who had been "involved" with testing certain physical evidence retrieved from the victim's apartment." When the State tendered Mr. Badger as an expert in the field of serology, Ms. Cashman declined to voir dire and stated, "we're familiar with Mr. Badger." Defendant argues this deprived counsel of the opportunity to inquire about the witness's current standing as an FDLE employee and his current level of knowledge, skill, experience, education, and training, which "undoubtedly presented the jury with a defense endorsement" of Mr. Badger's testimony. Finally, he argues that this allowed the judge to state that the witness was qualified as an expert, which may have ben an improper comment.
>
> The State argues in response that Defendant failed to show how counsel's failure to voir dire this witness actually prejudiced him, because he did not allege that Mr. Badger was actually unqualified or that any specific damaging facts could have been revealed through further questioning. The State also argues that it is long established practice in Florida for judges to qualify witnesses as experts who may give opinion testimony and notes that Defendant did not cite any cases to the contrary.
>
> The State's arguments are well-taken. Defendant's allegations are conclusory and fail to demonstrate what questions counsel should have asked or how those questions would have impeached Mr. Badger's credibility. Therefore, he fails to demonstrate either deficient performance or prejudice.

> Furthermore, counsel's actions did not constitute an endorsement of the testimony and did prevent the jury from hearing additional information about the witness's qualifications, which might only have enhanced his credibility. Finally, it is proper for a judge to determine whether a witness is qualified to give opinion testimony and there was no error in stating that Mr. Badger was so qualified. *See* § 90.702 Florida Statutes.

(PCR-23, 2174-75).

Appellant simply failed to articulate any basis for the trial court to find counsel was ineffective. Appellant did not assert any facts from which the court could conclude the witness was unqualified to render an opinion.[15] Indeed, the record reveals that Mr. Badger had a Bachelor's Degree, had been trained as a Forensic Serologist, and, had been qualified to testify in Florida courts some "twelve or thirteen times." (TR. 663). Aside from failing to show a defect in Badger's qualifications, collateral counsel failed to identify any particular deficiency in the evidence presented by this witness. Consequently, the trial court properly found that appellant was not entitled to a hearing on this issue.

B. Counsel's Failure To Rehabilitate An African American Juror

[15]"The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error." Geralds v. State, 674 So.2d 96 (Fla. 1996)(citing Ramirez v. State, 542 So.2d 352, 355 (Fla. 1989)).

Appellant next asserts that the trial court erred in summarily

denying his claim that counsel was ineffective for failing to rehabilitate a potential African American Juror during voir dire. In rejecting this claim, the trial court stated:

> Defendant alleges counsel failed to rehabilitate potential juror Mattie Barnwell during voir dire after she told the state attorney she could not vote to impose the death penalty. He also alleges counsel failed to correct the state attorney's inaccurate statement that the juror would have to "take an oath swearing before God to follow the law of Florida," when in fact jurors may either swear or affirm. Defendant argues Ms. Barnwell was one of the few African-Americans in the venire and counsel's failure to rehabilitate her denied him a fair trial and impartial jury composed of a cross-section of the community.
>
> The State argues in response that it is mere speculation that this juror could have been rehabilitated since she spoke so firmly against the death penalty. The State also notes that Ms. Alexander, another juror who expressed reservations about the death penalty, was excused for cause even though she had been rehabilitated to the extent of agreeing to follow the law. The Florida Supreme Court upheld Ms. Alexander's excusal, although it must be added that she was acquainted with two people on death row, one of whom was the father of her child. *See Kimbrough v. State*, 700 So. 2d at 639.
>
> The standard for determining whether a prospective juror may be excused for cause because his or her views of the death penalty is whether those views would "prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions or oath." *See Wainwright v. Witt*, 469 U.S. 412, 424 (1985). Here, Ms. Barnwell stated that she would do away with the death penalty and, although she understood it was part of the law in Florida, she would not be able to go along with the

> law and swear to follow it. *See* guilt phase transcript, pages 148-151. Defendant fails to offer any specific questions counsel might have asked or persuasions counsel might have employed in an attempt to rehabilitate Ms. Barnwell, and it is unlikely such an attempt would have been successful. Therefore, Defendant fails to demonstrate either deficient performance or prejudice.

(PCR-23, 2175-76).

The trial court's rationale for denying this claim is clear and legally correct. The potential juror revealed an inflexible attitude on the death penalty. Asking trial counsel hypothetical questions about rehabilitating the juror, nearly a decade after the trial, would have been an exercise in futility. Summary denial of this claim was clearly appropriate. See generally Reaves v. State, 826 So. 2d 932 (Fla. 2002) (affirming summary denial of ineffective assistance claims where no challenge for cause would have been successful for named jurors and where claims that followup questions would have revealed a basis for cause challenges constituted mere "conjecture.").

C. Defense Counsels' Failure To Discover A Connection Between A Juror And FDLE During Voir Dire Or To Later Request A Mistrial

Appellant asserts with very little argument, that the trial court erred in failing to order a hearing or attach portions of the record to its denial of Claims VI and XVIII of his Motion

for Post-Conviction Relief. (Appellant's Brief at 31-32). The trial court rejected this claim, finding it was developed below at the time of trial and could have been raised on direct appeal. The trial court stated:

> Defendant alleges counsel failed to ask during voir dire whether the prospective jurors knew any FDLE employees, resulting in the failure to discover the fact that juror Eddie Julian's fiancé worked in the FDLE crime lab. He also alleges counsel failed to ask whether anyone had specific knowledge of DNA, so he failed to discover that Mr. Julian had taken "courses in DNA." He argues only that DNA evidence was a pivotal factor in the trial.
>
> The State argues in response that Mr. Julian's coursework and his fiancé's employment do not establish a reasonable probability that the outcome of the trial would have been different if these facts had been brought out on voir dire. The State also argues that defense counsel filed a motion for new trial and a motion to voir dire Mr. Julian. After a detailed voir dire in a hearing conducted August 8, 1994, the Court denied the motion for new trial.
>
> The underlying substance of this claim is clearly Mr. Julian's potential bias, an issue which could have been raised on direct appeal because it was thoroughly addressed at the conclusion of the trial. Therefore, it is procedurally barred, and Defendant is not permitted to attempt to relitigate the matter in a motion for post-conviction relief by rephrasing it in terms of ineffective assistance of counsel.

(PCR-23, 2177-78).

Appellant does not submit argument to show the trial court's procedural bar ruling is incorrect. When the juror's potential bias was revealed, trial counsel sought a full inquiry into the matter. The issue was fully discussed at a hearing conducted on

August 30, 1994. (TR. 150-188). The trial court considered the matter and denied a motion for new trial. (TR. 463). A claim which should have been raised on appeal is procedurally barred in a motion for post-conviction relief. Maharaj v. State, 684 So. 2d 726 (Fla. 1996)(Post-conviction relief petitioner's claims which were either raised or could have been raised on direct appeal were properly denied without an evidentiary hearing); Robinson v. State, 707 So. 2d 688, 697, n. 17 (Fla. 1998).

Summary denial of these claims was proper. The substance of this claim has been raised, addressed, and rejected by the trial court below. Appellant may not now simply recast this claim as an allegation of ineffective assistance. See Sireci v. State, 469 So. 2d 119, 120 (Fla. 1985)("[c]laims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel."). In any case, the record reveals that Juror Jilian denied knowing any of the FDLE witnesses or that he discussed the case with his fiancé. (TR. 160-62). The lower court's summary denial of this claim should be affirmed.

D. Prosecutorial Comments

Finally, appellant asserts the trial court erred when it

failed to provide him a hearing on his assertion that counsel was ineffective for failing to object to the prosecutor's closing argument. (Appellant's Brief at 32). Appellant asserts that the prosecutor's burden shifting argument was improper and that counsel should have requested a mistrial. The State disagrees.

The trial court denied this claim below, stating:

> Defendant alleges counsel failed to move for a mistrial after the sate attorney's improper closing argument. Specifically, he alleges the state attorney impermissibly shifted the burden of proof to the defense on three separate occasions, implying that the defense should have presented certain evidence but failed to do so. He acknowledges that counsel objected each time and the Court sustained each objection.
>
> The State argues in response that after the jury was sent to deliberate, the Court asked Defendant if he had been consulted about whether to request a mistrial based on Mr. Ashton's closing arguments. Defendant responded that he and counsel had discussed the matter and he agreed that it would not be a good idea to request a mistrial. *See* pages 1004-1005 of the guilt phase transcript. The Court also gave two curative instructions during the closing argument to inform the jury that the defense was not required to put on evidence. *See* pages 953-936 and 942 of the guilt phase transcript.
>
> The state attorney's remarks were inappropriate, but the curative instructions were sufficient to correct any misconception in the minds of the jurors. Furthermore, the comments were simply not prejudicial enough to warrant a mistrial; counsel's obligations were fulfilled by raising timely objections. Finally, even if a new trial had been requested and granted, there is no reasonable probability that the outcome would have been any different. Therefore, Defendant fails to demonstrate either deficient

performance or prejudice.

(PCR-23, 2178-79).

Trial counsel clearly made a tactical decision not to request a mistrial after consulting with the appellant.[16] Moreover, the trial court provided curative instructions to the jury. Even if a motion for mistrial had been requested, the trial court was under no obligation to grant it. Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994)("[i]n order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." (citations omitted). Based upon this record, appellant cannot establish a reasonable probability of a different result if only

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[16] A party should not be able to gamble on a favorable verdict, as in this case, then after an unfavorable verdict, request a new trial. See e.g. United States v. Morris, 977 F.2d 677 (1st Cir. 1992). "[A] defendant cannot learn of juror misconduct during trial, gamble on a favorable verdict by remaining silent, and then complain in a post-verdict motion that the verdict was influenced by the misconduct." Id. at 685 (citing United States v. Bolinger, 837 F.2d 436 (11th Cir. 1988), cert. denied, 486 U.S. (1989); Hampton v. Kennard, 633 So.2d 535, 537 (Fla. 2d DCA 1994)("the respondent should have brought it [juror misconduct] to the court's attention at the time it was observed rather than waiting until after an unsatisfactory verdict.").

the defense attorneys had requested a mistrial.

An examination of the comments at issue reveal the prosecutor was primarily arguing the uncontradicted nature of the evidence, not attempting to shift the burden of proof. For example, the prosecutor observed: "That hair in every microscopic respect matched exactly the hair of Darious Kimbrough. And you have not been given one piece of evidence to refute that." (TR. 933). This was immediately followed by an objection and a curative instruction: "Before Mr. Ashton goes back in his closing arguments let me remind everyone I said it before and I said it again and Mr. Ashton said it before, defense has - - the burden is entirely on the state to prove the case. Defense has no burden whatsoever. So counsel is instructed not to even imply that they do." (TR. 935-36). The prosecutor's comments certainly did not warrant the drastic remedy of a mistrial.[17] Summary denial of this claim was clearly appropriate.

[17]The State also notes that the prosecutor's comments appear in the record and could have been raised on direct appeal.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State asks this Honorable Court to affirm the denial of post-conviction relief in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Robert T. Strain, Assistant Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, on this ___ day of May, 2003.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

CHARLES J. CRIST, JR.
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IN THE SUPREME COURT OF FLORIDA

DARIOUS MARK KIMBROUGH,

Appellant,

vs. **CASE NO. SC02-1158**

STATE OF FLORIDA

Appellee.

_____/

APPENDIX

Psychological Report by Sidney J. Merin, Ph.D., March 15, 2001