IN THE SUPREME COURT OF FLORIDA

CHARLES MICHAEL KIGHT,

Petitioner/Appellant,

v. CASE NOS: **74,974** and **75,086**

STATE OF FLORIDA,

Respondent/Appellee.
_____/

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND TO STATE'S ORIGINAL BRIEF ON RULE 3.850 APPEAL

CHARLES MICHAEL KIGHT, Petitioner/Appellant, in the above-referenced action, respectfully provides the instant short submission as a reply to the State's response to his petition for writ of habeas corpus and to the State's previously filed brief.

A. INTRODUCTION

The State filed a response to the habeas corpus petition and presented a brief on the Rule **3.850** appeal during the pendency of Mr. Kight's death warrant. The Court thereafter entered a briefing schedule. On Friday, January **5, 1990,** and Monday, January **8, 1990,** undersigned counsel's office contacted opposing counsel inquiring as to whether the State would be filing an answer brief on the Rule **3.850** appeal pursuant to the Court's schedule. Opposing counsel indicated that he was not certain

whether or not he would be filing an answer. Mr. Kight noted in his previously filed initial brief that, given this Court's briefing schedule, he would not present a reply argument therein, but would await the State's response/answer brief. Since oral argument is scheduled for tomorrow (January 9, 1990), Petitioner/Appellant will go forward and file this reply at this juncture, reserving the opportunity to file a reply to any new matters raised by any additional submissions the State may make. The affidavit appended hereto was served on opposing counsel on Friday, January 5, 1990.

B. HABEAS CORPUS PETITION

The Respondent's position on many of the issues presented in the habeas corpus petition is that former counsel's failure to present the claims on direct appeal was somehow tactical or deliberate. Mr. Kight submitted that counsel did not raise the issues because of prejudicially deficient performance. Appended hereto is an affidavit from former appellate counsel regarding these matters which reflects that the omissions were not tactical, strategic, deliberate, or reasoned. Since the facts at issue are in dispute, Mr. Kight urges that the Court allow an evidentiary hearing on the issue of ineffective assistance of appellate counsel. Mr. Kight also submits that relief is warranted at this juncture on the basis of the submissions of his habeas corpus petition. See Johnson v. Wainwright, **498** So. 2d

935 (Fla. 1987).

With regard to the State's argument that the trial court did not err in refusing to instruct the jury that it could consider Mr. Kight's age, particularly in light of his mental retardation and developmental impairments, as a mitigating factor because Mr. Kight had reached the "age of majority," Mr. Kight briefly replies as follows:

First, Mr. Kight's age at the time of the offense was 23, not "25" as the State wrote in its habeas corpus response (p. 5). The trial judge at sentencing noted as much (R. 499 [sentencing order]), and further made reference to the fact that "Dr. Krop testified that defendant's social age was that of an eight year old." Id. Given these circumstances, the trial court's refusal to allow the jury to consider the issue by providing an instruction on the statutory age mitigating factor made no sense.

It cannot be disputed that an age of 23 is a proper statutory mitigating circumstance for a capital sentencing jury to consider. See Hallman v. State, 305 So. 2d 180 (Fla. 1974); Hoy v. State, 353 So. 2d 826 (Fla. 1977); King v. State, 390 So. 2d 315 (Fla. 1980); Mikenas v. State, 367 So. 2d 606 (Fla. 1978). It was simply wrong for the trial court to remove the issue from the jury's consideration through its refusal to instruct on this statutory mitigator. This was particularly egregious when Mr. Kight's chronological age is considered in the context of his impairments, which made his real functioning much less than that

of his chronological age. The trial court, however, usurped the jury's important role in Florida capital sentencing proceedings, see Riley v. Wainwrisht, 517 So. 2d 656 (Fla. 1987); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (in banc); Tedder v. State, 322 So. 2d 908 (Fla. 1975), because Mr. Kight had reached the "age of majority." This is wrong under the eighth amendment. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Riley, supra. Under the trial court's construction, no jury would be allowed to consider the statutory mitigating factor of age in any case in which the defendant is over 18. That view, however, cannot be squared with the statute (sec. 921.141), this Court's construction of the statute, or the eighth amendment. The trial court's ruling was fundamental error under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), Penry, supra, and their progeny.

The State also suggests that appellate counsel somehow strategically decided not to present the issue on direct appeal. This is directly contrary to what was pled in the habeas corpus petition and to counsel's own affidavit. The issue was properly preserved for appellate review. Counsel's failure to urge it was ineffective assistance. In any event, given Hitchcock and its progeny, the claim is properly before the Court on its merits at this juncture: it involves fundamental eighth amendment error.

C. RULE 3.850 APPEAL

The State's prior submission says very little about Mr. Kight's claims. Like the lower court, the State relied on the former prosecutors' speculations, although the prosecutors themselves expressly testified that they recalled virtually nothing about this case, to contradict the voluminous proof presented by Mr. Kight. Neither the lower court nor the State, however, have addressed the specific instances of Brady/discovery violations discussed in Mr. Kight's brief (see Initial Brief of Appellant, pp. 12-36). Documents which should have been turned over to the defense were in the State's possession, but were not turned over. The State and lower court have simply ignored this. Cf. Roman v. State, 528 So. 2d 1169 (Fla. 1988). Finally, as discussed in Mr. Kight's brief, speculation (such as that provided by the prosecutors at the hearing) is simply not "competent, substantial evidence," and a circuit court's order denying Rule 3.850 relief cannot be sustained unless it is based on "competent, substantial evidence." Cf. State v. Michael, 530 So. 2d 929, 930 (Fla. 1988). The trial court and State err in relying on the former prosecutors' speculations, and err in ignoring the specific Brady/discovery violations involved in this case and discussed in Mr. Kight's brief.

The State's submissions also overlook the lower court's errors in refusing to conduct an evidentiary hearing on any of the other claims presented by Mr. Kight. The conflict of

interest claim (see Initial Brief of Appellant, pp. **36-51),** for example, cried out for evidentiary resolution. The lower court erred.

D. CONCLUSION

Petitioner/Appellant will not belabor the Court with a lengthy reply. On the basis of this submission, and Mr. Kight's prior submissions, we respectfully urge that the Court allow proper evidentiary resolution, grant a new trial and/or sentencing proceeding, and grant all other and any further relief which the Court may deem just, proper and equitable.

RESPECTFULLY SUBMITTED,

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. **0125540**

BILLY H. NOLAS
Chief Assistant Capital
Collateral Representative
Florida Bar No. **806821**

THOMAS H. DUNN
JOSEPHINE HOLLAND

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL **32301**
(904) 487-4376

By: Billy H Nolas

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by HAND DELIVERED to Mark Menser, Assistant Attorney General, Department of Legal Affairs, 119 Magnolia Park Courtyard, Tallahassee, FL 32301, this 8th day of January, 1990.