IN THE SUPREME COURT OF FLORIDA

PHILLIP ALEXANDER ATKINS,

Petitioner,

vs. **CASE NO. 80,108**

HARRY K. SINGLETARY,

Respondent.

_____/

REPLY OF PETITIONER

The Respondent, through the Office of the Attorney General, has filed its response in opposition to Mr. Atkins' petition. This response is inconsistent with positions taken by the Office of the Attorney General in other cases and generally reflects the attitude that the State will say whatever is believed necessary in order to win the particular case at hand. This reply will address the specific misrepresentations concerning the record in Mr. Atkins' case and will also point out how the response is inconsistent with pleadings filed by the Attorney General's Office in other cases.

CLAIM I

I. Did Mr. Atkins request a jury resentencing?

The Assistant Attorney General represents in the response, "It should be noted that Atkins did not argue in his brief on that resentencing appeal that the Constitution or other law required a new sentencing hearing with a new jury convened." Response at 3. However, the Assistant Attorney General has chosen to obfuscate and mislead. On the first

direct appeal, Mr. Atkins asked this Court to "remand the matter to the trial court with directions to conduct a new penalty phase of the jury trial." Initial Brief of Appellant, pp. 22-23)(emphasis added). This Court remanded for resentencing without mentioning a jury. In a motion to clarify, the State indicated that the failure to mention a jury implied that the resentencing was intended to be to the judge alone and would be so construed unless this Court indicated otherwise. This Court denied the motion to clarify without indicating a jury was necessary. Subsequently, in the second direct appeal, this Court specifically indicated, "We found no fault with the evidence or argument presented to the jury at the sentencing phase." Atkins, 497 So. 2d at 1201. Subsequently, in the Rule 3.850 appeal, this Court found the issue "barred because [it was] either raised, or should have been raised, during one of Atkins' two direct appeals." Atkins, 541 So. 2d at 1166. Clearly, in light of this Court's prior opinions, the bar applied to this particular claim was premised upon it having been raised and decided in the first direct appeal.

The Assistant Attorney General has chosen to not address Mr. Atkins' brief from his first direct appeal, the State's motion to clarify, the language of this Court's opinions in the first and second direct appeal, or the precise language used in denying the claim in the Rule 3.850 appeal. This is because these items clearly establish that Mr. Atkins did previously present the issue to this Court and that the Assistant Attorney General's contrary arguments are specious.

II. Is Judge Hodges correct that the trial judge conducted a reweighing which defeats Mr. Atkins' claim for a new jury?

The Assistant Attorney General has chosen to rely on the federal district court's opinion authored by Judge Hodges and the Eleventh Circuit's decision as controlling. Specifically, the Assistant Attorney General relies upon Judge Hodges' conclusion that the judge resentencing cured any error which occurred before the jury. Response at 8.

However, what the Assistant Attorney General has chosen not to tell this Court is that neither Judge Hodges nor the Eleventh Circuit had the benefit of Espinosa v. Florida, 112 S. Ct. 2926 (1992), at the time their decisions were rendered.[1] Moreover, Espinosa undeniably establishes Judge Hodges' conclusion was in error. In Espinosa, the Supreme Court held that "we must presume that the trial court followed Florida law [ ] and gave 'great weight' to the jury recommendation. By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found." 112 S. Ct. at 2928. In conclusion, the Supreme Court emphasized the basic holding of Espinosa: "if a weighing state decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." 112 S. Ct. at 2929.[2] This holding specifically rejects Judge Hodges' conclusion.

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[1]In fact, Espinosa was decided four days after the Eleventh Circuit decision in Atkins.

[2]Rather than attempting to understand Espinosa's holding, the Assistant Attorney General somehow believes it to be significant that "the Constitution does not require jury sentencing in capital cases." Response at 7 (emphasis in original). The issues in Mr. Atkins' case do not involve whether the Constitution requires jury sentencing. Rather, the issues involve what the Constitution requires when a state chooses, as Florida has, to make the jury one of the actors in the sentencing decision. Espinosa clearly holds that when a jury is one of the actors in the sentencing decision, the Eighth Amendment is violated when the jury considers invalid aggravation.

Here, in fact, at the resentencing, the sentencing judge said he had "considered the [death] recommendation of the jury." (R2. at 7). Clearly, under Espinosa, this violated the Eighth Amendment because the jury had been permitted to consider invalid aggravation. Judge Hodges' contrary conclusion does not survive Espinosa.

III. Did the sentencing judge consider the death recommendation at the resentencing?

The Assistant Attorney General has chosen to ignore the fact that the judge at the resentencing specifically noted that he had considered the jury's death recommendation (R2. at 7). Instead, the Assistant Attorney General asserts, "the trial court reweighed." Response at 9. The Assistant Attorney General chooses to ignore the record because the record establishes that Espinosa requires a reversal. The jury's death recommendation tainted by Eighth Amendment error was considered in sentencing Mr. Atkins to death. The errors before the jury have never been corrected.

IV. Is Espinosa a change in law?

The Assistant Attorney General chooses not to address the issue at the very heart of the petition -- is Espinosa a change in law. Not once does the Assistant Attorney General bother to tackle this issue. As Mr. Atkins' petition explains, Espinosa is a substantial change in Florida law which must be applied in post-conviction proceedings because it overturned prior decisions of this Court misapplying the Eighth Amendment.

Indeed, other representatives of the State and the Attorney General's Office have recognized the substantial impact of Espinosa. In State v. Jennings, Case No. 79-773 (18th Jud. Cir., Brevard Cty.), the State Attorney conceded the obvious:

> The Defendant alleges and the State agrees that the United States Supreme Court has established new law in

> Espinosa v. Florida, No. 91-7390 (U.S. June 29, 1992). Therefore, the Defendant is entitled to have this court consider the issues raised by that case. Rule 3.850, F.R.Cr.P..

Answer to Defendant's First Supplement, State v. Jennings, p. 5 (filed July 30, 1992)(App. 1).

In Tompkins v. Singletary, Case No. 89-1638-Civ-T-15B (M.D. Fla.), the Attorney General's Office argued Espinosa was a change in Florida law:

> However, in all candor, the application of the Espinosa decision must be discussed. Prior to the decision in Espinosa, it is clear that the trial judge, and not the jury, was the sentencer for Eighth Amendment purposes. Indeed, the United States Court of Appeals to the Eleventh Circuit, in Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987), adhered to on rehearing, 844 F.2d 1446 (11th Cir. 1988), concluded that a Florida jury could be treated as "a sentencer" for constitutional purposes. This was the first pronouncement of this theory by any court. In an attempt to correct this misapprehension of the Florida system, the Florida Supreme Court rendered its decision in Combs v. State, 525 So.2d 843 (Fla. 1988). Combs clearly holds that the trial judge is the sole sentencer in the State of Florida. The Supreme Court of Florida also recognized that the United States Supreme Court "has expressly characterized the jury's role in Florida to be 'advisory' in nature." Combs, Id. at 858. The Combs court relied upon the majority opinion authored by Justice Blackmun in Spaziano v. Florida, 468 U.S. 447 (1984);
>
> > In Florida, the jury's sentencing recommendation in a capital case is *only advisory*. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances and, "[n]otwithstanding the recommendation of the majority of the jury," is to enter a sentence of life imprisonment or death; in the latter case, specified written findings are required. Fla. Stat. §921.141(3)(1983).
>
> Combs, supra, at 858. The Combs court also recognized that the United States Supreme Court has consistently upheld the validity of Florida's advisory jury system, citing Barclay v.

> Florida, 463 U.S. 939 (1983); Dobbert v. Florida, 432 U.S. 282 (1977); Proffitt v. Florida, 428 U.S. 242 (1976).
>
> Even more recently, the United States Supreme Court again observed that constitutional challenges to Florida's death sentencing scheme have been repeatedly rejected, a scheme "which provides for sentencing by the judge, not the jury." Walton v. Arizona, 497 U.S. ___ (1990). However, Espinosa now makes both the trial judge and the jury constituent parts of the Florida sentencing process. This is clearly a change in the law.

Supplement to the Response, Tompkins v. Singletary, at 42-44 (filed July 17, 1992)(App. 2).

Similarly, the Attorney General's Office has filed a motion for rehearing in Davis v. Florida, 112 S. Ct. 3021 (1992), which was reversed in light of Espinosa. In asking for the rehearing, the Attorney General's Office argued that Espinosa overruled Combs v. State, 525 So. 2d 853 (Fla. 1988), and other established case law:

> Not only has Florida consistently held that the judge is the sole sentencer, but this Court has, likewise, consistently recognized that Florida is a judge sentencing state. It was observed in *Combs*, supra., that this Court "has expressly characterized the jury's role in Florida to be 'advisory' in nature." *Combs*, at 858. Relying on Justice Blackmun's majority opinion in *Spaziano v. Florida*, 468 U.S. 447 (1984), the Court, in *Combs*, noted:
>
> > In Florida, the jury's sentencing recommendation in a capital case is *only advisory*. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances and, "[n]otwithstanding the recommendation of a majority of the jury," is to enter a sentence of life imprisonment or death; in the latter case, specified written findings are required. Fla. Stat. §921.141(3)(1983).
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> *Combs*, *supra* at 858. *See also Barclay v. Florida*, 463 U.S. 939 (1983); *Dobbert v. Florida*, 432 U.S. 282 (1977); *Proffitt v. Florida*, 428 U.S. 242 (1976). *Walton v. Arizona*, 497 U.S.

> ___, 111 L.Ed.2d 511, 524 (1990). *See also, Lewis v. Jeffers*, 497 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 606 (1990). The State of Florida has reasonably relied on this Court's approval of the advisory system and recognition that the judge is the sentencer. *See Parker v. Dugger*, 111 S.Ct. 731 (1991) (reliance on trial court's findings for sentencing determination).
>
> Thus, this Court's decision in *Espinosa* and as applied in *Davis* constitutes a departure from established case law.

Case No. 91-7273, Motion for Rehearing, Davis v. Florida, pp. 9-10 (filed July 29, 1992)(App. 3).

In its rehearing request in Davis, the Attorney General's Office further expressed concern about the inequity to those who lost their appeals on the basis of Combs and other decisions from this Court:

> This Court recognized that before overruling a prior case, inquiry must be made as to whether the departure from established case law would result in "serious inequity to those who have relied upon it or significant damage to the stability of the society governed by the rule in question."
>
> The decision to summarily reverse has such a result. The issue before this Court is critical to the administration of justice in Florida. Certainly, the confusion expressed by Justice Kogan in his specially concurring opinion in *Kennedy v. Singletary*, ___ So.2d ___ (Fla. July 16, 1992), 17 F.L.W. S___, brings the urgency into focus, ("I . . . note with some perplexity the confusing opinions issued by the United States Supreme Court when it reviewed several Florida death cases on June 29, 1992, including this one. . . .").

Motion for Rehearing, Davis, at 11-12.

Clearly, under the precedent set out in Mr. Atkins' petition, Espinosa is a change in law which defeats procedural bars. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Delap v. Dugger, 513 So. 2d 659 (Fla. 1987); Witt v. State, 387 So. 2d 922 (Fla. 1980).

The Assistant Attorney General's refusal to discuss this question must be taken as a concession, particularly in light of the State's arguments in other cases recognizing the tremendous change in Florida law resulting from the decision in Espinosa.

V. Is Mr. Atkins' challenge to the jury instruction procedurally barred?

The Assistant Attorney General cannot argue that Mr. Atkins' jury received a constitutionally adequate jury instruction, so instead in order to win he has to argue "procedural bar."[3] In making this argument of a procedural bar, the Assistant Attorney General relies on Sochor v. Florida, 112 S. Ct. 2114 (1992).

However, the Assistant Attorney General overlooks the fact that the Attorney General's Office in seeking a rehearing in Espinosa has argued that Espinosa and the cases reversed in light of Espinosa "has seemingly rejected both Florida's procedural default rule and harmless error analysis in these cases." Motion for Rehearing at 16 n.5, Espinosa v. Florida (filed July 29, 1992):

> As seen above, this Court's decision is a departure from established law. Apart from the erroneous construction of Florida law, Espinosa and its companion cases, *Henry v. Florida*, 51 Cr. L. 3097 (July 1, 1992); *Davis v. Florida, Id.*, and *Gaskin v. Florida, Id.*, have also caused considerable confusion with respect to the application of harmless error and procedural bar to a jury instruction error in Florida. *See Kennedy v. Singletary*, ___ So.2d ___ (Fla. 1992), ___ F.L.W. S___, *slip op.* at 3, (Kogan J., concurring specially) ("I also note with some perplexity the confusing opinions issued by the United States Supreme Court ..."). This is because, contrary to *Sochor v. Florida*, 504 U.S. ___ (1992), this Court has seemingly rejected both Florida's procedural default rule and

[3]In fact, the Assistant Attorney General never once discusses the jury instruction regarding "heinous, atrocious or cruel," which was given in this case and which is identical to the one found defective in Espinosa.

> harmless error analysis in these cases. *See Davis*, *supra* (no objection to the HAC jury instruction); *Gaskin*, *supra* (no claim of instruction error in Florida courts; additionally the Florida Supreme Court expressly found that death would be imposed even in the absence of HAC); *Henry*, *supra* (HAC instruction proposed by the defense, was unlike Espinosa's instruction and thus not at issue).

Motion for Rehearing, Espinosa, at 16 n.5 (emphasis added)(App. 4).

Moreover, following Hitchcock v. Dugger, this Court found that the change brought by Hitchcock was so significant that the failure to previously raise a timely challenge to the jury instruction would not preclude consideration of a Hitchcock claim in post-conviction proceedings. Delap v. Dugger, 513 So. 2d 659 (Fla. 1987). Again, the Assistant Attorney General chose not to address Delap.

Here, the State's rehearing petitions in Espinosa and its companion cases and the State's arguments in State v. Jennings and Tompkins v. Singletary have acknowledged that Espinosa is a fundamental change that completely alters Florida law. Accepting these assertions, Delap requires that this Court treat Espinosa as a change in law that defeats all procedural bars.

VI. Does Espinosa apply to cold, calculated and premeditated?

Again, the Assistant Attorney General in his desire to win ignores what another Assistant Attorney General has conceded:

> The Capital Collateral Representative has already filed a habeas corpus petition on behalf of Phillip Atkins, in which relief is sought on the basis of Espinosa (see appendix). In this petition, however, Atkins does not confine his attack to the jury instruction on the heinous, atrocious or cruel aggravating circumstance, which was, in contrast to Kennedy, actually found as part of his sentence and affirmed by this Court on appeal. Rather, collateral counsel contends that the jury should not have

> been instructed on the felony murder aggravating circumstance and that the instruction given the jury on the cold, calculated and premeditated aggravating circumstance was unconstitutionally vague, such that relief is mandated under Espinosa (see Petition, Atkins v. Strickland, Case No. 80,108, at pgs. 15-21; see appendix). While Espinosa only specifically addresses Florida standard jury instruction on the heinous, atrocious or cruel aggravating factor, it is easy to see why the above arguments have been made, and it is more than fair to expect that such arguments will continue to be made, as virtually every defendant whose sentence this Court has affirmed in the last decade seeks reconsideration of such sentence, based upon any of the standard jury instructions which he now finds objectionable.

Kennedy v. Singletary, Case No. 80,129, Response to Petition for Writ of Habeas Corpus, at 55 (filed July 15, 1992).

It is clear that under Espinosa, Florida's juries must be advised as to the limitations which control the application of aggravating factors. As explained in Walton v. Arizona, 110 S. Ct. 3047, 3057 (1990):

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.

Here, the jury was given no limiting instructions regarding cold, calculated and premeditated. The instructions were inadequate under Walton and Espinosa.

VII. Does the harmless error analysis require consideration of impact of the error on the jury's death recommendation?

The Assistant Attorney General in arguing the error here was harmless, never once mentions the jury. He pretends that the harmless error analysis must only consider what the sentencing judge found. Again, the Assistant Attorney General chooses to ignore the law.

The harmless error analysis must consider whether the jury's recommendation may have been different but for the extra thumbs on the death side of the scale. Stringer v. Black, 112 S. Ct. 1130 (1992). Where the jury may have returned a binding life recommendation, the error cannot be harmless beyond a reasonable doubt. Hall v. State, 541 So. 2d 1125 (Fla. 1989). Moreover, where there were already five jurors voting for life, it is clear that the balance may have easily been tipped the other way. Duest v. Singletary, ___ F.2d ___, No. 90-6009 (11th Cir. July 15, 1992); Cave v. Singletary, ___ F.2d ___, No. 90-3959 (11th Cir. Aug. 26, 1992).

Substantial mitigation upon which the jury could have premised a life recommendation is present in the record. The trial judge found two statutory mitigating circumstances: (1) no significant history of criminal activity and (2) substantial impairment of capacity to conform to the requirements of law. Additional mitigation is also in the record. The defense mental health expert, Dr. Dee, testified that 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. Dr. Dee's testimony was bolstered by lay witnesses' testimony of Phillip Atkins' demeanor on the night in question. Kay Marler, a neighbor of the Atkins' family, 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 sitting there in a daze, you know, like I wasn't even there, nobody was there but him. He was just in another world.

(R. 847-48). 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 had taken "two Ludes and did a hit of speed" (R. 851) and that he had 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. 851). 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. This evidence also supported nonstatutory mitigation that Mr. Atkins was intoxicated, under the influence of drugs and emotionally and mentally disturbed. The record presented a great deal of other uncontroverted evidence establishing nonstatutory mitigation. 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 nonstatutory mitigation that went unrefuted by the State. See Maxwell v. State, 17 FLW 396 (Fla. 1992). The error in allowing Mr. Atkins' jury to consider invalid aggravating factors thus cannot be found harmless beyond a reasonable doubt. The mitigation before the jury provided more than a reasonable basis for a life recommendation. See Hall v. State, 541 So. 2d 1125 (Fla.

1989)(question whether constitutional error was harmless is whether properly instructed jury could have recommended life).

The Assistant Attorney General never mentions that the jury vote was 7-5. The Assistant Attorney General never discusses the fact that, had a life recommendation been returned, ample mitigation was present which would have precluded an override. These facts were ignored because they establish that the error cannot be harmless beyond a reasonable doubt.

CLAIM II

Notwithstanding the Respondent's reliance upon the federal courts' discussion of Mr. Hill's affidavit, this Court has the responsibility of addressing and correcting constitutional error. Because of the exigencies imposed by an outstanding death warrant and by CCR's workload, the Rule 3.850 proceedings did not provide Mr. Atkins' counsel an adequate opportunity to investigate Mr. Atkins' case or this Court an adequate opportunity to address Mr. Atkins' case. Rather than addressing this situation, the Assistant Attorney General simply brushes it off (Response at 22), failing to address the fairness of the Rule 3.850 proceedings, or the fairness and reliability of Mr. Atkins' conviction and death sentence. Mr. Atkins is entitled to relief.

CONCLUSION

For the reasons stated herein and in the habeas corpus petition, Mr. Atkins is entitled to relief from his unconstitutional conviction and death sentence. Mr. Atkins' penalty phase proceedings were tainted by Eighth Amendment error. This Court found Eighth Amendment error in the original direct appeal. In addition, the jury instructions regarding aggravating

circumstances violated Espinosa. As a result of these errors, extra thumbs were placed upon the death side of scales considered by the jury. With these extra thumbs, the jury voted for death by a 7-5 vote. These errors cannot be harmless beyond a reasonable doubt. Moreover, Mr. Atkins was denied the effective assistance of counsel. In light of the other errors, the cumulative effect requires a resentencing. Mak v. Blodgett, ___ F.2d ___, No. 91-35256 (9th Cir. July 16, 1992).

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 27, 1992.

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