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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This brief is filed on behalf of the Appellant Darius Mark Kimbrough in reply to the Answer Brief of Appellee, the State of Florida, regarding Argument I. The Appellant does not reply to the Answer Brief regarding Argument II.

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. The Appellee's Answer Brief will be referred to as "AB ___" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained.

ARGUMENT I

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

In its answer to the ineffective assistance of counsel penalty phase claim of the Appellant, Appellee incorrectly states that at trial "[d]efense counsel presented extensive mitigation evidence from appellant's family members." (AB. 79)(emphasis added). This Court correctly noted on direct appeal that "[T]here was no statutory mitigation and weak nonstatutory mitigation" when the Court ruled that the Appellant's death sentence was not disproportionate to other similar cases. *Kimbrough v. State*, 700 So.2d 634, 638 (Fla. 1997).

In fact, defense counsel argued for only one statutory mitigator (age; rejected by the trial court and this Court on direct appeal; *Kimbrough v. State*, 700 So.2d at 637) and for only five nonstatutory mitigators (unstable childhood; maternal

deprivation; father figure an alcoholic; dysfunctional family; and talent for singing) (R. 558-62).

This incorrect statement of the trial record is further padded by the Appellee with inappropriate and sarcastic attempts to twist the nature of the claims presented at postconviction and in Argument I of Appellant's brief. Specifically, Appellee states that "[t]rial counsel had no specific duty to locate Dr. Mosman, a Miami based attorney and licensed psychologist, at the time of trial." (AB. 69). Also stated later was that "[T]he Orlando attorneys had no duty to scour the State, hiring potentially dozens of experts, until they happened to find Dr. Mosman in Miami." (AB. 70). Further, it is stated by Appellee that "[A]ssuming 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." (AB. 80, FN 14).

Nowhere in the Appellant's postconviction pleadings nor in the evidentiary hearing is there any such suggestion that the Appellant was arguing IAC for defense counsel's failure to find or use Dr. Mosman at trial. To suggest that Dr. Mosman's use as Appellant's expert at the evidentiary hearing was anything more

is regrettable. As to the Appellee's assertion that its expert, Dr. Sidney Merin, was the more credible expert at postconviction, Appellee fails to provide the details or basis for such a conclusion and failed to draw this Court's attention to several recent examples of the State of Florida's use of Dr. Merin in other cases (*see*, for example, ***Walton v. State***, 28 Fla. L. Weekly S425 (Fla. May 29, 2003) and ***Sanders v. State***, 707 So.2d 664 (Fla. 1998).

Additionally, it appears that Appellee is trying to misconstrue or hide the key fact of defense counsel Cashman's misinterpretation of Dr. Ming's retention and work and her notation of "psychopathic deviant." The evidentiary court was correct when it ruled that "... there was no such diagnosis" and that Dr. Mings "was referring to the 'psychopathic deviate' scale, one which has nothing to do with deviant behavior." (PC-R.-23, 2192-96).

Therefore, Appellee is wrong to state that "[T]he MMPI was essentially normal with an elevated psychopathic deviate or deviant scale." (AB. 62)(emphasis added). Appellee is also wrong to state that "... Dr. Mings told defense counsel he had little positive mitigation to offer and a potentially damaging MMPI result (elevation on scale 4). " (AB. 69)(emphasis added).

Consequently, the Appellee repeats the essential error of

the trial court which found that "[defense counsel Cashman's] fears that Dr. Mings testimony would hurt defendant in front of a jury appear to have been based in part on a technical misunderstanding." (PC-R.-23, 2192)(emphasis added).

A better interpretation, to make a factual determination actually supported by the record, would have been for the evidentiary court to describe counsel's fears as based on a "monumental" misunderstanding. The misunderstanding led the public defender's office to remove Dr. Mings from its witness list. It led re-hired co-counsel Simms to be misled with his own misunderstanding that a "sociopathic" diagnosis was at hand from Dr. Mings. It short-changed the time-frame and work-up of successor expert, Dr. Berland. Again, as a result, Appellant was denied his right to adequate mental health assistance under *Ake v. Oklahoma*, 470 U.S. 78, 105 S.Ct. 1087 (1985).

The case of *Ragsdale v. State*, 798 So.2d 713 (Fla. 2001), does point out that the penalty phase of a capital trial must be subject to meaningful adversarial testing to be reliable; that there is a strict duty on defense counsel to conduct a reasonable investigation of the defendant's background; and that testimony from mental health experts can 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,* 798 So.2d at 717.

A "technical misunderstanding" should not explain away the reasons why counsel did not further investigate or present available mitigation evidence. *Ragsdale*, 798 So.2d at 718-19. While the evidentiary court's superior vantage point is given deference by this Court when reviewing IAC claims, only factual findings that are supported by competent, substantial evidence are to be upheld. *Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999).

In view of the evidentiary court's dismissal of the substantial statutory and nonstatutory evidence available at the time of and from the record of the trial below, as outlined by Dr. Mosman, (PC-R.-23, 2192-96), the evidentiary court findings not only fall under *Stephens* but those findings show a failure to properly measure the evidence that was available against the evidence presented at the penalty phase in violation of *Ragsdale*; because 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*, 798 So.2d at 720.

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 Reply 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, Concourse Center 4,

3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013 and Darius Mark Kimbrough, DOC# 374123; P3207S; Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this 11th day of July, 2003.

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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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