IN THE

SUPREME COURT OF FLORIDA

CASE NOS. 73,869 AND 73,910

PHILLIP ALEXANDER ATKINS,

Petitioner,

versus

RICHARD L. DUGGER,

Respondent.

PHILLIP ALEXANDER ATKINS,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The following symbols will be used to designate references to the record in the instant cause:

"R" -- Record on Direct Appeal to this Court;

"RII" -- Record on the Second Direct Appeal to this Court.

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 13, 1981, Defendant was charged by indictment with one count of murder in the first degree, two counts of sexual battery upon a child of the age of eleven or younger, and one count of kidnapping (R. 16). Defendant, on October 23, 1981, entered a written plea of "Not Guilty" to the charges (R. 19). A "Notice of Intent to Rely on Insanity Defense" was filed by Defendant on January 22, 1982 (R. 20).

On February 15, 1982, trial commenced. Defendant was tried by jury on the foregoing charges before the Circuit Court for the Tenth Judicial Circuit in and for Polk County, Florida, the Honorable E. Randolph Bentley presiding. At the close of the State's evidence, the court granted Defendant's motion for a directed verdict on the two sexual battery counts (R. 832). After the close of all of the evidence and arguments of counsel, the court instructed the jury on both premeditated and felony-murder theories of first-degree murder (R. 1008-10). The jury found Defendant guilty of first-degree murder and kidnapping, the only two charges submitted to the jury (R. 1029).

In the penalty phase of the trial, Defendant objected to the court's instruction to the effect that if the murder was committed while Defendant was engaged in the commission of sexual battery or kidnapping, this fact could be considered as an aggravating circumstance pursuant to Section 921.141(5)(d), Florida Statutes (1981). After being instructed and having deliberated, the jury, by a vote of seven to five (7-5) reccommended that Defendant be sentenced to death for the first-degree murder conviction (R. 1149-50). The trial judge then

considered the appropriate punishment and made written findings as to the aggravating and mitigating circumstances surrounding the murder. The aggravating circumstances found were as follows: (1) the murder was committed while Defendant was engaged in the crime of kidnapping; (2) it was committed while Defendant was engaged in the crime of sexual battery; (3) it was committed for the purpose of avoiding or preventing a lawful arrest; and (4) it was especially heinous, atrocious and cruel (R. 1212-14). The mitigating circumstances found were: (1) no significant history of prior criminal activity for which Defendant had been convicted (although the court gave diminished weight to this factor because of Defendant's history of homosexual contact with minors); (2) that the crime was committed while Defendant was under the influence of extreme mental or emotional disturbance; and (3) that Defendant's ability to conform his conduct to the requirements of law was substantially impaired at the time of the offense (R. 1214-16). The court sentenced Defendant to death (R. 1216).

On appeal this Court reversed Mr. Atkins' sentence of death because an improper aggravating circumstance had been considered. Atkins v. State, 452 So. 2d 529 (Fla. 1984). On remand the trial judge determined that he would not call a new jury but would simply strike the offending aggravating circumstance and reimpose death (RII 7). This sentence was affirmed on Mr. Atkins' second appeal. Atkins v. State, 497 So. 2d 1200 (Fla. 1986).

On January 19, 1989, the Capital Collateral Representative, Larry H. Spalding, moved the Florida Supreme Court for an extension of time in which to file Mr. Atkins' motion to vacate

judgment and sentence due to substitution of counsel. The Florida Supreme Court granted CCR until and including February 22, 1989. On February 16, 1989, the Governor of Florida signed a death warrant setting Mr. Atkins' execution for Tuesday April 18, 1989. On February 22, 1989, Mr. Atkins timely filed his Rule 3.850 motion. A status hearing was conducted on March 3, 1989. At that hearing the State served its Answer and Motion to Dismiss to the Rule 3.850 motion and asked that it summarily be denied. Counsel for Mr. Atkins' was given until March 7, 1989, to file a written response to the State's Answer and Motion to Dismiss and in fact did so file. On March 10, 1989, the circuit court summarily denied Mr. Atkins' motion. From that order, Mr. Atkins filed a timely notice of appeal.

On March 20, 1989, Mr. Atkins filed an original action with this Court seeking habeas corpus relief and a stay of execution.

On Monday, April 3, 1989, counsel was telephonically notified that a brief on the appeal and the habeas action was due on April 5, 1989.

QUESTIONS PRESENTED

I. Whether 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 for which sufficient evidence existed, and (2) there is no way of determining whether there was juror unanimity, in violation of the sixth, eighth and fourteenth amendments and whether this Court failed in its duty to determine the sufficiency of the evidence to support a capital conviction and whether Mr. Atkins received ineffective assistance of counsel

when his appellate attorney unreasonably failed to present this claim on direct appeal.

II. Whether 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 and whether Mr. Atkins received ineffective assistance of counsel when his appellate attorney failed to raise this issue on direct appeal.

III. Whether the rule 3.850 court's summary denial of Mr. Atkins' motion to vacate judgment and sentence was erroneous as a matter of law and fact.

IV. Whether Mr. Atkins' rights under the fifth, sixth, eighth, and fourteenth amendments were denied when defense counsel rendered ineffective assistance of counsel by failing to investigate, develop and to present a defense at trial based on Mr. Atkins' abnormal mental condition that made it impossible for him to have the requisite specific intent.

V. Whether Phillip Atkins was denied the effective assistance of counsel at both the guilt-innocence and sentencing phases of his trial, in violation of the sixth, eighth and fourteenth amendments.

VI. Whether there was no knowing and intelligent waiver of Miranda rights in Mr. Atkins' case: his mental impairments precluded him from comprehending, and validly waiving, those rights and whether counsel inadequately argued and presented a suppression motion.

VII. Whether Mr. Atkins' sentence of death, resting on the "heinous, atrocious, and cruel" aggravating factor, is in direct and irreconcilable conflict with and contrary to Maynard v.

Cartwright, 108 S. Ct. 1853 (1988), is in conflict with the ninth circuit court of appeals decision in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc), and violates the eighth and fourteenth amendments.

VIII. Whether Mr. Atkins' sentence of death violates the eighth amendment because the penalty phase jury instructions shifted the burden to Mr. Atkins to prove that death was inappropriate contrary to Mullaney v. Wilbur, 421 U.S. 684 (1975), Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988).

IX. Whether 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 and whether Mr. Atkins received ineffective assistance of counsel when his appellate attorney unreasonably failed to riase this issue on direct appeal.

X. Whether 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 and whether the failure to raise this claim on direct appeal deprived Mr. Atkins of his right to the effective assistance of counsel.

XI. Whether Mr. Atkins' death sentence rests upon an unconstitutional automatic aggravating circumstance.

XII. Whether the eighth amendment was violated by the sentencing court's refusal to find the presence of certain statutory and nonstatutory mitigating circumstances and whether 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.

XIII. Whether 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 and whether 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 and whether the failure to raise this claim on direct appeal deprived Mr. Atkins of his right to effective assistance of counsel.

XIV. Whether the prosecutor's closing argument in the guilt and penalty phase denied Mr. Atkins a fundamentally fair and reliable capital trial and sentencing determination as guaranteed by the fifth, sixth, eighth and fourteenth amendments.

XV. Whether 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 and whether Mr. Atkins received ineffective assistance of counsel when his appellate attorney unreasonably failed to present this claim on direct appeal.

XVI. Whether during the course of voir dire examination, penalty phase argument and the jury instructions, the prosecution and the court improperly asserted that sympathy towards Mr. Atkins was an improper consideration in violation of the eighth and fourteenth amendments and whether the failure to raise this claim on direct appeal deprived Mr. Atkins of his right to the effective assistance of counsel.

XVII. Mr. Atkin's sentencing jury was repeatedly misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing, contrary to Caldwell v. Mississippi, 105 S. Ct. 2633 (1985) and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), and in violation of the eighth and fourteenth amendments.

ARGUMENT 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 FOR WHICH SUFFICIENT EVIDENCE EXISTED, AND (2) THERE IS NO WAY OF DETERMINING WHETHER THERE WAS JUROR UNANIMITY, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. THIS COURT FAILED IN ITS DUTY TO DETERMINE THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT A CAPITAL CONVICTION. MR. ATKINS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS APPELLATE ATTORNEY UNREASONABLY FAILED TO PRESENT THIS CLAIM ON DIRECT APPEAL.

At the closing of the State's evidence counsel for Mr. Atkins moved for a directed verdict of acquittal on the two counts of sexual battery. The Court granted the motion ordering directed verdicts of acquittal on counts two and three of the indictment concerning both sexual battery charges (R. 832). The circuit court thus determined as a matter of law that there was

insufficient evidence of a sexual battery upon which to convict. Despite this ruling that there was insufficient proof of a sexual battery, the circuit court decided to permit the jury to consider whether the State had proved beyond a reasonable doubt that the homicide occurred in the course of a sexual battery and was thus felony murder.

The State argued during its guilt phase closing that the jury could find the defendant guilty of felony murder utilizing sexual battery as the underlying felony:

> Now I'm sure all of you have heard of premeditated murder and probably have a pretty good idea of what that is. A lot of people don't understand the concept of felony murder. In this case, there are two underlying felonies that you are to consider, sexual battery, and kidnapping.
>
> If Tony Castillo was killed as a consequence of -- and these words are important -- as a consequence of or during the commission, the attempt to commit, or in escaping from the scene of a sexual battery, then a first degree murder has occurred.
>
> If Tony Castillo was killed as a consequence of or during the course of committing or attempting to commit a kidnapping, then there is a first degree murder. The distinction being that for there to be a felony murder conviction of first degree murder under this theory, you do not have to have premeditation. There does not have to be an intent to kill.
>
> Technically, the killing could be accidental, but if the killing was during the course of a kidnapping or during the course of a sexual battery, even if the killing was totally accidental, it's still first degree murder under the felony murder theory.
>
> Now as Judge Bentley explained to you, you will not have verdict forms to find the Defendant either guilty or not guilty of sexual battery. But the evidence as to the sexual battery having occurred can still be considered by you in determining whether

there was a sexual battery for the purposes of the felony murder rule.

If you should determine in your deliberations that beyond a reasonable doubt that a sexual battery did occur; and that as a consequence of that sexual battery or during the commission of the sexual battery, Tony Castillo was killed, the Defendant is guilty of felony -- of first degree murder.

If you should conclude during your deliberations that a kidnapping occurred, that during the course, as a consequence of or during the course of that kidnapping, Tony was killed -- whether intentionally or unintentionally -- Mr. Atkins is guilty of first degree murder.

The second theory or the second way a person can commit first degree murder is, as I said, premeditated murder. The State's position in this case is that Mr. Atkins is guilty of first degree murder for both of these reasons, that the evidence shows it was a premeditated murder, that he intended to show it was a premeditated murder, that he intended to kill Tony, and that the murder was committed during the course of or as a consequence of a kidnapping and it was committed during the con- -- as a consequence of or during the commission of a sexual battery. And both of these don't have to apply, either one. You can find that there was a sexual battery but there wasn't a kidnapping, and it would still be first degree murder. Or that there was a kidnapping but there was no sexual battery, this is kidnapping there was no sexual battery, this is still first degree battery, this is still first degree murder. This is an either/or, there's not an "and" as to A and B there.

(R. 937-39)(emphasis added).

Later in the State's argument, the jury was reminded of the sexual battery:

Third, they then drove out to the area behind the Taco Bell. Once they got out there, they had sex, oral and anal. That's what he told the police.

> Now when he gets into court here today, that didn't happen. It's also amazing that the two areas where he now denies culpability from the witness stand are two of the most crucial areas in the whole case -- whether he had sex with the boy or whether he hit the boy.
>
> He told the police he did have sex with the boy, both oral and anal, and he told the police he did hit the boy with his fists and with the pipe. Yet today on the witness stand he says, "No, I didn't have sex with him, and no, I didn't hit him with my hands. I did hit him with a pipe." Yet every, the rest of the statement he agrees with as far as waving him down and taking him to Dobbins Park and everything else. Yet we get to those points and the story changes.

(R. 957, 958).

The court then incorrectly instructed the jury that the sexual battery could be utilized to find felony murder:

> Before you can find the Defendant guilty of first degree felony murder, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. The person alleged to have been killed is dead.
>
> 2. The death occurred as a consequence of and while the Defendant was engaged in the commission of, or was attempting to commit, or was escaping from the immediate scene of a <u>sexual battery</u> upon a person eleven years or younger by a person nineteen years or older, or a kidnapping.
>
> 3. The Defendant was the person who actually killed the deceased, or the deceased was killed by a person other than the Defendant who was involved in the <u>commission or attempt to commit a sexual battery</u> on a person eleven years of age or younger by a person eighteen years of age or older or a kidnapping, but the Defendant was present and did knowingly aid, abet, counsel, hire, <u>or otherwise procure the commission of sexual battery</u> upon a person eleven years of age or younger by a person

eighteen years of age or older, or kidnapping.

It is not necessary for the State to prove that the Defendant had a premeditated design or intent to kill.

"Sexual battery" means oral, anal or vaginal penetration by or union with the sexual organ of another, or the anal or vaginal penetration of another by any object.

(R. 1009, 1010)(emphasis added).

During the penalty phase charge conference, the court voiced its concern over instructing the jury that it could find felony murder with sexual battery as the underlying felony after directing a verdict of acquittal on those two counts because the State had not proved sexual battery beyond a reasonable doubt:

There's another problem the Court has considered overnight and I'm very concerned with. I do not know what the appellate court is going to do with it. Looking at paragraph two, we have an anomalous situation here. The sexual battery, though there was not sufficient evidence to justify the case going to the jury on that, the law of Florida says you can't imprison a man in this case under the current state of law for life on a sexual battery charge with no evidence other than the confession.

But then we say well, but we can consider it for felony murder. Which carries death by -- death as a penalty at this point, even without any foundation to support it and the legal rationalization of the corpus delecti as the corpse and the criminal agency and all that makes legal sense but it's rather bothersome to the Court. And then we're further using the same thing again in the second phase of the trial.

I think, however, it appears to be the law of Florida. I'm not sure it makes a great deal of sense, if the evidence isn't good for one purpose, it ought not to be good for the other purpose. It rather offends me that it's good for one purpose and not the other. It offends my common sense, it

> offends that the public has the right to expect consistency from the legal system.
>
> But I don't think it's incumbent upon me to reverse the Supreme Court of the State of Florida, so I am not going to act on that. But I am concerned about that and, gentlemen, I think if there's a weak link in this case, that's where it is right there. But it's the law.

(R. 1126-1127).

A general verdict was returned with no specification of the theory. The trial judge found as a matter of fact and law that the two counts of sexual battery had not been proven beyond every reasonable doubt. However, the State argued to the jury that this was a sexual battery; that the homicide occurred during the course of that felony, and that the jury should convict of felony murder. There is at this point no way of knowing whether any of the jurors voted to convict of first degree murder because of the State's argument that the homicide occurred during a sexual battery.

The Florida Supreme Court has held that the state must prove the elements of the underlying felony under the felony-murder rule. Robles v. State, 188 So. 2d 789, 793 (Fla. 1966). The United States Supreme Court has explicitly held that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In Re Winship, 397 U.S. 359 (1970). Where this principle is violated, at the very least, a new trial must be ordered in order to insure a defendant his right to a trial by a jury of his peers. Ballew v. Georgia, 435 U.S. 223 (1978). Here, the jury was improperly told that it could premise a felony murder conviction upon a sexual

battery that the court had determined was not sufficiently proved.

The State charged Mr. Atkins with the underlying felonies of sexual battery knowing they could not prove the sexual batteries, and the State relied upon those felonies as possible bases for a felony murder conviction.[1] The trial court agreed that as a matter of law those two felonies could not be proven. As a result, the jury should not have been authorized to even consider returning a first degree murder conviction based on felony murder with the sexual battery charge as the underlying felony. Robles v. State, 188 So. 2d 789, 793 (Fla. 1966). If either count of sexual battery was the basis for the guilty verdict on the part of even one single juror, then the verdict was based upon insufficient evidence and violated the fourteenth amendment. The United States Supreme Court has consistently "followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon." Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988).

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[1]The prosecutor conceded that he did not have "any physical evidence that a sexual battery occurred." (R. 663). Accordingly, "its in all honesty the State's feeling the Court would probably have to direct a verdict on the sexual battery counts." Id. Certainly, the prosecutor's acknowledgement that he knew that the sexual battery counts would result in directed verdicts of acquittal also raise questions about his motives in injecting into the trial unproveable but yet very inflammatory allegations of sexual battery. This was a violation of Williams v. State, 110 So. 2d 654 (Fla. 1959), cert. denied, 361 U.S. 847. See Arguments X and XIV, infra.

Here, the possibility that one of the sexual battery counts was used as the underlying felony, as was in fact urged by the State, cannot be ruled out. Furthermore, the jurors could have been unanimous for guilt, but not for the theory of guilt. For example, six jurors may have believed proof of premeditated murder was sufficient, while six others did not, but the six others may have believed that either rape or kidnapping was proven. The possible permutations are endless. Under these circumstances, the requirement of juror unanimity is not followed, and Mr. Atkins' rights under the fourteenth amendment were violated.

It cannot be stated beyond a reasonable doubt that the jury could have found premeditated murder. At sentencing the court found in mitigation that Mr. Atkins' ability to conform his conduct to the requirements of the law was substantially impaired. Also, the court did not find in aggravation that the offense was committed in a cold and calculated manner. The implication then, is that the evidence adduced at trial sufficiently established a question as to Mr. Atkins' capability of forming a conscious, premeditated thought. This makes the likelihood that twelve jurors found premeditation beyond a reasonable doubt highly suspect.

It would also be unreasonable to assume that the jury did not find premeditated murder, but found felony murder with kidnapping as the underlying felony. Kidnapping is a specific intent crime. Surely if the jury could not find premeditation for the murder due to intoxication or insanity at the time of the offense, they could not find the specific intent necessary for

kidnapping, thereby making it very unlikely that twelve jurors found kidnapping beyond a reasonable doubt.

Rule 9.140(f) of the Florida Rules of Appellate Procedure provides that in appeals "[i]n capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review." In Mr. Atkins' direct appeal this Court was obligated to consider this claim whether it was raised or not. This Court erred in failing to recognize that there was insufficient evidence to support Mr. Atkins' conviction on each of the theories advanced by the State as required by Stromberg.

The United States Supreme Court in Stromberg v. California, 283 U.S. 359 (1931), held as a matter of due process that a verdict which might be based on an unconstitutional ground cannot stand, even if there are alternative theories to support the verdict. The principle of Stromberg has been consistently reaffirmed by the United States Supreme Court. Leary v. United States, 395 U.S. 6 (1969); Thomas v. Collins, 323 U.S. 516, 528-29 (1945); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Street v. New York, 394 U.S. 475, 585-88 (1969); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970). See also Zant v. Stephens, 462 U.S. 862 (1983). The Stromberg rule is that when the jury is instructed on alternative theories, "it is impossible to say under which clause of the statute the conviction is obtained," and thus the conviction must be overturned. Id. at 368 (emphasis added). Stromberg teaches that the reviewing courts are not to look at

whether there is sufficient evidence to support a jury verdict on a legal ground where one of the grounds charged is unconstitutional. If there is insufficient evidence to support a conviction on any one of the alternate theories, there is insufficient evidence to convict. The reviewing court is only to consider whether the verdict may have rested on an impermissible ground and if so, reverse.[2]

There is no equivocation in the Stromberg holding. Under Stromberg, the appropriate analysis is not whether there was sufficient evidence of premeditation but whether under the jury instructions the jury was permitted to convict for an unconstitutional and/or nonexistent charge. A conviction in this case based on sexual battery felony-murder would violate due process of law -- the judicial finding is that the sexual batteries were simply not proven. Yet the sexual batteries were extensively argued and the jury was instructed by the State and the court that they could convict on felony-murder if they found a sexual battery had occurred (R. 937-39). There is absolutely no way of determining if the jury convicted unanimously of premeditated murder, unanimously of kidnapping felony-murder or unanimously of sexual battery felony-murder or any combination thereof. If the jury's verdict is based in any part on the nonexistent charge, the fourteenth amendment is violated, see

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[2]Certainly the State should not be in any position to complain about the harshness of the Stromberg rule. The State here charged sexual battery knowing full well it could not prove its case, but yet knowing the highly prejudicial impact of the charge and the likely effect on the jurors' attitude towards Mr. Atkins. See Williams v. State, 110 So. 2d 654 (Fla. 1959).

Jackson v. Virginia, 443 U.S. 307 (1979), Mills v. Maryland, 108 S. Ct. 1860 (1988). Thus the guilty verdict is invalid under Stromberg.

Mr. Atkins was acquitted of the sexual battery charges yet the State continued to put this non-issue before the jury. Trial counsel moved for mistrial on these grounds (R. 861) but the court denied the motion (R. 862). Trial counsel then moved for a new trial because the court erred in allowing the jury to consider the sexual battery charges for a felony murder theory (R. 1222). It is clear that this issue had been properly preserved for direct appeal; yet Mr. Atkins' counsel on direct appeal did not raise the issue. This was in spite of the circuit court's express concern that this question was "a weak link in this case." (R. 1127). Clearly the circuit court thought this was an important issue worthy of this Court's attention.

The claim is now properly brought pursuant to the Court's habeas corpus authority for it involves not only substantial and prejudicially ineffective assistance of counsel on direct appeal, but also this Court's failure under Rule 9.140(f) of the Florida Rules of Appellate Procedure to address this issue. This issue involved a classic violation of longstanding constitutional principles. See, Robles, Winship, Stromberg, Mills, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). Yet counsel failed to present it to this Court. Moreover, this Court failed on its own to address the claim. No procedural bar precluded review of this issue -- this Court was obligated to address it. See Rule 9.140(f). In fact this situation is

virtually identical to Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). There this Court found ineffective assistance of counsel in the failure to challenge on appeal the sufficiency of the evidence to support Wilson's conviction of first degree murder.

> The decision not to raise this issue cannot be excused as mere strategy or allocation of appellate resources. This issue is crucial to the validity of the conviction and goes to the heart of the case. If, in fact, the evidence does not support premeditation, petitioner was improperly convicted of first degree murder and death is an illegal sentence. To have failed to raise so fundamental an issue is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome.

474 So. 2d at 1163-64.

Mr. Atkins' conviction and sentence of death are inherently unreliable and fundamentally unfair. Mr. Atkins was denied his fifth, sixth, eighth and fourteenth amendment rights. Habeas relief as in Wilson, supra, is warranted.

ARGUMENT 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.

After convicting Mr. Atkins of first degree murder, the jury deliberated for more than two hours before recommending by a vote of 7 to 5 that Phillip Atkins be sentenced to death (R. 1150). Shortly thereafter the court entered its order imposing the death sentence (R. 1155-1168), finding as an aggravating circumstance that "the murder was committed while the Defendant was engaged in

the commission of a sexual battery" (R. 961). The jury, likewise, had been instructed that they could find, as an aggravating circumstance, that "[t]he crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of, in an attempt to commit, or flight after committing or attempting to commit the crime of sexual battery or kidnapping" (R. 1144).

On direct appeal, the Florida Supreme Court reversed Mr. Atkins' case and remanded for resentencing, Atkins v. State, 452 So. 2d 529 (Fla. 1984). The reversal was based on the fact that the circuit court found the sexual battery as an aggravating circumstance even though it had granted Mr. Atkins' motion for judgment of acquittal on that count at the close of the State's case.

> The sentencing judge, in the present case found that even though a sexual battery conviction was not proper due to lack of proof of corpus delecti, it was nevertheless appropriate to consider that a sexual battery had taken place for purposes of finding a statutory circumstance in aggravation of the murder.
>
> . . .
>
> Under these circumstances, we hold that the consideration of the occurrence of a sexual battery as an aggravating circumstance in the capital felony sentencing process was error.

Id. at 532-33.

The opinion did not specifically address the necessity of reconvening a jury. However, this Court did state:

> "Because some mitigating circumstances were established to the satisfaction of the trial court, the court's erroneous finding of an improper aggravating circumstance may have injuriously affected the process of weighing

aggravating and mitigating circumstances. See Elledge v. State, 346 So. 2d 998 (Fla. 1977).[3]

452 So. 2d at 533. The State was unsure whether a new jury should have been reconvened and submitted a motion requesting the Court clarify whether a new jury was needed or whether the trial judge should simply reconsider his sentence based on the original jury recommendation. There was never a response to this motion.

At the new sentencing, the circuit court heard additional argument by counsel, but chose not to convene a new jury in order to obtain a new recommendation. In its Findings of Fact, the circuit court said, "The [Florida Supreme Court] opinion is silent as to the necessity of reconvening the trial jury. This Court concludes that it is not necessary to reconvene the jury" (RII 2). The trial judge, without the aid of a new properly-instructed jury, simply omitted the aggravating factor found to be erroneous and resentenced Mr. Atkins to death. There was no proper "reweighing" of mitigation and aggravation by a jury and thus no jury recommendation based upon the proper aggravating circumstances as required under Fla. Stat. 921.141(1).[4] The judge in essence simply opined that deletion of the evidence regarding a sexual battery would have had no effect on him. However, the proper question is would it have had any effect upon the jury. Hall v. State, 14 F.L.W. 101 (Fla. 1989).

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[3]The significance of the citation to Elledge should not be overlooked and is explained infra.

[4]Pursuant to Fla. Stat. 921.141(1), a separate proceeding before the trial jury should have been conducted. The statute's only provision for a sentencing proceeding absent a jury is if the defendant has waived a jury. No such waiver was ever presented by Mr. Atkins.

On direct appeal from the resentencing, appellate counsel failed to argue that a new jury should have been reconvened in order to provide a valid jury recommendation for the trial court to consider. This failure to raise the issue was ineffective assistance of counsel. At the original penalty phase, the record clearly established that the jury had been presented with the improper evidence and argument of the sexual batteries. Counsel, by failing to raise a challenge to the tainted jury recommendation, failed to zealously advocate on Mr. Atkins' behalf. Appellate counsel unreasonably failed to put before this Court the fact that the prosecutor's arguments to the jury during the penalty phase urged them to find the sexual battery as an aggravating circumstance (R. 1133). Counsel's performance was deficient. His failure to bring these claims to this Court cannot be attributed to any reasonable tactical or strategic choice. This Court clearly held that the sexual battery counts should not have been considered in the penalty phase. Certainly, counsel should have pointed out that this Court's ruling was violated because the jury recommendation resulted from a penalty phase proceeding in which the jury was told it could consider the sexual battery allegations as an aggravating circumstance. In light of this Court's finding of error in the trial judge's consideration of the sexual battery and the fact that the jury considered this same unsubstantiated allegation in its sentencing recommendation, it is clear that Mr. Atkins' appellate counsel should have contested the failure to reconvene a penalty phase jury for the second sentencing. The resulting prejudice is

obvious. These multiple omissions constitute ineffective assistance of counsel.

The jury's recommendation in this case was 7-5, the barest of majorities. It took two hours to reach this result. Had the jury not been instructed it could find the crime for which the defendant was to be sentenced was committed while he was "engaged in the commission of, an attempt to commit, or flight after committing or attempting to commit the crime of sexual battery," the jury may not have recommended death. Had the jury not been urged by the State to find that aggravating circumstance and sentence Mr. Atkins to death because of the sexual battery allegation, the result might have been different. In any event, it is clear that a jury recommendation free of the taint of this improper consideration has never occurred, since a jury at resentencing was never convened.

It is settled law that an aggravating circumstance must be proved beyond a reasonable doubt before being considered by judge or jury. State v. Dixon, 283 So. 2d (Fla. 1973). It is clear from the Florida Supreme Court's opinion remanding this case for a new sentencing that the consideration of the sexual battery allegation in this case was in error:

> The sentence of death, having been found tainted by the improper consideration of an erroneous aggravating circumstance, is vacated. The case is remanded to the trial court for reconsideration and the imposition of an appropriate sentence for the capital felony.

Atkins, supra, 452 So. 2d at 533.[5]

This Court has generally recognized that where improper aggravation was presented at a penalty phase and mitigating circumstances were found to exist, a new sentencing jury must be empaneled in order to conduct a reweighing. In reversing Mr. Atkins' sentence of death and ordering a resentencing, this Court cited Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977). In Elledge, after noting that both improper aggravation was considered and mitigation had been found, this Court ordered a new sentencing trial. In doing so, the Court stated:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered. See Miller v. State, 322 So. 2d 65 (Fla. 1976); Messer v. State, 330 So. 2d 137 (Fla. 1976). This result is dictated because, in order to satisfy the requirements of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972), the sentencing authority's discretion must be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." (emphasis supplied) Proffitt v. Florida, 428 U.S. 242, 258, 96 S. Ct. 2960, 2969, 49 L.Ed.2d 913.

346 So. 2d at 1003. Elledge makes clear that where improper aggravation was considered by a jury and where mitigation was

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[5]The Court's ruling was in line with the rule of Williams v. State, 110 So. 2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959). Admission of irrelevant bad conduct evidence is reversible unless shown to be harmless beyond a reasonable doubt.

present, a whole new penalty phase must be conducted with a new jury and a new jury recommendation. In reversing Mr. Atkins' death sentence because of consideration of improper aggravation and because of the existence of mitigation, this Court relied on Elledge. Yet, the circuit court refused to convene a new sentencing jury even though that was the holding in Elledge. The rationale of Elledge applied equally to Mr. Atkins' case and indicated a new jury should have been impaneled.

The importance of the jury's recommendation in the Florida death penalty scheme has been recognized by every court that must deal with it:

> A review of the case law shows that the Supreme Court of Florida has interpreted section 921.141 as evincing a legislative intent that the sentencing jury play a significant role in the Florida capital sentencing scheme. See Messer v. State, 330 So.2d 137, 142 (Fla.1976)("[T]he legislative intent that can be gleaned from Section 921.141 [indicates that the legislature] sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part."); see also Riley v. Wainwright, 517 So.2d 656, 657 (Fla.1987) ("This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process."); Lamadline v. State, 303 So.2d 17, 20 (Fla.1974)(right to sentencing jury is "an essential right of the defendant under our death penalty legislation"). In the supreme court's view, the legislature created a role in the capital sentencing process for a jury because the jury is "the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors." Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977); see also McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982)(the jury's recommendation "represent[s] the judgment of the community as to whether the death sentence is appropriate"); Chambers v. State, 339 So.2d

> 204, 209 (Fla.1976)(England, J., concurring) (the sentencing jury "has been assigned by history and statute the responsibility to discern truth and mete out justice").

Mann v. Dugger, 844 F.2d 1446, 1450 (11th Cir. 1988).

The legislature intended the sentencing jury's recommendation to be an integral part of the determination of whether Mr. Atkins lives or dies. The validity of the jury's recommendation is directly related to the information it receives to form a basis for such recommendation. Messer v. State, 330 So. 2d 137, 142 (Fla. 1976).

This Court in Hall v. State, 14 F.L.W. 101 (Fla. 1989), recently reiterated the importance of the jury recommendation in Florida's death penalty scheme. There, this Court found sentencing error which infected the proceedings before both the jury and the judge. In ordering a new jury to be empaneled, this Court concluded: "It is of no significance that the trial judge stated that he would have imposed the death penalty in any event." 14 F.L.W. at 103. This Court then held that in determining whether a new jury is required, "[t]he proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation." (Id.) Thus, according to this Court's reasoning in Hall, the all important factor in determining whether the error was harmless is the effect the error may have had upon the jury, not the trial judge. Here it can not be seen that the improperly admitted evidence and argument had no effect upon the jury that by a 7-5 vote after two hours of deliberation recommended death. Moreover, it can not be contested that statutory and nonstatutory mitigating circumstances were present which would have constituted a

reasonable basis for a life recommendation. Under Hall it is clear that Mr. Atkins should have had a new jury untainted by the error which occurred at the first proceeding.

As the United States Supreme Court recently explained, the question is "what a reasonable juror could have understood the charge as meaning." Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988), quoting Francis v. Franklin, 471 U.S. 307, 316 (1985). The Court reversed in Mills because it found sentencing error when the jury could have read the instructions in an erroneous and unconstitutional fashion. Under Mills, the question is whether the jury could have based its recommendation on the improper, unsupported aggravating circumstance.

A judge is duty bound to follow a jury's recommendation for a life sentence if there is any reasonable basis therefore. Tedder v. State, 322 So. 2d 908 (Fla. 1975). The jury vote in Mr. Atkins' case was 7 to 5. Had the jurors not been instructed on the sexual battery as an aggravating circumstance, they may well have voted for a life sentence. The Court then would have been bound by that recommendation since here it cannot be disputed that in Mr. Atkins' case a reasonable basis for a life recommendation existed which would have precluded an override. "The possibility that a single juror [could have voted for death as a result of the erroneous instruction] is one we dare not risk." Mills, supra, 108 S. Ct. at 1870.

Clearly, here the jury recommendation was tainted by the erroneous consideration of improper aggravation, enough so that the case was remanded for new sentencing. Resentencing before the judge alone, however, did not adequately correct the error.

The error occurred in the weighing of the aggravation and the mitigation conducted by the jury. However, this Court was never called upon to determine in light of "what a reasonable juror could have understood" whether a new jury was required. Mills, supra at 1866.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Atkins' death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and Rule 9.140(f) of the Florida Rules of Appellate Procedure. It should now correct this error.

Moreover, the claim is also brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on Mr. Atkin's second direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See, Elledge, supra; Dixon, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). After this Court's decision reversing for a new sentencing there was obvious consternation as to what was required. Counsel should have reasserted this basic fundamental issue during the second direct appeal. This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Atkins a valid jury recommendation to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Atkins respectfully urges that the Court now grant a stay of execution and the relief to which these precedents demonstrate his entitlement.

ARGUMENT III

THE RULE 3.850 COURT'S SUMMARY DENIAL OF MR. ATKINS' MOTION TO VACATE JUDGMENT AND SENTENCE WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

Under this Court's well-settled precedents, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Atkins' Motion alleged facts which, if proven, would entitle him to relief. The files and records in his case do not "conclusively show that he is entitled to no relief," and the

trial court's summary denial of his motion, without an evidentiary hearing, was therefore erroneous.

Mr. Atkins' verified Rule 3.850 motion alleged and supported extensive non-record facts in support of claims which have traditionally been raised by sworn allegations in Rule 3.850 post-conviction proceedings and tested through an evidentiary hearings. Mr. Atkins is entitled to an evidentiary hearing with respect to his claims, unless the files and records in the case conclusively show that he will necessarily lose on each claim. In that instance, the judge must attach "a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief. . . " Fla. R. Crim. P. 3.850. Otherwise, an evidentiary hearing is proper. Those portions of the record which were attached to the trial court's order here (the transcript of Defendant's Motion for Appointment of Psychiatric Advisor; the Psychological Evaluation conducted by Dr. Burt Kaplan; the Psychological Evaluation conducted by Dr. William Kremper; and the Psychological Evaluation conducted by Dr. Henry Dee) in no way refute or rebut Mr. Atkins' sworn and supported allegations, and an evidentiary hearing was and is therefore proper.

Mr. Atkins' claims are of the type classically recognized as issues warranting full and fair Rule 3.850 evidentiary resolution. See Arguments IV, V, and VI, infra. Obviously, the question of whether a capital inmate was denied effective assistance of counsel during either the capital guilt-innocence or penalty phase proceedings is a paramount example of a claim requiring an evidentiary hearing for its proper resolution. See

O'Callaghan, supra; Squires, supra; Groover v. State, 489 So. 2d 15 (Fla. 1986). Mr. Atkins' claim that he was denied a professionally adequate pretrial mental health evaluation due to failures on the part of counsel and the court-appointed mental health professional is also a traditionally-recognized Rule 3.850 evidentiary claim, see Mason, supra; Sireci, supra; cf. Groover v. State, supra.

In O'Callaghan, supra, this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance claim were not "of record." See also Vaught v. State, 442 So. 2d 217, 219 (Fla. 1983).

The circuit court erred in denying an evidentiary hearing and in summarily denying Mr. Atkins' Motion to Vacate. The State's submissions to the circuit court attempted to analyze Mr. Atkins' claims (see Argument IV) under a "diminished capacity" theory, when in fact involuntary intoxication was the primary theory. The circuit court, in its order denying relief, incorrectly accepted the State's erroneous analysis regarding Mr. Atkins' ineffective assistance of counsel claims.

There was lay testimony concerning Mr. Atkins' use of alcohol, marijuana and quaaludes on the day of the offense. Although this evidence was useful, it could not provide the jury with expert analysis of how the use of such substances affected Mr. Atkins' behavior at the time of the offense. Clearly, Dr. Dee would have been able to inform the jury of how these drugs taken together would have impaired Mr. Atkins' ability to form the requisite specific intent necessary for the crimes charged. Dr. Dee would have testified concerning the fact that Mr. Atkins'

simultaneous use of three types of intoxicants made him incapable of forming specific intent. Trial counsel unreasonably failed to put him on the stand at the guilt phase. Dr. Dee could have explained to a jury of laypersons the complex effects that the quaaludes, as combined with alcohol and marijuana, had on Mr. Atkins. Albeit ready to render his expert opinion, counsel ineffectively failed to call Dr. Dee during the guilt phase. Upon proper assessment, and having had access to information regarding Mr. Atkins which trial counsel failed to provide, Dr. Dee's expert account -- at trial -- would have established a truly compelling defense, a defense ineffectively ignored by trial counsel -- as counsel's own affidavit attests.

Mr. Atkins was clearly prejudiced. The laypersons of the jury were not provided with Dr. Dee's expert explanation of how the intoxicants impaired Mr. Atkins. Counsel has admitted that his failure to pursue this defense was based on ignorance. Thus, contrary to the circuit court's order, no tactic or strategy could be ascribed to counsel's omissions in this regard. Moreover, the State, at the time of trial, had little evidence with which to rebut this defense. As Dr. Dee's account, and as that of any qualified expert assessing this case under appropriate standards in the profession would attest (see App. A, Summary Report of Dr. Merikangas, appended to Motion for Rehearing), compelling guilt-innocence defenses were available. However, since counsel, in ignorance, failed to properly evaluate and consider this defense, the defense was never developed at the time of trial.

Diminished capacity and voluntary intoxication are two different types of defenses. It is true that trial counsel attempted to pursue a diminished capacity defense; this Court rejected that attempt. It is also true that trial counsel pursued the defense of voluntary intoxication. Dr. Dee's expert testimony was clearly admissible to substantiate the voluntary intoxication defense. Lambrix v. State, 534 So. 2d 1151, 1154 (Fla. 1988). Counsel failed to develop it. Indeed, as Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984), makes clear, counsel's failure in this regard cannot but be deemed ineffective. Given the holdings of Lambrix and Chestnut v. State, 14 F.L.W. 9 (Fla. 1989), the circuit court erred in its analysis. Chestnut applies to diminished capacity. The claim at issue involved intoxication.

The Chestnut court held that "diminished capacity" is not a valid defense in Florida. Voluntary intoxication is, and always has been, a valid defense in Florida. Lambrix, supra. Expert testimony thereon is undeniably admissible. Id. The record shows that trial counsel's main strategy was to convince the jury that intoxication made Mr. Atkins unable to form a specific intent. To disallow Dr. Dee's testimony relevant to the crux of Mr. Atkins' central defense, a recognized defense, would have violated Mr. Atkins' right to present witnesses in his own behalf. Boykins v. Wainwright, 737 F.2d 1539 (1984). United States v. Hammond, 598 F.2d 1008 (1979). Washington v. Texas, 388 U.S. 14 (1967). Indeed, as Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984) makes clear, counsel's failure to pursue expert testimony on his own chosen defense theory was

prejudicially deficient performance. Counsel's affidavit admits as much.

In this regard, finally, it is respectfully noted that the circuit court erred in its analysis of the weight to be accorded Mr. Edmund's affidavit. The affidavit was proffered in support of Mr. Atkins' request for an evidentiary hearing. It clearly showed, consistent with the facts of this case, that the "files and records" far from "conclusively" showed that Mr. Atkins was not entitled to an evidentiary hearing. Rule 3.850; O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986). It was a proffer in support of the facts establishing that an evidentiary hearing was required in this action.

The circuit court in denying an evidentiary hearing despite defense counsel's affidavit acknowledging his error relied upon Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985). However, the circuit court overlooked the fact that Johnson dealt with "ineffective assistance of appellate counsel." The Johnson court went on to analyze the function of appellate counsel. Mr. Atkins' claim, and the traditional standards establishing the need for an evidentiary hearing thereon, O'Callaghan, supra, involved ineffective assistance of trial counsel. Although Mr. Edmund's affidavit was not conclusive evidence of unreasonable representation, it was definitely evidence that should be duly considered as a proffer in support of the petitioner's request for an evidentiary hearing. See Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983). Thomas, like Mr. Atkins' case, involved a capital petitioner's request for an evidentiary hearing, a

request supported by an affidavit from former counsel. In Thomas, the court relied on the affidavit and ordered a hearing. The circuit court should have done the same. Mr. Atkins' claim (as further evidenced by Mr. Edmunds' affidavit) cannot be said to have no merit on its face, and is not refuted by the files and records.

An evidentiary hearing was and is required. This Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearings. See, e.g., Zeigler v. State, 452 So. 2d 537 (1984); Vaught, supra; Lemon, supra; Squires, supra; Gorham, supra; Smith v. State, 461 So. 2d 1354 (Fla. 1985); Morgan v. State, 461 So. 2d 1534 (Fla. 1985); Meeks v. State, 382 So. 2d 673 (Fla. 1980); McCrae v. State, 437 So. 2d 1388 (Fla. 1983); LeDuc v. State, 415 So. 2d 721 (Fla. 1982); Demps v. State, 416 So. 2d 808 (Fla. 1982); Arango v. State, 437 So. 2d 1099 (Fla. 1983). These cases control: Mr. Atkins was (and is) entitled to an evidentiary hearing, and the trial court's summary denial of his Rule 3.850 Motion was therefore erroneous.

ARGUMENT IV

MR. ATKINS' RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WERE DENIED WHEN DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INVESTIGATE, DEVELOP AND TO PRESENT A DEFENSE AT TRIAL BASED ON MR. ATKINS' ABNORMAL MENTAL CONDITION THAT MADE IT IMPOSSIBLE FOR HIM TO HAVE THE REQUISITE SPECIFIC INTENT.

Phillip Atkins suffered from the combined effects of mental disorder, brain damage, and severe alcohol dependence and substance abuse at the time of the offense. Trial counsel filed a notice of intent to rely on the insanity defense (R. 20) and

experts were appointed to determine sanity at the time of the offense, competence to stand trial and whether involuntary hospitalization was required (R. 37-41). The court determined the defendant competent to stand trial (R. 171), however, no other determination with regard to guilt phase mental health questions appear as of record.

Dr. Henry Dee was one of the experts appointed by the court to assist the defense. Dr. Dee testified at the penalty phase:

> Q. That determination was made that he was competent to stand trial and he was sane under the laws of Florida as they presently exist by you, is that correct, doctor?
>
> A. Yes.
>
> Q. You made that determination, right?
>
> A. Yes.
>
> Q. Doctor, did you form an opinion as to whether --
>
> A. Well now, now, I said that I believed that he was competent to stand trial and, under the charges, could participate in the defense and so forth, and I believed that he understood the nature and consequence of his act as legally defined insofar as the sexual offense was concerned. But I said that I was not certain with regard to the murder.
>
> Q. As to the murder?
>
> A. Yes.
>
> Q. All right, doctor. Then do you have an opinion as to whether he had the capacity to appreciate the criminality of his conduct as it related to the murder or to conform his conduct to the requirements of the law at the time of the murder?
>
> A. That's an issue of course that I've given a lot of thought to.
>
> Q. Let me ask you this, doctor. Would his capacity, based on your opinion, to

appreciate the criminality of his conduct or conform his conduct to the requirements of the law as relates to the murder have been, because of his mental condition, substantially impaired?

A. Yes.

Q. All right. Do you have an opinion as to whether this, as to when at the time this murder occurred whether or not this Defendant was under the influence of extreme mental and emotional -- or emotional disturbance?

A. Yes, yes, I believe that he, he is emotionally disturbed, psychotic, in fact, and has been for a number of years.

Q. To the point that you can categorize it as extreme, doctor?

A. Yes.

Q. All right. Do you have an opinion as to whether he was acting, at the time of this homicide, under extreme duress as a result of his mental condition as it would have appeared to him?

A. That's a difficult question for me. I, uh, I would like to answer it by rephrasing it, if I may?

Q. Please.

A. I think when the child confronted him with the possibility that he might tell his parents, he panicked and reacted; and I'm not at all sure that he had an intended outcome at that point. In fact, under such duress, I'm not sure whether or not he, I just can't be sure whether or not he could have.

Q. He could have even --

A. Have a clear intended outcome.

Q. Right, that he could have even formulated a clear and intended outcome in his mind?

A. Yes, that's right.

(R. 1085-86).

Dr. Dee was never asked to testify at guilt phase nor was he directly asked if Mr. Atkins could have formed the specific intent necessary to commit murder. Recently, however, Dr. Dee was asked specifically whether he believed Mr. Atkins was capable of forming specific intent to commit the murder. His response was:

> I do not believe Mr. Atkins could have had a fully-formed conscious purpose to kill, i.e., that he was at the time of the murder, not capable of forming a specific intent to commit murder.

Defense counsel focused his penalty phase questions of Dr. Dee toward mitigation. However, Dr. Dee had certainly put the defense counsel on notice with his written evaluation that due to the effects of drugs and intoxicants upon Mr. Atkins' mental processes he was unable to form specific intent.

> With regard to the murder, there seems little doubt that at the time that the act occurred he was uncontrolled emotionally and panicked. This, coupled with a long history of a personality disorganization of psychotic proportion must of course raise the question as to whether or not he truly understood the consequences and even nature of the act he was carrying out; the latter is said in view of the pathology report which would appear to indicate a remarkable number of blows.

This should surely have made the defense counsel aware of the very real concern that Dr. Dee had with regard to Mr. Atkins' ability, or lack thereof, to form any specific intent to commit the murder. When this condition is intensified by alcohol and narcotics, it is clear that an experts' opinion was necessary to fully assess and explain Mr. Atkins' mental state. Had defense counsel pursued this either with Dr. Dee or with other competent mental health professionals, he would have discovered that in

fact Mr. Atkins was unable to form any specific intent to commit murder. Dr. James Merikangas, neuro-psychiatrist, recently evaluated Mr. Atkins and concluded that Mr. Atkins' mental state at the time of the offense was such that he was "not in control, under extreme emotional disturbance and that he was most likely suffering from drug induced blackouts which would have rendered him incapable of knowing right from wrong and that the ability to formulate a course of action or premeditate or deliberate would have been severely impaired if not impossible."

Clearly a defense presenting this evidence of Mr. Atkins' inability to form a specific intent was a very viable defense, one that defense counsel had obviously considered but then failed to present. Failure to present the defense and to call an expert during the guilt/innocence phase deprived Mr. Atkins of his constitutional right to present a defense as guaranteed by the sixth and fourteenth amendments to the United States Constitution and Article 1 Sections 9 and 16 of the Florida Constitution. See Washington v. Texas, 388 U.S. 14, 17 (1967), and Chamber v. Mississippi, 410 U.S. 284, 285 (1973). An expert's testimony would have established that Mr. Atkins either could not or did not entertain the specific intent or state of mind essential to proof of first degree premeditated murder or felony murder due to an abnormal mental condition.

It seems very clear that not only is this type of evidence admissible, but counsel's failure for presenting the requisite expert testimony to explain Mr. Atkins' mental abnormalities and the effect of the intoxicants was ineffective. While the State and the circuit court would like to attribute tactical reasons

for counsel's failure in this area, the record in no way supports that nor do defense counsel's own recollections:

> 4. Dr. Henry L. Dee, psychologist, could have testified during the guilt phase of the trial that Mr. Atkins, at the time of the murder, was "uncontrolled emotionally and panicked" and this, coupled with his other mental disorders and state of intoxication, rendered him incapable of understanding the consequences and nature of his act.
>
> 5. Although affiant called Dr. Dee during the penalty phase of the trial, affiant simply failed to consider the effect that his testimony, or that of any expert, concerning Mr. Atkins' ingestion of quaaludes, marijuana and alcohol would have had on the jury.

Mr. Edmund's strategy or lack thereof is not a matter of record and his testimony on this and other issues is critical for proper determination of this claim.

In Gurganus v. State, 451 So. 2d 817, 822-23 (Fla. 1984), this Court held that when specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant. Relevant evidence is evidence tending to prove or disprove a material fact. Section 90.401, Florida Statutes. Evidence which tends to disprove the specific intent element of the crime charged is relevant and must be allowed. Thus evidence of a mental condition offered as bearing on the capacity of the accused to form the specific intent essential to constitute a crime is relevant. Case law from Florida and elsewhere indicates that petitioner had the right to present expert testimony on this issue.

In the landmark case of Garner v. State, 28 Fla. 133, 153-54, So. 835 (1891), it was held that evidence of voluntary intoxication was relevant to negate specific intent or a premeditated design. See also Gentry v. State, 437 So. 2d 1097, 1099 (Fla. 1983). Jacobs v. State, 395 So. 2d 1113, 1115 (Fla. 1981).

Below the State claimed that expert testimony with regard to Mr. Atkins' mental state would not have been admissible anyway and that Gurganus v. State is "no longer good law." The State failed to recognize that in Chestnut v. State, 14 F.L.W. 9 (Fla. 1989), the Florida Supreme Court did not overrule Gurganus but merely distinguished it. The court very clearly stated "Gurganus simply reaffirmed the long-standing rule in Florida that evidence of voluntary intoxication is admissible in cases involving specific intent." Supra at 10. Obviously, Gurganus is still good law. Expert testimony regarding the effects of alcohol and drug usage upon a specific defendant's ability to form a specific intent is admissible under Chestnut. The Chestnut opinion focused almost entirely on the question of whether admissibility of evidence of a defendant's mental condition meant Florida had adopted a diminished capacity defense. Mr. Atkins' claim is not one of diminished capacity but rather whether defense counsel's failure to present expert testimony as to the effects intoxicants had upon Mr. Atkins and his ability to form specific intent prejudiced Mr. Atkins' right to a fair trial. Clearly, under Gurganus and Chestnut such evidence for that purpose is admissible.

The Florida Supreme Court recently addressed a similar question in Lambrix v. State, 534 So. 2d 1151, 1154 (Fla. 1988):

> . . . [D]efense counsel can be faulted for not having sought the opinion of an addictionologist, in order for such an expert to testify that Lambrix was so chemically dependent that he could not have formed the specific intent to commit this crime.

(emphasis added). Here the State of Florida having defined first degree murder so as to make the defendant's intent a material issue can not preclude presentation of evidence relevant to the resolution of that issue. Any other rule would violate the constitutional principles embodied in Washington v. Texas, 388 U.S. 14 (1967); Chambers v. Mississippi, 410 U.S. 284 (1973); and Rock v. Arkansas, 107 S. Ct. 2704 (1987).

Even if Mr. Atkins' abnormal mental condition was not so acute as to constitute legal insanity, it was, however, serious enough to negate specific intent. Expert testimony should have been presented in the guilt/innocence phase since there were no obstacles to his doing so. In Mr. Atkins' case, his mental condition at the time and its impact upon his mental processes during the fatal episode were relevant to demonstrate an absence of premeditation or specific intent. See State v. Christensen, 628 P.2d 580 (Ariz. 1981)(court held it was error in a first degree murder prosecution to exclude psychiatric testimony that defendant had difficulty in dealing with stress, and in stressful situations, his actions were more reflexive than reflective. Because defendant acted impulsively, particularly when drunk, the jury could have concluded that he did not premeditate the homicide). Cf. Dr. Dee, testimony at penalty (R. 1084-86).

Expert testimony regarding any such abnormality aids the jury in understanding the circumstances and evaluating the accused's state of mind. Florida rules of evidence allow expert testimony as to the ultimate issue. See Sections 90.702 and 90.703, Florida Statutes (1981). Those sections provide:

> Testimony by experts. -- If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.
>
> Opinion on ultimate. -- Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

Defense counsel's performance was deficient when he failed to present expert testimony as to Mr. Atkins' state of mind at the time of the offense. In Mr. Atkins' case mental health experts were available or could have been obtained who could have documented that because of his intoxication Mr. Atkins was unable to form a specific intent to commit murder. Drs. Dee and Merikangas would have been able to testify that due to the confluence of brain damage, mental disability, alcohol dependence and intoxication at the time of the offense, Mr. Atkins was unable to form the requisite specific intent to commit the crime of first degree murder. Counsel, however, investigated but failed to present this evidence, never putting forth the expert opinion he had from Dr. Dee in this regard. Further defense counsel did not pursue additional expert opinions that would have been available.

In addition to expert testimony, there was an abundance of evidence in the form of lay testimony and records which would have established the effects of alcohol upon Mr. Atkins. Some of this evidence was actually available to the trial attorney, and put into evidence but never used to argue an inability to form a specific intent, an element of the crime. Additional evidence would have been available with even minimal investigation, all of which should have been presented to the jury. Particularly valuable would have been expert testimony to adequately explain to the jury the nature of Mr. Atkins' deficiencies.

If the jury had been provided with this information, and had this information and a great deal more -- information regarding Mr. Atkins' mental deficits, deficits made even more significant by his continuous abuse of intoxicants -- been discussed by a qualified mental health professional, they would have had evidence from which to find that at the time of this offense, Phillip Atkins' mental incapacity to form the specific intent to commit the crime of murder could not be doubted.

There is a reasonable probability that if this case had been handled competently, the verdict would have been different. Moreover, had the jury nevertheless returned a verdict of murder in the first degree, they would have returned a recommendation for a life sentence based on what should have been the evidence. Mr. Atkins was denied the effective assistance of counsel in violation of his rights under the sixth, eighth and fourteenth amendments to the United States Constitution, and Article I, Section 16 of the Declaration of Rights of the Florida

Constitution. At the very least this Court must remand for an evidentiary hearing on this claim.

ARGUMENT V

PHILLIP ATKINS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT-INNOCENCE AND SENTENCING PHASES OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION: EVALUATING MR. ATKINS' CLAIMS

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland v. Washington requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. In this motion Mr. Atkins pleads each. Given a full and fair evidentiary hearing, he can prove each. He is entitled, at a minimum, to an adequate evidentiary hearing on these claims.

1. The Guilt-Innocence Phase

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147, 1148-50 (5th Cir. 1978). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective

assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th cir. 1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Lovett v. Florida, 627 F.2d 706, 709 (5th Cir. 1980).

Counsel have been found to be prejudicially ineffective for failing to impeach key state witnesses with available evidence; for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976), or taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; and for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963. Moreover, counsel has a duty to ensure that his or her client receives appropriate mental testing, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984), especially when, as here, the client's level of mental functioning is at issue, Mauldin, supra, and when the client

cannot fend for himself. See United State v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979).

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle 642 F.2d 903, 906 (5th cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washington, supra; Kimmelman v. Morrison, supra.

Each of the errors committed by Mr. Atkins' counsel is sufficient, standing alone, to warrant Rule 3.850 relief. Each undermines confidence in the fundamental fairness of the guilt-innocence determination. The allegations are more than sufficient to warrant a Rule 3.850 evidentiary hearing. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1987); see also, Code v. Montgomery, 725 F.2d 1316 (11th Cir. 1983). Here the files and records do not conclusively establish that Mr. Atkins received effective representation, particularly those documents attached to the circuit court's order summarily denying relief

2. The Sentencing Phase

Beyond guilt-innocence, defense counsel must also discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Tyler v. Kemp, 755 F.2d 741, 745 (11th cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and remanded, 467 U.S. 1211 (1984), adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, 468 U.S. 1206 (1984), adhered to on remand, 739 F.2d 531 (1984), cert. denied, 469 U.S. 1207 (1985); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Thomas v. Kemp, 796

F.2d 1322, 1325 (11th Cir. 1986), cert. denied, 107 S. Ct. 602 (1986). Trial counsel here did not meet these rudimentary constitutional standards. Cf. King v. Strickland, supra, see also O'Callaghan v. State, supra; Douglas v. Wainwright, supra; Thomas v. Kemp, supra, 796 F.2d at 1325. As explained in Tyler v. Kemp, supra:

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

Id. at 743 (citations omitted). Mr. Atkins is entitled to the same relief.

In O'Callaghan v. State, supra, 461 So. 2d at 1354-55, the Florida Supreme Court examined allegations that trial counsel ineffectively failed to investigate, develop, and present mitigating evidence. 461 So. 2d at 1355. The Court found that such allegations, if proven, were sufficient to warrant Rule 3.850 relief and remanded the case for an evidentiary hearing.

Counsel's highest duty is the duty to investigate and prepare. Where counsel unreasonably flouts that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. State v. Michael, 530 So. 2d 929 (Fla. 1988). See, e.g., Kimmelman v. Morrison, supra, 106 S. Ct. at 2588-89 (1986)(failure to request discovery

based on mistaken belief state obliged to hand over evidence); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986)(failure to interview potential alibi witnesses); Thomas v. Kemp, supra (little effort to obtain mitigating evidence); Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985) (failure to depose any of the state's witnesses), cert. denied, 107 S. Ct. 324 (1986); King v. Strickland, supra (failure to present additional character witnesses was not the result of a strategic decision made after reasonable investigation); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978)(defense counsel presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (refusal to interview alibi witnesses); see also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985)(counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

Mr. Atkins' court-appointed counsel failed in his duty. The wealth of significant evidence which was available and which should have been presented was inadequately presented. Counsel operated through neglect. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. See Nealy v. Cabana, supra; Kimmelman v. Morrison, supra. Mr. Atkins' capital conviction and sentence of death are the resulting prejudice. In this case, as in Thomas v. Kemp,

> It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trials would have been different if mitigating evidence had been presented to the jury. Strickland v. Washington, 466 U.S. at 694. The key aspect

> of the penalty trial is that the sentence be individualized, focusing on the particularized characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were given no information to aid them in making such an individualized determination.

796 F.2d at 1325. A full and fair evidentiary hearing, O'Callaghan, supra; Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986), and, thereafter, Rule 3.850 relief are proper.

B. GUILT PHASE

Mr. Atkins' attorney had initially filed a notice of intent to rely on the insanity defense (R. 20) but then failed to follow through on that even though he had attained the expertise of Dr. Henry Dee who had stated in his report:

> With regard to the murder, there seems little doubt that at the time that the act occurred he was uncontrolled emotionally and panicked. This, coupled with a long history of a personality disorganization of psychotic proportion must of course raise the question as to whether or not he truly understood the consequences and even nature of the act he was carrying out; the latter is said in view of the pathology report which would appear to indicate a remarkable number of blows.

Defense counsel's failure in presenting this very viable defense was clearly ineffective and resulted in Mr. Atkins' conviction of first degree murder when the question of a very basic element of the crime -- specific intent -- was clearly in doubt (See also Argument IV).

Defense counsel attempted to present a defense of voluntary intoxication, again a viable defense to a specific intent crime. The record is replete with evidence of Mr. Atkins' intoxication and Mr. Edmund presented that evidence throughout the proceeding. However, at the suppression hearing, Mr. Edmund should have taken

the obvious signal from the Judge that an expert in the field was necessary.

Andy Yevchak of the Lakeland Police Department was called to testify at the suppression hearing (R. 114). He had picked up Mr. Atkins on the evening of the arrest and testified as to his condition (R. 116-120). Mr. Yevchak also testified that he had some experience working with people who have been under the influence of narcotics (R. 121) and explained what a Quaalude is (R. 122). The Judge then interrupted the questioning to ask, "What are the effects of combining alcohol and Quaalude?" (R. 123). Mr. Yevchak responded but it was clear that he was not an expert in the field and equally clear that Judge Bentley's curiousity had been peaked by the possibilities. The hearing was held on January 28, 1982 (R. 46) and the trial commenced on February 15, 1982 (R. 175), allowing defense counsel time to seek the advice of an expert witness on intoxicants. He failed to do so.

A wealth of evidence was available to counsel which would have clearly established a compelling intoxication defense. Counsel presented lay witness testimony but without an expert's opinion on the effects of these intoxicants on Phillip Atkins, the defense failed.

Counsel could have developed with adequate investigation a very compelling case since several possibilities existed for Mr. Atkins. Mr. Atkins suffers from brain damage (see report of Dr. James Merikangas) and possibly suffers from diabetes. Dr. Merikangas or an expert of equal knowledge and competence, could have testified to the effects of alcohol and quaaludes on an

average "normal" person; the effects of alcohol and quaaludes on someone with brain damage; and the effects of alcohol and quaaludes on someone with diabetes. Dr. Merikangas has indicated that someone with diabetes would probably go into an alcoholic blackout of some sort while under the influence of alcohol and quaaludes and certainly would not be able to form specific intent or have a sufficient understanding of right from wrong. Someone suffering from brain damage, as Mr. Atkins does, is at least more severely affected by this combination than is the "normal" person.

Expert opinion in this area to fully explain the consequences of these drugs on Phillip Atkins given his mental, physical and emotional state at the time, was absolutely vital in presenting this defense. The jury and the judge wanted to know how it affected him. Counsel's failure to take that one extra step deprived the factfinders of a necessary ingredient for their determination and deprived his client of a very viable defense.

Counsel's failure here was clearly ineffective. No tactical reason can be ascribed to failing to put on the expert testimony that is crucial to the defense one has chosen.

The State's position below attempted to attribute certain tactical reasons to Mr. Edmund's performance. Again, Mr. Edmund's own words reflect the state's error (See his affidavit attached to Reply to State's Motion to Dismiss). The State was incorrect in declaring that "[t]he decision on which witness to call is strictly tactical and cannot be faulted." In Lambrix the Florida Supreme Court expressed its view that expert testimony is critical to a defense of intoxication. In Squires v. State, 513

So. 2d 138 (Fla. 1987), the court remanded for an evidentiary hearing on Mr. Squires' allegation that his defense attorney was ineffective in failing to interview a possible defense witness. Clearly, if this Court considered the failure to interview a possible witness may justify an evidentiary hearing, on ineffective assistance defense counsel's failure to call witnesses may also be ineffective assistance. An evidentiary is thus warranted to determine whether counsel made a reasonable decision to forego the testimony critical to the defense. These are precisely the type of factual disputes that can only be resolved through an evidentiary hearing. Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986).

Trial counsel did not argue that the State had failed to prove the corpus delicti of the kidnapping charge. Even though counsel seemed to be defending this charge under the element of consent, he failed to request an instruction to the jury which would define consent. Counsel's performance here was deficient.

There is no question that counsel was faced with a difficult task in that he had to attempt to explain Mr. Atkins' illness to the jury both at guilt/innocence and at sentencing. It is in this area that counsel needed to seek the assistance of experts.

The State introduced evidence of Mr. Atkins' "sexual problem." Mr. Atkins' "sexual problem" was the featured component of this trial as the State attempted to exploit bad character evidence. The State continually referred to it, Mr. Atkins "confessed" to it, even though that "confession" may have described acts that never actually occurred except in Mr. Atkins' fantasy, since the physical evidence did not support that aspect

of the confession. Defense counsel did not have many options except to deal with this "sexual problem." Certainly, mental health experts could have helped diffuse the prejudice from the improper admission of this evidence.

Dr. Dee reported a dull normal range of intelligence for Mr. Atkins and reality testing that was "far below the critical minimum for the healthy." Dr. Dee concluded that Mr. Atkins had a "psychosis of a schizophrenic type." Recently, Dr. Dee stated that Mr. Atkins' history is consistent with a finding of organicity and there are physical symptoms indicating the possibility of diabetes. All of these problems -- brain damage, mental and emotional delays, personality disorders, possible diabetes, plus Mr. Atkins' "sexual problem" -- are much too complicated to be ignored in the defense of a case as important as this. It is probable that several experts should have been contacted to examine Mr. Atkins and to testify to these conditions and how they all had a part in bringing Phillip Atkins to trial for the rape and murder of a six-year-old boy.

Medical doctors could have screened Mr. Atkins for obvious conditions, such as diabetes and could have testified to the violent reaction or "black out" reaction suffered by a diabetic when alcohol or narcotic drugs are consumed. With the testing and opinions of Dr. Dee, other mental health professionals including Dr. Dee could have attested to how someone like Phillip has poor impulse control because of the organicity, low average intelligence, personality deficits, etc., and how those factors combine to make it difficult, if not impossible to effectively deal with any sexual dysfunction.

Other experts vital to a case like this are expert in the filed of intoxicants. An expert in this area could have explained the effects of the drugs ingested by Phillip Atkins on September 23, 1981.

The intricate complex goings on, physically, emotionally and mentally in Phillip Atkins that night are still not completely understood. What is understood is that those complex interminglings resulted in provoking this usually passive, non-violent man into an uncontrolled rage. There was much to be explored, much the jury needed to know, had a right to understand why Phillip Atkins had limited or no choices on September 23, 1981. To have ignored the intricacies of Phillip Atkins' mental deficits by failing to fully explain these matters to the jury was to render ineffective assistance of counsel and to virtually negate the efforts counsel did make.

Clearly, Mr. Atkins was prejudiced by such omissions of counsel and denied his rights under the sixth, eighth and fourteenth amendments. In light of the evidence available through Drs. Dee and Merikangas it is clear that there is a reasonable probability that the jury would not have convicted of a specific intent crime -- first degree murder in this case. And certainly presentation of this evidence would have resulted in a life sentence in light of the 7-5 juror recommendation as it was. Certainly a full and fair evidentiary hearing and Rule 3.850 relief are proper.

C. PENALTY PHASE

Trial counsel failed to argue against the jury's diminished responsibility as prohibited in Caldwell/Mann (See also Argument

XVII). Inasmuch as counsel failed to predict the Caldwell/Mann error, his performance was ineffective.

Trial counsel did not understand eighth amendment law clearly enough to argue various sentencing instructions, particularly limiting instructions. This failure was ineffective.

Defense counsel presented several witnesses in mitigation. Clearly his presentation had some effect on the jury since the jury vote was by the barest majority, 7-5. But there was more that could have been presented and done at penalty.

This Court has also found that competent expert testimony regarding a complete and thorough mental health evaluation is critical. See State v. Sireci, 536 So. 2d 231 (Fla. 1988). Here, the expert testimony was necessary at both guilt and penalty phases to explain the effects of the intoxication on Phillip Atkins. Mr. Edmund's failure to present this testimony was ineffective, as was counsel's failure to obtain critical background evidence which the mental health expert needed to thoroughly discuss the mental health mitigation present in the case. The State's attempt to "explain away" Mr. Edmund's failure simply emphasizes the need for an evidentiary hearing on this claim.

As to penalty phase failure on the part of trial counsel the affidavits attached to the Reply to the Motion to Dismiss attest to the type of information available to defense counsel but not presented. Dr. Dee, after viewing these, believed he could have testified to significant nonstatutory mitigation had he known the facts during Mr. Atkins' trial (Attachment 1). As can be seen

from the attached affidavits, Mr. Atkins suffered from physical and emotional abuse at the hands of his father. Such abuse corroborated an extremely dependent personality, so much so that Phillip Atkins always asked his parents permission to leave the house, turned over his pay check to his father and relied on his parents totally even in his adult years (Attachments 3-7). The affidavits also attest to Phillip's severe emotional retardation. People that knew Phillip said it was as if Phillip stopped growing at age 14 or 15 (Attachment 5).

Family and friends of Phillip knew that he was completely dependent on his parents, especially his father. Phillip's father always treated Phillip as a child and even when Phillip was grown, he would turn his paycheck over to his parents and even ask their permission to go to the park or to friends' houses. Phillip loved his father but was frightened of him. His father was very abusive toward his family when he drank and he drank a lot.

George Hanania remembered Phillip as a "nice guy." Phillip was "easy going" and "non-violent". George thought that Phillip was very immature and "mentally slow" and that if it hadn't been for his mental problems he wouldn't have gotten into trouble. Angela Payne knew that Phillip was immature, too. "It is like he stopped growing up at age 14 or 15." She often heard Phillip's father "yelling and cussing out his family" and knew that Phillip was afraid of his father.

Phillip's father and mother tell a parents' nightmare when they explain Shirley's difficult pregnancy with Phillip. She had fainting and blackout spells and a delivery that ultimately

required that forceps be used to force Phillip into a cold, frightening world, a world to which he could never really adjust. Don and Shirley's first born was left with "dents" in his head. Misshapen and damaged, baby Phillip convulsed at the age of two months and stopped breathing until he turned blue.

Phillip's development was slow. He walked late, talked late and was so immature by school age that he was held back in the second grade. His language was labored so he was humiliated by other children. Phillip was afraid to sleep alone and afraid to go to the bathroom alone. He was overly sensitive to things and a fanatic about being clean. As a young teenager, Phillip began developing severe headaches and ear aches. Eventually, he had surgery for removal of a cyst in the inner ear. The infection had spread throughout the bones in his head into his neck and he lost the hearing in his ear due to it.

When Phillip realized there was something "not right" about his sexual needs, he asked his parents to help him. They tried but were turned away. Phillip's family was too poor to pay for help for him. The tragedy of Phillip's story is probably contained in that last sentence. Phillip was too poor to be helped. But help was available. Treatment for people like Phillip is available through behavior modification programs and now through drug therapy. Had Phillip received the help he so desperately wanted, this tragedy would not have happened.

Counsel did not present this information to the jury since he relied almost exclusively on the testimony of Don Atkins for background information. It is clear, however, that Don Atkins did not give the full picture of Phillip's background and that

even Dr. Dee could have more fully discussed mitigation, both statutory and non-statutory had he been given this additional material from those who had known Phillip.

This is not merely cumulative testimony, nor can its omission be viewed as harmless when the jury recommendation was the narrowest of margins -- 7-5 for death.

Had defense counsel presented to the jury at guilt/innocence or at penalty the true picture of Phillip's dysfunction and the type of treatment available, it is likely that at least a life recommendation would have been forthcoming. After all, the jury deliberated over two hours at penalty alone and came back with the narrowest possible margin, 7-5. Had they known that people like Phillip can be treated, can be taught through therapy, behavior modification and hormone injections, it is likely that they would have returned a vote for life.

Counsel's failure in presenting the full story of Phillip Atkins, not just his history but his tragedy; counsel's failure in presenting experts to discuss and explain the complexities of Phillip's disease and the treatment options -- these were failures that resulted in a death sentence for Phillip Atkins.

These clearly are claims for which an evidentiary hearing is warranted. The disputes are substantial, are factual in nature and are not of record. Porter v. Wainwright, 805 F. 2d 930 (11th Cir. 1986). An evidentiary hearing to resolve these questions of fact is required. See O'Callaghan, Lemon, Squires, supra.

ARGUMENT VI

THERE WAS NO KNOWING AND INTELLIGENT WAIVER OF MIRANDA RIGHTS IN MR. ATKINS' CASE: HIS MENTAL IMPAIRMENTS PRECLUDED HIM FROM COMPREHENDING, AND VALIDLY WAIVING, THOSE RIGHTS. COUNSEL INADEQUATELY ARGUED AND PRESENTED A SUPPRESSION MOTION.

Mr. Atkins was mentally impaired and under the influence of drugs and alcohol at the time of the offense and at the time of his interrogation by the police. This mental impairment made it impossible for him to understand the "rights" he had under the Constitution, or to in any way knowingly, intelligently, and voluntarily waive what he did not comprehend.

In Smith v. Zant, 855 F.2d 712 (11th Cir. 1988), the Eleventh Circuit discussed the proper constitutional standard for circumstances such as those herein at issue:

> The inquiry [into the validity of a waiver] has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986)(citations omitted). In particular, "[t]he determination of whether there has been an intelligent waiver . . . must depend in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); see Miranda, 384 U.S. at 475, 86 S.Ct. at 1628 (applying Johnson v. Zerbst standard to waiver of Miranda rights); . . .

Smith v. Zant, 855 F.2d 712, 716 (11th Cir. 1988).

Mr. Atkins' attorney recognized the problems and made a motion to suppress, in part because "[t]he Defendant is a person of limited intellectual capacity and has a history of mental illness." (R. 28). Mr. Edmund's motion also alleged "[t]he Defendant was under the influence of alcoholic and narcotic drugs at the time the statement was taken, and the law enforcement personnel were well aware of this fact, but conducted interrogation into the early morning hours without giving Defendant an opportunity to rest." (R. 28). Although the police claimed throughout that there were no visible symptoms of Mr. Atkins' intoxication or mental impairments; defense counsel attempted to present evidence to the contrary (R. 47-68, R. 834-929). He failed, however, to present available expert testimony.

A recent psychiatric evaluation of Mr. Atkins performed by Dr. James Merikangas, concluded that in part Mr. Atkins suffers from brain damage, migrain headaches and shows signs of hypoglycemia or diabetes. The organicity when coupled with alcohol or narcotic ingestion intensifies the reactions to intoxication. Additionally, combining alcohol or drugs with either hypoglycemia or diabetes "would have rendered him incapable of knowing right from wrong." Specifically, with regard to the statements given by Mr. Atkins to the police, Dr. Merikangas stated:

> It is possible that the confessions are themselves the products of confabulation and that while in a state of extreme distress, Mr. Atkins was simply admitting to things which had no basis in reality or at least in his memory of reality. Therefore the confession was not a free and voluntary act.

Even Dr. Henry Dee who was available but negligently not called at the suppression hearing gave his opinion of Mr. Atkins during the penalty phase and reported evidence of at least developmental delays. While at the time Dr. Dee was not specifically asked about brain damage, in a recent affidavit, Dr. Dee said that certainly Mr. Atkins' history and symptomology was consistent with brain damage.

Dr. Dee testified that Mr. Atkins "doesn't well understand the consequences of what he's doing" (R. 1078) and that "[t]he only defense that he seems to have [ ] in an emotionally charged situation -- and which it is, by the way, quite inadequate defense -- is just to shut off feelings" (R. 1083). "There are times when he seems he should be panicked or distressed, he seems to show no emotional response whatsoever" (R. 1083). In his recent affidavit, Dr. Dee was more specific:

> I also was not asked whether or not in my opinion, Phillip Atkins was capable of knowingly and voluntarily waiving his right to counsel and his right to remain silent during the police interrogation that occurred on the night in question. It seems apparent that Phillip was under the influence of intoxicants and that fact coupled with his other mental impairments at the time make me believe that he did not fully understand the consequences of "waiving" his right to counsel. I recall testifying that Phillip's seeming "walking through type of recollection" was quite consistent with his personality and a stress reaction for him so I am not surprised that his apparent demeanor with the police was quite calm and apparently cooperative. That demeanor did not mean that Phillip understood all that was happening at that time, nor did it mean that he was not still under the influence of the intoxicants he had consumed that evening.

Mr. Atkins was interrogated several times throughout the night and asked to provide consent for search and seizure of his residence, automobile and person. The final interrogation occurred in the early morning hours. Even a person of ordinary intelligence and emotional maturity would have a difficult time understanding all that was happening to him under such stressful conditions. Clearly Mr. Atkins was not an emotionally mature or stable person. In fact, at least part of his "confession" was considered by the court to have been "fantasized":

> The defendant clearly confessed to having anal intercourse with the victim, but the Court cannot determine whether this actually took place or whether the Defendant fantasized....

(R. 1157).

All of this evidence supports the fact that Mr. Atkins, even though he "seemed to be quite coherent and rational at the time of the interrogation, clearly was not. Because of his mental dysfunction, his emotional makeup and his intoxication on the night involved, there was no way that Mr. Atkins could have understood the consequences of "waiving" his Miranda rights. Neither did he understand the consequences of being arrested. The apparently rational behavior was, in fact, a product of his illness, not evidence of his comprehension of what was happening around him.

The testimony of family and friends was that just before the police arrested Mr. Atkins their observations of him were that he was "in a daze" (R. 847, 852), that he was "in another world" (R. 848, 867), and "in a coma" (R. 867). Clearly, it is reaching by the state to interrogate someone like Phillip Atkins under these

conditions without benefit of counsel. Any waiver by Mr. Atkins could not have been made with a "full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." Smith v. Zant, supra. Counsel failed his client when he failed to develop and present evidence that would have established that Mr. Atkins' waiver was not voluntary.

It is clear that Mr. Atkins' mental impairments were sufficient to have precluded any knowing waiver of Miranda and the statement should therefore have been inadmissible. Counsel's failure to adequately litigate and the court's failure to suppress the statement violated Mr. Atkins' fifth and sixth amendment rights. An evidentiary hearing on this claim and thereafter Rule 3.850 relief are proper.

ARGUMENT VII

MR. ATKINS' SENTENCE OF DEATH, RESTING ON THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR, IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH AND CONTRARY TO MAYNARD V. CARTWRIGHT, 108 S. CT. 1853 (1988), IS IN CONFLICT WITH THE NINTH CIRCUIT COURT OF APPEALS DECISION IN ADAMSON V. RICKETTS, 865 F.2D 1011 (9TH CIR. 1988)(EN BANC), AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The issue raised by Mr. Atkins' claim is identical to that raised in Maynard v. Cartwright, 108 S. Ct. 1853 (1988).[6] Under the Cartwright decision, Mr. Atkins is entitled to relief. However, the court below refused to recognize a violation of

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[6]Oklahoma's "heinous, atrocious, or cruel" aggravating circumstance was founded on Florida's counterpart, see Cartwright v. Maynard, 802 F.2d 1203, 1219, and the Florida Supreme Court's construction of that circumstance in State v. Dixon, 283 So. 2d 1 (Fla. 1973) was the construction adopted by the Oklahoma courts.

Cartwright. The issue is also identical to that raised in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc).

A. MR. ATKINS' DEATH SENTENCE IS CONTRARY TO MAYNARD V. CARTWRIGHT

In the present case, as in Cartwright, the jury instructions provided no guidance regarding the "heinous, atrocious or cruel" aggravating circumstance. The jury was simply told: "the crime of which -- or for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel." (R. 1145). No further explanation of the aggravating circumstance was given. At sentencing, the trial judge found that "heinous, atrocious and cruel" applied to Mr. Atkins' case (R. 1158).

The Tenth Circuit's en banc opinion (unanimously overturning the death sentence) explained that the jury in Cartwright received the following instruction:

> the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987)(en banc), affirmed 108 S. Ct. 1853 (1988). Thus, Mr. Atkins' jury received even less explanation of this aggravating circumstance than was found wanting in Cartwright. In Cartwright, the United States Supreme Court unanimously held that such an instruction did not "adequately inform juries what they must find to impose the death penalty." 108 S. Ct. at 1858.

The United States Supreme Court affirmed the Tenth Circuit's grant of relief in Cartwright, explaining that the death sentence did not comply with the fundamental eighth amendment principle

requiring the limitation of capital sentencers' discretion. The Court's eighth amendment analysis fully applies to Mr. Atkins case. The result here should be the same as in Cartwright where the Court noted:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).

108 S. Ct. at 1858.

The Court then discussed its earlier decision in Godfrey v. Georgia, 446 U.S. 420 (1980):

> Godfrey [] which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at 422. The jury had been instructed in the words of the statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:
>
> > "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding

> that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterized almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation." Id., at 428-429 (footnote omitted).
>
> The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance. Id., at 429, 432. This Court concluded that, as a result of the vague construction applied, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id., at 433. Compare Proffitt v. Florida, 428 U.S. 242, 254-256 (1976). It plainly rejected the submission that a particular set of facts surrounding a murder, however, shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.

108 S. Ct. at 1858-59.

Accordingly, the Court concluded that words given to the jury in the instructions regarding heinous, atrocious or cruel were inadequate: "To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and

an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" 108 S. Ct. at 1859.

In Mr. Atkins' case, as in Cartwright, the penalty phase instructions did not guide or channel sentencing discretion. Likewise, here, no adequate "limiting construction" was ever applied by the factfinders to the "heinous, atrocious or cruel" aggravating circumstance.

The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe any murder to be heinous, atrocious or cruel under the instructions. Mills v. Maryland, 108 S. Ct. 1860 (1988). These terms require definition in order for the statutory aggravating factor genuinely to narrow, and its undefined application here violated the eighth and fourteenth amendments. Godfrey v. Georgia, 446 U.S. 420 (1980). Jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988). In essence the jury must be told of the elements constituting this circumstance.

In Mr. Atkins' case, the Court offered no explanation or definition of "heinous, atrocious, or cruel" but simply instructed the jury that the seventh aggravating circumstance the jury could consider was whether the crime "was especially wicked, evil, atrocious or cruel." (R. 1145). The judge's oral instructions may have been interpreted by the jury as telling

them that in fact the murder was wicked, evil, atrocious or cruel. This alone violated Mills v. Maryland, 108 S. Ct. 1860 (1988).

The sentencing court in imposing death noted that there was "no evidence as to when the child became unconscious so that he could suffer no further pain . . . but it is highly probable that the child suffered excruciating pain before dying." (R. 1160). However, the court also noted "[a]fter the victim threatened to tell his parents, the victim was hit and knocked unconscious." (R. 1158). In fact, there were two witnesses to his unconscious state. There is no evidence that he ever regained consciousness, and thus that the crime was unnecessarily torturous. The judge's recitation of facts did not contain any "narrowing principle to apply to those facts." 108 S. Ct. at 1859. Absent application of the narrowing or limiting principle this Court can not simply apply a sufficiency of the evidence test. Where an instruction fails to instruct on an essential element of the crime, a resulting conviction can not stand. Robles v. State, 188 So. 2d 789 (Fla. 1966). Since here the jury did receive instruction on all the elements of this aggravating circumstance, this circumstance must be stricken.

Even though the Florida Supreme Court had consistently held that in order to show "heinous, atrocious, and cruel" something more than the norm must be shown, see Cooper v. State, 336 So. 2d 1133 (Fla. 1976); Odom v. State, 403 So. 2d 936 (Fla. 1981); Parker v. State, 458 So. 2d 750 (Fla. 1984), the court found that "heinous, atrocious and cruel" applied to Mr. Atkins' case (R. 1158). In fact, in Proffitt v. Florida, 428 U.S. 242 (1976), the

circumstance was found to have sufficient guidance because the Florida Supreme Court had construed it as containing the requirement that the crime was "conscienceless or pitiless" because it was "unnecessarily torturous to the victim." 428 U.S. at 255-56.

When Mr. Atkins challenged this aggravating circumstance on direct appeal, the court did not have the benefit of Maynard v. Cartwright, decided by the United States Supreme Court in June, 1988. Cartwright did not exist at the time of Mr. Atkins' trial, sentencing, resentencing, or direct appeals and it substantially alters the standard pursuant to which Mr. Atkins' claim must be determined. As did Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), Cartwright also represents a substantial change in the law that requires Mr. Atkins' claim to be determined on the merits.

In Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980), the Florida Supreme Court held that state post-conviction relief is available to a litigant on the basis of a "change of law" which:

> (a) emanates from [the Florida Supreme] Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

Id., 387 So. 2d at 922.

Maynard v. Cartwright, supra, like Hitchcock v. Dugger, supra, satisfies the three Witt requirements. It is a United States Supreme Court decision. It is premised upon the eighth amendment to the United States Constitution. Finally, it constitutes a development of fundamental significance by concluding that state courts, such as the Florida Supreme Court,

were misconstruing Godfrey v. Georgia, 446 U.S. 420 (1980). State courts had interpreted Godfrey as not requiring a sentencer to be instructed on or to apply limiting principles which were to guide and channel the sentencer's construction of the "heinous, atrocious or cruel" aggravating circumstance. Thus, the decision in Maynard v. Cartwright is very much akin to the decision in Hitchcock v. Dugger, which held that the Florida Supreme Court and the Eleventh Circuit Court of Appeals had failed to properly construe Lockett v. Ohio, 438 U.S. 586 (1978). Cartwright, like Hitchcock, changed the standard of review previously applied. See Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

Indeed, this Court has previously passed off Godfrey as only effecting its own appellate review of death sentences. Brown v. Wainwright, 392 So. 2d 1327, 1332 (Fla. 1981)("Illustrative of the Court's exercise of the review function is Godfrey v. Georgia"). This Court has declined to address the impact of Godfrey upon the adequacy of jury instructions regarding this aggravating circumstance.[7]

In its decision in Maynard v. Cartwright, the United States Supreme Court held that state courts had failed to comply with Godfrey when they did not require adequate jury instructions which guided and channelled the jury's sentencing discretion. More is required than simply asking the jury if the homicide was

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[7]In fact, through 1988, Shepards' United States Citations shows that the Florida Supreme Court cited Godfrey three times, once in Brown, once in Witt v. State, 387 So. 2d 922 (Fla. 1980), and once in the dissent in Hitchcock v. State, 413 So. 2d 741, 748 (Fla. 1982).

"wicked, evil, atrocious or cruel." Maynard v. Cartwright also applies to the judge's sentencing where there has been a failure to apply the controlling limiting construction of "heinous, atrocious, or cruel." Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc). This Court's prior limited reading of Godfrey (as only effecting appellate review of a death sentence) was thus in error. That error has been recognized and spelled out in Maynard v. Cartwright.

B. MR. ATKINS' DEATH SENTENCE IS IN DIRECT CONFLICT WITH ADAMSON V. RICKETTS, 865 F.2D 1011 (9TH CIR. 1988) (EN BANC)

Just as this claim is identical to that found meritorious in Cartwright, so is it identical to the claim upon which the Ninth Circuit Court of Appeals granted relief in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc). There, the sentencing judge's verdict stated, "the aggravating circumstance[] . . . exists [since Adamson] committed the offense in an especially cruel, heinous and depraved manner," and described the murder. Adamson, supra, 865 F.2d at 1030. In Mr. Atkins' case, the jury was instructed with and the trial judge applied the identical erroneous standard. The en banc Ninth Circuit found that the standard at issue lacked "any discussion or application of the 'actual suffering' cruelty standard" enunciated by the Arizona Supreme Court as a limiting construction of the circumstance, and that thus the circumstance did not provide for the "suitably directed discretion" of the sentencer required by Maynard v. Cartwright, 108 S. Ct. 1853 (1988) and Godfrey v. Georgia, 446 U.S. 420 (1980). Adamson, supra, 865 F.2d at 1030.

Adamson further found that appellate review of the propriety of the heinous, atrocious, or cruel aggravating circumstance did not cure the trial judge's overbroad application of the circumstance:

> That the Arizona Supreme Court affirmed Adamson's death sentence based on cruelty grounds in no way cures the sentencing judge's failure to apply this allegedly constitutional cruelty construction in Adamson's sentencing proceeding. . . . [A]s the Supreme Court has repeatedly emphasized, it is the suitably directed discretion of the sentencing body which protects against arbitrary and capricious capital sentencing. Maynard, 108 S. Ct. at 1858; Godfrey, 446 U.S. at 428-29; Gregg, 428 U.S. at 189; Furman, 408 U.S. at 313 (White, J., concurring). Post hoc appellate rationalizations for death sentences cannot save improperly channeled determinations by a sentencing court. Not only are appellate courts institutionally ill-equipped to perform the sort of factual balancing called for at the aggravation-mitigation stage of the sentencing proceedings, but more importantly, a reviewing court has no way to determine how a particular sentencing body would have exercised its discretion had it considered and applied appropriately limited statutory terms.

Adamson, supra, 865 F.2d at 1036 (emphasis in original)(footnote omitted).

As in Adamson, the discretion of the sentencing jury in Mr. Atkins' case was not properly channeled or guided, and the state high court's summary affirmance of the application of the heinous, atrocious, or cruel aggravating circumstance did not cure the sentencers' unbridled discretion in applying that factor.

C. THE ERROR WAS NOT HARMLESS

This Court in Hall v. State, 14 F.L.W. 101 (Fla. 1989), recently explained when penalty phase error requires a new

sentencing before a new jury. "The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation." 14 F.L.W. at 103. In other words, would a life recommendation based upon the mitigating evidence in the record have withstood an override. Certainly the considerable statutory and non-statutory mitigation presented here established a reasonable basis for a life recommendation. See Holsworth v. State, 522 So. 2d 348 (Fla. 1988); DuBoise v. State, 520 So. 2d 260 (Fla. 1988); Burch v. State, 522 So. 2d 810 (Fla. 1988); Brown v. State, 526 So. 2d 908 (Fla. 1988). Accordingly, the error cannot be found to be harmless and a new sentencing before a new jury must be ordered.

D. CONCLUSION

In its decision in Maynard v. Cartwright, the United States Supreme Court held that state courts had failed to comply with Godfrey when they did not require adequate jury instructions which guided and channelled the jury's sentencing discretion. More is required than simply asking the jury if the homicide was "wicked, evil, atrocious or cruel." Maynard v. Cartwright also applies to the judge's sentencing where there has been a failure to apply a limiting construction to "heinous, atrocious, or cruel." Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc). This Court's prior constructions of Godfrey (as only effecting appellate review of a death sentence) were thus in error. That standard has been altered by Cartwright.

The circuit court erroneously concluded that Mr. Atkins did not challenge the sentencer's determination that the homicide was "heinous, atrocious or cruel." This issue was presented on

direct appeal. See Brief of Appellant, filed September 7, 1982, Issue VI. Accordingly, the rule in Witt applies and Rule 3.850 is available to address the failure to apply the limiting construction of "heinous, atrocious or cruel" in Mr. Atkins' case. Cartwright changed the relevant eighth amendment standard of review. Cartwright applies to this case, as Witt makes clear. See also Thompson v. Dugger, supra; Downs v. Dugger, supra. This Court erred in concluding otherwise.

The "heinous, atrocious, or cruel" aggravating factor, as applied in this case, violated the eighth and fourteenth amendments. Indeed, there is no principled distinction between Mr. Atkins' case and Maynard v. Cartwright. This Court must grant sentencing relief.

ARGUMENT VIII

MR. ATKINS' SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENT BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. ATKINS TO PROVE THAT DEATH WAS INAPPROPRIATE CONTRARY TO MULLANEY V. WILBUR, 421 U.S. 684 (1975), LOCKETT V. OHIO, 438 U.S. 586 (1978), AND MILLS V. MARYLAND, 108 S. CT. 1860 (1988).

In Arango v. State, 411 So. 2d 172, 174 (Fla. 1982), this Court held that a capital sentencing jury must be

> told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

Accord State v. Dixon, 283 So. 2d 1 (Fla. 1973). This Court, in fact, held in Arango that shifting the burden to the defendant to

establish that the mitigating circumstances outweigh the aggravating circumstances would conflict with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as with Dixon. Mr. Atkins' sentencing proceeding did not follow this straightforward due process and eighth amendment requirement. Rather, Mr. Atkins' sentencing jury was specifically and repeatedly instructed that Mr. Atkins bore the burden of proof on the issue of whether he should live or die.

Mr. Atkins' sentencing jury was instructed at the outset of the sentencing process:

> Now the state and the Defendant in just a few moments may present evidence to you relative to the nature and the character of the Defendant. You're instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine first whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.
>
> At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation which you may consider.

(R. 1037).

Defense counsel argued that the jury's task was to look at Phillip Atkins as an individual when determining the aggravating and mitigating factors (R. 1139-1143), but the State had already made it clear that the legislature by establishing aggravating and mitigating circumstances intended the defendant to have the burden of proving that life was appropriate.

> [The legislature has] made a list of things that you are to consider in determining whether to recommend a life or a death

> sentence. These are called aggravating circumstances and mitigating circumstances. The aggravating circumstances are those that if you find they exist would indicate a death penalty is a proper sentence.

(R. 1131)(emphasis added). The State went on then to discuss the "weighing process." (R. 1131-32).

The court's instructions then solidified the burden-shifting notion:

> However, it is your duty to follow the law that will now be given to you by the Court and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 1144) and to emphasize it again:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 1145).

Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc). In Adamson, the Ninth Circuit held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable sentencing determination:

> We also hold A.R.S. sec. 13-703 unconstitutional on its face, to the extent

that it imposes a presumption of death on the defendant. Under the statute, once any single statutory aggravating circumstance has been established, the defendant must not only establish the existence of a mitigating circumstance, but must also bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance(s). See Gretzler 135 Ariz. at 54, 659 P.2d at 13 (A.R.S. sec. 13-703(E) requires that court find mitigating circumstances outweigh aggravating circumstances in order to impose life sentence). The relevant clause in the statute--"sufficiently substantial to call for leniency"--thus imposes a presumption of death once the court has found the existence of any single statutory aggravating circumstance.

Recently, the Eleventh Circuit held in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), that a presumption of death violates the Eighth Amendment. The trial judge, applying Florida's death penalty statute, had instructed the jury to presume that death was to be recommended as the appropriate penalty if the mitigating circumstances did not outweigh the aggravating circumstances. Examining the jury instructions, the Eleventh Circuit held that a presumption that death is the appropriate sentence impermissibly "tilts the scales by which the [sentencer] is to balance aggravating and mitigating circumstances in favor of the state." Id. at 1474. The court further held that a presumption of death "if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment." Id. at 1473.

The Constitution "requires consideration of the character and record of the individual offender and the circumstances of the particular offense," Woodson, 428 U.S. at 304, because the punishment of death is "unique in its severity and irrevocability," Gregg, 428 U.S. at 187, and because there is "fundamental respect for humanity underlying the Eighth Amendment." Woodson, 428 U.S. at 304 (citation omitted). A defendant facing the possibility of death has the right to an assessment of the appropriateness of death as a penalty for the crime the person was convicted of. Thus, the Supreme Court has

held that statutory schemes which lack an individualized evaluation, thereby functioning to impose a mandatory death penalty, are unconstitutional. See, e.g., Sumner v. Shuman, 107 S.Ct. 2716, 2723 (1987); Roberts, 428 U.S. at 332-33; see also Poulos, Mandatory Capital Punishment, 28 Ariz. L. Rev. at 232 ("In simple terms, the cruel and unusual punishments clause requires individualized sentencing for capital punishment, and mandatory death penalty statutes by definition reject that very idea.").

In addition to precluding individualized sentencing, a presumption of death conflicts with the requirement that a sentencer have discretion when faced with the ultimate determination of what constitutes the appropriate penalty. See Comment, Deadly Mistakes: Harmless Error in Capital Sentencing, 54 U. Chi. L. Rev. 740, 754 (1987)("The sentencer's authority to dispense mercy . . . ensures that the punishment fits the individual circumstances of the case and reflects society's interests.").

Arizona Revised Statute sec. 13-703(E) reads, in relevant part: "the court . . . shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Thus, the Arizona statute presumes that death is the appropriate penalty unless the defendant can sufficiently overcome this presumption with mitigating evidence. In imposing this presumption, the statute precludes the individualized sentencing required by the Constitution. It also removes the sentencing judge's discretion by requiring the judge to sentence the defendant to death if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard, which outweigh the aggravating circumstances. See Arizona v. Rumsey, 467 U.S. 203, 210 (19840("death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency"); State v. Jordan, 137 Ariz. 504, 508, 672 P.2d 169, 173 (1983)("Jordan III")(sec. 13-703 requires the death penalty if no mitigating circumstances exist).

The State relies on the holdings of its courts that the statute's assignment of the burden of proof does not violate the Constitution. The Arizona Supreme Court reasons that "[o]nce the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the defendant to establish mitigating circumstances." Richmond, 136 Ariz. at 316, 666 P.2d at 61. Yet this reasoning falls short of the real issue--that is, whether the presumption in favor of death that arises from requiring that the defendant prove that mitigating circumstances outweigh aggravating circumstances, offends federal due process by effectively mandating death.

In addition, while acknowledging that A.R.S. sec. 13-703 places the burden on the defendant to prove the existence of mitigating circumstances which would show that person's situation merits leniency, State v. Poland, 144 Ariz. 388, 406, 698 P.2d 183, 201 (1985) aff'd, 476 U.S. 147 (1986), the State suggests that its statute does not violate the Eighth Amendment because subsection (E) requires the court to balance the aggravating against the mitigating circumstances before it may conclude that death is the appropriate penalty. While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. This is because in situations where the mitigating and aggravating circumstances are in balance, or, where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death and thus precludes the individualized sentencing required by the Constitution. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence, and we note that "[p]resumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect." Jackson, 837 F.2d at 1474 (citing Francis and Sandstrom).

Thus, we hold that the Arizona statute, which imposes a presumption of death, is unconstitutional as a matter of law.

Adamson, supra, 865 F.2d at 1041-44 (footnotes omitted)(emphasis in original).

What occurred in Adamson is precisely what occurred in Mr. Atkins' case. The instructions, and the standard upon which the court based its own determination, violated the eighth and fourteenth amendments, Mullaney v. Wilbur, 421 U.S. 684 (1975), Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988). The burden of proof was shifted to Mr. Atkins on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Atkins' due process and eighth amendment rights. See Mullaney, supra. See also, Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). In Arango v. State, 411 So. 2d 172 (Fla. 1982), this Court noted that Mullaney precluded shifting the burden of proof to the defendant on the issue of whether he should live or die. Accordingly, that court held the burden was on the state to show that the aggravating circumstances outweighed the mitigating circumstances. Thus, the constitutional error in the instruction has been previously acknowledged by this Court. Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Atkins' rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Adamson, supra; Jackson, supra.

The focus of a jury instruction claim is "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307 (1985); see also Sandstrom v. Montana, 442

U.S. 510 (1979). The gravamen of Mr. Atkins' claim is that the jury was in essence told that death was presumed appropriate once aggravating circumstances were established, unless Mr. Atkins proved that the mitigating circumstances outweighed the aggravating circumstances. A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the instructions, that Mr. Atkins had the ultimate burden to prove that life was appropriate.

The express application of a presumption of death violates eighth amendment principles:

> Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985). When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state.
>
> It is now clear that the state cannot restrict the mitigating evidence to be considered by the sentencing authority. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). . . . Rather than follow Florida's scheme of balancing aggravating and mitigating circumstances as described in Proffitt [v. Florida, 428 U.S. 242, 258 (1976)], the trial judge instructed the jury in such a manner as virtually to assure a sentence of death. A mandatory death penalty is constitutionally impermissible. Woodson v. North Carolina, 428 U.S. 280 (1976); see also State v. Watson, 423 So. 2d 1130 (La. 1982) (instructions

> which informed jury that they must return recommendation of death upon finding aggravating circumstances held unconstitutional). Similarly, the instruction given is so skewed in favor of death that it fails to channel the jury's sentencing discretion appropriately. Cf. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (sentencing authority's discretion must "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

Jackson v. Dugger, 837 F.2d 1469, 1474 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988).

Proper analysis requires consideration of the United States Supreme Court's recent decision in Mills v. Maryland, 108 S. Ct. 1860 (1988). There, the Court focused on the special danger that an improper understanding of jury instructions in a capital sentencing proceeding could result in a failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114.

Mills, supra, 108 S. Ct. at 1865 (footnotes omitted). Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

In Mills, the court concluded that, in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States, 354 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., Lockett v. Ohio, 438 U.S., at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of [section] 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, Zant v. Stephens, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

Mills, supra, 108 S. Ct. at 1866-67 (footnotes omitted). Thus under Mills the question must be: could reasonable jurors have read the instructions as calling for a presumption of death which shifted the burden to the defendant? The answer to that question in Mr. Atkins' case must be yes.

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting instruction given in Mr. Atkins' case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. Cf. Mills, supra; Hitchcock, supra.

The United States Supreme Court recently granted a writ of certiorari in Blystone v. Pennsylvania, 44 Cr. L. 4210 (March 27, 1989), to review a related issue. The question presented in Blystone has obvious ramifications here. Under Pennsylvania law, the jury is instructed that where it finds an aggravating circumstance present and no mitigation is presented, it "must" impose death. However, if mitigation is offered then the jury must decide whether the aggravating circumstances outweigh the mitigating. Specifically, in Blystone, the defendant decided no mitigation was to be presented. Thus, the jury after finding an aggravating circumstance returned a sentence of death.

Clearly, under Pennsylvania law, the legislature chose to place upon a capital defendant a burden of production. However, once evidence of a mitigating circumstance is offered then the State bears the burden of persuasion as to whether the aggravating circumstances outweigh the mitigating such that a death sentence should be returned.

Under Florida law and the instructions presented here, once one of the statutory aggravating circumstances is found by

definition sufficient aggravation exists to impose death. The jury is then directed to consider whether mitigation has been presented which outweighs the aggravation. Thus under Florida law the finding of a statutorily-defined aggravating circumstance operates to impose upon the defendant both the burden of production and the burden of persuasion. Certainly, the Florida law is more restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in Blystone. The outcome in Blystone will directly affect correct resolution of the issue presented and the viability of Mr. Atkins' death sentence.

Moreover, the error raised here can not be written off as harmless. Any consideration of harmlessness must also consider that had the jury voted for life, that vote could not have been disturbed -- the evidence before the jury established much more than a "reasonable basis" for a jury's life recommendation. See Hall v. State, 14 F.L.W. 101 (Fla. 1989); Mann v. Dugger, 844 F.2d 1446, 1450-51 (11th Cir. 1988)(en banc); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Tedder v. State, 322 So. 2d 908 (Fla. 1975). Under Florida law, to be binding, a jury's decision to recommend life does not require that the jury reasonably concluded that the mitigating circumstances outweighed the aggravating. In fact, the Tedder standard for overriding a jury recommendation of life belies any contention of harmlessness made by the Respondent. Under Tedder and its progeny, a jury recommendation of life may not be overridden if there is a "reasonable basis" discernible from the record for that recommendation, regardless of the number of aggravating

circumstances, and regardless of whether the mitigation "outweighs" the aggravation. See, e.g., Ferry v. State, 507 So. 2d 1373 (Fla. 1987)(override reversed irrespective of presence of five aggravating circumstances); Hawkins v. State, 436 So. 2d 44 (Fla. 1983)(same). Thus the instruction not only violated Mullaney and Adamson, but it was not an accurate statement of Florida law. The error can not be found to be harmless beyond a reasonable doubt because if the jury here had been correctly told that it could recommend life so long as it had a reasonable basis for doing so and the jury had recommended life, a reasonable basis for that recommendation exists in the record. Thus a life recommendation could not have been overridden. This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Atkins. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Atkins' death sentence. This Court has not hesitated in the past to exercise its inherent habeas jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. For each of the reasons discussed above the Court should vacate Mr. Atkins' unconstitutional sentence of death. At the very least this Court must stay Mr. Atkins' execution pending Blystone.

ARGUMENT IX

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 RIASE THIS ISSUE ON DIRECT APPEAL.

The jury in Mr. Atkins' sentencing trial was erroneously instructed on the vote necessary to recommend a sentence of death or life. As decisions of the Florida Supreme Court have made clear, the law of Florida is not that a majority vote is necessary for the recommendation of a life sentence; rather, a six-six vote, in addition to a seven-five or greater majority vote, is sufficient for the recommendation of life. Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983). However, Mr. Atkins' jury throughout the proceedings was erroneously informed that, even to recommend a life sentence, its verdict must be by a majority vote. These erroneous instructions are also the type of misleading information condemned by Mills v. Maryland, 108 S. Ct. 1860 (1988). As in Mills, the instructions here undermined the reliability of the sentencing determination, for they created the risk that the jury may have read the instructions so as to preclude a six-six deadlock.[8]

During voir dire the state incorrectly informed the jury:

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[8]This is particularly true here where after deliberating for two hours, the jury finally returned a 7-5 death recommendation.

> Now whereas the first part of the case, being the guilt or innocence, is, requires a unanimous decision, all 12 of you have to agree, the recommendation as to penalty -- being it life or death -- is a majority vote. It could be seven to five one way or the other.

(R. 257)(emphasis added).

During the State's penalty phase closing argument the jury was clearly misled concerning the number of votes required to recommend a life sentence:

> The second important point to keep in mind is that your recommendation is not, does not have to be unanimous. It has to be by a majority. So it could be seven to five, or eight to four, or whatever. It could be unanimous, but it does not have to.

(R. 1131)(emphasis added). This argument is clearly an incorrect view of Florida capital sentencing law.

There can be no question that the jury charged with deciding whether Mr. Atkins should live or die was erroneously instructed. At the penalty phase, the trial court informed the jury that,

> In these proceedings, it's not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury.
>
> . . .
>
> Now if a majority of the jury determine the Defendant should be sentenced to death, your advisory sentence will be "the majority of the jury by a vote of, advise" -- a blank space to insert your vote -- "advise and recommend that it impose the death penalty upon the Defendant."

(R. 1147-48). As the latter quote demonstrates, Mr. Atkins' "Mann" claim is directly intertwined with the instant claim -- throughout the proceeding the Court and the prosecutor clearly informed the jury that their sentencing "recommendation" was to

be made by a mere majority, and that that "recommendation" could be flatly rejected by the trial court (See Argument XVII). In fact, inaccurate and misleading comments regarding the jury vote and the jury's "advisory sentence" went hand-in-hand.

As a matter of law, the issues go together. The trial court's erroneous instructions regarding the jury vote "create[d] a misleading picture of the jury's role." Caldwell v. Mississippi, 105 S. Ct. 2633, 2646 (O'Connor, J., concurring). This "misleading picture" may very well have diminished the importance the individual jurors placed on their "recommended" sentence. Caldwell, supra. In any case, the jury's deliberations, its application of law to facts, its very weighing process, are untrustworthy. This has resulted in an unreliable sentencing proceeding.

The defendant's jury was erroneously instructed. Although the court at one point correctly informed the jury once that "if by six or more votes the jury determines the Defendant should not be sentenced to death," the sentence should be life (R. 1147-48), this clearly conflicted with other instructions from the court. In fact, seconds later the court stated:

> When seven or more are in agreement as to what sentence should be recommended . . .

(R. 1148). The record reflects that it was only after a deliberation exceeding two hours that the jury, by the marest of majorities, recommended death (R. 1150). It is entirely possible that a six-to-six vote, i.e., a life recommendation, was reached at some point during deliberations only to be abandoned on the basis of the prosecutor's argument as supported by the trial court's erroneous instruction (R. 1147). Jurors so instructed

could quite logically believe that a tied jury was a hung jury. Such a mistaken belief could lead a vacillating juror to change his or her vote from life to death in order to avoid this eventuality.

In any event, it is the erroneous instruction itself that violated the defendant's fifth, sixth, eighth, and fourteenth amendment rights. Mr. Atkins may well have been sentenced to die because his jury was misinformed and misled. Such a procedure creates the substantial risk that a death sentence was imposed in spite of factors calling for a less severe punishment. Lockett v. Ohio, 438 U.S. 586, 605 (1978). Erroneously telling the jury that it had to reach a majority verdict "interject[ed] irrelevant considerations into the fact finding process, diverting the jury's attention from the central issue" of whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). The erroneous instruction may have encouraged Mr. Atkins' jury to reach a death verdict for an improper reason -- its incorrect belief that a majority verdict was required. The erroneous instruction thus "introduce[d] a level of uncertainty and unreliability into the [sentencing] process that cannot be tolerated in a capital case." Id. at 643. Under Mills, supra, since there is the possibility a single juror voted for death because of the misinformation. Mr. Atkins' sentence of death can not stand.

Because these instructions and comments, in their entirety, created a misleading picture of the jury's role, Mr. Atkins need not show prejudice. The instructions and comments misled the jury, diminished the jury's sense of responsibility, injected

arbitrary and capricious factors into the sentencing process, and undermined the reliability of that process. Mr. Atkins has been denied his fifth, sixth, eighth, and fourteenth amendment rights. These errors must not be allowed to stand uncorrected.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Atkins' death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and Rule 9.140(f) of the Florida Rules of Appellate Procedure. It should correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Rose, Harich, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The Court would have done the rest, based on Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Atkins of the

appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, sentencing relief must be accorded Mr. Atkins.

ARGUMENT X

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.

The State brought Mr. Atkins to trial on one count of first degree murder, one count of kidnapping, and two counts of sexual battery. The State did not produce any evidence that any sexual battery had occurred except for Mr. Atkins' statement. Actually, the State produced evidence that no sexual battery had occurred (R. 479, 480, 485). The court granted a directed verdict of acquittal on the two counts of sexual battery (R. 832).

The prosecutor even admitted that the State had no evidence that the sexual batteries occurred:

> MR. PICKARD: Judge, Jack is half right. I've done some research on this, too, because the issue concerned me, also, that the law is fairly clear that you cannot have a conviction of an individual based solely on his confession that he committed a crime without some proof that the crime occurred.
>
> I guess analogizing like somebody walking into the police station and saying, "I killed X out there," and the police never can find the body or don't know who X is, they can't charge him with murder.

> In this case, there has not been, and I agree there will not be, any physical evidence that a sexual battery occurred. The pathologist saw no physical evidence of that. The lab tests were all either inconclusive or negative as far as that; and even jumping ahead further, when we get to the point of the State resting it's case, it's in all honesty the State's feeling the Court would probably have to direct a verdict on the sexual battery counts simply because I do not think I can prove the crime was committed independently of the confession.

(R. 662-663).

If the State had no evidence to present to the jury to prove the elements of sexual battery, there can be no valid reason for allowing inflammatory accusations to be inserted into a capital trial. The insertion of baseless accusations that serious crimes had been committed surely distracted the jury from objectively determining Mr. Atkins' guilt or innocence of murder and kidnapping and more importantly, whether Mr. Atkins should live or die. Under well established Florida law, evidence of collateral crimes is not admissible to establish propensity or bad character. It is only admissible if relevant to a material issue. Drake v. State, 400 So. 2d 1217 (Fla. 1980); Williams v. State, 110 So. 2d 654 (Fla. 1959), cert. denied, 361 U.S. 847.

Here, the prosecution brought sexual battery charges it acknowledged it could not prove. It tried and succeeded in bootstrapping a murder conviction through these unprovable charges.

The trial court was fully aware that the inclusion of the sexual battery charges in Mr. Atkins' trial was at a minimum an anomoly and that an appellate court might find that Mr. Atkins' rights were violated:

> There's another problem the Court has considered overnight and I'm very concerned with. I do not know what the appellate court is going to do with it. Looking at paragraph two, we have an anomalous situation here. The sexual battery, though there was not sufficient evidence to justify the case going to the jury on that, the law of Florida says you can't imprison a man in this case under the current state of law for life on a sexual battery charge with no evidence other than the confession.
>
> But then we say well, but we can consider it for felony murder. Which carries death by -- death as a penalty at this point, even without any foundation to support it and the legal rationalization of the corpus delecti as the corpse and the criminal agency and all that makes legal sense but it's rather bothersome to the Court. And then we're further using the same thing again in the second phase of the trial.
>
> I think, however, it appears to be the law of Florida. I'm not sure it makes a great deal of sense, if the evidence isn't good for one purpose, it ought not to be good for the other purpose. It rather offends me that it's good for one purpose and not the other. It offends my common sense, it offends that the public has the right to expect consistency from the legal system.
>
> But I don't think it's incumbent upon me to reverse the Supreme Court of the State of Florida, so I am not going to act on that. But I am concerned about that and, gentlemen, I think if there's a weak link in this case, that's where it is right there. But it's the law.

(R. 1126-1127).

The State should not be free to sidetrack a court and jury with baseless inflammatory charges. This is particularly so in a trial with the possibility of a death sentence. Mr. Atkins was forced to defend himself against two sexual battery charges for which the State admittedly had no proof. This was clearly an attempt to establish guilt through innuendo, to convict on the

basis of bad character evidence. This happened during the legal proceeding that not only decided his guilt or innocence but determined whether he should live or die. There must be some limitation to prosecutorial discretion. Certainly Drake, supra, and Williams, supra, should define that limit.

As evidenced by the claims in this pleading and the record as a whole, Mr. Atkins was denied his right to a fundamentally fair trial as demanded by due process. "Improper admission of evidence of a prior crime or conviction, even in the face of other evidence amploy supporting the verdict, constitutes plain error impinging upon the fundamental fairness of the trial itself." United States v. Parker, 604 F.2d 1327, 1329 (10th Cir. 1978). See also United States v. Gilliland, 586 F.2d 1384, 1391 (10th Cir. 1978); United States v. Biswell, 700 F.2d 1310, 1319 (10th Cir. 1983). Clearly it was prosecutorial misconduct for the State to charge two life felonies of which there was admittedly no proof.

A prosecutor's concern in a criminal prosecution is not that it shall win a case, but that justice shall be done. Berger v. United States, 295 U.S. at 88-89. Clearly the inclusion of the sexual battery charges tainted this trial to an extent that justice was left by the wayside. Bringing these baseless charges during Mr. Atkins' trial for his life violated his rights under the fifth, sixth, eighth and fourteenth amendments to the Constitution of the United States. Mr. Atkins' convictions for kidnapping and murder and subsequent sentences are unconstitutional.

Counsel for Mr. Atkins preserved this issue. An objection and motion for a mistrial were made because the State had brought these baseless inflammatory charges (R. 863). Counsel also moved for a new trial because the inclusion of the unsubstantiated sexual battery charges had infected the jury's guilt phase deliberations (R. 1222). However, counsel then failed to raise this issue on appeal. This was clearly ineffective assistane of appellate counsel for which no tactical reason can be ascribed. Particularly where, as here, trial counsel and appellate counsel were one and the same. The carefully preserved trial issue was ignored on direct appeal.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law or neglect, deprived Mr. Atkins of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Substantial denial of effective assistance of counsel on appeal brings this claim properly before this Court under this Court's habeas corpus authority. The issue is one involving violations of classic principles of Florida law. See Williams, supra; Drake, supra. An issue such as this which "leap[s] out upon even a casual reading of transcript," Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987), is clearly one in which the Court need only be directed to the issue. No elaborate presentation was required to establish such per se error. The

Court, properly directed, would have done its duty as established from longstanding Florida and federal constitutional standards.

This claim clearly involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Atkins' trial and death sentence. This Court has not hesitated in the past to exercise its inherent jursidiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and Rule 9.140(f) of the Florida Rules of Appellate Procedure. It should now correct this error.

Mr. Atkins' conviction and sentence of death were imposed in violation of the sixth, eighth and fourteenth amendments. The error must be corrected now, by means of habeas relief.

ARGUMENT XI

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

In Florida, the "usual form" of indictment for first-degree murder under sec. 783.04, Fla. Stat. (1987), is to "charg[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968). The absence of felony murder language is of no moment: when a defendant is charged with a killing through premeditated design, he or she is also charged with felony-murder, and the jury is free to return a verdict of first-degree murder on either theory. Blake v. State, 156 So. 2d 511 (Fla. 1963); Hill v. State, 133 So. 2d 68 (Fla. 1961); Larry v. State, 104 So. 2d 352 (Fla. 1958).

Mr. Atkins was charged with first-degree murder in the "usual form": murder "from a premeditated design to effect the death of" the victim in violation of Florida Statute 782.04. An indictment such as this which "tracked the statute" charges felony murder: section 782.04 is the felony murder statute in Florida. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983).

In this case, the jury did not specify whether Mr. Atkins was convicted of felony murder or premeditated murder. The verdict was unspecified (R. 1029). However, the jury had been instructed by the state and the court that they could find Mr. Atkins guilty of first degree felony murder based on the underlying felony of sexual battery (even though there was a directed verdict with regard to those charges) or the underlying felony of kidnapping (R. 1009). The State relied extensively on the felonies charged even though two counts of sexual battery received a directed verdict, and argued that the victim was killed in the course of a sexual battery or a kidnapping. The jury received instructions on both theories and returned a first degree murder verdict (R. 1029). During the penalty phase the jury was instructed that it was an aggravating circumstance of the homicide occurred during the course of a felony.

Since felony murder was most likely the basis of Mr. Atkins' conviction, the subsequent death sentence is unlawful. Cf. Stromberg v. California, 283 U.S. 359 (1931). This is because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. The imposition of an automatic death penalty upon conviction of

first-degree murder violates the eighth and fourteenth amendments, as was recently stated by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, felony murder was found as a statutory aggravating circumstance. ("The crime was committed during the course of sexual battery or kidnapping" (R. 1144)). The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). In short, since Mr. Atkins was convicted for felony murder, he then faced statutory aggravation for felony murder. In fact Mr. Atkins original judgment and sentence contained the following:

> Proceeding first to the aggravating circumstances, number one, an aggravating circumstance the capital felony, that is, the murder of Antonio Castillo, a six-year-old child, was committed while the Defendant was engaged in the crime of kidnapping. The Defendant was found guilty of kidnapping by the jury; and in the view of the Court, there was a sufficient basis for the jury to reach that verdict.
>
> As a further aggravating circumstance, the murder was committed while the Defendant was engaged in the commission of a sexual battery. The Court finds the sexual battery in which the Defendant was engaged was oral sexual battery.

(R. 1156). This Florida Supreme Court, however, struck the improper aggravating circumstance of a sexual battery, since

there had been no proof of that, and remanded for new sentencing. Atkins v. State, 452 So. 2d 529 (Fla. 1984). On resentencing without a jury the court still applied the automatic aggravating circumstances of kidnapping felony-murder. Moreover, the jury had been instructed that once an aggravating circumstance was found, there was, in essence, a presumption of death. See Argument VIII. Since the question is how would a reasonable juror have interpreted the instruction (Mills v. Maryland, 108 S. Ct. 1860 (1988)), it cannot be said the jury did not presume the underlying felony, either kidnapping or sexual battery, to be an aggravating circumstance that warranted death. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments.

The United States Supreme Court recently addressed a similar challenge in Lowenfield v. Phelps, 108 S. Ct. 546 (1988). In Lowenfield, petitioner was convicted of first degree murder under Louisiana law which required a finding that he had "a specific intent to kill to inflict great bodily harm upon more than one person," which was the exact aggravating circumstance used to sentence him to death. The United States Supreme Court found that the definition of first degree murder under Louisiana law that was found in Lowenfield provided the narrowing necessary for eighth amendment reliability:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153

(1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976)(reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. Zant, supra, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").

In Zant v. Stephens, supra, we upheld a sentence of death imposed pursuant to the Georgia capital sentencing statute, under which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." 462 U.S., at 874. We found no constitutional deficiency in that scheme because the aggravating circumstances did all that the Constitution requires.

The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in Jurek v. Texas, 428 U.S. 262 (1976), establishes this point. The Jurek Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the evidence, the defendant's acts were an unreasonable response to the victim's provocation. Id., at 269. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime

and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. Id., at 271-274. But the Court noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of Gregg, supra, and Proffitt, supra:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in Texas." 428 U.S., at 270-271 (citations omitted).

It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at 876, n. 13, discussing Jurek and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Id. at 554-55 (emphasis added).

In Louisiana, the narrowing of the class of death eligible defendants is embraced in the statutory definition of murder, whereas in Florida the narrowing of the class of death eligible defendants is defined by the application of specific aggravating circumstances at sentencing. Thus, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) or at the sentencing phase (as in Florida and Georgia), then the statute may satisfy the eighth amendment as written. However, as applied, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction and aggravation were predicated upon a non-legitimate narrower -- felony-murder.

The conviction-narrower state schemes require something more than felony-murder at guilt/innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This narrows. Here, however, Florida allows a first-degree murder conviction based upon a finding that does not legitimately narrow -- felony murder. The Florida death penalty scheme approved in Proffitt fails to operate when the defendant is convicted of felony murder. Once the defendant is convicted of felony murder, the application of a statutory aggravating circumstance is automatic. The automatic application of all aggravating circumstance fails to constitutionally narrow the class of death eligible defendants.

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony, and . . . is foreseen," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but armed robbery, for example, is nevertheless an offense "for which the death penalty

is plainly excessive." Id. at 1683. With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. Mr. Atkins' conviction and sentence required only a finding that he committed a felony during which a killing occurred, and no finding of intent to kill was necessary. There is no constitutionally valid criteria for distinguishing Mr. Atkins' sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

This analysis cannot be sidestepped by any appellate finding of premeditation. Neither this Court, nor any other court, can determine conclusively that there was a premeditation finding, since that is a question for the jury. See Stromberg; supra. If the basis for the conviction may result in an unconstitutional sentence, then a new sentencing hearing is necessary. See Stromberg, supra. Consequently, since a felony-murder conviction in this case has collateral constitutional consequences (i.e. automatic aggravating circumstance, failure to narrow), this Court's, or any other court's, finding of premeditation is directly at odds with the jury's finding.

The jury did not find premeditation. "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948). The principle that an appellate court cannot utilize a basis for review of a conviction different from that which was litigated and determined by the trial court applies with equal force to the penalty phase

of a capital proceeding. In Presnell v. Georgia, 439 U.S. 14 (1978), the United States Supreme Court reversed a death sentence where there had been no jury finding of an aggravating circumstance, but the Georgia Supreme Court held on appeal there was sufficient evidence to support a separate aggravating circumstance on the record before it. Citing the above quote from Cole v. Arkansas, the United States Supreme Court reversed, holding:

> These fundamental principles of fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilty/determining phase of a criminal trial.

Presnell, 439 U.S. at 18.

During closing arguments the state advanced the felony murder theory explaining that this theory of first degree murder was applicable when there was insufficient evidence to show premeditation:

> Now I'm sure all of you have heard of premeditated murder and probably have a pretty good idea of what that is. A lot of people don't understand the concept of felony murder. In this case, there are two underlying felonies that you are to consider, sexual battery, and kidnapping.
>
> If Tony Castillo was killed as a consequence of -- and these words are important -- as a consequence of or during the commission, the attempt to commit, or in escaping from the scene of a sexual battery, then a first degree murder has occurred.
>
> If Tony Castillo was killed as a consequence of or during the course of committing or attempting to commit a kidnapping, then there is a first degree murder. The distinction being that for there to be a felony murder conviction of first degree murder under this theory, you do not have to have premeditation. There does not have to be an intent to kill.

Technically, the killing could be accidental, but if the killing was during the course of a kidnapping or during the course of a sexual battery, even if the killing was totally accidental, it's still first degree murder under the felony murder theory.

Now as Judge Bentley explained to you, you will not have verdict forms to find the Defendant either guilty or not guilty of sexual battery. But the evidence as the sexual battery having occurred can still be considered by you in determining whether there was a sexual battery for the purposes of the felony murder rule.

If you should determine in your deliberations that beyond a reasonable doubt that a sexual battery did occur; and that as a consequence of that sexual battery or during the commission of the sexual battery, Tony Castillo was killed, the Defendant is guilty of felony -- of first degree murder.

If you should conclude during your deliberations that a kidnapping occurred, that during the course, as a consequence of or during the course of that kidnapping, Tony was killed -- whether intentionally or unintentionally -- Mr. Atkins is guilty of first degree murder.

The second theory or the second way a person can commit first degree murder is, as I said, premeditated murder. The State's position in this case is that Mr. Atkins is guilty of first degree murder for both of these reasons, that the evidence shows it was a premeditated murder, that he intended to kill Tony, and that the murder was committed during the course of or as a consequence of a kidnapping and it was committed during the con- -- as a consequence of or during the commission of a sexual battery. And both of these don't have to apply, either one. You can find that there was a sexual battery but there wasn't a kidnapping, and it would still be first degree murder. Or that there was a kidnapping but there was no sexual battery, this is still first degree murder. This is an either/or, there's not an "and" as to A and B there.

(R. 937-939).

The jury did not specify its verdict, returning only a verdict that convicted of "first degree murder" (R. 1029). The underlying felony, however, was used to aggravate the offense allowing the imposition of a death sentence without more.

The Lowenfield violation is demonstrated by the closing argument of the prosecutor during the penalty phase. The State argued that the jury had already found one aggravating circumstance merely because the defendant was convicted based on the theory of felony murder.

> Number one, it is an aggravating circumstance if this particular crime was committed while the defendant was engaged in the commission of, an attempt to commit, or flight after committing or attempting to commit sexual battery or kidnapping.
>
> This, that aggravating circumstance, I feel, has been shown by the evidence. That the murder was committed during the course of a kidnapping or a sexual battery. So that would be an aggravating circumstance that exists.

(R. 1133-34). The jury's verdict for first degree murder impermissibly allowed the mandatory application of a statutory aggravating circumstance. Under the instructions, jurors could have reasonably concluded that Mr. Atkins had the burden of establishing mitigation which outweighed the aggravation. See Argument VIII.

The imposition of the death sentence based on a felony murder conviction and the statutory aggravating factor that the crime was committed during the course of the robbery improperly allowed the imposition of a presumptive death sentence. The Florida capital sentencing has passed constitutional muster because the consideration of aggravating factors narrows the

class of defendants that may receive a death sentence. See Proffitt, supra. Since Mr. Atkins was convicted of felony murder the application of the aggravating circumstance did not serve this constitutionally mandated function.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Atkins' trial and death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and Rule 9.140(f) of the Florida Rules of Appellate Procedure. It should correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves error on direct appeal. The issue was raised but not addressed by this Court in Mr. Atkins' first direct appeal because this Court reversed Mr. Atkins' death sentence. The issue was not considered by the Court during Mr. Atkins' second appeal. There could have been no tactical reason for counsel not to re-raise and re-argue this issue in the second appeal. Failure to do so must have been premised upon neglect.

Moreover, it is clear under Florida law that if an aggravating circumstance is improperly found and any mitigating circumstances are present, as is the case here, a new sentencing proceeding must be held because it is impossible to know the weight given to the improper aggravator by the jury. Elledge, supra. Here, the sentencing judge identified three aggravating circumstances and two mitigating circumstance. Since the death

sentence was improperly premised in part upon the jury's consideration of in-the-course-of-a-sexual battery or kidnapping aggravating circumstance. Mr. Atkins' death sentence is unconstitutional.

Mr. Atkins' sentence of death is inherently unreliable and fundamentally unfair. Mr. Atkins was denied his fifth, sixth, eighth and fourteenth amendment rights. Habeas relief is warranted.

ARGUMENT XII

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.

Pursuant to the eighth and fourteenth amendments, a state's capital sentencing scheme must establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 242 (1976). On appeal of a death sentence the record should be reviewed to determine whether there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). Where that finding is clearly erroneous the defendant "is entitled to new resentencing." Id. at 1450.

The sentencing judge in Mr. Atkins' case found two statutory mitigating circumstances, but concluded that no non-statutory mitigation was present (R. 1163, R. II 5). Finding three

aggravating circumstances, the court imposed death (R. 1156-1160). The court's conclusion that only two statutory mitigating circumstances was present, however, is belied by the record.

There was substantial evidence in mitigation for Mr. Atkins, including both evidence of statutory mitigation as well as evidence of non-statutory mitigation. When Dr. Dee testified, he very clearly stated that as to statutory mitigation, Mr. Atkins was under extreme mental or emotional disturbance [sec. 921.141(6)(b)], "psychotic, in fact" (R. 1085); that he was acting under extreme duress at the time of the homicide [sec. 921.141(6)(e)] (R. 1086); and that his capacity to appreciate the criminality of his conduct was substantially impaired [sec. 921.141(6)(f)] (R. 1085). At no time did the State rebut Dr. Dee's testimony. The court's original sentencing order stated:

> Now the next question on mitigation is whether the crime was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Dr. Dee did not find that the Defendant was incompetent at the time of the offense or incompetent to proceed to trial, but did find he had a psychosis of the schizophrenic type and indicates that at the time the act occurred, he was uncontrolled emotionally and panicked.
>
> Essentially, the Defendant has a personality disorder such that, when confronted with the possibility of disclosure, he panicked and committed the act with which we're concerned here.
>
> It is clear from both the Defendant's own testimony and that of others that he had drunk a large quantity of beer on the afternoon and evening of the acts in question. By his own testimony, he had taken two Quaaludes after work that day and had smoked a number of marijuana cigarettes earlier. There was considerable testimony from numerous persons as to his state some time after the acts the late evening hours of

> that day and the early morning hours the next day.
>
> The Court cannot find the Defendant was under the influence of extreme mental or emotional disturbance.

(R. 1160-61). The sentencing order upon resentencing read exactly the same with regard to this mitigating factor (R. II 5-6).

In fact, the court incorrectly stated that "Dr. Dee did not find that the defendant was incompetent at the time of the offense" (R. 1160). Dr. Dee's testimony was:

> A Well now, now, I said that I believed that he was competent to stand trial and, under the charges, could participate in the defense and so forth, and I believed that he understood the nature and consequence of his act as legally defined insofar as the sexual offense was concerned. But I said that I was not certain with regard to the murder.

(R. 1085-86). Dr. Dee further explained:

> A I think when the child confronted him with the possibility that he might tell his parents, he panicked and reacted; and I'm not at all sure that he had an intended outcome at that point. In fact, under such duress, I'm not sure whether or not he, I just can't be sure whether or not he could have.
>
> Q He could have even --
>
> A Have a clear intended outcome.

(R. 1086).

Additionally, the court completely ignored Dr. Dee's testimony with regard to whether Mr. Atkins was under extreme duress [sec. 921.141(6)(e)]. The sentencing order reads:

> There is no evidence that the defendant was under extreme duress or under the substantial domination of any person.

(R. 1162 and RII 6)(citations omitted). In fact, however, there was ample evidence that Mr. Atkins was under extreme duress:

> Q. All right. Do you have an opinion as to whether this, as to when at the time this murder occurred whether or not this Defendant was under the influence of extreme mental and emotional -- or emotional disturbance?
>
> A. Yes, yes, I believe that he, he is emotionally disturbed, psychotic, in fact, and has been for a number of years.

(R. 1085).

The court then did find the testimony of Dr. Dee worth considering with regard to whether Mr. Atkins could conform his conduct to the requirement of the law:

> Number six, there is evidence that the ability of the Defendant to conform his conduct to the requirements of law were substantially impaired. Psychological tests done on Mr. Atkins indicated results in the reality testing that are far below the critical minimum for the healthy. His understanding of the motives underlying the behavior of other people, as well as his understanding of the implications and consequences of what he does is defective.
>
> The report of Dr. Dee indicates that the world is a highly frightening place for the Defendant and his general appearance and demeanor mask a great deal of aggressive content in his fantasy and in his mental life generally. This seems to frighten him. As a result of this and other factors, he experiences extremely high levels of distress and anxiety from which he seeks relief in various forms of drug intoxication, fantasy and acting out.
>
> His mental life and thought processes are odd and disorganized. He seems incapable of much rational analysis of even mildly emotionally provoking situations.
>
> The balance, although the Defendant is legally sane, the Court finds his ability to conform his conduct to the requirements of law was substantially impaired and that this

is a mitigating circumstance.

(R. 1162-63; R. II 6-7). There then were three statutory mitigating factors [sec. 921.141(6)(b), (e) and (f)] which Dr. Dee, in his expert opinion, believed unequivocally applied to Mr. Atkins. He testified as to all three and yet the court without explanation, misstated and then completely ignored his opinion in one (R. 1160-61; R. II 5-6); failed to even consider it in another (R. 1162 and R. II. 6), and yet found the third mitigating factor because of Dr. Dee's testimony (R. 1162-63 and R. II 6-7).

Not once was Dr. Dee's testimony refuted. It was instead, bolstered by lay witnesses testimony of Phillip Atkins' demeanor on the night in question. Kay Marler, a neighbor of the Atkins, testified that she had seen Phillip on the night he was arrested:

> A. Well, I've seen Phillip straight and I've seen him messed up. But that night, he wasn't the same person that I've seen. He was just in another space or world or something, he wasn't the right Phillip Atkins I know. He was just (Shakes head negatively).

(R. 846). Mrs. Marler stated that Phillip smelled of beer (R. 847) and was then asked to describe her observations to the jury:

> A. Well, you know, usually when I talk to Phillip, he usually responds to me. That night, I tried to talk to him and he was just setting there in a daze, you know, like I wasn't even there, nobody was there but him. He was just in another world.

(R. 847-848). Kevin Marler, Mrs. Marler's son, had also known Phillip Atkins and saw him on September 23, 1981. He testified that Mr. Atkins had told Kevin that he'd taken "two Ludes and did a hit of speed" (R. 851) and that he'd been drinking beer (R. 851). Kevin saw Phillip later that evening and observed that, "He

just, he was in a daze, you know. He just walked in the house, didn't even say nothing to nobody, hardly." (R. 852). Donna Atkins, Phillip's sister, testified that about 5:00 in the evening of September 23, 1981, her brother was drinking beer and sitting in the living room:

> A. I'd just gotten out of the shower and I went to the living room to light a cigarette and Phil was sitting there on the couch. And he looked up at me and I looked down at him; and he had this strange look on his face, I've never seen him look like that before. It was like he was crazy, kind of like a wild man.
>
> And I asked him, I said, "Why are you looking at me like that?" And he looked up at me like he was in a trance. And he said, "No reason."

(R. 895). Phillip's father also noted Phillip's condition that evening:

> A. He looked to me like that he was in a coma, like he was in another world. That he didn't know nothing. That's the reason I didn't ask him anything else, because I knew he didn't know nothing. I knew he was, he was out. He was out. He wasn't, up here (indicating), he wasn't in, he was out. Just like if he was in a deep coma, not knowing nothing surrounding him, nothing.

(R. 867).

All of this evidence was presented from first hand witnesses to Phillip Atkins' mental state on the night of the incident and it supported the findings made by Dr. Dee that Phillip was, in fact, under extreme mental or emotional disturbance, under extreme duress and that his capacity to appreciate the criminality of his conduct was substantially impaired. Yet the trial court found only one of these statutory mitigating circumstance. As to non-statutory mitigation, the court simply

found none present. As a result, no consideration was given by the court to the fact that Mr. Atkins was intoxicated, under the influence of drugs, and emotionally and mentally disturbed. Apparently the court concluded that the mental or emotional disturbance shown by Mr. Atkins did not arise to the extreme level necessary for the statutory mitigating circumstance to be present. However, the court refused to consider this circumstance as non-statutory mitigation which failed to meet the statute's threshold. The sentencing court's belief that this mitigation could not be considered because it did not arise to the level of statutory mitigation violated the eighth amendment principles embodied in Lockett v. Ohio, 438 U.S. 586 (1978); Skipper v. South Carolina, 106 S. Ct. 1669 (1986); and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

The record presented a great deal of other evidence that should have been considered as nonstatutory mitigation as well. Yet, the trial court failed to mention nonstatutory mitigation in its first sentencing findings (R. 1163) and on resentencing merely stated:

> The Court does not find that any non-statutory mitigating circumstances exist.

(R. II 5).

Clearly, the circumstances of Mr. Atkins' mental impairment, his mother's difficult delivery, Phillip's history of delayed developmental skills, an alcoholic father and Phillip's severe sexual dysfunctions were clearly mitigating. At sentencing, Don Atkins testified about his son's early years:

> Q. Will you tell the jury any unusual events of Phillip Atkins' childhood that you

recall, Mr. Atkins?

A. Yes, sir. When Phil was borned, we noticed a lot of big dents.

Q. A lot of what?

A. Big dents in his head?

Q. Yes, sir.

A. And his head was whump-sided, kind of whump-sided is what you call it, not in shape.

Q. Yes, sir?

A. And we asked what those dents were from or what they were and how come his head that way. And the nurse said that was from forceps when he was delivered, they used instruments to pull him out or deliver him.

And Phil was slow learning to walk. He didn't learn to walk until he was a year and a half old. But prior to that, when he was three months old, he had some kind of seizures. He stiffened out, just got all stiff and his eyes would roll all over his head, just like he, I don't know, I never seen nothing like it before. And we mentioned it to the doctor, and he said it was seizures.

So when Phil, he didn't learn to walk as quick as normal kids do. He was about a year and a half old before he, uh, learned to walk. And he was slow learning to talk. And in his talking, he would stutter and he couldn't pronounce words right.

So when he started to school, when he was six-year-old, the kids all made fun of him. That hurt him real bad, he was a little fellow. He told his mom, "They make fun of me, Mom, at school."

And the teacher wrote a note to his mom and said that Phil was immature. Other words, she said his mind and his age didn't correspond. His mind wasn't up to his age. His mind was more lower than his age was.

So Phil, all along that line, uh, has had problems stumbling as he walks. He, uh, and walk hard. Like you would hear a

> horse a'coming. And I mentioned to him on different occasions, "Why do you walk that way? Why do you walk so hard?" And he said, "I don't, I don't know, Dad, I don't know why I do it."
>
> So when Phil was fourteen years old, we were living in Michigan. We were living with my wife's brother and his wife. She was a school teacher. And they had two little boys. And I, I'd gotten a job in a auto factory in Michigan and we moved out. And we would go back occasionally and visit them.
>
> . . .
>
> So we moved to Florida in 73 and we, uh, picked fruit, oranges, that's the way we were making a living. And the oranges got down low and we got to where we couldn't make nothing in them and we couldn't pay our rent and buy our groceries, so we moved in a tent. And we lived in a tent for six months. And we'd come in from picking oranges and our tent would be blown down and our clothes all wet and stuff. That's the way we lived for six months.

(R. 1106-08).

This testimony was clearly evidence of an individual that was, at best, developmentally and emotionally delayed. This was non-statutory mitigation that went unrefuted by the State and yet completely ignored and unconsidered by the court. This is clearly in violation of the spirit and intent of Lockett and Hitchcock.

Despite the presence of clearly mitigating circumstances, the court concluded that only two mitigating circumstances were present, one with "little weight." The Florida Supreme Court has recognized that factors such as poverty, emotional deprivation, lack of parental care, cultural deprivation, and a previous history of good character are mitigating. See, e.g., Perry v.

State, 522 So. 2d 817 (Fla. 1988)(non-violent background is mitigating).

In Eddings v. Oklahoma, 455 U.S. 104 (1982), by a 5-4 majority the Supreme Court reversed a death sentence. Justice O'Connor writing separately explained why she concurred in the reversal:

> In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstance. See Okla. State., Tit. 21, Section 701.10 (1980). Nonetheless, in sentencing the petitioner (which occurred about one month before Lockett was decided), the judge remarked that he could not "in following the law. . . consider the fact of this young man's violent background." App. 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in Lockett compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S., at 605, 98 S. Ct., at 2965.
>
> I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

455 U.S. at 119-20. Justice O'Connor's opinion makes clear that the sentencer is entitled to determine the weight due a

particular mitigating circumstance; however, the sentencer may not refuse to consider that circumstance as a mitigating factor.

Here, that is undeniably what occurred. In the face of overwhelming evidence of statutory and non-statutory mitigation, the judge declared that only two statutory mitigating circumstances were present and no non-statutory mitigation existed.

Under Eddings, supra, and Magwood, supra, the sentencing court's refusal to accept and find all of the undisputed statutory and non-statutory mitigating circumstances was error. Mitigating circumstances that are clear from the record must be recognized or else the sentencing is constitutionally suspect. How can the required balancing occur when the "ultimate" sentencer has failed to consider obvious mitigating circumstances?

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Atkins' trial and death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and Rule 9.140(f) of the Florida Rules of Appellate Procedure. It should correct this error.

The substantial denial of appellate effective assistance of counsel occurred by the failure to present this issue on appeal. This claim is now properly before this Court under this Court's habeas corpus authority. The issue is one involving violations of classic principles of Florida law. See Lockett, Eddings,

supra. The issue virtually "leap[s] out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987).

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon neglect or ignorance of the law, deprived Mr. Atkins of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Atkins' conviction and sentence of death were imposed in violation of the sixth, eighth and fourteenth amendments. That error must be corrected now. Mr. Atkins' death sentence must be overturned.

ARGUMENT XIII

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.

The State did not prove by substantial evidence the corpus delicti for the charge of kidnapping and the trial court improperly shifted the burden of proof for corpus delicti required to admit Mr. Atkins' statement for the purpose of proving kidnapping. The admission of the statement for the

purposes of proving kidnapping violated Mr. Atkins' right to due process of law and equal protection, as well as rights under the fifth, fourteenth and eighth amendments.

At trial, counsel for Mr. Atkins objected to the admission into evidence of a taped confession on various grounds. One of the grounds for the objection was that the corpus delicti for kidnapping was not established (R. 671). The trial court overruled this objection:

> THE COURT: On the objections that were made in the courtroom on the introduction of the confession, I think, number one, the Court is determining that, number one, the kidnapping is an underlying felony because it is the child is under thirteen and no consent of the parent or guardian has been shown.

(R. 674).

The court clearly improperly shifted the burden of proof of to Mr. Atkins on the element of no parental consent. It is well settled law in this jurisdiction that it is incumbent upon the State to prove the corpus delicti in every case, . . . Farley v. City of Tallahassee, 243 So. 2d 161 (Fla. 1971)(emphasis added). It obvious from the judge's statement that he expected Mr. Atkins to affirmatively prove that there was parental consent, rather than requiring the State to carry its burden of proof on this issue.

Under the court's analysis the burden of proving that there was parental consent was placed on Mr. Atkins even before the State had concluded its case in chief and consequently, before Mr. Atkins could present evidence in his own behalf. This certainly violated Mullaney v. Wilbur, 421 U.S. 684 (1975). Due to the court's unconstitutional shifting of the burden of proving

the corpus delicti for the crime of kidnapping, the confession was improperly admitted for the purpose of proving the charge of kidnapping. Notwithstanding the trial judge shifting of the burden of proof on corpus delicti, the State did not carry its burden of proof on the corpus delicti for the charge of kidnapping.

Prior to the admission of Mr. Atkins' confession for the purpose of proving kidnapping, the State had the burden to bring forth 'substantial evidence' tending to show the commission of the charged crime, State v. Allen, 335 So. 2d 823 (1976). The term "corpus delicti" has been regularly used in appellate decisions to mean the legal elements necessary to show that a crime was committed. State v. Allen. As to each crime -- with the exception of murder -- this requirement is the same as showing the existence of every element of the particular offense. Ruiz v. State, 388 So. 2d 610 (Fla. 3d DCA 1980)(rev. den. 1981) 392 So. 2d 1380. The State had the burden to show the commission of the charged crime. It must show at least the existence of each element of the crime. State v. Allen, 335 So. 2d 823 (1976).

Under the Florida kidnapping statute, Fla. Stat. Ch. 787.01 the State must prove intent beyond a reasonable doubt. The State must prove the person was held against his will with the intent to either hold for ransom; facilitate commission of any felony; inflict bodily harm upon the victim; to terrorize the victim or to interfere with the performance of any government function. The State did not produce one scintilla of evidence that Mr. Atkins had the requisite specific intent before the admission

into evidence of Mr. Atkins' statement. It is clear that there was not substantial evidence of this key element of the corpus delicti.

Prior to the admission of Mr. Atkins' statement, the State did not show that the victim was forcibly, secretly, or by threat confined, abducted or imprisoned against his will with the intent to commit a felony, inflict bodily harm, or interfere with a governmental function. All the State showed was that the victim was driven to the area behind the Taco Bell. Before the admission of Mr. Atkins' statement the State did not show that the victim was intentionally harmed by Mr. Atkins. Before the admission of the statement the State did not show that the victim was taken to the train yard to inflict bodily harm on the victim. Until the admission of the statement the State produced no evidence whatsoever that Mr. Atkins had harmed the victim in any way. The State produced no eyewitness who saw Mr. Atkins assault the victim. The State produced no weapon with which bodily harm was inflicted on the victim. The State produced no past pattern of similar circumstances that could be inferred as showing intent. The State produced no witness who testified that Mr. Atkins had planned to hold the victim against his will in order to inflict bodily harm.

All the State produced prior to its admission of the taped statement was that Mr. Atkins and the victim were together behind the Taco Bell and that the victim was injured. The State did not bring forth any information that showed that Mr. Atkins inflicted the injury on the victim. In fact, the only evidence produced was that the victim had fallen down. The State only produced

evidence that the victim was found at the train yard. Prior to the admission of the statement there was no evidence put forth that Mr. Atkins in any way inflicted bodily harm on the victim, much less that he inflicted bodily harm on the victim with intent. The evidence brought forth actually showed that the injuries to the victim could have been caused by an automobile accident (R. 483, 609). The State only showed that Mr. Atkins was with the victim. The record is devoid of any evidence as to the time the injuries were inflicted upon the victim. Circumstantial evidence that Mr. Atkins was with the victim does not prove by substantial evidence that he had intent to commit bodily harm.

It is clear that the State did not prove by substantial evidence that the victim was abducted with the intent to commit sexual battery. The only evidence of sexual battery appears in Mr. Atkins' statement. The State had no physical evidence that a sexual battery had occurred. Mr. Atkins was acquitted of the two sexual battery charges. Prior to the admission of the statement there was no substantial evidence that Mr. Atkins had held the victim against his will, much less showed by substantial evidence that he had the requisite intent to commit a felony or cause bodily harm. Clearly the State did not prove by substantial evidence the corpus delicti of the kidnapping. It was error for the court to admit Mr. Atkins' statement without proof by substantial evidence that all the elements of kidnapping existed.

The State also did not prove by substantial evidence that there was no consent by the parents of the victim for Mr. Atkins to take the victim anywhere. The record shows that the parents

had never objected to the victim being with Mr. Atkins in the past. The State did not prove by substantial evidence the intent or consent elements of kidnapping prior to the admission of Mr. Atkins' statement into evidence. The State was required to prove the existence of every element of the crime in order to prove the crime charged occurred. Clearly it was error for the judge to admit the statement for the purpose of proving kidnapping, and to require Mr. Atkins' to prove the absence of an element of the crime; parental consent.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Atkins' trial and death sentence. This Court has not hesitated in the past to exercise its inherent jursidiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Because there was a substantial denial of effective assistance of counsel on appeal, this claim is now properly before this Court under this Court's habeas corpus authority. The issue is one involving violations of classic principle of Florida law. See Farley, Allen, Ruiz, supra. This was an issue such as this which "leap[s] out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987).

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue -- it was properly litigated before the lower court. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's

failure, a failure which could not but have been based upon neglect or ignorance of the law, deprived Mr. Atkins of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Atkins' sentence of death is inherently unreliable and fundamentally unfair. Mr. Atkins was denied his fifth, sixth, eighth and fourteenth amendment rights. Habeas relief is warranted.

ARGUMENT XIV

THE PROSECUTOR'S CLOSING ARGUMENT IN THE GUILT AND PENALTY PHASE DENIED MR. ATKINS A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL TRIAL AND SENTENCING DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

During closing argument at the guilt phase, Mr. Pickard, the trial prosecutor, stated:

> In this case, there are two underlying felonies that you are to consider, sexual battery, and kidnapping.
>
> If Tony Castillo was killed as a consequence of -- and these words are important -- as a consequence of or during the commission, the attempt to commit, or in escaping from the scene of a sexual battery, then a first degree murder has occurred.
>
> If Tony Castillo was killed as a consequence of or during the course of committing or attempting to commit a kidnapping, then there is a first degree murder. The distinction being that for there to be a felony murder conviction of first degree murder under this theory, you do not have to have premeditation. There does not have to be an intent to kill.
>
> Technically, the killing could be accidental, but if the killing was during the

course of a kidnapping or during the course of a sexual battery, even if the killing was totally accidental, it's still first degree murder under the felony murder theory.

Now as Judge Bentley explained to you, you will not have verdict forms to find the Defendant either guilty or not guilty of sexual battery. But the evidence as to the sexual battery having occurred can still be considered by you in determining whether there was a sexual battery for the purposes of the felony murder rule.

If you should determine in your deliberations that beyond a reasonable doubt that a sexual battery did occur; and that as a consequence of that sexual battery or during the commission of the sexual battery, Tony Castillo was killed, the Defendant is guilty of felony -- of first degree murder.

(R. 937-938) (emphasis added).

Mr. Pickard went on to argue:

You can find that there was a sexual battery but there wasn't a kidnapping, and it would still be first degree murder.

(R. 939) (emphasis added). These statements to the jury are clearly not a correct statement of the law in Florida.

Later in Mr. Pickard's guilt phase closing argument he attempted to convince the jury that sexual batteries were committed. This clearly disregarded the fact that Mr. Atkins had been acquitted of the charges of sexual battery:

Third, they then drove out to the area behind the Taco Bell. Once they got out there, they had sex, oral and anal. That's what he told the police.

Now when he gets into court here today, that didn't happen. It's also amazing that the two areas where he now denies culpability from the witness stand are two of the most crucial areas in the whole case -- whether he had sex with the boy or whether he hit the boy.

He told the police he did have sex with the boy, both oral and anal, and he told the police he did hit the boy with his fists and with the pipe. Yet today on the witness stand he says, "No, I didn't have sex with him, and no, I didn't hit him with my hands. I did hit him with a pipe." Yet every, the rest of the statement he agrees with as far as waving him down and taking him to Dobbins Park and everything else. Yet we get to those points and the story changes.

Why do you think Tony was taken behind the Taco Bell? To look at a haunted house? Of course not. He was taken behind the Taco Bell to have sex. Because Mr. Atkins was sexually aroused by a little six-year-old boy and wanted to talk him into having sex with him. And that's an intent to commit a crime, and that's kidnapping, taking the little boy without his parents consent to that area for the purposes of committing a felony of sexual battery. Legally, under the law, that is kidnapping.

As a consequence of that kidnapping, Tony is now dead. That is first degree murder. As a consequence of the sexual battery, Tony is now dead. That is first degree murder.

(R. 957-958) (emphasis added).

When you commit a sexual assualt upon the boy, when Phillip Atkins committed a sexual assault upon Tony, and then Tony says that because of that I'm going to tell my mother; and because of that, Mr. Atkins kills him, that is in, quote, unquote, "the consequence of" a sexual battery. It certainly falls within the felony murder rule.

(R. 995) (emphasis added).

Jack says there is no physical evidence of a sexual battery other than Mr. Atkins' confession. And he emphasizes that in two ways, he says there's no semen found in the automobile.

Well, if you're committing oral sex, you're probably not going to find semen in the automobile anyway. I don't need for, I'm not going to go into that any more.

> Also, I think the doctor said that it is certainly possible and it is not inconsistent that anal intercourse may have occurred and there is just no evidence of it because sometimes that happens, he says, you don't see physical evidence of it having occurred.

(R. 998).

> We're here today for one reason, simply because a little six-year-old boy decided he wanted to tell his mother what Phillip Atkins had done to him, and that's why we're here today.

(R. 999).

The State attempted to convince the jury that sexual batteries had actually occurred. Mr. Pickard made the sexual battery contentions the key feature of his guilt phase argument although Mr. Atkins had been acquitted of those charges. Mr. Pickard again returned to the sexual battery contentions in his penalty phase arguments. He again told the jury that the sexual batteries occurred (R. 1133). After the State had rested and Mr. Pickard had agreed he couldn't prove the sexual batteries, he attempted to cross examine a defense witness about the sexual battery aspect of the trial (R. 861). This was clearly improper.

Referring to the defendant as being untruthful and bolstering state witnesses is improper argument. Gradsky v. United States, 373 F.2d 706 (1967); United States v. Lanerson, 457 F.2d 371 (1972). "[I]mproper prosecutorial comments will warrant a new trial . . . where a prosecutor indulges in personal attacks upon an accused, his defense, or his counsel. E.g., Waters v. State, 486 So. 2d 614 (Fla. 5th DCA) . . . Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA) . . . Jackson v. State, 421 So. 2d 15 (Fla. 3rd DCA 1982)," Rosso v. State, 505 So. 2d 611, 614 (Fla. DCA 1987).

The Rosso case went on to define a proper closing argument:

> The Florida supreme court has summarized the function of closing argument:
>
> > The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Rosso v. State, id. at 614.

Clearly the prosecutor should not have argued that sexual batteries had occurred when Mr. Atkins was acquitted of these charges. Such comments:

> . . . convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the government's judgment rather than its own view of the evidence. See Berger v. United States, 295 U. S. at 88-89.

United States v. Young, 470 U.S. 1, 18-19 (1985). This reference to matters that he should have known he could not bring before the jury was clearly improper conduct especially when placed in the context of Rosso's holding that: "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Rosso v. State, 505 So. 2d 611, 614 (Fla.App.3 Dist. 1987)(quoting, Berger v. United States).

These comments by the prosecutors went beyond the bounds of proper argument and cross examination and clearly prejudiced Mr. Atkins' right to a fair trial as guaranteed by the sixth, eighth and fourteenth amendments. Trial counsel rendered ineffective assistance by failing to object and preserving this issue for appeal. Nero v. Blackburn, supra. No tactical reason can be ascribed to counsel's failure to urge this claim. Moreover, the argument impinged upon the fundamental fairness of Mr. Atkins' trial. See Argument VI. Mr. Atkins' conviction and sentence should be set aside.

ARGUMENT XV

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.

In considering whether the death penalty constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments, Justice Brennan wrote:

> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause--that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a

> particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif.L.Rev. 839, 857-60 (1969).

(footnote omitted). Furman v. Georgia, 408 U.S. 238, 274, 92 S. Ct. 2726, 2744 (1972)(Justice Brennan concurring).

When then faced with a challenge to Florida's capital sentencing scheme, the Supreme Court found it passed constitutional muster:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judges and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be outweighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Gregg v. Georgia, 428 U.S. 242, 96 S. Ct. 2960, 2969 (1976).

Thus, aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979).

> This court, in Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) stated:
>
> > We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Miller v. State, supra. See also Riley v. State, 366 So. 2d 19 (Fla. 1979), and Robinson v. State, 520 So. 2d 1 (Fla. 1988).

Here the prosecution introduced hearsay evidence of Mr. Atkins' mental illness, i.e., pedophilia, to aggravate the crime. At sentencing Officer Yevchak testified that he had seized a "list of names" from Mr. Atkins (R. 1042) that had 45 male names on it. When he confronted Mr. Atkins about it in the early morning hours of the 24th, Mr. Atkins stated that these were all males with whom he'd had sexual encounters, "some as young as ten years old" (R. 1044-1046). Counsel had attempted to suppress this evidence as having been illegally seized (R. 34-35). The State focused on Mr. Atkins' sexual dysfunction consistently throughout the trial, even though it was known before trial that the sexual batteries could not be proven. Even after the court had directed verdicts on the two sexual batteries, the state continued to argue them and to emphasize them throughout closing and at sentencing.

Also, over objection by the defense (R. 1056), the State produced hearsay testimony of Officer Joseph Keil who testified as to Mr. Atkins' alleged sexual contact with two minor boys, Frank and Raymond Grubba. The court over objection permitted

this testimony although there is no indication of why the testimony was submitted in the first place. Clearly this was impermissible evidence under the Proffitt, supra, Elledge, supra, line of cases.

Mr. Atkins' sentencing jury returned a sentence of death by a bare majority of 7-5 and only after an extended deliberation. It clearly cannot be said that presentation and argument of nonstatutory aggravating factors had no effect on the jury's recommendation. There can be no doubt that the state's only purpose in including this testimony was to inject an "unauthorized aggravating factor" since the testimony went into considerable detail as to the nature of sexual contact. This compounded the error in presenting and arguing to the jury that the homicide occurred in the course of a sexual battery. The whole thrust of the State's case and argument was to use the allegations of sexual misconduct to inflame improperly the jury (See Argument VI).

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Atkins' trial and death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and Rule 9.140(f) of the Florida Rules of Appellate Procedure. It should correct this error.

The substantial denial of appellate effective assistance of counsel brings this claim properly before this Court under this Court's habeas corpus jurisdiction. The issue is one involving

violations of classic principles of Florida law. See Proffitt and Elledge, supra. This is an issue which "leap[s] out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987).

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon neglect or ignorance of the law, deprived Mr. Atkins of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Atkins' conviction and sentence of death were imposed in violation of the sixth, eighth and fourteenth amendments. That error must be corrected now.

ARGUMENT XVI

DURING THE COURSE OF VOIR DIRE EXAMINATION, PENALTY PHASE ARGUMENT AND THE JURY INSTRUCTIONS, 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.

During the course of the trial, the state and the court informed the jurors chosen to sit on Mr. Atkins' trial that sympathy was an improper factor for their consideration. During voir dire, Mr. Pickard instructed the jury as to things they should not consider:

> Number one is sympathy or emotion. It's difficult . . . it's easy for us to say that

> but sometimes difficult for you to do is not to have some sort of sympathy . . .

(R. 260).

The court then instructed the jury:

> This case must not be decided for or against anyone because you feel sorry for anyone or are angry at anyone.

(R. 1022-23). The court hammered home the notion that the jury was not free to show mercy by its later instructions:

> Feeling of prejudice, bias or sympathy are not legally reasonable doubt and they should not be discussed by any of you in any way.

(R. 1023)(emphasis added).

In Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985), the court found that statements of prosecutors, which may mislead the jury into believing personal feelings of mercy must be cast aside, violates the federal Constitution:

> The clear impact of the [prosecutor's statement's] is that a sense of mercy should not dissuade one from punishing criminals to the maximum extent possible. This position on mercy is diametrically opposed to the Georgia death penalty statute, which directs that "the jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant." O.C.G.A. Section 17-10-2(c)(Michie 1982). Thus, as we held in Drake, the content of the [prosecutor's closing] is "fundamentally opposed to current death penalty jurisprudence." 762 F.2d at 1460. Indeed, the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976)(striking down North Carolina's mandatory death penalty statute for the reason, inter alia, that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a

> sentence of death"); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)(striking down Ohio's death penalty statute, which allowed consideration only of certain mitigating circumstances, on the grounds that the sentencer may not "be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The [prosecutor's closing] in strongly suggesting otherwise, misrepresents this important legal principle.

Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985)

Requesting the jury to dispel any sympathy they may have towards the defendant undermined the jury's ability to reliably weigh and evaluate mitigating evidence. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988)(en banc). The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition to disregard the consideration of sympathy improperly suggests to "the jury that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring).

Sympathy is an aspect of the defendant's character that must be considered by the jury during penalty deliberations:

> The capital defendant's constitutional right to present and have the jury consider mitigating evidence during the capital phase of the trial is very broad. The Supreme

Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

The sentencer must give "individualized" consideration to the mitigating circumstances surrounding the defendant and the crime, Brown, 479 U.S. at 541; Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddings, 455 U.S. at 114. See also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).

Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to, the defendant in normal human terms. A long line of Supreme court cases shows that a capital defendant has a constitutional right to make, and have the jury consider, just such an appeal.

In Gregg v. Georgia, 428 U.S. 153 (1976), the Court upheld the Georgia sentencing scheme which allowed jurors to consider mercy in deciding whether to impose the penalty of death. Id. at 203. The Court stated that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Id. at 199.

In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Court struck down mandatory death sentences as incompatible with the required individualized treatment of defendants. A plurality of the Court stated that mandatory death penalties treated

defendants "not as uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." Id. at 304. The Court held that "the fundamental respect for humanity underlying the Eight Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. The Court explained that mitigating evidence is allowed during the sentencing phase of capital trial in order to provide for the consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind." Id.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court reviewed a sentencing judge's refusal to consider evidence of a defendant's troubled family background and emotional problems. In reversing the imposition of the death penalty, the Court held that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 113-14 (emphasis in original). The Court stated that although the system of capital punishment should be "consistent and principled," it must also be "humane and sensible to the uniqueness of the individual." Id. at 110.

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Court held that an attempt to shift sentencing responsibility from the jury to an appellate court was unconstitutional, in part, because the appellate court is ill equipped to consider "the mercy plea [which] is made directly to the jury." Id. at 330-31. The Court explained that appellate courts are unable to "confront and examine the individuality of the defendant" because "[w]hatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." Id.

In Skipper v. South Carolina, 476 U.S. 1 (1986), the trial court had precluded the defendant from introducing evidence of his good behavior while in prison awaiting trial. The Court held that the petitioner had a

constitutional right to introduce the evidence, even though the evidence did not relate to his culpability for the crime. Id. at 4-5. The Court found that excluding the evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Id. at 8.

"Mercy," "humane" treatment, "compassion," and consideration of the unique "humanity" of the defendant, which have all be affirmed as relevant considerations in the penalty phase of a capital case, all inevitably involve sympathy or are sufficiently intertwined with sympathy that they cannot be parsed without significant risk of confusion in the mind of a reasonable juror. Webster's Third International Dictionary (Unabridged ed. 1966) describes "mercy" as "a compassion or forbearance shown to an offender," and "a kindly refraining from inflicting punishment or pain, often a refraining brought about by a genuinely felt compassion and sympathy." Id. at 1413 (emphasis added). The word "humane" similarly is defined as "marked by compassion, sympathy, or consideration for other human beings." Id. at 1100 (emphasis added). Webster's definition of "compassion" is a "deep feeling for and understanding of misery or suffering," and it specifically states that "sympathy" is a synonym of compassion. Id. at 462. Furthermore, it defines "compassionate" as "marked by . . . a ready inclination to pity, sympathy, or tenderness." Id (emphasis added).

Without placing an undue technical emphasis on definitions, it seems to us that sympathy is likely to be perceived by a reasonable juror as an essential or important ingredient of, if not a synonym for, "mercy," "humane" treatment, "compassion," and a full "individualized" consideration of the "humanity" of the defendant and his "character." . . . [I]f a juror is precluded from responding with sympathy to the defendant's mitigating evidence of his own unique humanness, then there is an unconstitutional danger that his counsel's plea for mercy and compassion will fall on deaf ears.

> Here, the petitioner did offer mitigating evidence about his background and character. Petitioner's father testified that petitioner was a "happy-go-lucky guy" who was "friendly with everybody." The father also testified that, unlike other people in the neighborhood, petitioner avoided violence and fighting; that he (the father) was in the penitentiary during the petitioner's early childhood; that petitioner was the product of a broken home; and that petitioner only lived with him from about age 14 to 19. Although the father admitted that petitioner once was involved in an altercation at school, he suggested that it was a result of the difficulties of attending a school with forced bussing. Record, vol. V, at 667-82.
>
> Petitioner's counsel, in his closing argument, then relied on this testimony to argue that petitioner's youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. In so doing, defense counsel appealed directly to the jury's sense of compassion, understanding, and sympathy, and asked the jury to show "kindness" to his client as a result of his background. Record, vol. V, at 708-723.
> . . . [There is] an impermissible risk that the jury did not fully consider these mitigating factors in making its sentencing decision.
>
> . . .
>
> As we discussed above, sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character.

Parks v. Brown, supra, 860 F.2d at 1554-57.

The remarks by the prosecutor during voir dire coupled with the court's instruction may have served to constrain the jury in their evaluation of mitigating factors. Under Mills v. Maryland, 108 S. Ct. 1860 (1988), the question is whether reasonable jurors may have understood what they were told as precluding consideration of mercy or sympathy towards Mr. Atkins.

Certainly, here reasonable jurors could have understood the instructions as precluding them from allowing the natural tendencies of human sympathy from entering into their determination of whether any aspect of Mr. Atkins' character required the imposition of a sentence other than death. If it is possible one juror voted for death because of the belief that sympathy or mercy for Mr. Atkins could not be considered, then the death sentence must be vacated. Mills, supra.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Atkins. For each of the reasons discussed above the Court should vacate Mr. Atkins' unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Atkins' death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. Certainly, California v. Brown, Mills, and Parks v. Brown are new cases expounding upon the old principles of Lockett and Eddings. Thus, these cases are unquestionably retroactive.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Lockett, Eddings, supra. It

virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987).

No tactical decision can be ascribed to counsel's failure to urge the claim. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Atkins of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, Mr. Atkins' death sentence must be vacated.

ARGUMENT XVII

MR. ATKIN'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985) AND MANN V. DUGGER, 844 F.2D 1446 (11TH CIR. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 44 Cr. L. 4192 (1988), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Atkins' eighth amendment rights. Phillip Atkins is entitled to relief under Mann, for there is no discernible difference between the two cases.

Caldwell v. Mississippi, 472 U.S. 320 (1985), involved prosecutorial/judicial reduction of a capital jury's sense of responsibility which is far surpassed by the jury-diminishing

statements made during Mr. Atkins' trial. The en banc Eleventh Circuit in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), determined that Caldwell assuredly does apply to a Florida capital sentencing proceeding and that when either judicial instructions or prosecutorial comments minimize the jury's role relief is warranted. See Mann, supra. Caldwell involves the most essential eighth amendment requirements to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that such a sentence be reliable. Id., 105 S. Ct. at 2645-46.

At all trials there are only a few occasions when jurors learn of their proper role. At voir dire, the prospective jurors are informed by counsel and, on occasion, by the judge about what is expected of them. When lawyers address the jurors at the close of the trial or a segment of the trial, they are allowed to give insights into the jurors' responsibility. Finally, the judge's instructions inform the jury of its duty. In Mr. Atkins' case, as in Mann v. Dugger, at each of those stages, the jurors heard statements from the judge and/or prosecutor which diminished their sense of responsibility for the awesome capital sentencing task that the law would call on them to perform.

Throughout the proceedings, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non- responsibility at the sentencing phase. As to guilt or innocence, they were told they were the only ones who

would determine the facts. As to sentencing, however, they were told that they merely recommended a sentence to the judge.

Mann v. Dugger makes clear that proceedings such as those resulting in Mr. Atkins' sentence of death violate Caldwell and the eighth amendment. In Mann, as in Mr. Atkins' case, the prosecutor sought to lessen the jurors' sense of responsibility during voir dire and repeated his effort to minimize their sense of responsibility during his closing argument. In Mann, the en banc Eleventh Circuit held that "the Florida [sentencing] jury plays an important role in the Florida sentencing scheme," 844 F.2d at 1454, and thus:

> Because the jury's recommendation is significant . . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that has been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing.

Id. at 1454-55. The comments and arguments provided to Mr. Atkins' jurors were as egregious as those in Mann and went far beyond those condemned in Caldwell. Pertinent examples are reproduced immediately below.

From the very start of the trial the role of the jury in sentencing was trivialized in a steady stream of misstatements. The jury was repeatedly told it was the court -- not the jury -- that decides the sentence (R. 196, 257-58, 1023, 1031, 1032, 1037, 1130). What was emphasized to Mr. Atkins' jury was not, as

required, that the jury's sentencing role is integral, central and critical. Rather they were told the "final decision" was the judge's (R. 257, 258) and that the jury only makes a "recommendation."

The State misinformed the jury concerning the seriousness of their role in determining whether Mr. Atkin's lived or was put to death. The prosecutor told the entire venire panel from which Mr. Atkin's jury was selected:

> If you should convict the Defendant of first degree murder, there would then be a second phase of the trial where you would have to bring in a recommendation to the judge as to whether the Defendant should receive life imprisonment with 25 years before he is eligible for parole, or whether he should receive the death penalty.

(R. 257) The prosecutor continued in this vein:

> I would also mention that whatever result or recommendation that would be there is strictly that, a recommendation, which the Judge is free to accept or reject.
>
> The final sentence is up to the Judge, it's not up to you, you would just make the recommendation.

(R. 257-58).

The jury was lulled into a false and improper sense of non-responsibility for determining the sentence:

> The penalty is for the court to decide.

(R. 1023).

. . . .

> The court ultimately sets the penalty . . . It is necessary for you, the jury, to render to the court an advisory opinion -- which is just that, advisory in nature to the Court . . .

(R. 1031).

Rather than stressing that the jury's sentencing decision is integral, and will stand unless patently unreasonable, the court and the prosecutor stressed to Mr. Atkins' jury that the "final decision" was the courts. The court told the jury, for example:

> Final decision as to what judgment shall be imposed rests solely with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant.

(R. 1037). The prosecutor repeated this theme:

> As has been explained to you by Judge Bentley, your decision is not final, it is simply a recommendation that the Judge can follow or not follow.

(R. 1130).

Again and again, the jury was told it is the judge who "pronounces" sentence (E.g., R. 1023, 1031, 1032, 1037, 1130, 1147, 1148-49). The jury, as if their sentencing determination were but a political straw poll, were told that they were simply making a recommendation (R. 1130), providing a view which could be taken for whatever it was worth by the true sentencing authority who carried the entire responsibility on his shoulders -- the judge. At the guilt-innocence phase, the jury was instructed: "You are not responsible for the penalty in any way because of your verdict. The possible results of this case are to be disregarded. . . ." (R. 1023). Then, at sentencing, they were time and again instructed that their role was merely advisory and only a recommendation which could be accepted or rejected as the sentencing judge saw fit. At the commencement of the penalty phase, the trial judge instructed the jury as follows:

> Ladies and gentlemen of the jury, in this case you have found the defendant, Phillip Atkins, guilty of first degree murder.
>
> The punishment for this crime is either death or life imprisonment without the possibility of parole for twenty-five years. The final decision as to what punishment shall be imposed rests solely with the judge of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon the defendant.

(R. 1037)(emphasis supplied). Cf. Mann, 844 F.2d at 1458(Jurors told that "the final sentencing decision rested 'solely' with the judge of this court." [Emphasis in original].)

At the end of the penalty phase the judge explained:

> It's now your duty to advise the Court as to what punishment should be imposed upon the Defendant, Phillip Atkins, for his crime of first degree murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge.

(R. 1148-49). Cf. Mann, 844 F.2d at 1458 ("[A]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge." [Emphasis in original]). These instructions, and the trial judge's earlier comments, like the instructions in Mann, "expressly put the court's imprimatur on the prosecutor's previous misleading statements." Id. at 1458.

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize

the importance of its role." Caldwell v. Mississippi, 105 S. Ct. 2633, 2641-42 (1985)(emphasis supplied). When we understand these factors, we can appreciate why comments and instructions such as those provided to Mr. Atkins' jurors, and condemned in Mann, served to diminish their sense of responsibility, and why the State cannot show that the comments at issue had "no effect" on their deliberations. Caldwell, 105 S. Ct. at 2645-46.

The comments here at issue were not isolated, but were made by prosecutor and judge at every stage of the proceedings. They were heard throughout, and they formed a common theme: the judge had the final and sole responsibility, while the critical role of the jury was substantially minimized. The prosecutor's and the judge's comments allowed the jury to attach less significance to their sentencing verdict, and therefore enhanced the risk of an unreliable death sentence. Mann v. Dugger; Caldwell v. Mississippi. Indeed, there can be little doubt that the egregiousness of the jury-minimizing comments here at issue and of the judge's own comments and instructions surpassed what was condemned in Caldwell.

Under Caldwell the central question is whether the prosecutor's comments minimized the jury's sense of responsibility. See Mann, 844 F.2d at 1456. If so, then the reviewing court must determine whether the trial judge sufficiently corrected the prosecutor's misrepresentation. Id. Applying these questions to Mann, the en banc Court of Appeals found that the prosecutor did mislead or at least confuse the jury and that the trial court did not correct the misapprehension. Applying these same questions to Mr. Atkins'

case, it is obvious that the jury was equally misled by the prosecutor, and that the prosecutor's persistent misleading and jury minimizing statements were not adequately remedied by the trial court. In fact, the trial court compounded the error.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. At the sentencing phase of a Florida capital trial, the jury plays a critical role. See Mann, supra; see also Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987); Hall v. State, 14 F.L.W. 101 (Fla. 1989). Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. See Mann v. Dugger, 844 F.2d at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme). The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as a "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976). While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. Mann, supra; McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982).

The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Atkins' jury, however, was led to believe that its determination meant very little, as the judge was free to impose whatever sentence he wished. Cf. Mann v. Dugger.

In Caldwell, 105 S. Ct. 2633, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id., 105 S. Ct. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S. Ct. at 2645. The same vice is apparent in Mr. Atkins' case, and Mr. Atkins is entitled to the same relief.

The constitutional vice condemned by the Caldwell Court is not only the substantial unreliability that comments such as the ones at issue in Mr. Atkins' case inject into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. Id. at 2640. A jury which is unconvinced that death is the

appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S. Ct. at 2641. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 2641-42 (emphasis supplied).

The comments and instructions here went a step further -- they were not isolated, as were those in Caldwell, but as in Mann were heard by the jurors at each stage of the proceedings. These cases teach that, given comments such as those provided to Mr. Atkins' capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. This the State cannot do. Here the significance of the jury's role was minimized, and the comments at issue created a danger of bias in favor of the death penalty. Had the jury not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden -- for example, the evidence of non-statutory mitigation was more than a "reasonable basis" which would have precluded an override. See Hall v. State, 14 F.L.W. 101 (Fla. 1989); Brookings v. State, supra, 495 So. 2d 135; McCampbell v. State, supra, 421 So. 2d at 1075. The Caldwell violations here assuredly had an effect on the ultimate sentence. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received. This case also presents a classic example of a case where no Caldwell error can be deemed to have had "no effect" on the verdict.

Moreover, counsel was ineffective for not objecting to the prosecutorial comments and judicial instruction. Longstanding Florida case law established the basis for such an objection. See Pait v. State, 112 So. 2d 380, 383-84 (Fla. 1959)(holding that misinforming the jury of its role in a capital case

constituted reversible error). No tactical decision can be ascribed to counsel's failure to object. Counsel's failure could not have been based upon ignorance of the law. It deprived Mr. Atkins of the effective assistance of counsel. Accordingly, Mr. Atkins was denied his eighth amendment rights. His sentence of death is neither "reliable" nor "individualized." The Court should grant relief pursuant to Rule 3.850.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Mr. Atkins respectfully requests that this Honorable Court enter a stay of execution and vacate the conviction and sentence of death.

Respectfully submitted,

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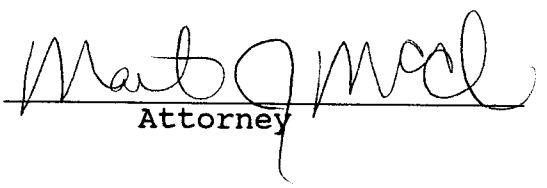
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Mr. Robert Landry, Assistant Attorney General, Department of Legal Affairs, Park Trammel Building, 1313 Tampa Street, Tampa, Florida 33602, this 5th day of April, 1989.

By: Martin J. Mech
Attorney