IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1158

DARIUS MARK KIMBROUGH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Darius Mark Kimbrough's motion for post-conviction relief which was brought pursuant to Florida Rule of Criminal Procedure 3.850.

Citations shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "R ___" followed by the appropriate page numbers. The post-conviction record on appeal will be referred to as "PC-R ____" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained.

This appeal is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Kimbrough was deprived of his right to a fair and reliable trial and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives. Furthermore, as to the denial of Mr. Kimbrough's motion for post-conviction relief, there has been an abuse of discretion and a lack of competent evidence to support certain of the trial judge's conclusions.

REQUEST FOR ORAL ARGUMENT

Because of the seriousness of the claims at issue and the stakes involved, Darius Mark Kimbrough, a death-sentenced inmate on Death Row at Union Correctional Institution, urges this Court to permit oral argument on the issues raised in his appeal.

STATEMENT OF CASE AND FACTS

Darius Mark Kimbrough was charged by indictment for the offenses of murder in the first degree, burglary of a dwelling with intent to commit a sexual battery, and sexual battery with great force. He pleaded not guilty. Mr. Kimbrough's case proceeded to a jury trial on June 27, 1994, in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida. He was represented by Kelly Sims and Patricia Cashman of the Orange County Public Defender's Office. The State was represented by Jeffrey Ashton and Ted Culhan of the Orange County State Attorney's Office.

The facts adduced at trial were summarized by this Court in its direct appeal opinion as follows:

> 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, 635-36, (Fla. 1997).

On July 1, 1994, the jury returned guilty verdicts on all counts. On August 8, 1994, the case was set for a sentencing hearing, but the Court discovered that three jurors had read newspaper accounts of the trial after the guilt phase but before the penalty phase. Defense counsel moved for a mistrial as to

the penalty phase only and the Court granted the motion.

On November 8, 1994, a new jury was selected to hear the penalty phase only. After hearing matters in mitigation and aggravation, the jury recommended the sentence of death by a vote of eleven to one. This Court noted that "[T]he 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." Kimbrough, 700 So.2d at 636. The trial court followed the jury recommendation and sentenced Mr. Kimbrough to death with two concurrent life terms for the other charges.

This Court affirmed the conviction on direct appeal. Kimbrough v. State, 700 So.2d 634 (Fla. 1997). Rehearing was denied on October 21, 1997. Mr. Kimbrough filed a Petition for Writ of Certiorari with the United States Supreme Court which was denied on March 23, 1998. Kimbrough v. Florida, 523 U.S. 1028, 118 S.Ct. 1316, 140 L.Ed.2d 479 (1998).

On April 21, 1998, the Office of the Capital Collateral Regional Counsel-Middle Region filed a Notice of Newly

Designated Counsel with this Court.

On June 30, 1998, Mr. Kimbrough filed a Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend. An amended Rule 3.850 motion was filed on March 10, 2000. The Court held a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993) and Fla.R.Crim.P. 3.851(c) on September 22, 2000. The court granted an evidentiary hearing on Claims V, X and XIX of the motion by an order dated September 29, 2000. (PC-R. 1531-32).

At a hearing conducted on October 5, 2001, the court inquired of one juror regarding the proximity of her daughter's residence to the crime scene and whether that fact affected her verdict (Claim V of the Rule 3.850 motion) and interviewed all the penalty phase jurors regarding whether they had observed the Appellant in shackles and whether they were affected by such observations (Claim X of the Rule 3.850 motion). (PC-R. 394-545).

The evidentiary hearing for Claim XIX was conducted by the court from February 25 through March 1, 2002. The court's request for written closing argument was complied with by the State of Florida on March 15, 2002 (PC-R 2113-48) and by the Appellant on the same date (PC-R 2149-70). The court entered

its 27-page order denying Rule 3.850 relief on April 26, 2002 (PC-R 2171-97). The Appellant filed his appeal notice on May 7, 2002 (PC-R 2198) which presents this appeal as being properly before this Court.

SUMMARY OF ARGUMENT

1. In analyzing the criteria from Ragsdale v. State and using the guidance from Ake v. Oklahoma, Mr. Kimbrough's trial counsel were ineffective. There were egregious error-filled decisions not to use their psychologists for statutory mental health matters and there was an abysmal failure to establish a theme in Mr. Kimbrough's defense with the abundance of available non-statutory mitigation. The consequences are that but for counsels' errors, there is a reasonable probability that the

result of Mr. Kimbrough's penalty phase would have been different; it is a probability sufficient to undermine confidence in the outcome of Mr. Kimbrough's trial and sentence.

2. The trial court erred when it denied Mr. Kimbrough an evidentiary hearing on five of the claims in Appellant's Rule 3.850 motion. This Court should order an evidentiary hearing on the claims listed because each claim requires a factual determination by the trial court.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING RELIEF ON THE AKE V. OKLAHOMA CLAIM OF THE RULE 3.850 MOTION.

As previously indicated, the court conducted an evidentiary hearing from February 25 through March 1, 2002, on Claim XIX of the Rule 3.850 motion. That claim alleged that Mr. Kimbrough was deprived of his rights to due process and equal protection under the Fourteenth Amendment, as well as his rights under the Fifth, Sixth, and Eighth Amendments of the United States

Constitution because his trial counsel failed to prepare a competent mental health professional to evaluate Mr. Kimbrough and, as a result, Mr. Kimbrough was denied his right to adequate mental health assistance under Ake v. Oklahoma, 470 U.S. 78, 105 S.Ct. 1087 (1985).

The recent case of Ragsdale v. State, 798 So.2d 713 (Fla. 2001), provides significant guidance in determining the issue of whether defense counsel were ineffective at the penalty phase of this case in their investigation and presentation of mitigation evidence.

First, Ragsdale points out that the penalty phase of a capital trial must be subject to meaningful adversarial testing to be reliable. (Ragsdale at 716). Secondly, there is a strict duty on defense counsel to conduct a reasonable investigation of the defendant's background. (Ragsdale at 716). The court noted, thirdly and significantly, that Ragsdale's trial had no testimony from mental health experts to explain how the defendant's background factors may have contributed to the defendant's psychological and mental health status at the time of the crime. (Ragsdale at 717).

The fourth criteria from Ragsdale in the postconviction analysis is that the court also must consider the reasons why counsel did not investigate or present available evidence and

whether counsel made a reasonable tactical [or strategic] decision to forego further investigation of mental health mitigation. (Ragsdale at 718-19).

Lastly, the postconviction court must measure the evidence that was available against the evidence presented at the penalty phase; if there is a reasonable probability of a different result, the defendant has proved his ineffective assistance of counsel claim and should be granted relief. (Ragsdale at 720).

The Ragsdale criteria, of course, has a historical foundation in Ake v. Oklahoma, supra, where the United States Supreme Court discussed a defendant's right to be provided with "a competent psychiatrist ...[to] conduct an appropriate examination and *[to] assist in [the] evaluation, preparation and presentation of the defense*." Ake at 82. (emphasis added). That assistance is required because "[w]hen jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of success.' (citation omitted). By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make

its most accurate determination of the truth on the issue before them." Ake at 81. Mr. Kimbrough argues, of course, that an identical value is given by psychologists to a sentencing court and jury in the penalty phase of a capital trial.

In the context of the evidentiary court's obvious familiarity with the experienced trial counsel in this case, it is helpful to understand the known errors counsel committed previously in Mr. Kimbrough's case.

First, in the direct appeal, Mr. Kimbrough's appellate counsel tried to argue that the trial court erred in not conducting a proper Frye[1] hearing relative to the DNA testimony and evidence presented at trial. However, this Court stated it was the trial counsel who erred, not the trial court. Specifically, this Court indicated that trial counsel failed to make a timely request for a Frye hearing and, consequently, no abuse of discretion was found. Kimbrough v. State, 700 So.2d 634, 637 (Fla. 1997).

Secondly, trial counsel erred and was ineffective at the start of selection of the second penalty phase jury. During the proceeding on November 7, 1994, court room deputies failed to remove shackles from the defendant who later inadvertently exposed his handcuffs and belly chain in clear view of the

[1]Frye v. United States, 293 F. 1013, 1014 (D.C.Cir. 1923).

venire. Trial counsel Patricia Cashman informed the Court that she might move to strike the entire venire but Attorney Cashman failed or neglected thereafter to do so. ("We *may* have to get another fifty if they all seen him."; [emphasis added]; (R. Penalty Phase Vol. I p.28).

Furthermore, neither of Mr. Kimbrough's co-counsel followed-up with a contemporaneous request to inquire of the members of the venire to determine whether any had seen the shackles or if any were prejudiced by the sight of the handcuffs and belly chain. The failure to move to strike the venire and to request an inquiry of the venire members led the trial court to its hearing of October 5, 2001, regarding Claim X where the Court made the proper shackling incident inquiry of the venire members selected for the penalty phase. The court analyzed the results of that hearing in its ruling on Claim X. (PC-R. 2181-83).

The third error by trial counsel was Kelly Sims' at the penalty phase in responding to Assistant State Attorney Jeff Ashton's discussion about the defense not using "a" mental health expert. Mr. Sims erred in not recognizing the prospective rule announced in Koon v. Dugger, 619 So.2d 246, 250 (Fla. 1993) requiring a court to have the defendant confirm on the record the discussion with counsel of mitigation matters and the defendant's wishes to waive presentation when such is the

case.

The trial court was aware that the following exchange took place during the penalty phase of Mr. Kimbrough's trial:

> "MR. ASHTON: [T]here's one other matter I want to bring up.
>
> MS. CASHMAN: Okay.
>
> MR. ASHTON: It is my understanding from our pretrial preparation in this case that at one point it was considered, thought was considered presenting some mental health evidence as to – Mr. Kimbrough's doctor was list[ed] and then withdrawn from the defense, which is fine. I think normally counsel presents mental health mitigation of some sort[.] I would like the court in some fashion to address the defendant on his agreement with counsel's decision not to present mental health mitigation. I'm not asking the court to go into the reasons. I want for future reference the record to reflect that the defendant has knowingly and intelligently, waived any mental health mitigation or something to that effect. I mean it's –
>
> THE COURT: Let me ask the attorneys first. Is it your choice, did you go through the evaluation and decide this was the best way to go here?
>
> MR. SIMS: We have made a strategic decision. We're not – we're objecting to anybody inquiring of our client about our confidential communication.
>
> THE COURT: I would like to know at least he agreed with you all.
>
> MR. SIMS: I object to anybody asking him anything about what our decisions were with respect to how to present his mitigation.
>
> THE COURT: My concern is that I don't want him later to come down and say you all did this without his consent. He didn't agree with it. You were incompetent not to do it. I want to make sure this is what he's chosen to do. It's not too late to present

this stuff since you got the guy on the witness list. I would like to make sure that he would be in agreement with this.

MR. SIMS: Well, first off we [have] withdrawn the guy from the witness list.

THE COURT: Let me just make sure. Are you satisfied with everything they have done in this case, Mr. Kimbrough?

THE DEFENDANT: Well, not really because I got found guilty. But, well, you know, I got found guilty on evidence that's not putting me in the area. But, you know, that's how juries are sometimes. But, you know, **well, I never did discuss [with] them about mental thing and all that, if he talked to me.** (emphasis added).

THE COURT: Did you discuss this with him?

MR. SIMS: **No.** I can't remember discussing with him whether I was going to present the psychologist that evaluated him. I evaluated what the psychologist had to say and made the decision unilaterally. Mr. Kimbrough is not a defense attorney, a psychologist. **I thought he was no mitigation whatsoever.** (emphasis added).

THE COURT: You evaluated it. You saw nothing that would help him.

MR. SIMS. That's why we present it. If I thought it would help him I would have presented it. It's my decision and my decision alone. Not Ms. Cashman, not my client.

THE COURT: So did you tell him the reasons why you wanted to do it this way?

MR. SIMS: That's attorney client privilege Your Honor. And I decided that there was nothing to be garnered by putting it on.

THE COURT: What kind of experience do you have

in this particular area to make you competent to decide such a thing?

MR. SIMS: I can only stand on seven years of trying murder cases, first degree murder cases on a daily basis. So.

MR. ASHTON: Judge, my only concern is not to invade what they talked about. It's simply to make sure Mr. Kimbrough is aware of the defenses made by counsel because ultimately Mr. Kimbrough potentially would have the authority to overrule that. And I don't want him coming back later and saying well, had I known that this information was out there I would have made him present it. So I don't care. I want to make sure Mr. Kimbrough knows that information was out there, knows the decision was made not to present it. I don't care what they said to each other or even whether he agrees to it or not. But that he knows that because you know that's [a] potential thing down the line.

THE COURT: He was evaluated. So he knows a psychiatrist evaluated him.

MR. SIMS: Introduced him, went and talked and said this is what's going to happen and you need to be evaluated.

THE COURT: He ever see the evaluation?

MR. SIMS: It was a verbal.

THE COURT: It was a verbal.

MR. SIMS: Report to me.

THE COURT: So it was never in writing?

MR. SIMS: Right.

MR. ASHTON: It was a psychologist doctor everybody [would] recognize. I wouldn't have brought this up except he was initially listed as a witness and withdrawn which is – creates a record evidence that he was there but –

THE COURT: I want to make sure that isn't something that will come back to haunt this case later on. So I do know that Kelly Sims has been doing this a number of years. Do you always get your clients evaluated?

MR. SIMS: Pretty much every single time.

THE COURT: You['ve] seen enough reports that you feel like you can ferret out what's going to be positive for your client as opposed to of no value whatsoever?

MR. SIMS: Yes, Ma'am.

THE COURT: And just for the record I know you have been doing it a long time and I've not seen you do anything that didn't make sense, so I'll have to accept that. I certainly didn't mean to get into what you and your client talked about. I do want to cover the record as best I can as far as this particular evaluation.

MR. SIMS: Okay.

(R. Penalty Phase Vol. III pp. 521-527).

This colloquy between those in the courtroom utterly fails to show that Mr. Kimbrough understood what was going on. If the trial court had pressed on and developed a complete record regarding his making a knowing and intelligent decision to go with that of his attorneys, it likely would have developed a further component since neither the State or the trial court realized there were two mental health experts used and not presented by the defense.

Fourthly, as outlined above, the Ashton inquiry reflected a unilateral decision by Mr. Sims not to present any mental

health experts. The ill informed basis for that decision does not qualify as a reasonable and properly considered strategy and left Mr. Kimbrough's jury and sentencing judge without an abundance of mitigation information.

The fifth error of trial counsel involves the Court's postconviction consideration of and reliance upon the details provided by Dr. Robert Berland in his February 22, 2001, affidavit. (PC-R. 1667-81). In particular, Dr. Berland indicated that during his work for the defense at trial that there were indications that the defendant had suffered some head injuries which could have resulted in damage to Mr. Kimbrough's brain. (PC-R. 1673).

Dr. Berland's admitted shortcomings in further investigating or developing the issue of brain damage at the time of the trial were detailed in his affidavit. (PC-R. 1673-77). The significance of his follow-up efforts at postconviction were similarly detailed by Dr. Berland as he explained his first success in corroborating a head injury with a lay witness interview on February 19, 2001 (PC-R. 1677-78); this prompted his affidavit and the defendant's request for a PET scan which the Court ultimately granted. (PC-R. 2051-52).

It was in this context that the trial court had to determine whether trial counsel were ineffective for failure to

investigate and present evidence of mental health mitigation at Mr. Kimbrough's penalty phase. After all, based on the trial court's sentencing order, this Court referred to the "weak" nonstatutory mitigation that was presented, Kimbrough, 700 So.2d at 638, and upheld the trial court's failure to find age as a statutory mitigator by citing to Ellis v. State, 622 So.2d 991 (Fla. 1993): "Whenever a murder is committed by one who at the time was a minor, the mitigating factor of age must be found and weighed, but the weight can be diminished by other evidence showing unusual maturity..." (Ellis at 1001). This Court noted that Mr. Kimbrough, of course, was not a minor--he was nineteen at the time of the offense and thereafter cited to Merck v. State, 664 So.2d 939, 942 (Fla. 1995) and Peek v. State, 395 So.2d 492, 498 (Fla. 1980) for criteria for nineteen year-olds. Kimbrough, 700 So.2d at 637-38.

The evidence in the postconviction case showed the following.

First, that defense attorney Patricia Cashman was not routinely involved with or working on the case until the end of December, 1993. That is the time when defense attorney Kelly Sims left the Public Defender's Office. "[M]s. Cashman was not involved except in our monthly special defense meetings." "[S]he took over this case when I left at the end of December." (Testimony

of Kelly Sims, February 6, 2001, deposition, pp. 5 and 6).

Further, after taking the case by the first of January of 1994, Patricia Cashman was concentrating on the DNA evidence/issue.

Ms. Cashman *"had to bury herself"* in the DNA issue because of DNA evidence being fairly new according to the testimony of Public Defender Investigator Barbara Pizarroz on February 28, 2002. (PC-R. 1347).

Additionally, two weeks before Kelly Sims left the Public Defender's Office, on December 15, 1993, an "automatic" aggravator of a prior violent felony was established when the defendant was sentenced on his plea to the Claypool rape charges. (PC-R. 667-78).

Sims did not return to the case until his appointment by court order as a special assistant public defender on February 25, 1994. He billed no time upon his return to the case until a March 3, 1994, "case acceptance" conference with Public Defender Durocher. On March 8, 1994, Sims met with Cashman to discuss the division of responsibilities for the case. (PC-R. Exhibit 8 - Affidavit of Time dated January 19, 1995).

In the meantime, Cashman, with no identifiable second chair, talked to defense expert Dr. Eric Mings on February 9, 1994 (PC-R. Exhibit 1), and struck him from the defense witness list on

February 11, 1994 (PC-R. Exhibit 2).

After being retained by the defense on November 16, 1992, Dr. Mings was first listed as a defense witness on July 14, 1993. A second witness list dated December 14, 1993, was filed by the defense, presumably relating to a change of address for the expert.

Patricia Cashman took notes from a telephone call she had with Dr. Mings. The notes reflect a date of February 9. Testimony at the evidentiary hearing made it appear that the year was 1994--making the call two days before Mings was struck from the defense witness list [instead of 1993, three weeks before he filed his first invoice and requested an additional five hours beyond the 15 hours incurred to that date]. (PC-R. 588-93).

Among the handwritten entries by attorney Cashman, the following items appeared in the note: -the defendant denie[s] any problems; -all relatives live in Tennessee; -no history of abuse;

-[a] cousin was killed at age 16; -singing - won talent show trophies; -IQ 76 – 5th percentile; -WAIS R; -MMPI -valid but defensive; -spike on scale 4; -psychopathic deviant; -endorsing items consistent w[ith] family discord; -other scales normal. (PC-R. Exhibit 1).

The Public Defender's files produced the following involving Dr. Robert Berland:-a February 24, 1994, facsimile cover sheet memorandum from Dr. Berland to counsel Cashman which stated: I don't know if you've become familiar enough [with] the MMPI to see that this one's going to be a hard one but he is. There's definitely something wrong [with] him but he is working hard to hide it. Call at your convenience for data; -a February 28, 1994, letter from counsel Cashman to Dr. Berland by which additional "discovery" was forwarded to him; -a March 25, 1994, telephone call between counsel Cashman and Dr. Berland; handwritten file notes were made by Cashman which showed the following: -left hemisphere variation; -congenital defect; -MMPI – hidden craziness; -poss[ibility] Rx [history] of head inj[ury]; -denied [all] symptoms; -ambiguous WAIS; -left hemisphere prenatal damage? -MMPI – shows mental illness - difficult to present. (PC-R. Exhibit 10).

The evidentiary hearing record showed details from Dr. Berland's billing for his services. Importantly, he billed for only one hour of contacts with the defense counsel and was "off" the case at least by the end of April in 1994. (PC-R. Exhibit 10).

None of the experts' records and all of the evidentiary hearing testimony showed that Mr. Sims was completely incorrect

as to anti-social personality disorder being the existing diagnosis in 1994. The hearing testimony also revealed that no such diagnosis could ever be found because the DSM3R (1987) 301.7 criterion C requires evidence of a conduct disorder with an onset by age 15 in order to have a diagnosis of Anti-social Personality Conduct Disorder(sociopath); and there was none here. (PC-R. 2220).

An overview of Ms. Pizarroz's evidentiary hearing testimony and of the exhibit of her work product, as gathered by the State, shows that the bulk of her work in developing mitigation evidence, through her interviews and other measures, was performed after Dr. Berland was released from the case by the end of April, 1994. A good example is the July, 1994, interview of Cheryl Dorsch. The consequences meant there was no clinical expert guiding her, nor her attorney supervisors, for the several remaining months as the defense prepared for the June trial, nor during the "bonus" period of the four-plus months that the re-scheduled penalty phase provided. (PC-R. 1315-67).

At the hearing, Dr. Bill Mosman testified for Mr. Kimbrough about his review of all the files and materials from the time of the trial and in the parties preparation for the hearing. (PC-R. 992-97). He opined that the evidence reflected the existence of the three statutory mental health mitigators [F.S.

921.141(6)(b) - under the influence of extreme mental or emotional disturbance; F.S. 921.141(6)(e) - defendant acted under extreme duress; F.S. 921.141(6)(f) - the substantially impaired capacity] at the time of the offenses. (PC-R. 1000-02).

In addition, Dr. Mosman felt that the age of Mr. Kimbrough was also applicable. (PC-R. 1003). It is noted here that the following existed as case law authority at the time of Mr. Kimbrough's trial regarding Age as a statutory mitigator:

> Downs v. State, 574 So.2d 1095, 1099 (Fla. 1991)(vacating defendant's life sentence and imposing a life sentence based upon "ample mitigating evidence" including defendant's IQ of 71, a mental age of 13, and borderline mental retardation);
>
> Morris v. State, 557 So.2d 27, 30 (Fla. 1990)(vacating death sentence and imposing a life sentence where the mitigating evidence included circumstances that the defendant was "borderline mentally retarded with an IQ of approximately seventy-fie);
>
> Brown v. State, 526 So.2d 903, (Fla. 1988)(vacating defendant's death sentence and imposing a life sentence where the mitigating evidence included circumstances that the defendant has an IQ of 70-75, which was "classified as borderline defective or just above the level for mild mental retardation," and emotionally handicapped);
>
> Thompson v. State, 456 So.2d 444, 447 (Fla. 1984)(vacating death sentence and imposing a life sentence where there was "uncontradicted testimony" that the defendant had "an IQ between 50 and 70, which placed him clinically in the mildly retarded range").
>
> The following *post-1994* cases show the continuing importance

of Age as a mitigator:

> Jones v. State, 705 So.2d 1364, 1366 (Fla. 1998)(vacating defendant's death sentence and imposing a life sentence where the mitigating evidence included testimony that the defendant was "borderline" mentally retarded based upon the defendant's IQ of 76, and the fact that the defendant was placed in special education classes, had a first-grade reading ability and had learning disabilities);
>
> Cooper v. State, 739 So.2d 82, 88-89 (Fla. 1999)(vacating defendant's death sentence and imposing a life sentence where the mitigating evidence included evidence that the defendant suffered from brain damage, mental retardation, and had an abusive childhood; expert witnesses testified that a person's IQ of 82 is "low average," while an IQ of 77 is in the borderline mentally retarded range);

Dr. Mosman also testified that he could identify the presence of 30 nonstatutory mitigators regarding the available record about and for Mr. Kimbrough in 1994. (PC-R. 1003-1159). As to case authority, the following is a list for 23 of the non-statutory mitigators outlined by Dr. Mosman in his testimony:

1) potential and ability to be rehabilitated;
McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

2) lack of family life;
Thompson v. State, 548 So.2d 198 (Fla. 1989).

3) background--including father being an alcoholic;
Morgan v. State, 537 so.2d 973 (Fla. 1989).

4) Neglect;
Thompson v. State, 548 So.2d 198 (Fla. 1989).

5) disadvantaged or deprived childhood;
DuBoise v. State, 520 So.2d 260 (Fla. 1988).

6) educational deficits and difficulties;

Neary v. State, 384 So.2d 881 (Fla. 1980).

7) emotional impairment;
Amazon v. State, 487 so.2d 8 (Fla. 1986).

8) any emotional disturbance;
Cochrane v. State, 547 So.2d 928 (Fla. 1989).

9) emotional distress even if not extreme;
Boggs v. State, 575 So.2d 1274 (Fla. 1991).

10) mental impairments both cognitively and intellectually;
DuBoise v. State, 520 So.2d 260 (Fla. 1988).

11) medical problems, history of multiple head injuries;
Carter v. State, 560 So.2d 1166 (Fla. 1990).

12) utilization of alcohol or drugs;
Buford v. State, 570 So.2d 923 (Fla. 1990).

13) previous contributions to society;
Harmon v. State, 527 So.2d 182 (Fla. 1988).

14) psychological difficulties;
Brown v. State, 565 So.2d 304 (Fla. 1990).

15) positive jail record after arrest and through trial;
McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

16) remorse;
Trotter v. State, 576 So.2d 691 (Fla. 1991).

17) good behavior during trial;
Parker v. State, 476 So.2d 134 (Fla. 1985).

18) crimes out of character;
Pentacost v. State, 545 So.2d 861 (Fla. 1989).

19) maintained relationships with family members;
McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

20) mild brain abnormality;

McKinney v. State, 579 So.2d 80 (Fla. 1991).

21) grew up without father;
Neary v. State, 384 So.2d 881 (Fla. 1980).

22) lost 16 year-old cousin several years before the crime;
Cochrane v. State, 547 So.2d 928 (Fla. 1989).

23) mental/emotional handicap;
Rodriguez v. State, 575 So.2d 170 (Fla. 1991).

Dr. Sidney Merin testified for the State and, as found by the court, he concluded that there were no statutory or nonstatutory mitigators that could have been presented at the penalty phase other than the "mild" mitigator of Mr. Kimbrough having moved around a lot as a child. (Order: PC-R. 2221; testimony: PC-R. 1438-44).

The bottom line and inescapable conclusion from the record and evidentiary hearing testimony is that the trial court ignored competent, substantial evidence that showed Mr. Kimbrough met the Ragsdale criteria in proving deficient performance of trial counsel and prejudice in the penalty phase of Mr. Kimbrough's trial.

The court downplayed the fact that attorney Patricia Cashman grossly misunderstood Dr. Mings' MMPI Scale 4 "psychopathic deviate" references as a diagnosis of "psychopathic deviant." The court's finding that it was a "technical misunderstanding" (PC-R. 2222) does not recognize that the misunderstanding caused

the defense to drop its expert and abandon the pursuant of mental health mitigation. Cashman’s misunderstanding

It is also an inescapable conclusion that Kelly Sims some how extrapolated "sociopath" from Cashman's wrongful "psychopathic deviant" diagnosis as the court so found (“[H]e believes the term “sociopath” was used...”; PC-R. 2219). Referring to Dr. Berland's affidavit of February 22, 2001, and the materials surrounding Ms. Cashman's telephone call with Dr. Berland, at a minimum, Mr. Sims thereafter dropped the ball [for unknown reasons] with not pushing Dr. Berland himself -- after all, Dr. Berland knew there was "a hidden craziness" that further work should have found so it wouldn't be hidden from the jury. It is amazing that Kelly Sims felt he had it all understood, despite having his first expert struck from the witness list by co-counsel and despite only billing for 45 minutes in total contacts with Dr. Berland. (PC-R. Exhibit 10).

The court attempted to downplay Dr. Mosman’s testimony by finding, without elaboration, that the there was no evidence to support the existence of the mitigators discussed. (PC-R. 225). Without reference to any testimony or details, the court wrongly found that trial counsel, fearing cross-examination of unnamed factors showing Mr. Kimbrough in a non-defined “negative light” (PC-R. 2222), exhibited a reasonable trial tactic in not calling

Dr. Mings or Dr. Berland (PC-R. 2223). This ruling completely ignored the evidence of the separate abandonment of each expert before the expert's work was understood or finished.

Consequently, in analyzing the criteria from Ragsdale and using the guidance from Ake, Mr. Kimbrough's trial counsel were ineffective. There were egregious error-filled decisions not to use their psychologists for statutory mental health matters and there was an abysmal failure to establish a theme in Mr. Kimbrough's defense with the abundance of available non-statutory mitigation. The consequences are that but for counsels' errors, there is a reasonable probability that the result of Mr. Kimbrough's penalty phase would have been different; it is a probability sufficient to undermine confidence in the outcome of Mr. Kimbrough's trial and sentence.

ARGUMENT II

THE TRIAL COURT ERRED BY FAILING TO GRANT AN EVIDENTIARY HEARING AS TO CLAIMS II, IV, VI, VII, AND XVIII OF THE RULE 3.850 MOTION. MR. KIMBROUGH WAS THEREBY PREVENTED FROM ESTABLISHING INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND CONSEQUENT PREJUDICE THROUGH HEARING TESTIMONY REGARDING THE DISPUTED FACTS AS PLED IN HIS MOTION. THE DENIAL OF HEARINGS WAS IN VIOLATION OF THE SIXTH AND EIGHTH AMENDMENTS AND DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND RELATED PROVISIONS OF THE FLORIDA CONSTITUTION.

The trial court erred when it denied Mr. Kimbrough an evidentiary hearing on five of the claims in Appellant's Rule

3.850 motion as discussed below. Mr. Kimbrough recognizes that his motion was pending on October 1, 2001, at which time this Court revised Fla.R.Crim.P. 3.851 by expanding on the criteria for setting evidentiary hearings. Although his motion was not subject to the revised rule, Mr. Kimbrough notes that the Court Commentary to the revised rule stated the following:

> "Most significantly, that subdivision [subdiv. F] requires an evidentiary hearing on claims listed in an initial motion as requiring a factual determination. The Court has identified the failure to hold evidentiary hearings on initial motions as a major cause of delay in the capital postconviction process and has determined that, in most cases, requiring an evidentiary hearing on initial motions presenting factually based claims will avoid this cause of delay."
>
> Fla.R.Crim.P. 3.851; Court Commentary, 2001 Amendment.

Mr. Kimbrough urges this Court to find that each of the referenced claims were factually based and that the court below erred in denying the claims without hearings. The standard of review for summary denial of a Rule 3.850 claim is as follows:

> To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record.
>
> Lucas v. State, 2003 WL 60827 (Fla. Jan. 9, 2003)(omitting citations).
>
> Further, for Mr. Kimbrough, a Rule 3.850 litigant is

entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla.R.Crim.P. 3.850; See also, Valle v. State, 705 So.2d 1333 (Fla. 1997); Rivera v. State, 717 So.2d 477 (Fla. 1998); and Gaskin v. State, 737 So.2d 509 (Fla. 1999).

To support summary denial of a Rule 3.850 claim 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. Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), citing Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993). Accord: Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000)("this
Court's cases decided since *Hoffman* [571 So.2d 449 (Fla. 1990)] have made clear that an order denying an evidentiary hearing is sufficient if it sets forth a clear rationale explaining why the motion and record conclusively refute each claim...". (emphasis added).

The presentation of a rationale for its ruling as opposed to an attachment of those specific parts of the record that refute the claim would ordinarily comply with the above cited requirements.

However, the trial court merely gave its own characterization of the substance of the claim. There is no basis or objective rationale provided as to why the trial court disagreed with or rejected the substance of the claim. The trial court likewise failed to attach any specific parts of the record to refute this claim.

An incomplete or unobjective rationale, in the absence of a record attachment, cannot comply with Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000).

Additionally, the standard of proof for the trial court and standard of review for this Court in addressing a claim of ineffectiveness of trial counsel was addressed in Stephens v. State, 748 So.2d 1028 (Fla. 1999), summarized in Bruno v. State, 807 So.2d 55, 61-62 (Fla. 2001), and cited in Thomas v. State, 2003 WL 193743 (Fla. Jan. 30, 2003):

> The test to be applied by the trial court when evaluating an ineffectiveness claim is two-pronged: The defendant must show that trial counsel's performance was deficient and that the defendant was prejudiced by the deficiency. The standard of review for a trial court's ruling on an ineffectiveness claim is also two-pronged: The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.
>
> Thomas, 2003 WL 193743 at 1.

A. Claim II

In the second claim of Mr. Kimbrough's Rule 3.850 motion, he alleged that he was denied the effective assistance of counsel in violation of the Sixth, Eighth and Fourteenth amendments to the United States Constitution when counsel failed to adequately challenge the credentials of a state expert witness, namely, one Charles Badger, a FDLE employee. The claim detailed the record at trial, noted that the record could only lead to presumptions about the reasons for counsel's actions and cited authority as to the inappropriateness of placing a court in the position of endorsing a party's witness. (PC-R. 1478-80).

Without an evidentiary hearing, Mr. Kimbrough was unable to inquire as to counsel's reasons for not conducting *voir dire* as to the expert's credentials. The record is void as to whether trial counsel made a reasonable strategic decision after considering and rejecting alternative courses of action as would be required by Valle v. State, 778 So.2d 960, 965 (Fla. 2001) and Shere v. State, 742 So.2d 215, 220 (Fla. 1999). Without an evidentiary hearing, Mr. Kimbrough was unable to present expert testimony showing the deficiency and prejudice from counsel's actions.

Instead of treating the claim as one requiring a factual

determination, the court appears to have treated it as a pure legal issue. Without referring to Mr. Kimbrough's reliance on Professor

Ehrhardt and the ABA Civil Trial Practice Standard (PC-R. 1480), the court simply adopted, without citing to legal authority, the State's response that "[i]t is long-established practice in Florida for judges to qualify witnesses as experts..." (PC-R. 2174).

B. Claim IV

The fourth claim of the Rule 3.850 motion alleged that Mr. Kimbrough's right to a jury composed of a cross section of the community based on the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution were violated by counsel's ineffectiveness during voir dire when counsel failed to rehabilitate one of the few African-Americans on the venire. (PC-R. 1482-85).

The trial record reflects that defense counsel simply waived any questioning of this venire member by telling the court "[N]othing your honor" when the State finished its voir dire. (R. 151). Without an evidentiary hearing, Mr. Kimbrough was unable to inquire as to counsel's reasons for not conducting *voir dire* as to this juror in an effort to re-habilitate her.

The record is void as to whether trial counsel made a reasonable strategic decision after considering and rejecting alternative courses of action as would be required by Valle and Shere, supra, when counsel failed to object to the State telling the juror she was bound swear under oath or by failing to alert the juror himself that F.S. 92.52 permits jurors to affirm they can follow the law. Without an evidentiary hearing, Mr. Kimbrough was unable to present expert testimony showing the deficiency and prejudice from counsel's actions.

In its ruling, the court simply assumed that it would be "unlikely" any rehabilitative efforts would have been successful and denied the claim without a hearing or citation to authority. (PC-R. 2176).

C. Claims VI and XVIII

In his sixth and eighteenth claims, Mr. Kimbrough alleged that he was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution were violated by counsel's ineffectiveness (1) when, during voir dire, counsel failed to discover a juror's connection with the Florida Department of Law Enforcement (FDLE) (PC-R. 1486) and (2) when defense counsel failed to move for a mistrial after the state disclosed that the juror had a connection with an FDLE

employee (PC-R.1515-19).

Without a hearing and without a record attachment or citation to authority, the court rationalized that its post-trial conclusion of no prejudice, when denying a motion for new trial, settled the issue. It also presumed that trial counsel had no basis for moving for a mistrial and denied the claims as procedurally barred. (PC-R. 2178; 2187-88).

D. Claim VII

The seventh claim of the Rule 3.850 motion alleged that Mr. Kimbrough was denied the effective assistance of counsel at the guilt/innocence phase of his trial in violation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution when defense counsel failed to move for a mistrial after the state made three improper closing arguments. (PC-R. 1487-88).

The court acknowledged that the subject remarks of the State Attorney were inappropriate comments about burden shifting. (PC-R. 2179). At trial, after the second objected-to comment and before the third comment, the court warned the prosecutor that "[Y]ou have a tendency to make it like they got a responsibility here. They don't and that's mistrial material. Don't do it." (R. 934).

However, by the time the court ruled on the postconviction

motion, the court determined the comments were not "mistrial material" but did so without any citation to legal authority and denied the claim without any record attachment or evidentiary hearing. (PC-R. 2179). Without an evidentiary hearing, Mr. Kimbrough was unable to inquire as to counsel's reasons for not requesting a mistrial. The record is void as to whether trial counsel made a reasonable strategic decision after considering and rejecting alternative courses of action as would be required by Valle and Shere, supra. Without an evidentiary hearing, Mr. Kimbrough was unable to present expert testimony showing the deficiency and prejudice from counsel's actions. Instead, the court, with no given rationale and with ample speculation and conjecture, simply ruled that "even if a new trial had been requested and granted, there is no reasonable probability that the outcome would have been any different." (PC-R. 2179).

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the lower court improperly denied Rule 3.850 relief to Darius Mark Kimbrough. This Court should order that his conviction and sentence be vacated and remand the case for such further relief as the Court deems proper.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by U.S. Mail, first class postage prepaid, to Scott A. Browne, Assistant Attorney General, Office of the Attorney General, Westwood Building 7th floor, 2002 North Lois Avenue, Tampa, Florida 33607 and Darius Mark Kimbrough, DOC# 374123; P3207S; Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this 6th day of February, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Fla.R.App.P. 9.210 that the foregoing Initial Brief of the Appellant was generated in Courier New 12-point font.

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