IN THE FLORIDA SUPREME COURT

PHILLIP ATKINS,	
Petitioner,	
v.	**Case No. 73,869**
STATE OF FLORIDA,	**EMERGENCY RESPONSE:** DEATH WARRANT SIGNED; EXECUTION IMMINENT.
Respondent.	

RESPONSE IN OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

COMES NOW respondent, State of Florida, by and through undersigned counsel and hereby files its response in opposition to the Petition for Extraordinary Relief, for a Writ of Habeas Corpus, Request for Stay of Execution, and Application for Stay of Execution pending Disposition of Petition for Writ of Certiorari, and would show unto this Court:

I.

PROCEDURAL HISTORY

Appellant was tried and convicted of first degree murder and kidnapping. The trial court imposed a sentence of death on the murder charge. Atkins appealed and in an opinion reported at Atkins v. State, 452 So.2d 529 (Fla. 1984), the Florida Supreme Court affirmed the judgments and remanded for reconsideration of the sentence. The issues raised in that appeal included:

> I. THE TRIAL JUDGE SHOULD HAVE FOUND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES.
>
> II. THE IMPOSITION OF CAPITAL PUNISHMENT FOR FELONY-MURDER CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.
>
> III. THE FACT THAT A MURDER WAS COMMITTED DURING THE COURSE OF A FELONY MAY NOT BE CONSIDERED AS AN AGGRAVATING CIRCUMSTANCE FOR PUNISHMENT PURPOSES WHEN THE BASIS OF THE CONVICTION IS OR MAY BE THE FELONY-MURDER RULE.
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> IV. THE TRIAL JUDGE IMPROPERLY FOUND AS TWO SEPARATE AGGRAVATING CIRCUMSTANCES THE FACT THAT THE MURDER WAS COMMITTED IN THE COURSE OF KIDNAPPING AND SEXUAL BATTERY.

V. THERE WAS INSUFFICIENT EVIDENCE FOR THE TRIAL JUDGE TO MAKE A FINDING THAT THE MURDER WAS COMMITTED WHILE DEFENDANT WAS ENGAGED IN THE COMMISSION OF A SEXUAL BATTERY.

VI. THERE WAS INSUFFICIENT EVIDENCE FOR THE TRIAL JUDGE TO FIND THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

In a reply brief, Atkins added the following two issues:

I. IF A DEFENDANT MAKES INCRIMINATING STATEMENTS AND CONSENTS TO SEARCHES SUBSEQUENT TO AN UNLAWFUL ARREST, MADE WITHOUT PROBABLE CAUSE, SHOULD THE STATEMENTS AND ANY EVIDENCE SEIZED DURING THE SEARCHES, BE SUPPRESSED AS "FRUIT OF THE POISONED TREE"?

II. IF A DEFENDANT HAS INGESTED A LARGE QUANTITY OF DRUGS AND ALCOHOL DURING THE DAY, AND IS THEN INTERROGATED BY POLICE, GIVING STATEMENTS AND CONSENTS TO SEARCH, SHOULD THE STATEMENTS AND EVIDENCE SEIZED FROM THE SEARCH BE SUPPRESSED?

The trial court again reimposed a death sentence. Atkins appealed and the Florida Supreme Court affirmed the sentence. Atkins v. State, 497 So.2d 1200 (Fla. 1986). The issue raised in that appeal was:

WHETHER THE TRIAL JUDGE PROPERLY REWEIGHED AND RE-EVALUATED AGGRAVATING AND MITIGATING CIRCUMSTANCES IN IMPOSING THE DEATH PENALTY.

Phillip Atkins now seeks habeas corpus relief in this Court urging eleven grounds for relief.

CLAIM I

THE CONVICTION IN THIS CASE IS VOID BECAUSE (1) THERE IS NO WAY OF KNOWING WHETHER THE VERDICT WAS BASED ON A CONSTITUTIONALLY PERMISSIBLE GROUND, AND (2) THERE IS NO WAY OF DETERMINING WHETHER THERE WAS JUROR UNANIMITY, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. MR. ATKINS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS APPELLATE ATTORNEY UNREASONABLY FAILED TO PRESENT THIS CLAIM ON DIRECT APPEAL.

CLAIM II

THE TRIAL COURT'S FAILURE TO CONVENE A NEW JURY TO AID IN RESENTENCING DENIED PHILLIP ATKINS HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS. MR. ATKINS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS APPELLATE ATTORNEY FAILED TO RAISE THIS ISSUE ON DIRECT APPEAL.

CLAIM III

THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. ATKINS' CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS IN LIGHT OF MAYNARD V. CARTWRIGHT.

CLAIM IV

THE JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY WAS ERRONEOUS AND MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. MR. ATKINS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS APPELLATE ATTORNEY UNREASONABLY FAILED TO RAISE THIS ISSUE ON DIRECT APPEAL.

CLAIM V

MR. ATKINS' DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

CLAIM VI

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE PRESENCE OF CERTAIN STATUTORY AND NONSTATUTORY MITIGATING CIRCUMSTANCES. MR. ATKINS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS APPELLATE ATTORNEY FAILED TO PRESENT THIS CLAIM AS UNDERSCORING THE NEED FOR A JURY TO CONDUCT THE REWEIGHING.

CLAIM VII

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. ATKINS OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. ATKINS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS APPELLATE ATTORNEY UNREASONABLY FAILED TO RAISE THIS CLAIM ON DIRECT APPEAL.

CLAIM VIII

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. ATKINS' TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. MR. ATKINS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS APPELLATE ATTORNEY UNREASONABLY FAILED TO PRESENT THIS CLAIM ON DIRECT APPEAL.

CLAIM IX

THE CORPUS DELICTI OF KIDNAPPING WAS NOT PROVED BY SUBSTANTIAL EVIDENCE AS REQUIRED IN

ORDER TO SUPPORT THE ADMISSION OF MR. ATKINS' STATEMENT FOR THE PURPOSE OF PROVING KIDNAPPING. THE ADMISSION OF THE STATEMENT TO PROVE KIDNAPPING VIOLATED MR. ATKINS' RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, FOURTEENTH AND EIGHTH AMENDMENTS. THE FAILURE TO RAISE THIS CLAIM ON DIRECT APPEAL DEPRIVED MR. ATKINS OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

CLAIM X

DURING THE COURSE OF VOIR DIRE EXAMINATION AND PENALTY PHASE ARGUMENT, THE PROSECUTION AND THE COURT IMPROPERLY ASSERTED THAT SYMPATHY TOWARDS MR. ATKINS WAS AN IMPROPER CONSIDERATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FAILURE TO RAISE THIS CLAIM ON DIRECT APPEAL DEPRIVED MR. ATKINS OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

CLAIM XI

THE STATE'S ATTEMPT TO TRY MR. ATKINS ON TWO COUNTS OF SEXUAL BATTERY WHEN THE STATE HAD NO EVIDENCE THAT THE CRIMES HAD BEEN COMMITTED PRECLUDED MR. ATKINS FROM RECEIVING A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL TRIAL AND SENTENCING DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. THE FAILURE TO RAISE THIS CLAIM ON DIRECT APPEAL DEPRIVED MR. ATKINS OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

For the following reasons, relief should be denied.

ARGUMENT

I.

In Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987), this Honorable Court opined:

> [15-17] Blanco's petition for writ of habeas corpus is almost entirely a repetition of the issues raised in the rule 3.850 proceeding. The gravamen of the petition, to use petitioner's phrase, is appellate counsel's failure to recognize egregious fundamental constitutional error appearing on the face of the trial record, to wit: ineffective assistance of trial counsel. Generally, ineffective assistance of trial counsel will not be cognizable on direct appeal when the issue has not been raised before the trial court. *State v. Barber*, 301 So.2d 7 (Fla. 1974). There are rare exceptions where appellate counsel may successfully raise the issue on direct appeal because the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue. *Stewart v. State*, 420 So.2d 862 (Fla. 1982) *cert. denied*, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983); *Foster v. State*, 387 So.2d 344 (Fla. 1980). Petitioner asks that we expand this exception by holding in effect, that not only may it be raised on direct appeal but that it *must* be raised on direct appeal, i.e., appellate counsel is ineffective for failing to do so. We decline to do so. A proper and more effective remedy is already available for ineffective assistance of trial counsel under rule 3.850. If the issue is raised on direct appeal, it will not be cognizable on collateral review. Appellate counsel cannot be faulted for preserving the more effective remedy and eschewing the less effective. By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material. Our determination above on the rule 3.850 proceeding that trial counsel was effective negates any need to replough this ground once again.
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> * * *
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> [19, 20] In its answer brief to the issues raised on appeal of the denial of rule 3.850 relief, the state points out numerous instances of issues which are procedurally barred because they either were or should have been raised on direct appeal. In his reply brief, collateral counsel makes the representation to this Court that "[i]f direct appeal was the place to raise this, it is cognizable in the habeas petition." This is a totally incorrect statement of the law. As we have said many times, habeas corpus is not a vehicle for obtaining a second appeal

> of issues which were raised, or should have been raised, on direct appeal or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. *Steinhorst v. Wainwright*, 477 So.2d 537 (Fla. 1985); *Harris v. Wainwright*, 473 So.2d 246 (Fla. 1985); *McCrae v. Wainwright*, 439 So.2d 868 (Fla. 1983).

Accord, Suarez v. Dugger, 527 So.2d 190, 192 (Fla. 1988).

Respondent declines to address the merits of substantive claims asserted in this habeas petition which were, could have been or should have been asserted on direct appeal and urges this Court to continue to enforce its procedural default policy; otherwise, appeal will follow appeal and there will be no finality in capital litigation. Cf. Johnson v. State, __ So.2d __, 13 F.L.W. 699 (Fla. Case No. 72,238, Dec. 1, 1988) (the credibility of the criminal justice system depends upon both fairness and finality).

Thus, petitioner's application for habeas relief on the substance of grounds one through eleven should be denied for reasons of procedural default. In Harris v. Reed, __ U.S. __, __ L.Ed.2d __, 44 Cr.L. 3120 (No. 87-5677) (Opinion filed Feb. 22, 1989), the Supreme Court held that where a state court was ambiguous in its ruling denying relief on both procedural and substantive grounds, the federal habeas court should reach the merits.

> "Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar."
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> (44 Cr.L. at 3122-23)

The Court added in foot 12:

> ". . . . Additionally, the dissent's fear, post, p.11-12 and n.6, that our holding will submerge courts in a flood of improper prisoner petitions is unrealistic: a state court that wishes to rely on a procedural bar rule in a one-line pro forma order can easily write that 'relief is denied for reasons of procedural default'."

II.

The Ineffective Assistance of Appellate counsel claim -

Atkins contends that his appellate counsel on direct appeal rendered ineffective assistance for failing to argue a number of issues. Appellate counsel cannot be considered ineffective for failing to raise issues which he is procedurally barred from raising because they were not properly presented at trial. Ruffin v. Wainwright, 461 So.2d 109 (Fla. 1984); Darden v. State, 475 So.2d 214 (Fla. 1985); Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985); Bertolotti v. Dugger, 514 So.2d 1095 (Fla. 1987).

(1) Appellant's first contention with respect to ineffective appellate counsel is that he failed to argue that the conviction was void due to the inability to determine whether the verdict was based on a constitutionally permissible ground and inability to determine whether there was juror unanimity.

Trial counsel moved for a mistrial when during the penalty phase cross-examination of defense, witness Danny Atkins, the prosecutor asked if the victim's parents had consented to taking the child for sexual purposes. The bases of the mistrial requests were: (1) that the sexual battery issue was no longer before the jury once the court had granted a judgment of acquittal and (2) that the prosecutor should not have started the case with the sexual battery counts. The mistrial requests were denied (R 860-862).

At the conclusion of the penalty phase testimony during a conference on penalty phase instructions, trial counsel complained about a submission of an instruction on **§921.141(5)(d), Florida Statutes**, because:

> ". . . we don't know whether the jury's verdict was predicated upon felony murder or upon premeditated murder, and we don't know which of the evidence the jury considered to be credible and which evidence the jury considered not to be credible, but the circumstances of verdict are such the indication would be that it was felony murder because of kidnapping conviction."
>
> (R 1127)

This record reflects a concern raised by trial counsel to proceedings in the penalty phase and indeed appellate counsel did argue in his initial brief on direct appeal multiple claims with respect to the penalty imposed (Issues I-VI listed in the Procedural History section of this response).

But counsel had not preserved below for appellate review his most recent contention that the conviction must be set aside because of Stromberg v. California, 283 U.S. 359 (1981) or the alleged uncertainty regarding jury unanimity. Since the issue was not preserved in the circuit court, appellate counsel did not fall below standard in failing to argue it. As stated in Bertolotti v. Dugger, 514 So.2d 1095, 1096 (Fla. 1987):

> **[2,3]** We also find no merit to Bertolotti's second claim that appellate counsel was ineffective for failing to challenge the verdict as void because 1) there is no way of knowing whether it was based on a constitutionally permissible ground, and 2) there is no way of determining whether there was juror unanimity. The jury in this case was instructed on premeditated murder and felony murder based on robbery, sexual battery, and burglary. A general verdict was received. Bertolotti's second claim hinges on the fact that, in his sentencing order, the trial judge specifically found that the state had failed to prove sexual battery and burglary beyond a reasonable doubt and therefore, neither could serve as an additional bases for finding the aggravating circumstance that the murder was committed during the commission of a felony under section 921.141(5)(d), Florida Statutes. He maintains that counsel should have argued on appeal that the general verdict was void under *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) (verdict which might be based on unconstitutional ground cannot stand, even if there are alternative theories to support the verdict) because it might have been based on felony murder with either sexual battery or burglary as the underlying felony. We agree with the state that this issue was not properly preserved for appellate consideration. In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court. *Tillman v. State*, 471 So.2d 32 (Fla. 1985).

This Court has held that special verdict forms are not required to indicate whether the first degree murder conviction is based on premeditation murder or felony-murder. Buford v. State, 492

So.2d 355, 358 (Fla. 1986); Brown v. State, 473 So.2d 1260 (Fla. 1985).

(2) Appellate counsel cannot be deemed ineffective for having failed to raise on appeal the trial court's alleged failure to convene a new jury for sentencing following remand by this Court. In this Court's last decision reported at 497 So.2d 1200 (Fla. 1986), the Court stated:

> Our previous decision vacating the death sentence and remanding for resentencing was based upon the fact that the court had considered an aggravating circumstance which this Court found to be improper. We found no fault with the evidence or argument presented to the jury at the sentencing phase. Accordingly, on remand no additional evidence was presented.

(497 So.2d at 1201)

Implicitly, the Court approved the trial court's not convening a new jury since there had been "no fault" with the jury's involvement previously. Thus, there was no deficiency by appellate counsel.

(At page 14 of his habeas petition, he contends that on Atkins' original direct appeal the state sought clarification as to whether a new jury needed to be impaneled. Atkins mistakenly recites that "this Court never ruled on the state's request". The fact is that this Court denied the state's motion for clarification on July 26, 1984).

(3) Appellate counsel cannot be deemed ineffective for having failed to raise on direct appeal the instruction pertaining to a majority vote at the penalty phase. Since the jury recommended the penalty of death by a 7 to 5 vote (R 1150; R 1210), any complaint relating to a tie vote must be deemed harmless and the prejudice prong of Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984), remains unmet.

(4) Appellate counsel cannot be certified as ineffective for the failure to urge on appeal that the sentencer had included an unconstitutional automatic aggravating circumstance since this Court had previously and repeatedly rejected the argument. See Clark v. State, 443 So.2d 973, 978 (Fla. 1983); Menendez v.

State, 419 So.2d 312, 315 (Fla. 1982); White v. State, 403 So.2d 331 (Fla. 1981). Since even the federal courts have rejected this contention[1], appellate counsel cannot be deemed deficient and the prejudice prong of Strickland is unsatisfied. Bertolotti v. State, 534 So.2d 386 fn.3 (Fla. 1988).

Appellate counsel was not deficient in arguing on appeal from the sentence imposed following remand that the trial court had improperly reweighed and reevaluated aggravating and mitigating circumstances in imposing the death penalty. Atkins v. State, 497 So.2d 1200 (Fla. 1986).

(5) In claim six[2], appellant again urges as he did in claim two that appellate counsel failed to urge on appeal the need for another jury to make a recommendation as to sentence upon remand. Respondent will rely on the previous argument advanced, supra.

Respondent would add that this court's previous opinion (497 So.2d 1200) recites the trial court's sentencing order and on its face demonstrates that the trial court provided a reasoned, considered judgment regarding the aggravating and mitigating circumstances. Appellate counsel was not derelict in failing to urge a reweighing as:

> ". . . It is not this Court's function to engage in a general *de novo* re-weighing of the circumstances. Rather, we are to examine the record to ensure that the findings relied upon are supported by evidence. We find that there is legally sufficient evidence to support the trial judge's findings of fact.
>
> (497 So.2d at 1203)

(6) Atkins next contends that appellate counsel failed to urge on direct appeal the trial court's alleged improper burden-shifting instruction at the penalty phase. The record reflects that no objection was made in the trial court preserving the issue for appellate review (R 1143-1149). Consequently, appellate counsel cannot be deemed ineffective for having failed

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[1] Porter v. Wainwright, 805 F.2d 930, 943 fn.15 (11th Cir. 1986); Henry v. Wainwright, 721 F.2d 990, 996 (11th Cir. 1983); Lowenfield v. Phelps, 484 U.S. __, 98 L.Ed.2d 568 (1988).

[2] Atkins does not raise an ineffective appellate counsel claim as to grounds III and V.

to urge an unpreserved issue. See, Suarez v. Dugger, 527 So.2d 190, 193 (Fla. 1988); Martin v. Wainwright, 497 So.2d 872, 874 (Fla. 1986).

(7) Appellant also argues in ground eight that appellate counsel rendered ineffective assistance for failure to argue on appeal that the trial court improperly allowed the introduction of nonstatutory aggravating circumstances.

This claim is frivolous. The record affirmatively reflects that trial counsel agreed with the presentation of evidence concerning defendant's prior sexual activity. When the prosecutor informed the court of his intention to introduce evidence rebutting the mitigating factor of no significant history of prior criminal activity, defense counsel replied:

> "As a matter of fact, your Honor, I've made a tactical decision that that has to be a part of my testimony also."
>
> (R 1040)

Trial defense counsel also elicited from defense witness Dr. Dee that Atkins had been fired "because he had been having intercourse with a boy on the job" (R 1068). Moreover, defense counsel had appellant's father testify to the efforts to encourage appellant to "start noticing girls instead of boys." (R 1110). Atkins himself testified as to his sexual preference for young boys (R 1113-1114).

For appellate counsel to change strategy on appeal and complain about the testimony he wanted introduced would have yielded no favorable result. See, McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971); State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980) (Gotcha maneuvers will not be permitted to succeed in criminal cases).

(8) Atkins also complains that appellate counsel rendered a deficient performance in failing to argue that the state failed to prove the corpus delicti of a kidnapping. There was neither a deficiency by counsel nor is there any prejudice under Strickland. This Court approved the trial court's sentencing order which found as an aggravating factor that a homicide was

committed while defendant was engaged in the crime of kidnapping. 497 So.2d at 1201.

(9) Atkins argues that appellate counsel was ineffective for failing to argue that the prosecutor and court impermissibly told the jury not to consider sympathy. Appellate counsel could not have successfully urged reversal because there was no objection in the trial court upon which to preserve appellate argument (R 260, R 1022-23). Additionally, there is no deficiency by appellate counsel since the complained-of comments at R 260, and R 1022-1023 were made in the context of the guilt-innocence phase not the penalty phase and it is not error to advise the jury that sympathy should play no role in determining the guilt or innocence of the accused. In context, the instruction was accurate. Cf. Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986).

(10) Finally, appellant argues that appellate counsel was ineffective in failing to argue the alleged impropriety of the prosecution in charging sexual battery. If trial counsel did not urge the ground for appellate review, appellate counsel cannot be criticized for not arguing it. In any event, the prejudice prong of Strickland is not satisfied since the Court affirmed the sentence of death after reference to the sexual batteries was omitted on resentencing. Atkins v. State, 497 So.2d 1200 (Fla. 1986).

WHEREFORE, for the above and foregoing arguments and citations of authority, relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 6TH day of April , 1989.

Robert J. Landry

OF COUNSEL FOR RESPONDENT