IN THE SUPREME COURT OF FLORIDA

PHILLIP ALEXANDER ATKINS,

Petitioner,

v. CASE NO. 80,108

HARRY K. SINGLETARY,
Secretary, Department of Corrections,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS

PRELIMINARY STATEMENT

Petitioner Atkins was tried and convicted and sentenced to death for the murder of Antonio Castillo. This Court affirmed the judgment but remanded for resentencing by the trial judge. Atkins v. State, 452 So.2d 529 (Fla. 1984). The trial judge reimposed a sentence of death and this Court affirmed. Atkins v. State, 597 So.2d 1200 (Fla. 1986). Petitioner sought post conviction relief via Rule 3.850 and habeas corpus in this Court. This Court denied habeas relief and affirmed the summary denial of relief by the trial court. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989). Petitioner sought relief in the federal courts and both District Judge W. Terrell Hodges and the Eleventh Circuit Court of Appeals denied relief.

ARGUMENT

Atkins now returns to this Court with a second successive habeas corpus petition.

Petitioner Atkins now presents two claims in this his second successive habeas corpus petition:

> (1) The failure to convene a new jury at resentencing denied petitioner his constitutional rights;
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> (2) This Court erred in denying the Rule 3.850 appeal without permitting collateral counsel to complete investigation and obtain a proffer of evidence initially discovered immediately before oral argument.

* * *

(1) THE FAILURE TO CONVENE A NEW JURY AT RESENTENCING

(A) History -- In the initial direct appeal opinion this Court declared:

> ". . . The court's erroneous finding of an improper aggravating circumstance may have injuriously affected the process of weighing aggravating and mitigating circumstances . . . We therefore conclude that appellant's case must be remanded to the trial court for resentencing . . . ."
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> Atkins v. State, 452 So.2d 529, 533 (Fla. 1984)

Following the trial court's reimposition of a sentence of death, Atkins appealed contending that the trial court had not engaged in a meaningful reconsideration and there was no exercise of reasoned judgment in the resentencing. This Court said: "We disagree." Atkins v. State, 497 So.2d 1200, 1201 (Fla. 1986). After reciting the trial court's articulation of the aggravating and mitigating circumstances, this Court stated:

> Upon our review of the findings and the record, we conclude that the trial court exercised reasoned judgment and engaged in real and meaningful reconsideration of sentence with a weighing of circumstances as required by law.
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> [2,3] Appellant argues that the evidence of emotional disturbance should tip the scales in favor of a life sentence. It is clear that the trial judge did consider appellant's mental and emotional problems as factors to be weighed but concluded that they did not outweigh the proven aggravating circumstances calling for a sentence of death. It is not this Court's function to engage in a general *de novo* reweighing of the circumstances. Rather, we are to examine the record to ensure that the findings relied upon are supported by evidence. We find that there is legally sufficient evidence to support the trial judge's findings of fact.
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> Having found the trial judge's factual conclusions supported by evidence, and having found that the trial judge weighed and considered the circumstances in the manner required by law, we can find no reason to disturb the court's judgment. We therefore affirm the sentence of death.

(text at 1203)

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. A copy of Atkins' brief is attached as an Exhibit to this response.

The claim that petitioner urges -- that the trial court failed to convene a new jury for resentencing -- was a claim that this Court found procedurally barred in Atkins v. Dugger, 541 So.2d 1165, 1166 n. 1(4) (Fla. 1989).

In federal court United States District Judge Hodges ruled that the issue of jury resentencing was both procedurally barred and meritless. (Claim XI, pp. 33 - 35 of J. Hodges' order).

> The petitioner claims the federal constitution required the trial judge to reconvene a new jury upon remand for resentencing by the Florida Supreme Court. Petition, at 148 - 160. The issue is, and has been determined to be, procedurally barred since it was not raised on direct appeal from the resentencing procedure. See Atkins, 541 So.2d at 1166, n. 1(4); and Wainwright v. Sykes, supra; and Harris v. Reed, supra. Even so, it is without merit.
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> The Florida Supreme Court remanded the case for resentencing only because the trial judge had improperly considered sexual battery as an aggravating circumstance. Atkins, 497 So.2d at 1201. The Florida Supreme Court found no fault with the evidence or argument presented to the jury. Id. And the resentencing was affirmed on appeal. Atkins, 541 So.2d 1165. In Clemons v. Mississippi, ___ U.S. __, 1990 Lexis 1667 (March 28, 1990), the United States Supreme Court reaffirmed that "[a]ny argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court [cite omitted]." Id. at ____.[27] To the extent the petitioner wishes

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[27] Although remanding the case for resentencing absent consideration of an impermissible aggravating circumstance, the Clemons' Court held that the state's appellate court could itself reweigh the aggravating and mitigating factors and that it did not have to resubmit the case to a jury for its recommendation. Clemons ___ U.S. at ___. If the appellate court can reweigh the circumstances itself, it can certainly remand the case to the trial judge to reweigh the circumstances without requiring him to reconvene a new jury.

> to argue the importance Florida law places on the recommendation of a jury, his argument is better addressed to the Florida, not the federal courts.[28] That a new sentencing jury was not required by Florida law in this case is evidenced by the facts that no statute nor legal decision specifies it, the Florida Supreme Court did not mandate it, and the resentencing was affirmed on appeal.
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> Claim XI warrants no relief.

The Eleventh Circuit Court of Appeals ruled that with respect to the reconvening a new jury issue the claim was procedurally defaulted, that Atkins had failed to allege valid cause and that there was no prejudice under Wainwright v. Sykes:

> We conclude that Atkins has procedurally defaulted on six claims: (1) alleged failure to convene a new jury at Atkins' resentencing; (2) alleged violation of *Stromberg v. California*, 283 US. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931); (3) alleged ineffective assistance of appellate counsel for failing to argue that the state never proved corpus delicti for Atkins' kidnapping conviction; (4) alleged prosecutorial misconduct for bringing sexual-battery charges; (5) alleged prosecutorial misconduct for arguing to the jury during the guilt phase that Atkins' confessed but unproved sexual battery could be used to support a felony-murder conviction; and (6) alleged improper jury instructions. We now examine whether Atkins' claim fit within the *Wainwright v. Sykes* exception to procedural defaults.
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> [1-3] We can review Atkins' procedurally defaulted claims if Atkins can

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[28] See also Barclary and Wainwright v. Goode, text, supra. (the issue is one of state law.)

show abuse for and prejudice from the procedural default. *See, e.g., Johnson, 938* F.2d at 1174 (citing *Murray v. Carrier*, 477 U.S. at 485, 106 S.Ct. at 2644; *Wainwright v. Sykes*, 433 U.S. 72, 90 - 91, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977) [2] But Atkins has failed to allege valid cause.

[4] First, Atkins has failed to advance any cause for his procedural default on two claims: the trial court's alleged failure to convene a sentencing jury and alleged improper jury instructions. Atkins, therefore, has failed to overcome his procedural default on this issue under *Wainwright v. Sykes*.

[5] For the remaining four claims, Atkins has relief on alleged ineffective assistance of trial counsel , appellate counsel or both as causes for his procedural default. After looking at the trial and direct appeal records, we conclude that Atkins failed to establish valid cause under *Wainwright v. Sykes*. Trial counsel advanced Atkins' case in a reasonable effective manner; and appellate counsel rendered effective assistance because he either properly argued Atkins' claims on appeal or he was prohibited from raising on appeal issues that had not been preserved for appeal at the trial level. *See infra* §II.D.1 (discussing ineffectiveness standard under

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[2] Under extraordinary circumstances a federal court can review a defaulted claim if the alleged constitutional violation has resulted in conviction of an innocent defendant. *Johnson v. Singletary*, 938 F.2d 1166, 1174 (11th Cir. 1990) (en banc) (citations omitted). And a federal court can review a defaulted claim if the state procedural bar has been inconsistently or irregularly applied. *See, e.g., Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988). Neither of these exceptions apply to Atkins' case.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

> We also stress that, even if Atkins had presented sufficient cause under *Wainwright v. Sykes*, he would still have failed to overcome his procedural defaults. We have examined each of these procedurally defaulted claims, and we conclude that Atkins was not prejudiced by the alleged violations. Because Atkins failed to show either cause or prejudice, he is procedurally barred from raising these claims now.

(emphasis supplied)
(slip opinion at 3047 - 48)

The federal appellate court also determined in footnote 1 of that opinion that the companion claim of ineffective assistance of appellate counsel for the failure to argue that a new jury should be reconvened for sentencing on remand had been abandoned by Atkins for not briefing that issue on appeal of Judge Hodges' order. See Doyle v. Dugger, 922 F.2d 646, 649 - 50, n. 1 (11th Cir. 1990)

(b) Sochor, Espinosa, and Stringer

Petitioner argues that the issue of whether the failure to convene a new jury at resentencing violated the Eighth Amendment must be reconsidered in light of Espinosa v. Florida, ___ U.S. ___, 51 Cr.L. 3096 (1990); Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 326 (1992) and Stringer v. Black, 503 U.S. ___, 117 L.Ed.2d 367 (1992).

The first point that needs to be made is that the Constitution does not require jury sentencing in a capital case. Spaziano v. Florida, 468 U.S. 447, , 82 L.Ed.2d 340 (1984). If

the Constitution does not require jury sentencing, it is difficult to understand how it is required for a resentencing. In any event petitioner is not entitled to relief on the new decisions he cites. Stringer v. Black, supra, held that a habeas petitioner was entitled to rely on the decisions in Maynard v. Cartwright, 486 U.S. 356, 100 L.Ed.2d 372 and Clemons v. Mississippi, 494 U.S. 738, 108 L.Ed.2d 725 -- that Maynard was controlled by Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 and was not a new rule for Teague v. Lane, 489 U.S. 288, 103 L.Ed.2d 334 (1989) purposes and that Clemons, supra, required that where the sentencer has considered improper aggravating factors the state appellate court may correct such error either by performance a harmless error analysis or by reweighing the appropriateness of the death penalty. In so ruling, the Court rejected the defense argument that the Eighth Amendment required a new sentencing hearing before a jury. 494 U.S. at 748 - 750, 108 L.Ed.2d at 738 - 739. And as United States District Judge Hodges observed at p. 34, n. 27 of his order denying Atkins' federal habeas petition:

> "If the appellate court can reweigh the circumstances itself, it can certainly remand the case to the trial judge to reweigh the circumstances without requiring him to reconvene a new jury."

Stringer simply adds nothing for the benefit of Atkins. The Supreme Court merely held that the state could not rely on an argument that Maynard and Clemons were "new law" under Teague and that the state was immune from the requirement of correcting

error when properly presented. But this Court did not do that in Atkins' appeal; it remanded to the trial court to resentence without consideration of the factor, the trial court did so and this Court approved his actions. Atkins v. State, 497 So.2d 1200 (Fla. 1986). See also Kennedy v. Singletary, ___ So.2d ___, 17 F.L.W. S271 (Fla. Case NO. 79,736 and 79,741, April 30, 1992) ("Stringer v. Black . . . self-evidently did not announce a change in the law but merely discussed and applied well-established principles"). As noted in Stringer itself:

> "When the weighing process itself has been skewed, only constitutional harmless error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence."
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> (emphasis supplied)
> 117 L.Ed.2d at 379

That is precisely what happened in the instant case; this Court remanded and the trial court reweighed, determined that death was appropriate and this Court affirmed. Especially since petitioner did not complain on direct appeal, and procedurally defaulted on the claim, he is in no position now to complain.

Nor is petitioner aided by Sochor, supra, or Espinosa, supra. In Sochor, the Supreme Court declined to reach the issue of whether the jury instruction on HAC was vague because the issue for appellate review constituted a procedural bar. 119 L.Ed.2d at 337 - 338. Atkins similar failure precludes review now on this second collateral attack. Sochor is supportive of the state's position. However, Sochor also held that there was

no dispute that the "CCP" aggravator was invalid for Clemons purposes and the question at issue was the Florida Supreme Court's effort to cure that error. This Court's effort was deemed insufficient because there was no reweighing and this Court's discussion under a proportionality analysis was inadequate as a harmless error analysis. 119 L.Ed.2d at 341 - 342. But this Court in the Atkins appeal did not commit the error of the state court in Stringer or simply automatically affirm; instead as stated, supra, the Court remanded to the trial court to conduct a reweighing and then on review found that the sentencing court did not err in his reweighing.

Espinosa does not aid Atkins. There was no procedural default in Espinosa on the claim that the HAC instruction was vague -- unlike the instant case where this Court and the federal courts have unanimously agreed there has been a procedural default. Even if the procedural default policy of the state court were to be overcome and Sochor teaches that it is not -- the instant case does not involve Espinosa error. There the jury considered an invalid aggravator (a vague HAC instruction) an the trial court "indirectly weighed the invalid aggravating factor that we must presume the jury found"; and there was no correcting mechanism applied in Espinosa; in contrast, sub judice, the trial court specifically removed from consideration the improper aggravating factor in his sentencing order on remand, reweighed and still found death appropriate. Espinosa is inapposite.

With respect to Mr. Atkins' claim that the jury was inadequately instructed with respect to the "HAC" and "CCP" aggravating factors, respondent would reply and reiterate that:

(1) Any complaint regarding instructions has been held by this court to have been procedurally defaulted by the failure to object at trial and raise on direct appeal. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); has been held procedurally barred by United States District Judge Hodges (see p. 30 of Order attached as Appendix hereto); and has been held to be defaulted by the Eleventh Circuit Court of Appeals (see Eleventh Circuit slip opinion at pp. 3047 - 3048, attached to this response).

(2) And Sochor v. Florida, teaches that the state's application of its procedural default policy to challenges to HAC instruction will be enforced by the United States Supreme Court. 199 L.Ed.2d at 337 - 338. This Court has most recently -- after Sochor -- enforced its procedural bar on this issue in Kennedy v. Singletary, 17 F.L.W. S464 (Fla. July 16, 1992).

(3) Petitioner's effort here, apparently for the first time to attack the CCP factor as vague must fail for the foregoing reasons and for the additional reason that no court has yet held CCP to be unconstitutionally vague. The Sochor decision provided relief to the defendant on the basis that all agreed that the factor was inapplicable on an evidentiary basis and the United States Supreme Court had failed to correct it. But "CCP" was not held to be unconstitutionally vague.

(4) Espinosa does not aid petitioner since it was predicated upon this Court having reached the merits of an HAC challenge on direct appeal, not the enforcement of a procedural default.

Finally, in the event that this Court should reject the state's argument and decide to revisit the jury reconvening issue, respondent would respectfully submit that a new jury is not required and that this Court can on the instant record decide that the error was harmless or alternatively conduct a reweighing itself and determine that death is the appropriate sanction. Clemons, supra.

With regard to a reweighing -- to determine whether petitioner deserves the ultimate sanction, the record is abundantly clear on the presence of multiple aggravating factors including a homicide committed while engaged in a kidnapping (*5d* of *F.S. 921.141*), a capital felony to avoid or prevent a lawful arrest (5e), especially heinous, atrocious or cruel (5h). The mitigating factors found were weak: the trial court found the history of prior criminal activity was not significant but the weight to be accorded this factor was diminished by Atkins' history of homosexual contact with minors. 497 So.2d at 1202. Atkins was not under the influence of extreme mental or emotional disturbance; the trial court found Atkins' ability to conform his conduct to the requirements of law was substantially impaired but that he did have the capacity to appreciate the criminality of his conduct. Id. at 1203. Petitioner cannot claim as some other

capital defendants do that he acted in concert with a codefendant and therefore his responsibility should be apportioned or reduced because his participation was relatively minor. Atkins acted alone in kidnapping and murdering his six year old victim. Death is appropriate irrespective of the jury instruction regarding a sexual battery.

Even should the Court choose not to engage in a reweighing analysis, the Court can determine that the now-challenged instruction (trial counsel did not challenge it then) constituted harmless error as in effect the Court did when it affirmed the resentencing order of Judge Bentley in the opinion of October 30, 1986.

(2) Whether this Court erred in failing to permit full investigation by Collateral Counsel

Petitioner's argument leaves one with the impression that the affidavit of investigator Ron Hill is new evidence that has not yet been evaluated and considered by any court of competent jurisdiction; the fact of the matter is that after Ms. Delk answered a direct question from Justice Barkett at oral argument on April 11, 1989, that she was not contending that Atkins did not cause the death of Antonio Castillo (Respondent invites the Court to listen to the tape of that argument), petitioner Atkins included in his federal habeas corpus petition appendix the Hill affidavit which Atkins now portrays as being so significant. And as will be explained infra, both United States District Judge William Terrell Hodges and the Eleventh Circuit Court of Appeals

found the Hill affidavit along with the other allegations presented by Atkins too insubstantial to require an evidentiary hearing. Attached herewith as an appendix are copies of the order summarily denying relief by Judge Hodges and the opinion of the Court of Appeals approving Judge Hodges (and ratifying this Court's summary denial of relief). If the federal courts have approvingly declared that no constitutional violation has occurred and no evidentiary hearing is required (after reviewing the Hill affidavit), how can it be said that this Court acted improperly in denying relief in 1989?

When petitioner went to federal court for habeas relief he added as a claim of ineffective assistance of trial counsel the assertion that counsel should have investigated the scene of the crime to substantiate an argument that the child was left alive on the road but was subsequently run over and killed by another car.

The Honorable William Terrell Hodges denied relief, finding both a procedural default for failing to urge it in the state 3.850 motion and on the merits:

> "(v) The petitioner claims his counsel failed to investigate the crime scene (presumably, where the body was found) and that, had he done so, counsel would have been better able to substantiate his argument that the victim was left alive on the road but was subsequently run-over and killed by another's car. Petition, at 42 - 49. The claim is procedurally barred since the petitioner did not raise it before the Florida courts in his Rule 3.850 Motion to Vacate and he cannot

> show, or has he even attempted to show, cause and prejudice. See Bennet v. Fortner, 863 F.2d 804, 806 (11th Cir. 19890. See also Wainwright v. Sykes, supra; and Lindsey v. Smith, 820 F.2d 137, 1143 (11th Cir. 1987). Even if the claim were not barred it would be denied since the petitioner has not overcome the presumption that trial counsel's investigation was constitutionally sufficient nor has he raised a reasonable probability of prejudice.
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> Trial counsel had the duty to investigate but the scope of that investigation was governed by a standard of reasonableness. Mitchell v. Kemp, 762 F.2d 886, 888 (11th Cir. 1985), cert. denied, 107 S.Ct. 3248, 97 L.Ed.2d 774 (1987). His duty was to make reasonable investigations or reasonable decisions which rendered particular investigations unnecessary. Id. See also Strickland, supra at 691. The petitioner admitted to beating the boy over the head with a steel bar countless times and medical testimony indicated that the victim's head injuries (exceeding 30 points of impact) were "totally inconsistent" with the theory that he was run over by a car. TT at 422. The petitioner has not shown any reasonable probability that, had trial counsel investigated the crime scene (assuming he did not), he would have uncovered evidence sufficient to alter the outcome of the trial or sentencing. Trial counsel himself argued to the jury that the only issue was whether the murder was first or second degree. TT at 195 - 96.
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> (pp. 13 & 14 of Judge Hodges' Order)

Petitioner Atkins pursued the issue in the federal appeal to review Judge Hodges' order and the Eleventh Circuit Court of Appeals held in Atkins v. Singletary, ___ F.2d ___ (11th Cir. Case No. 90-3737, June 25, 1992) that Atkins was not entitled to an evidentiary hearing and that trial counsel was not ineffective:

C. Evidentiary Hearing

[7] Atkins argues that, under *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977), the district court was required to hold an evidentiary hearing to give Atkins an opportunity to prove his claims.[4] We do not think so.

"A petitioner is entitled to an evidentiary hearing if he alleges facts which, if true, would warrant habeas relief." *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991), *cert. denied* __ U.S. ___, 112 S.Ct. 199, 117 L.Ed.2d 439 (1992). And we must accept as true the factual assertions made by a habeas petitioner when determining whether an evidentiary hearing is required. *See, e.g., Smelcher v. Attorney General of Alabama*, 947 F.2d 1472, 1478 (11th Cir. 1991); *Agan v. Dugger*, 835 F.2d 1337, 1338 (11th Cir. 1987). But after reviewing Atkins' allegations and accepting as true his factual allegations, we conclude that the would be due no relief and,

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[4]Atkins has failed to state precisely which issues require an evidentiary hearing or why those issues warrant an evidentiary hearing. Based on Atkins' footnotes, *see* Brief for Petitioner, at 10 n. 4; Reply Brief for Petitioner at 14 n. 9, and the string citations to the record contained therein, Atkins seems to complain about the following issues: ineffective assistance of counsel for failing to investigate the scene of the crime, for failing to use an expert to negate specific intent, for failing to use an expert to prove the involuntariness of Atkins' confession, and for failing to use expert and lay testimony to show nonstatutory mitigating circumstances; no *Miranda* waiver; and procedural-default questions related to cause and prejudice.

therefore, that Atkins is entitled to no evidentiary hearing.[5]

(slip opinion at 3049)

* * *

a. *Ineffectiveness of Trial Counsel for Failing to Investigate the Scene of the Crime*

[12] Atkins argues that trial counsel rendered ineffective assistance by failing to investigate whether some intervening cause (a third-party motorist) might have killed Castillo. We disagree.

The record shows us that Atkins' trial counsel was faced with the following circumstances. Atkins admitted to beating Castillo about the head; not even a hint of evidence existed to support the theory that Castillo had been struck by a car; and the witness who found Castillo barely alive promptly reported it to police. Also, at trial, the state's pathologist, under exacting cross-examination by defense counsel, testified that Castillo's numerous injuries were "totally inconsistent" with Atkins' theory that Castillo had been hit by a car; and the police officer who investigated the site where Castillo was found testified that no car accident occurred. Under these circumstances, we cannot say that Atkins' trial lawyer rendered

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[5] Even the Supreme Court in *Blackledge v. Allison*, 431 U.S. 63, 76, 97 S.Ct.1621, 1630, 52 L.Ed.2d 136 (1977), recognized that allegeations that were palpably incredible, patently frivolous or false would warrant no evidentiary hearing. Beause we think that Atkins' claims and allegations are, at best, meritless and, at worst, frivolous, the district court committed no error by summarily disposing of Atkins' petition.

> ineffective assistance by failing to investigate the spot where Castillo's body was found. This intervening-cause argument was inherently weak and was unlikely to be strengthened by a greater investment of lawyer time. Nothing presented by Atkins shakes our confidence in the outcome of this case. At some point, a trial lawyer has done enough. Although we have studied Atkins' arguments to the contrary, we think that point was reached here.
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> slip opinion at 3050 - 3051

To Atkins' argument that Judge Hodges had found the claim of counsel's failure to investigate the scene of the crime unexhausted and that he had erred in failing to dismiss a "mixed petition" under Rose v. Lundy, 455 U.S. 509, 71 L.Ed.2d 379 (1982), the Eleventh Circuit Court of Appeal answered:

> B. *Alleged Rose v. Lundy Violation*
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> [6] Atkins argues that the district court should have dismissed Atkins' habeas petition because it was a so-called mixed petition subject to mandatory dismissal under *Rose v. Lundy, 455* U.S. 509,102 S.Ct. 1198, 71 L.Ed.2d 379 (19820. We disagree.
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> Atkins says the district court found the following three claims were unexhausted: ineffective assistance of trial counsel for failing to investigate the scene of the crime; ineffective assistance of appellate counsel for failing to argue that Atkins' mental impairment precluded a voluntary *Miranda* waiver; and ineffective assistance of appellate counsel for failing to contest the evidentiary admission of Atkins' confession to sexual battery. To the extent Atkins argues that the district court found Atkins failed to raise these issues during his state 3.850 proceedings, we agree. But we disagree with Atkins' argument that the district court needed to dismiss Atkins' habeas petition because these ineffective-assistance claims had not been raised in the state courts.

For purposes of this discussion, we assume that Atkins might be able to raise these issues at another Rule 3.850 proceeding.[3] The more crucial question, though, is whether, under *Lundy*, the district court should have dismissed Atkins' petition. We conclude no dismissal was required.

Within five years after *Rose v. Lundy*, the Supreme Court in *Granberry v. Greer*, 481 U.S. 129, 131, 107 S.Ct. 1671, 1674, 94 L.Ed.2d 119 (1987), recognized that "there are some cases in which it is appropriate for an appellate court to address the merits of a habeas corpus petition notwithstanding the lack of complete exhaustion." The Supreme Court instructed us that, "if it is perfectly clear that the applicant does not raise even a colorable federal claim, the interests of the petitioner, the warden, the state attorney general, the state courts, and the federal courts will all be well served . . . if . . . the district court denies the habeas petition, and the court of appeals affirms the judgment of the district court." *Id.* at 135, 107 S.Ct. at 165. Because the three claims that Atkins failed to raise in the state courts present no colorable federal

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[3] Although we assume no exhaustion, we believe strongly that the district court correctly concluded that these three issues would effetively be procedurally barred by Atkins' failure to raise them at his first Rule 3.850 proceeing. Under Rule 3.850, "[a] second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief . . . or, if new and different grounds are alelged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of . . . procedure." Fla.R.Crim.P. 3.850. Had Atkins tried to raise these issues in a second Rule 3.850 proceeding, he would likely have faced dismissal.

> claim, we conclude that no dismissal was required. We will address the merits of these three claims in Section II.D. *See infra* §§II.D.1.a (scene of crime); II.D.1.d. (sexual battery confession); II.D.2 (*Miranda*).
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> (slip opinion at 3048 - 49)

Having been told first by this Court that his claims were meritless and too insubstantial to merit an evidentiary hearing and having been told the same by both the federal district court and the federal court of appeals that his allegations are "at best meritless and, at worst, frivolous," petitioner returns unchastened to this court, perhaps happily of the view that prior rejections are only temporary, and that capital post-conviction applications are similar to baseball or basketball championships which require the best four out of seven victories until a claim will be abandoned.

Now, he contends, the affidavit he received on April 14, 1989 -- and which was considered and found insubstantial by United States District Judge Hodges and the Eleventh Circuit -- from investigator Ron Hill requires reconsideration of his judgment and sentence. As the federal district court and the federal appellate court both observed the petitioner admitted to beating the boy over the head with a steel bar countless times; pathologist Francis Drake testified there were thirty separate injuries (broken jaw, extensive skull fractures) and the cause of death was injuries to the brain caused by multiple blows to the head (R 474 - 479). Consider also the medical expert's testimony at R 608:

Q. Dr. Drake, when you testified this morning,, I think you were asked some questions by Mr. Edmund concerning the possibility that the deceased may have been involved in, or a party to, or words to that effect, an automobile accident as far as that causing some of these injuries.

Do you want to clarify your answer in that regard, sir?

A. Yes. These injuries would be consistent, conceivably consistent with an automobile accident in the sense that he may have been the passenger in a motor vehicle that was involved in an accident that was severely damaged and therefore if the roof cave in, et cetera, that he would have injuries essentially limited to his head and neck. It would not be consistent with a motor vehicle accident in the sense that he was a, could have been a pedestrian struck by a motor vehicle or could have been in the roadway run over by a motor vehicle.

Q. So if he was found laying in the roadway, the injuries are not consistent with having been, say, laying there already and a car come along later and run over him?

A. That's correct.

The hypothetical musings of investigator Ron Hill articulated years after the conviction add nothing and require no further consideration by this Court after the federal courts have fully considered the Hill affidavit and have deemed it too

meritless to even mandate an evidentiary hearing. *

Petitioner's contention that a claim (supported by the Hill affidavit) presented to, considered and rejected as frivolous by the federal courts should now be reviewed ab initio by this Court because this Court erred in "failing to permit collateral counsel to complete investigation" does not even rise to the level of frivolity; it is absurd and this Court need not waste more time by ruling that a meritless claim rejected in the federal courts now requires attention in the state court.

It is apparent that petitioner's current effort constitutes an abuse of the writ and respondent respectfully requests this Court to so hold. Witt v. State, 465 So.2d 510 (Fla. 1985); Christopher v. State, 489 So.2d 22 (Fla. 1986).

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*The only new material submitted is another affidavit from trial counsel Edmond apparently obtained a few days after the Eleventh Circuit Court of Appeals issued its opinion of June 25, 1992 affirming the summary denial of habeas corpus relief by United States District Judge Hodges (and inferentially this Honorable Court). But as recognized by this Court, by Distict Judge Hodges and by the Eleventh Circuit even admissions of deficient performance by attorneys are not decisive. Johnson v. Wainwright, 463 So.2d 207, 211, fn. (Fla. 1985); Francis v. State, 529 So.2d 670, 672, n. 4 (Fla. 1988); Harris v Dugger, 874 F.2d 756, 761 n. 4 (11th Cir. 1989); Atkins v. Singletary, supra, slip opinion at 3051.

CONCLUSION

For the foregoing reasons, the instant habeas petition must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 7th day of August, 1992.

OF COUNSEL RESPONDENT.

IN THE SUPREME COURT OF FLORIDA

PHILLIP ALEXANDER ATKINS,

Petitioner,

v. CASE NO. 80,108

HARRY K. SINGLETARY,
Secretary, Department of Corrections,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS

APPENDIX

Attachment "A" -- Initial Brief of Appellant

Attachment "B" -- Opinion of the United States Court of Appeals, Eleventh Circuit

Attachment "C" -- Memorandum Opinion and Order Denying Petition in the United States District Court, Middle District of Florida of Judge Hodges date May 3, 1990

IN THE SUPREME COURT OF THE STATE OF FLORIDA

PHILLIP ATKINS, :

Appellant, :

vs. : CASE NO. ~~61,851~~ 65,974

STATE OF FLORIDA, :

Appellee. :

Death case

Correct Be sure Put under pleadings

JN Jan — 95

INITIAL BRIEF OF APPELLANT

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

91-125573ACA 65,974
Atkins, Phillip Alexander
vs Florida, State of
Florida Supreme court
Robert D. Landry

JACK T. EDMUND, ESQUIRE
P. O. BOX 226
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ATTORNEY FOR APPELLANT

TOPICAL INDEX

TABLE OF CITATIONS

PRELIMINARY STATEMENT

References to the record of Appellant's trial will be made by the notation (R-XX). References to the resentencing hearing will be made by the notation (T2-XX).

POINT ON APPEAL

POINT I

WHETHER THE TRIAL JUDGE PROPERLY REWEIGHED AND REEVALUATED AGGRAVATING AND MITIGATING CIRCUMSTANCES IN IMPOSING THE DEATH PENALTY.

STATEMENT OF FACTS

The facts are unchanged from Appellant's initial brief in this matter.

STATEMENT OF THE CASE

This is an appeal from reimposition of a sentence of death. A sentence of death was imposed by the trial court after the trial that concluded February 19, 1982 (R1219-20).

That sentence was vacated by this Court on June 7, 1984, Atkins v. State, 452 So. 2d 529 (Fla. 1984).

The matter of resentencing was heard by the trial court on September 11, 1984. The Honorable E. Randolph Bentley, the original sentencing judge, heard the matter and reimposed the death penalty on Appellant (T2-7).

POINT I

ARGUMENT

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

The trial judge abused his discretion by not properly re-weighing or reevaluating the valid aggravating and mitigating circumstances. In Lucas v. State, 417 So. 2d 250 (1982), the Supreme Court of Florida held that when sentence is vacated, the trial judge must properly reweigh and reevaluate aggravating and mitigating circumstances in imposing the death penalty. Lucas cited Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). In Proffitt, the United States Supreme Court said that both the trial judge and the supreme court have a "keen and deep responsibility" in imposing and reviewing death sentences. Proffitt goes on to explain the care Florida takes in its sentencing procedures to pass "constitutional muster" and that such care should provide that after a person is convicted of first degree murder, "there should be an informed, focused, guided and objective inquiry into the question of whether he should be sentenced to death". This, according to Proffitt assured that death sentences will not be "wantonly or "freakishly" imposed. Lucas supra, further said that although the directions from the Florida Supreme Court to the trial court may not have been clear, it was nevertheless the trial judge's responsibility to "exercise a reasoned judgment in weighing the aggravating and miti-

gating circumstances on remand". The court points out that it is after all, "this sentence and not any prior one which may be carried out". Lucas, like the instant case, concerned a death sentence that was remanded to the trial court for resentencing. The trial judge reinstated the death sentence, and the Supreme Court of Florida apparently felt that there was nothing on the Lucas record that demonstrated that the trial judge engaged in a reasoned consideration, therefore, the sentence was again vacated and remanded. It is the Appellant's contention that there is nothing in the instant record demonstrating reasoned consideration. The findings of fact in the new sentence filed September 11, 1984, were identical to the previous sentences in every way but one. The one difference was the exclusion of the paragraph the Florida Supreme Court found erroneous This paragraph concerned the lack of evidence for one of the aggravating factors that the trial court had taken into consideration. This paragraph was deleted and the remaining paragraphs renumbered. Appellant contends that to be in accordance with Lucas the trial court must do more than merely delete one offending paragraph and arrive at the same conclusion with no further reasoning.

It has been held, in Eddings v. Oklahoma, 455 U.S. 104, 71 L Ed. 2d 1, 102 S. Ct. 869 (1982) that in the sentencing proceeding, evidenc may be presented as to any mitigating circumstance. In Eddings, substantial evidence was presented with a turbulant family history. This factor was found to "tip the balance" of mitigating, aggravating

factors in favor of no death penalty. Appellant's prior history in the instant case should be accorded the same weight.

Appellant would submit that the trial court did not adequately reweigh the mitigating and aggravating circumstances of this case. In Jones v. State, 332 So. 2d 615 (Fla. 1976), this court held that the death sentence was excessive in the case of a defendant who had a history of mental illness which contributed to his behaviour. That is exactly the situation in the case at bar, and the trial judge even included such remarks in his findings of facts, Paragraph's 2 and 6 of the mitigating circumstances (T2-5,6).

Likewise in Holmes v. State, 429 So. 2d 297 (Fla. 1983), where this court found that a psychological disturbance existing at the time a capital felony is committed was relevant as mitigation, even if it did not rise to the level of a defense, at 300.

In Menendez v. State, 419 So. 2d 312 (Fla. 1982), this court held that a death sentence was inappropriate where there was no direct evidence of premeditated murder and the Defendant had no significant history of prior criminal activity. That is exactly the situation in the instant case. There was no evidence of premeditation, and the only other possible criminal activities, were unsubstantiated hearsay allegations of homosexual conduct. There was nothing to even indicate that if such activities had taken place, that there was anything unlawful about them, in view of recent U. S. Supreme Court rulings on sexual conduct.

The trial court in this case also speculated about the commission of the offense, and was not even sure that the victim was conscious after the first blow (R1214). This usage of an aggravating circumstance that the death of the victim was committed in a cruel manner, is in contravention of Washington v. State, 432 So. 2d 44 (Fla. 1983). There, this court held that proof of this factor must be beyond even that necessary to prove premeditation, at 48.

CONCLUSION

Based upon the foregoing argument and case law cited, it is apparent that the trial deviated from the essential requirements of the law and the death sentence imposed in this matter should be set aside. The trial court did not reweigh the circumstances as directed, used speculation in assessing aggravating factors, failed to adequately consider the drug impaired condition of Appellant's mind, failed to adequately consider the diminished mental capacity of Appellant, and failed to adequately consider the lack of prior criminal activity in Appellant's background.

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Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to Honorable Jim Smith, Attorney General, Park Trammell Building, Room 804, 1313 Tampa Street, Tampa, Florida 33602, by U. S. Mail, this 12th day of December, A. D., 1984.

JACK T. EDMUND, ESQUIRE
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(813) 533-0507
Attorney for Appellant

Phillip Alexander ATKINS, Petitioner–Appellant,

v.

Harry K. SINGLETARY, Respondent–Appellee.

No. 90–3737.

United States Court of Appeals, Eleventh Circuit.

June 25, 1992.

After convictions for murder and kidnapping, and sentence of death, were upheld on direct appeal, 452 So.2d 529, state prisoner petitioned for writ of habeas corpus. The United States District Court for the Middle District of Florida, No. 89–528–CIV–T–13, Wm. Terrell Hodges, J., denied petition, and petitioner appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) petitioner failed to overcome procedural defaults; (2) dismissal of petition was not required on ground that there were unexhausted claims; (3) petitioner did not establish ineffectiveness of trial or appellate counsel; and (4) evidence supported conclusion that petitioner knowingly and voluntarily waived his *Miranda* rights.

Affirmed.

1. Habeas Corpus ⇐404

Court of Appeals can review procedurally defaulted claims if habeas petitioner can show cause for and prejudice from the procedural default.

2. Habeas Corpus ⇐101

Under extraordinary circumstances, federal court can afford habeas review of a procedurally defaulted claim if the alleged constitutional violation has resulted in conviction of an innocent defendant.

3. Habeas Corpus ⇐403

Federal court can review a procedurally defaulted claim of habeas petitioner if state procedural bar has been inconsistently or irregularly applied.

4. Habeas Corpus ⇐337, 340

Habeas petitioner failed to overcome procedural default on issues concerning trial court's alleged failure to convene sentencing jury and alleged improper jury instructions, where petitioner failed to advance any cause for his procedural default.

5. Habeas Corpus ⇐406, 409

Alleged ineffective assistance of trial counsel, appellate counsel or both, did not establish cause for procedural defaults; trial counsel advanced case in a reasonably effective manner, and appellate counsel rendered effective assistance on appeal because he either properly argued claims on appeal or was prohibited from raising on appeal issues that had not been preserved for appeal at the trial level; moreover, even if petitioner had presented sufficient cause, he was not prejudiced by alleged violations.

6. Habeas Corpus ⇐352

Assuming that claims raised by habeas petitioner were unexhausted and that he would be able to raise issues at another state postconviction proceeding, no dismissal of federal habeas petition was required, because claims that petitioner failed to raise in state courts presented no colorable federal claim.

7. Habeas Corpus ⇐742

Court of Appeals must accept as true factual assertions made by a habeas petitioner when determining whether an evidentiary hearing is required.

8. Criminal Law ⇐641.13(1)

When presenting ineffectiveness claims, petitioners bear burden of showing that counsel's performance was constitutionally deficient and that such deficient performance prejudiced their defense. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐641.13(1)

When reviewing whether counsel's performance was deficient, Court of Appeals must, in a highly deferential manner, examine whether counsel's assistance was reasonable considering all the circumstances; standard is not a high standard, and Court does not determine what the ideal attorney would have done in a perfect world or even what the average attorney might have done on an average day; instead, case-by-case inquiry focuses on whether particular counsel's conduct was reasonably effective in context. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(1)

In considering an ineffective assistance of counsel claim, Court of Appeals always presumes strongly that counsel's performance was reasonable and adequate; petitioner alleging ineffectiveness bears burden of overcoming strong presumption. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐641.13(1)

Unreasonable conduct on part of counsel will not warrant relief if petitioner fails to prove affirmatively that the unreasonable conduct prejudiced his case; to establish prejudice, petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, results of proceeding would have been different. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(6)

Petitioner did not establish that trial counsel was ineffective for failing to investigate scene of crime to determine whether some intervening cause such as third-party motorist might have killed victim; petitioner admitted to beating victim about the head, and no evidence existed to support theory that victim had been struck by car. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐641.13(6)

Petitioner did not establish that trial counsel was ineffective for presenting no expert testimony on involuntariness, in connection with petitioner's confession; because confession was constitutionally voluntary, petitioner failed to show that omission of expert testimony prejudiced his case. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐641.13(6)

Petitioner failed to establish that trial counsel was ineffective in failing to present expert testimony about effect alcohol and drugs would have had on petitioner; although counsel stated in affidavit that he should have presented such testimony for its "probable positive defensive effect," affidavit admitted no ineffective performance; moreover, petitioner failed to show that omission prejudiced his defense; counsel presented evidence throughout trial to establish petitioner's mental condition and amount of drugs and alcohol he allegedly consumed on day victim was killed. U.S.C.A. Const.Amend. 6.

15. Criminal Law ⇐64

Petitioner did not e
counsel was ineffective f
cutors to put into evidenc
fession to sexual battery,
counsel attempted to ke
of evidence, and that evid
ble as part of the res gest
crime. U.S.C.A. Const.A

16. Criminal Law ⇐641.

Trial counsel was no
failing to object to admi
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boys, where counsel state
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sexual proclivities. U.S.C.
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17. Criminal Law ⇐414

Evidence supported co
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his alcohol and drug consu
ed a voluntary and know
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that final interrogation oc
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failed to qualify as coe
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18. Criminal Law ⇐1208.1

Acceptance of nonstatu
factors is not constitutionall
capital sentencing proceedin
only requires that sentence
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Appeal from the United
Court for the Middle Distr

15. Criminal Law ⇐641.13(6)

Petitioner did not establish that trial counsel was ineffective for allowing prosecutors to put into evidence petitioner's confession to sexual battery, considering that counsel attempted to keep confession out of evidence, and that evidence was admissible as part of the res gestae of the charged crime. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⇐641.13(6)

Trial counsel was not ineffective for failing to object to admission of part of confession which referred to petitioner's sexual relations with 45 young men and boys, where counsel stated that one of his tactics was to bring into play petitioner's sexual proclivities. U.S.C.A. Const.Amend. 6.

17. Criminal Law ⇐414

Evidence supported conclusion that defendant's *Miranda* waiver was voluntary and knowing, notwithstanding defendant's argument that his mental impairment and his alcohol and drug consumption prevented a voluntary and knowing waiver; in terms of coercion, defendant alleged only that final interrogation occurred in early morning hours, and late-night questioning failed to qualify as coercion or overreaching by police.

18. Criminal Law ⇐1208.1(5)

Acceptance of nonstatutory mitigating factors is not constitutionally required in a capital sentencing proceeding; Constitution only requires that sentencer consider the factors.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, FAY and EDMONDSON, Circuit Judges.

EDMONDSON, Circuit Judge:

Phillip Alexander Atkins, who was convicted for kidnapping and first-degree murder and sentenced to death, appeals the district court's denial of Atkins' petition for the writ of habeas corpus. We affirm.

I. BACKGROUND

Atkins confessed to the 1981 kidnapping, sexual battery and murder of six-year-old Antonio Castillo. The trial judge directed a verdict of acquittal on the sexual-battery charges because, despite Atkins' confession, prosecutors were unable to produce independent evidence to prove that sexual battery occurred. The jury then convicted Atkins of kidnapping and murder and, by a seven-to-five vote, recommended that Atkins be sentenced to death. The state trial judge agreed with the jury and sentenced Atkins to death.

Atkins appealed his conviction and sentence to the Florida Supreme Court, which affirmed his conviction but which remanded his case for resentencing. The supreme court held that, because the trial court had acquitted Atkins of sexual-battery charges, the trial court erred in considering "the occurrence of a sexual battery as an aggravating circumstance in the capital felony sentencing process." *Atkins v. State*, 452 So.2d 529, 533 (Fla.1984) [*Atkins I*]. On remand, the trial judge examined the remaining aggravating and mitigating circumstances and resentenced Atkins to death.

Atkins appealed this resentencing, arguing that the trial judge failed to reweigh

death-penalty factors. Atkins alleged that the trial court merely omitted reference to sexual battery and reissued its earlier death sentence. On review, the Florida Supreme Court rejected Atkins' arguments and affirmed the death sentence. *Atkins v. State*, 497 So.2d 1200 (Fla.1986) [*Atkins II*].

Atkins then moved the trial court to vacate or modify the judgment and sentence under Fla.R.Crim.P. 3.850. The trial court summarily denied Atkins' 3.850 motion; and Atkins appealed the denial to the Florida Supreme Court, at the same time petitioning that court for habeas relief.

The Florida Supreme Court affirmed the 3.850 denial and denied Atkins' habeas petition. *Atkins v. Dugger*, 541 So.2d 1165 (Fla.1989) [*Atkins III*]. On the 3.850 appeal, the court said that, "[w]ith the exception of the issues relating to ineffective assistance of counsel, all [other fourteen] issues raised by Atkins [were] procedurally barred because they were either raised, or should have been raised, during one of Atkins' two direct appeals." *Id.* at 1166. On Atkins' habeas petition, the court stated:

> Atkins raises several points which he contends are examples of ineffective assistance of counsel. We find that seven of these points were not properly preserved for appeal by trial counsel, thus precluding appellate review. Accordingly, they are procedurally barred. Two other issues raised by Atkins in the petition are also procedurally barred because they should have been raised or were raised on appeal.

Id. at 1166–67 and nn. 2 & 3. The court then rejected Atkins' two remaining arguments: that appellate counsel was ineffective for failing to argue that the trial court refused to find statutory and nonstatutory mitigating circumstances and for failing to argue that Atkins was denied a fair trial by the state's attempt to try him for sexual battery without corroborating evidence. *Id.* at 1167.

Atkins then sought federal habeas relief, raising eighteen issues and multiple subissues. The district court rejected each of Atkins' arguments and denied habeas relief. This appeal followed.[1]

1. Atkins appeals only a portion of the multiple issues and subissues he raised in the district court. Atkins, therefore, is deemed to have abandoned the claims not addressed on appeal. *See Doyle v. Dugger*, 922 F.2d 646, 649–50 n. 1 (11th Cir.1991). We deem the following claims abandoned: ineffective assistance of trial counsel for failing to argue that the state had not proved the corpus delicti of kidnapping, *see Atkins v. Dugger*, No. 89–528–CIV–T–13, slip op. at 11–12 (M.D.Fla. May 3, 1990); ineffective assistance of trial counsel for failing to argue an alleged violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), *see Atkins v. Dugger*, slip op. at 15; ineffective assistance of appellate counsel for failing to argue that a new jury should have been convened for Atkins' sentencing on remand, *id.* slip op. at 20–21; ineffective assistance of appellate counsel for failing to argue that the trial court impermissibly shifted the sentencing burden of proof to Atkins, *id.* slip op. at 21; due process and equal protection violations caused by insufficient time for Atkins to file his Fla.R.Crim.P. 3.850 motion, *Atkins v. Dugger*, slip op. at 21; Eighth Amendment violation caused at trial by the prosecutor's argument and the judge's instruction that Atkins alleges shifted to him the burden of showing the inappropriateness of the death sentence, *id.* slip op. at 23; insufficient evidence to prove kidnapping, *id.* slip op. at 35; inadequate jury instructions on whether a majority vote was needed to recommend the death sentence, *id.* slip op. at 35–36; unconstitutional sentencing because aggravating circumstance—kidnapping—was also used to convict Atkins of felony murder, *id.* slip op. at 36–37; Eighth and Fourteenth Amendment violations caused by consideration of nonstatutory aggravating circumstances, *id.* slip op. at 39–41; misleading jury instructions during senten
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id. slip op. at 43–44; and inef
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II. DISCUSSI

Our discussion of Atkins
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Rose v. Lundy, 455 U.S.
1198, 71 L.Ed.2d 379 (1982
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And fourth, we will discuss
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A. Procedural Default

Federal habeas review re
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stitutional rights." *Murra*
477 U.S. 478, 487, 106 S.Ct.
L.Ed.2d 397 (1986). So, wh
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938 F.2d 1166, 1173 (11th
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2. Under extraordinary circum
court can review a defaulted cl

II. DISCUSSION

Our discussion of Atkins' claims will be divided into four sections. First, we will discuss those claims that have been procedurally defaulted. Second, we will discuss Atkins' claim that the district court violated *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), by deciding a so-called mixed petition. Third, we will discuss Atkins' claim that he was entitled to an evidentiary hearing in the district court. And fourth, we will discuss Atkins' remaining claims that have been neither procedurally defaulted nor deemed abandoned on appeal.

A. Procedural Default

Federal habeas review reduces the finality of litigation and frustrates states' "sovereign power to punish offenders" and states' "good-faith attempts to honor constitutional rights." *Murray v. Carrier*, 477 U.S. 478, 487, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). So, when a state prisoner fails to follow state procedural rules, thereby procedurally defaulting on the claim, our authority to review the prisoner's state court criminal conviction is "severely restricted." *Johnson v. Singletary*, 938 F.2d 1166, 1173 (11th Cir.1991) (en banc). "Federal review of a petitioner's claim is barred by the procedural-default doctrine if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar, and that bar provides an adequate and independent state ground for denying relief." *Id.* (citations omitted).

We conclude that Atkins has procedurally defaulted on six claims: (1) alleged failure to convene a new jury at Atkins' resentencing; (2) alleged violation of *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931); (3) alleged ineffective assistance of appellate counsel for failing to argue that the state never proved the corpus delicti for Atkins' kidnapping conviction; (4) alleged prosecutorial misconduct for bringing sexual-battery charges; (5) alleged prosecutorial misconduct for arguing to the jury during the guilt phase that Atkins' confessed but unproved sexual battery could be used to support a felony-murder conviction; and (6) alleged improper jury instructions. We now examine whether Atkins' claims fit within the *Wainwright v. Sykes* exception to procedural defaults.

[1–3] We can review Atkins' procedurally defaulted claims if Atkins can show cause for and prejudice from the procedural default. *See, e.g., Johnson*, 938 F.2d at 1174 (citing *Murray v. Carrier*, 477 U.S. at 485, 106 S.Ct. at 2644; *Wainwright v. Sykes*, 433 U.S. 72, 90–91, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977)).[2] But Atkins has failed to allege valid cause.

[4] First, Atkins has failed to advance any cause for his procedural default on two

jury instructions during sentencing that violated *Caldwell v. Mississippi*, *id.* slip op. at 41–43; misleading prosecutorial argument and jury instruction during sentencing that led jury to believe they could have no sympathy for Atkins, *id.* slip op. at 43–44; and ineffective assistance of counsel for failing to argue the alleged misleading jury instructions on sympathy, *id.*

2. Under extraordinary circumstances, a federal court can review a defaulted claim if the alleged constitutional violation has resulted in the conviction of an innocent defendant. *Johnson v. Singletary*, 938 F.2d 1166, 1174 (11th Cir.1991) (en banc) (citations omitted). And a federal court can review a defaulted claim if the state procedural bar has been inconsistently or irregularly applied. *See, e.g., Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988). Neither of these exceptions apply to Atkins' case.

claims: the trial court's alleged failure to convene a sentencing jury and alleged improper jury instructions. Atkins, therefore, has failed to overcome his procedural default on these issues under *Wainwright v. Sykes.*

[5] For the remaining four claims, Atkins has relied on alleged ineffective assistance of trial counsel, appellate counsel or both as causes for his procedural default. After looking at the trial and direct-appeal records, we conclude that Atkins failed to establish valid cause under *Wainwright v. Sykes.* Trial counsel advanced Atkins' case in a reasonably effective manner; and appellate counsel rendered effective assistance because he either properly argued Atkins' claims on appeal or he was prohibited from raising on appeal issues that had not been preserved for appeal at the trial level. *See infra* § II.D.1 (discussing ineffectiveness standard under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

We also stress that, even if Atkins had presented sufficient cause under *Wainwright v. Sykes,* he would still have failed to overcome his procedural defaults. We have examined each of these procedurally defaulted claims, and we conclude that Atkins was not prejudiced by the alleged violations. Because Atkins failed to show either cause or prejudice, he is procedurally barred from raising these claims now.

3. Although we assume no exhaustion, we believe strongly that the district court correctly concluded that these three issues would effectively be procedurally barred by Atkins' failure to raise them at his first Rule 3.850 proceeding. Under Rule 3.850, "[a] second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief ... or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of ... procedure." Fla.R.Crim.P. 3.850. Had Atkins tried to raise these issues in a second Rule 3.850 proceeding, he would likely have faced dismissal.

B. Alleged Rose v. Lundy Violation

[6] Atkins argues that the district court should have dismissed Atkins' habeas petition because it was a so-called mixed petition subject to mandatory dismissal under *Rose v. Lundy,* 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). We disagree.

Atkins says the district court found the following three claims were unexhausted: ineffective assistance of trial counsel for failing to investigate the scene of the crime; ineffective assistance of appellate counsel for failing to argue that Atkins' mental impairment precluded a voluntary *Miranda* waiver; and ineffective assistance of appellate counsel for failing to contest the evidentiary admission of Atkins' confession to sexual battery. To the extent Atkins argues that the district court found Atkins failed to raise these issues during his state 3.850 proceedings, we agree. But we disagree with Atkins' argument that the district court needed to dismiss Atkins' habeas petition because these ineffective-assistance claims had not been raised in the state courts.

For purposes of this discussion, we assume that Atkins might be able to raise these issues at another Rule 3.850 proceeding.[3] The more crucial question, though, is whether, under *Lundy,* the district court should have dismissed Atkins' petition. We conclude no dismissal was required.

Within five years after *Rose v. Lundy,* the Supreme Court in *Granberry v. Greer,* 481 U.S. 129, 131, 107 S.Ct. 1671, 1674, 95 L.Ed.2d 119 (1987), recog
are some cases in which
for an appellate court to a
of a habeas corpus petit
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II.D. *See infra* §§ II.
crime); II.D.1.d (sexual-ba
II.D.2 (*Miranda*).

C. Evidentiary Hearing

[7] Atkins argues tha
ledge v. Allison, 431 U.S.
52 L.Ed.2d 136 (1977), t
was required to hold an ev
to give Atkins an opportu
claims.[4] We do not think

4. Atkins has failed to state
sues require an evidentiar
those issues warrant an e
Based on Atkins' footnotes,
tioner at 10 n. 4; Reply Brief
n. 9, and the string citations
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the following issues: ineff
counsel for failing to investi
crime, for failing to use a
specific intent, for failing t
prove the involuntariness of
and for failing to use expert

L.Ed.2d 119 (1987), recognized that "there are some cases in which it is appropriate for an appellate court to address the merits of a habeas corpus petition notwithstanding the lack of complete exhaustion." The Supreme Court instructed us that, "if it is perfectly clear that the applicant does not raise even a colorable federal claim, the interests of the petitioner, the warden, the state attorney general, the state courts, and the federal courts will all be well served ... if ... the district court denies the habeas petition, and the court of appeals affirms the judgment of the district court." *Id.* at 135, 107 S.Ct. at 1675. Because the three claims that Atkins failed to raise in the state courts present no colorable federal claim, we conclude that no dismissal was required. We will address the merits of these three claims in Section II.D. *See infra* §§ II.D.1.a (scene of crime); II.D.1.d (sexual-battery confession); II.D.2 (*Miranda*).

C. *Evidentiary Hearing*

[7] Atkins argues that, under *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977), the district court was required to hold an evidentiary hearing to give Atkins an opportunity to prove his claims.[4] We do not think so.

"A petitioner is entitled to an evidentiary hearing if he alleges facts which, if true, would warrant habeas relief." *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991), *cert. denied* — U.S. ——, 112 S.Ct. 1199, 117 L.Ed.2d 439 (1992). And we must accept as true the factual assertions made by a habeas petitioner when determining whether an evidentiary hearing is required. *See, e.g., Smelcher v. Attorney General of Alabama*, 947 F.2d 1472, 1478 (11th Cir.1991); *Agan v. Dugger*, 835 F.2d 1337, 1338 (11th Cir.1987). But after reviewing Atkins' allegations and accepting as true his factual allegations, we conclude that he would be due no relief and, therefore, that Atkins is entitled to no evidentiary hearing.[5]

D. *Remaining Claims*

1. *Ineffective Assistance of Counsel*

With the exception of two claims, *see infra* §§ II.D.2 (*Miranda* claim); II.D.3 (mitigating-circumstances claim), all of Atkins' remaining claims involve allegations of ineffective assistance of trial and appellate counsel. Before addressing individual allegations, we will revisit *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to outline the general standards for judging ineffectiveness claims.

4. Atkins has failed to state precisely which issues require an evidentiary hearing or why those issues warrant an evidentiary hearing. Based on Atkins' footnotes, *see* Brief for Petitioner at 10 n. 4; Reply Brief for Petitioner at 14 n. 9, and the string citations to the record contained therein, Atkins seems to complain about the following issues: ineffective assistance of counsel for failing to investigate the scene of the crime, for failing to use an expert to negate specific intent, for failing to use an expert to prove the involuntariness of Atkins' confession, and for failing to use expert and lay testimony to show nonstatutory mitigating circumstances; no *Miranda* waiver; and procedural-default questions related to cause and prejudice.

5. Even the Supreme Court in *Blackledge v. Allison*, 431 U.S. 63, 76, 97 S.Ct. 1621, 1630, 52 L.Ed.2d 136 (1977), recognized that allegations that were palpably incredible, patently frivolous or false would warrant no evidentiary hearing. Because we think that Atkins' claims and allegations are, at best, meritless and, at worst, frivolous, the district court committed no error by summarily disposing of Atkins' petition.

[8] "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. When presenting ineffectiveness claims, petitioners bear the burden of showing, first, that counsels' performance was constitutionally deficient and, second, that this deficient performance prejudiced their defense. *Id.*

[9] When reviewing whether counsel's performance was deficient, courts must, in a highly deferential manner, examine "whether counsel's assistance was reasonable *considering all the circumstances.*" *Id.* at 688, 104 S.Ct. at 2065 (emphasis added). This standard is no high standard. We must not determine what the ideal attorney might have done in a perfect world or even what the average attorney might have done on an average day; instead, our case-by-case inquiry focuses on whether a particular counsel's conduct was reasonably effective in context.

[10] Most important, we must avoid second-guessing counsel's performance. *Id.* As is often said, "Nothing is so easy as to be wise after the event." We also should always presume strongly that counsel's performance was reasonable and adequate; and a petitioner alleging ineffectiveness bears the burden of overcoming this strong presumption. *Id.*

[11] Even in the light of this permissive review of counsel's performance under *Strickland*, on rare occasions conduct may be found unreasonable. But unreasonable conduct will not warrant relief if the petitioner fails to prove affirmatively that the unreasonable conduct prejudiced his case. *Id.* at 693, 104 S.Ct. at 2067. To establish prejudice, a petitioner proves nothing if he alleges only that the unreasonable conduct might have had "some conceivable effect on the outcome of the proceeding." *Id.* "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068.

Because questions of ineffectiveness are mixed questions of law and fact, we exercise plenary review. *Id.* at 698, 104 S.Ct. at 2070. And when applying *Strickland*, we are free to dispose of ineffectiveness claims on either of its two grounds. *Id.* at 697, 104 S.Ct. at 2069. Guided by these standards, we now examine Atkins' claims.

a. *Ineffectiveness of Trial Counsel for Failing to Investigate the Scene of the Crime*

[12] Atkins argues that trial counsel rendered ineffective assistance by failing to investigate whether some intervening cause (a third-party motorist) might have killed Castillo. We disagree.

The record shows us that Atkins' trial counsel was faced with the following circumstances: Atkins admitted to beating Castillo about the head; not even a hint of evidence existed to support the theory that Castillo had been struck by a car; and the witness who found Castillo barely alive promptly reported it to police. Also, at trial, the state's pathologist, under exacting cross-examination by defense counsel, testified that Castillo's numerous injuries were "totally inconsistent" with Atkins' theory that Castillo had been hit by a car; and the police officer who investigated the site where Castillo was found testified that no car accident occurred. cumstances, we cannot trial lawyer rendered inef by failing to investigate Castillo's body was found ing-cause argument was and was unlikely to be st greater investment of law ing presented by Atkins s dence in the outcome of thi point, a trial lawyer has d though we have studied At to the contrary, we think reached here.

b. *Ineffectiveness of Tr Failing to Present V Confession to Jury*

[13] Although Atkins a tial brief to us that trial c raise the question of involu jury, he concedes in his r trial counsel did raise the a jury; and we note that the structed the jury on invo confessions. Atkins then gue that trial counsel was presenting no expert testim tariness. But Atkins' arg cause he has not shown tha would likely have changed the case.

Although the mental cor fendant—on which Atkins have testified—can be a sig when discussing involuntar tal condition alone never c inquiry into constitutional *Colorado v. Connelly*, 479 107 S.Ct. 515, 520, 93 L.Ed Unless police or other state coercive tactics, Atkins' conf untary. *See, e.g., id.* 107 S Because Atkins' confession

no car accident occurred. Under these circumstances, we cannot say that Atkins' trial lawyer rendered ineffective assistance by failing to investigate the spot where Castillo's body was found. This intervening-cause argument was inherently weak and was unlikely to be strengthened by a greater investment of lawyer time. Nothing presented by Atkins shakes our confidence in the outcome of this case. At some point, a trial lawyer has done enough. Although we have studied Atkins' arguments to the contrary, we think that point was reached here.

b. *Ineffectiveness of Trial Counsel for Failing to Present Voluntariness of Confession to Jury*

[13] Although Atkins argues in his initial brief to us that trial counsel failed to raise the question of involuntariness to the jury, he concedes in his reply brief that trial counsel did raise the argument to the jury; and we note that the trial judge instructed the jury on involuntariness and confessions. Atkins then attempts to argue that trial counsel was ineffective for presenting no expert testimony on involuntariness. But Atkins' arguments fail because he has not shown that this testimony would likely have changed the outcome of the case.

Although the mental condition of a defendant—on which Atkins' expert might have testified—can be a significant factor when discussing involuntariness, the mental condition alone never disposes of the inquiry into constitutional involuntariness. *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S.Ct. 515, 520, 93 L.Ed.2d 473 (1986). Unless police or other state actors exerted coercive tactics, Atkins' confession was voluntary. *See, e.g., id.* 107 S.Ct. at 520–22. Because Atkins' confession was constitutionally voluntary—that is, because the record shows no improper or coercive state tactics—Atkins has failed to show that the omission of expert testimony prejudiced his case and has failed the second *Strickland* test.

c. *Ineffectiveness of Trial Counsel for Failing to Present Expert Testimony to Negate Specific Intent*

[14] Atkins relies on his trial attorney's affidavit to argue that counsel ineffectively failed to present expert testimony about the effect alcohol and drugs would have had on Atkins: namely, that Atkins could not have formed intent to commit a crime. This affidavit, however, states only that trial counsel's failure to use an expert was neither a tactical nor strategic decision. And while the affidavit says that trial counsel believes he should have presented such testimony for its "probable positive defensive effect," we see no constitutional ineffectiveness.

First, the affidavit alone establishes nothing. It admits no ineffective performance; and even if it did admit ineffectiveness, we would give the affidavit no substantial weight "because ineffectiveness is a question which we must decide, [so] admissions of deficient performance by attorneys are not decisive." *Harris v. Dugger*, 874 F.2d 756, 761 n. 4 (11th Cir.1989).

Second, Atkins has failed to show that this omission prejudiced his defense. Trial counsel presented evidence to the jury throughout the trial trying to show Atkins' mental condition and the amount of drugs and alcohol Atkins allegedly consumed on the day Castillo was killed. As the district court noted, if the jury believed Atkins' level of consumption, they would have needed no expert to explain what effect it

would have on Atkins. Also, the jury was presented with many witnesses testifying that Atkins was in complete control of his faculties during and after Castillo was killed. We conclude that, in the light of the evidence presented at trial, Atkins has failed to show a reasonable probability that the outcome of the case would have been different if an expert had testified.

d. *Ineffectiveness of Trial Counsel for Failing to Combat Use of Sexual-Misconduct Evidence*

[15] Atkins argues that trial counsel was ineffective for allowing prosecutors to put into evidence Atkins' confession to sexual battery.[6] To the extent that Atkins refers to the confession to sexual battery with Antonio Castillo, counsel's conduct was reasonably effective because counsel, in fact, attempted to keep the confession out of evidence and because this evidence was admissible as part of the res gestae of the charged crime. *See, e.g., Smith v. Wainwright*, 741 F.2d 1248, 1258 (11th Cir. 1984); *Reese v. Wainwright*, 600 F.2d 1085, 1090 (5th Cir.1979); *see also Atkins III*, 541 So.2d at 1168 (Grimes, J., specially concurring).

[16] To the extent that Atkins refers to his confessed sexual relations with forty-five young men and boys, we also find no ineffectiveness. Defense counsel agreed to admitting this statement into evidence, stating that one of his tactics was to bring into play Atkins' sexual proclivities. *See, e.g.*, Record at 1040. Because the use of this tactic in the guilt and penalty phases of the trial was (while not ultimately successful) a reasonable one from a constitutional point of view, we conclude that trial counsel was not ineffective for failing to object to the admission of that part of the confession showing Atkins' sexual proclivities.

e. *Ineffectiveness of Trial Counsel for Failing to Investigate and Present Mitigating Evidence*

Atkins argues that trial counsel was ineffective for failing to present mitigating evidence. We find this argument meritless because, after reviewing the entire penalty phase of Atkins' trial, virtually all of the mitigating evidence that Atkins argues should have been presented was presented. And while Atkins now offers some new testimonial evidence that *might* have been presented, "[t]he mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." *Foster v. Dugger*, 823 F.2d 402, 406 (11th Cir.1987). Trial counsel did enough. A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance. Trial counsel's presentation of mitigating circumstances—both what was put in and what was left out—in no way undermined the proper functioning of the adversarial process and, therefore, was constitutionally effective.

f. *Ineffectiveness of Appellate Counsel for Failing to Appeal the Admission into Evidence of Atkins' Confession to Sexual Battery*

Atkins argues that appellate counsel should have appealed the trial judge's admission into evidence of At
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this argument meritless.
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g. *Ineffectiveness of Ap*
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Without stating why the
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kins raises this issue, we ca
See, e.g., Campbell v. Wa
F.2d 1573 (11th Cir.1984).[7]

2. *Miranda Claim*

Atkins contends that he
knowingly waived his righ
randa v. Arizona, 384 U.S.
1602, 16 L.Ed.2d 694 (1966).
But before discussing this
to address a point appare
stood by Atkins and the St
Both Atkins, *see* Brief for P
and the state, *see* Brief for

6. We reject without discussion Atkins' claim that "the jury did not know that the trial court had determined that there was insufficient evidence as a matter of law to convict of sexual battery." *See, e.g.*, Brief for Petitioner at 28 n. 13. The record proves this allegation false. *See, e.g.*, Record at 933.

7. If we could review this ins
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convinces us that a reasonable
found beyond a reasonable d
was guilty of murdering Cast
have stated in the past, becaus
testify on his own behalf, he

mission into evidence of Atkins' confession to oral and anal sex with Castillo. We find this argument meritless. As we have already noted, however, even if state prosecutors had not pursued sexual-battery charges the confession would have been admissible into evidence as part of the res gestae of the crime. *See supra* § II.D.1.d. Appellate counsel's decision to forgo appeal of this issue was, under these circumstances, professionally reasonable. Atkins has failed to meet the first *Strickland* test.

g. *Ineffectiveness of Appellate Counsel for Failing to Argue that Atkins' Murder Conviction was Unsupported by Sufficient Evidence*

Without stating why the evidence was insufficient, Atkins argues that appellate counsel was ineffective for not arguing that the evidence presented by prosecutors was insufficient to support a murder conviction. Because this is the first time Atkins raises this issue, we cannot review it. *See, e.g., Campbell v. Wainwright,* 738 F.2d 1573 (11th Cir.1984).[7]

2. Miranda Claim

Atkins contends that he could not have knowingly waived his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). We disagree. But before discussing this issue, we need to address a point apparently misunderstood by Atkins and the State of Florida. Both Atkins, *see* Brief for Petitioner at 69, and the state, *see* Brief for Respondent at 72, assert that the district court found this issue procedurally barred. In fact, the district court found Atkins had failed to raise in his Rule 3.850 motion the issue whether Atkins' appellate counsel was ineffective for failing to raise this claim on direct appeal. *See supra* § II.B. This ineffectiveness claim differs from the issue whether Atkins knowingly waived his *Miranda* rights. But both claims are without merit.

Atkins' appellate counsel raised this issue on direct appeal. *See* Reply Brief on Direct Appeal for Appellant Atkins at 13–15 (arguing that Atkins' mental illness and use of drugs and alcohol prevented knowing, intelligent waiver). So, to the extent that Atkins argues before this court that appellate counsel was ineffective, *see* Brief for Petitioner at 68–69, we reject his argument. We also reject Atkins' argument that trial counsel was ineffective, *see id.* ("Counsel failed his client when he failed to develop and present evidence that would have established that Mr. Atkins' waiver was not knowing."). After reviewing the record, we conclude that trial counsel's efforts to persuade both judge and jury were reasonably effective.

Even if we were to assume unreasonable conduct, we would reject Atkins' attempt to inject an ineffectiveness claim here because we conclude that Atkins' *Miranda* claim has no merit; as such, no prejudice would have resulted from the alleged unreasonable conduct. In *Colorado v. Connelly,* 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473

7. If we could review this insufficiency claim, Atkins' argument would fail because the record convinces us that a reasonable jury could have found beyond a reasonable doubt that Atkins was guilty of murdering Castillo. And as we have stated in the past, because Atkins chose to testify on his own behalf, he ran the risk that the jury might conclude the opposite of his testimony is true. *See, e.g., United States v. Sharif,* 893 F.2d 1212, 1214 (11th Cir.1990) (citations omitted). So, because no possible prejudice resulted from not appealing this point, Atkins' ineffectiveness argument would, if reviewable, be meritless.

(1986), the Supreme Court equated the voluntariness inquiry in the *Miranda* waiver context with the voluntariness inquiry in the confession context under the Fourteenth Amendment. *Id.* at 169, 107 S.Ct. at 523. The Court recognized that "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion," *id.* at 170, 107 S.Ct. at 523, and rejected the notion that, absent state coercion, the voluntariness of a *Miranda* waiver depends on a defendant's mental condition. *Id.*

[17] Here, Atkins argues strenuously that his mental impairment and his alcohol and drug consumption prevented a voluntary and knowing waiver of his *Miranda* rights. But *Miranda* is about coercion. And, in terms of coercion, Atkins alleges only that "[t]he 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." Brief for Petitioner at 67–68. This late-night questioning fails to qualify as coercion or overreaching by the police. Because Atkins has failed to allege, and our review of the record has failed to discover, any instance of state coercion, we conclude that Atkins voluntarily waived his *Miranda* rights.

We also conclude that the *Miranda* waiver was knowingly made. To be an effective *Miranda* waiver, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986). After reviewing the waiver under the totality of the circumstances, we agree with the district court that Atkins knowingly waived his *Miranda* rights.

3. Statutory and Nonstatutory Mitigating Circumstances

[18] Atkins' argument that the trial judge erred by rejecting offered mitigating circumstances is without merit. We have written before that, once we see that a full hearing has been held in which the defense counsel is given a fair opportunity to present mitigating evidence, our review becomes highly deferential. *See, e.g., Palmes v. Wainwright*, 725 F.2d 1511, 1523 (11th Cir.1984). Trial court's findings on mitigating factors are presumed to be correct, *see, e.g., Magwood v. Smith*, 791 F.2d 1438, 1450 (11th Cir.1986), and will be upheld if they are supported by the record. *See, e.g.*, 28 U.S.C. § 2254(d). Here, the record supports the trial judge's findings on mitigating circumstances.

Although Atkins argues that the trial judge did not *consider* nonstatutory factors, it is more correct to say that the trial judge did not *accept*—that is, give much weight to—Atkins' nonstatutory factors. Acceptance of nonstatutory mitigating factors is not constitutionally required; the Constitution only requires that the sentencer *consider* the factors. *Blystone v. Pennsylvania*, 494 U.S. 299, 308, 110 S.Ct. 1078, 1084, 108 L.Ed.2d 255 (1990). Our review of the record and of the trial judge's order convinces us that the trial judge fully considered all the supposedly mitigating factors offered by Atkins but, in the light of the other evidence presented by the state, refused to accept most of those factors.

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III. CONCLUSION

Because our review of the record and the related law leads us to conclude that Atkins' arguments are without merit, we AFFIRM the district court's denial of Atkins' petition for the writ of habeas corpus.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PHILLIP ALEXANDER ATKINS,

Petitioner,

v. Case No. 89-528-CIV-T-13

RICHARD DUGGER,

Respondent.

MEMORANDUM OPINION AND ORDER DENYING PETITION

This is a habeas corpus proceeding brought pursuant to 28 U.S.C. §2254 by a state prisoner under sentence of death.

Phillip Alexander Atkins confessed to the kidnapping, sexual battery and murder of a six-year-old boy. The jury convicted him of kidnapping and murder, but the trial judge directed a judgment of acquittal concerning the two counts of sexual battery because there was no evidence to corroborate the confession. By a vote of seven to five, the jury recommended that Atkins be executed for the murder. In February, 1982, he was sentenced to die.

In June, 1984, the Florida Supreme Court affirmed the adjudication of guilt but remanded the case for resentencing because the trial judge had improperly considered sexual battery as an aggravating circumstance to the murder. See Atkins v. State, 452 So.2d 529, 532-33 (Fla. 1984). On September 11, Atkins was again sentenced to die and his appeal was unsuccessful. See Atkins v. State, 497 So.2d 1200 (Fla. 1986). He filed a Motion to Vacate the Judgment and Sentence under Fla.R.Cr.P. 3.850; but it was denied on

March 10, 1989. He moved for a rehearing, but it too was denied. Atkins appealed and filed a petition for writ of habeas corpus with the Florida Supreme Court. The appeal and petition were consolidated and both were denied by Order issued April 13, 1989. See Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989).

Execution was scheduled for Tuesday, April 18, 1989. Atkins filed this petition for writ of habeas corpus the day before. The Court stayed execution so that it could consider his claims. Having done so, it now renders its decision.

Claims I, II, III, IV, VII, VIII, XI, XII, XIII, XVI, XVII and XVIII allege that the petitioner's counsel was constitutionally ineffective during the trial's guilt/innocence and sentencing phases, and during his appeal. To prove that his legal representation was so defective as to require a reversal of his conviction or his sentence of death, the petitioner must do two things: he must prove that his lawyer's performance was deficient --that is, that the performance fell below an objective standard of reasonableness--and he must show that the deficient performance prejudiced the outcome. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1983). The constitutional standard is that of "reasonably effective assistance within the wide range of competence demanded of attorneys in criminal cases." Id at 687 and 690. See also Thomas v. Wainwright, 787 F.2d 1447, 1449 (11th Cir. 1986).

Judicial scrutiny of a counsel's performance must be highly deferential. The Court should make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances

of the challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689. The court must indulge a strong presumption that a lawyer's conduct "falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. See also, Darden v. Wainwright, 477 U.S. 168, 186, 106 S.Ct. 2464, 91 L.Ed.2d 144, 160 (1986).

However, even if petitioner's counsel made a professionally unreasonable error, neither the conviction nor the sentence will be overturned if the error had no effect on the judgment. Strickland, 466 U.S. at 691-92. As a general requirement, the petitioner must affirmatively prove prejudice. Id. at 693. A petitioner need not show that his counsel's deficiencies "more likely than not" altered the outcome in the case. Id. But it is not enough for him to show that the errors had some conceivable effect on the outcome of the proceeding. Id. He must show that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. Reasonable probability is a probability sufficient to undermine confidence in the outcome Id. at 694.

If it is easier to dispose of an ineffectiveness claim on the ground that the alleged deficiency lacked sufficient prejudice, th court should do so. Id. at 697.

CLAIM I

The petitioner claims his trial counsel was constitutionally ineffective during the trial's guilt/innocence phase since he did not present expert testimony to prove that the petitioner's state of intoxication during commission of the crimes, coupled with his mental deficiencies, precluded him from formulating the specific intent to commit murder. Petition, at 8-24. The record reveals that trial counsel made an extensive effort to prove that Atkins was so intoxicated during commission of the crimes that he was unable to think at all, let alone to formulate a specific intent to murder. See TT.[1] at 191-92, 194-95, 258-61, 276-78, 371, 382, 442-43, 604-06, 633-35, 638-39, 649-51, 654-56, 659, 661, 663-68, 673-76, 682, 687-90, 705-09, 712, 723, 769, 774 and 789. Counsel also introduced evidence to show that the petitioner had undergone surgery for a cranial infection and that he could not hear through one ear. See e.g., TT at 705-06. And he attempted to introduce what evidence he had pertaining to the petitioner's poor mental health. See TT at 695-700. Petitioner claims the failure to use an expert to elaborate on the effects of his alleged intoxication establishes ineffective assistance since, instead of deciding not to use an expert, counsel "simply failed to consider it." See

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[1] "TT" refers to the Trial Transcript. The page number[s] cited are the Court Reporter's numbers, not the Appellate Record numbers.

Petition, at 12-13.[2]

The claim fails to meet either prong of the Strickland test. Use of an expert is one method through which to establish the effects of intoxicants on the brain but it is by no means required, factually, legally or strategically. To prove that he was prejudiced by the lack of expert testimony regarding his ability to formulate a specific intent, the petitioner must show that there is a reasonable probability that jury members believed he had been intoxicated[3]--although they did not believe his intoxication had precluded him from formulating a specific intent--and, most importantly, that they would have believed that his intoxication had precluded him from formulating a specific intent had an expert informed them of the potential effects of intoxicants on persons suffering from the mental deficiencies which (allegedly) plague (or then plagued) the petitioner. He cannot do so since the clear weight of the evidence shows that he was not intoxicated and, even if the jury had found otherwise, the effect of the intoxication to the extent alleged did not require expert elaboration. Moreover, no expert testimony regarding the petitioner's alleged mental deficiencies would have even been admissible.

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[2]See also Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985) ("we do not find the lawyer's apparent willingness to confess incompetence on behalf of his former client, who faces execution, determinative or persuasive of the question of whether appellant received the effective assistance of counsel....").

[3]This is so because the expert could not have testified as to whether the petitioner was in fact intoxicated on the night in question, only as to what effect intoxication might have had on him had he been intoxicated.

The petitioner testified that, on the day of the murder, he had ingested, smoked or consumed two quaaludes, one hit of speed, five marijuana cigarettes, four "tall" beers, and two other quart beers. TT at 712-789. His mother, father, brother and friend all corroborated his assertion that he was "so messed up" and "so far out of it", that he "did not know what was going on." See TT at 715-735, especially 724, 729 and 732. But none of them saw him taking speed, none of them saw him taking quaaludes, none of them saw him drinking more than a few beers and only one of them, his brother, saw him smoking marijuana--one cigarette, early in the morning. See TT at 654-56 (friend); 659-61 (friend); 663-68 (brother); 673-76 (father); and 682, 687-90 (mother).[4] Fourteen other witness said that they saw the petitioner shortly before, during or shortly after commission of the crimes and that he was fully in control of his faculties and exhibited no indications of intoxication. See TT at 249-50, 257 (Hazell); 270 (Powell); 369, 379 (Wnuk); 394-95, 409 (Pickett, Jr.); 431 (Brower); 440-41, 449 (Yevchak); 453 (Cain); 466 (Dixon); 544 (Hancher); 550 (Smith); 600 (Hardee); 626 (Holcom); 631-32 (Nipper); and 637-38 (Dobson).

Their testimony was corroborated by the numerous physical and mental functions performed by the petitioner at or near the time the crimes were committed: he completed a full day of work without incident. See TT at 726 (petitioner's admission); see also TT at

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[4]When the petitioner first indicated that he had been intoxicated, an officer asked him how much he had had to drink. The petitioner said, "Well, I bought, I bought me a quart of Busch, Busch beer, and then I had one on the way home from work right after that. And a tall can of Budweiser." TT at 585.

544-45. He did an extensive amount of driving before, during and after commission of the crimes without incident and without causing any of the witnesses, including his parents, to question his driving ability. See e.g., TT at 257, 601-03 and 726-27.[5] He picked up the victim and drove him to a secluded area where he deliberately attempted to entice the boy into homosexual activity.[6] TT at 713-14 (petitioner's admission).[7] He became apprehensive that the victim would "tell his folks...what [had] happened."[8] TT at 716-17 (petitioner's admission). He chased the boy down and hit him with a steel bar, id., with the intention of killing the boy and of protecting himself. TT at 586-87, 588-89 (taped confession). He disposed of his weapon after being spotted by two witnesses. TT at 717 (petitioner's admission). He convinced the witnesses that the victim was his son, that the boy had fallen and injured himself and that he was taking the boy to the hospital. Id. at 717-18 and 244-47. He discarded the body. He checked the car for blood. Id. at 592. He lied to his father about what he had done with the boy and

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[5]See also petitioner's vivid recollection of his getaway, TT at 591.

[6]His own expert witness referred to the "seduction" as "skillful." TT at 877 (sentencing phase).

[7]In his earlier confession, the petitioner admits that he and the boy had both anal and oral sex. See TR at 582 (taped confessio

[8]The admission is notable since the petitioner had just finished telling the jury that nothing had happened--that he had not had oral or anal sex with the boy. TT at 715. See also, TT at 723-24 (where the petitioner says, "I'm absolutely positive I did not have sex with that kid." When the petitioner was asked why he feared the boy telling his parents "what had happened" when, according to him, nothing had happened, the petitioner said, "I don't know. Your guess is as good as mine." TT at 731.

he told the boy's father the same lie. Id. at 727-28.[9] He went willingly with the police officers who arrested him and he confessed to kidnapping, sexual battery and murder.

The expert whose testimony the petitioner now proffers cannot say whether the petitioner was intoxicated at the time of the murder (although he renders his opinions based on the assumption that he was); the expert could have elaborated only on the effect intoxication may have had on the petitioner had intoxication been otherwise established. Even so, the expert could not have elaborated on that effect with reference to the petitioner's alleged mental deficiencies since, in Florida, evidence of an abnormal mental condition which does not constitute incompetence is not admissible to prove either that the accused could not or did not entertain the specific intent essential to proof of the offense charged. See, Chestnut v. State, 538 So.2d 820, (Fla. 1989) (answering certified question). The petitioner was found competent to stand trial.

The only thing the expert could have done would have been to elaborate on the effects of taking the drugs the petitioner said he had taken. But if the jurors believed that the petitioner had taken two quaaludes and one amphetamine pill, smoked five marijuana cigarettes and drank 128 ounces of beer, they would not have needed an expert to tell them that his ability to formulate a specific intent might have been compromised. They could have reached that conclusion based upon their own common sense and consideration of

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[9]See also Prosecutor's similar argument, TT at 760.

the testimony of the petitioner's family. The likelihood that they did not only because the defense lacked an expert is minuscule; and the petitioner has not shown prejudice.

Even if there was a reasonable probability that the verdict would have been different had an expert attested to the potential effect of the petitioner's alleged intoxication on his ability to formulate a specific intent, this Court could not find that probability so obvious that trial counsel's failure to offer expert testimony fell beyond the "wide range of competence demanded of attorneys in criminal cases." An attorney is not required to produce an "intoxication expert" every time a client claims he is innocent by reason of his drunkenness.

Accordingly, Claim I warrants no relief.

CLAIM II

Petitioner alleges that trial counsel was constitutionally ineffective during the guilt/innocence and penalty phases of his trial for an assortment of reasons. The Court will address them seriatim.

A. Ineffectiveness During Guilt Phase

(i) The petitioner claims that his trial counsel failed to offer the defenses of insanity and intoxication sufficiently to negate specific intent. Petition, at 29-32. Prior to trial, the petitioner's counsel successfully moved the court for appointment of three mental health experts; and he gave notice to the court of his intent to rely on an insanity defense. See R[10] at 20, 21 and

[10]"R." refers to "Record on Appeal."

37-41. Upon a hearing, the court found the petitioner competent to stand trial. As indicated, during the guilt phase of a capital trial, Florida courts do not admit evidence of an abnormal mental condition short of incompetence to negate specific intent. Chestnut, supra. Therefore, trial counsel cannot be deemed ineffective for failing to negate specific intent with evidence of a mental abnormality. Counsel's presentation of the intoxication defense is adequately addressed above, in Claim I.

(ii) The petitioner claims his trial counsel failed to submit the voluntariness of his confession to the jury and that expert mental health testimony could have proven the confession involuntary. Petition at 33-38. The assertion is false. Counsel argued to the jury that it would have to decide whether the confession was voluntary and the trial judge instructed the jury to disregard statements it found to be involuntarily made. TT at 769 and 827-28. Prior to trial, petitioner's counsel moved to suppress the confession as involuntary, but the motion was denied. R at 28-29 and 169. Counsel's failure to substantiate his claim of involuntariness with expert testimony does not, by itself, rise to the level of constitutional ineffectiveness--especially when, as in this case, petitioner's actions throughout the commission of his crimes and his confession demonstrate his ability to appreciate the gravity of his circumstances and to act in his own interest: the facts do not invite the conclusion that the petitioner's statements were anything but voluntary and the petitioner has not overcome the presumption that his counsel's defense was adequate. The mental

health testimony he does present rests on the well-refuted premise that the petitioner was intoxicated on the night in question. The great weight of evidence indicates that he was not. The Florida Supreme Court found the statements voluntarily made and the likelihood that that court or the jury would have found otherwise had an expert informed them of the effects of intoxicants on the confessor is, again, minuscule. Even so, the petitioner himself virtually corroborated, on the witness stand, the confession of all the acts for which he was ultimately convicted. See TT at 703-35. Counsel was not constitutionally ineffective, nor his performance prejudicial.

(iii) The petitioner claims that his counsel failed to argue that the state had not proven the corpus delicti of kidnapping and that, had he so argued, the trial judge would have directed a verdict as to the kidnapping count. Petition at 38. The failure was neither constitutionally ineffective nor prejudicial since, as noted by the Florida Supreme Court, the trial judge independently found a sufficient basis to establish kidnapping and, indeed, viewed the kidnapping as an aggravating circumstance to the murder. Atkins, 497 So.2d at 1201. In addition, the claim is, and has already been found to be, procedurally barred. Atkins, 541 So.2d at 1166-67, n. 2. (6).[11] See, Wainwright v. Sykes, 433 U.S 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (a state prisoner, barred by

[11]In each instance in which the Court finds a claim to be procedurally barred and without substantive merit, the rulings are in the alternative. The Court is of the opinion, in each instance, that either ruling, standing alone, is sufficient to dispose of the claim.

procedural default from raising a constitutional claim in state court, could not litigate his claim in a §2254 habeas corpus proceeding without showing cause for, and actual prejudice from, the procedural default). See also Harris v. Reed, ___ U.S. ____, 109 S.Ct. 1038, 1043 (1989)(a procedural default bars consideration of a federal claim on either direct or habeas review if the last state court rendering a judgment in the case "clearly and expressly" stated that its judgment rested on a state procedural bar).[12]

(iv) The petitioner claims his trial counsel failed to combat the state's "improper exploitation" of evidence regarding his sexual misconduct, yet he fails to identify any specific instance of "exploitation" which gives rise to the claim. Petition, at 38-42. Moreover, evidence about the petitioner's sexual misconduct was volunteered primarily by the petitioner himself in his confession, his trial testimony, and the testimony of his father.[13] Despite the admissions, counsel succeeded in having a judgment of acquittal directed as to both counts of sexual battery. To any extent the

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[12]Harris v. Reed also noted that "a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred. Castille v. Peoples, ___ U.S. ___, ___, 109 S.Ct. 1056, 1060 ___ L.Ed.2d ___ (1989) [et al.]." Harris, 109 S.Ct. at 1043, n. 9. See also, Lindsey v. Smith, 820 F.2d 1137, 1143 (11th Cir. 1987) "...considerations of comity that underlie the procedural bar doctrine require federal habeas courts to honor state procedural rules, and not only state courts' procedural rulings (cites omitted)"

[13]The state did, however, introduce evidence at the trial's sentencing phase about the petitioner's homosexual experiences with young boys. See TT at 848-52. Among the personal belongings taken from the prisoner at the time of his arrest was a list of 45 names. Id. at 848. The petitioner admitted that the names belonged to various male youths with whom he had had sexual relations. Id. at 849. See, Claims VIII and XVI.

state otherwise "exploited" petitioner's sexual deviance, the defense counsel's rebuttal was not so inadequate that it warrants relief concerning the convictions for kidnapping and murder--particularly when the evidence of those crimes is overwhelming. The confession to sexual battery would have been admitted into evidence to explain the murder even if the counts for sexual battery had never been brought. Atkins, 541 So.2d at 1167 (J. Grimes, specially concurring). Moreover, the exploitation of petitioner's sexual proclivities was a strategy expressly adopted by his own counsel. See, the Court's consideration of Claims VIII and XVI, infra. Therefore, there was neither ineffectiveness nor prejudice.

(v) The petitioner claims his counsel failed to investigate the crime scene (presumably, where the body was found) and that, had he done so, counsel would have been better able to substantiate his argument that the victim was left alive on the road but was subsequently run-over and killed by another's car. Petition, at 42-49. The claim is procedurally barred since the petitioner did not raise it before the Florida courts in his Rule 3.850 Motion to Vacate and he cannot show, nor has he even attempted to show, cause and prejudice. See Bennet v. Fortner, 863 F.2d 804, 806 (11th Cir. 1989). See also Wainwright v. Sykes, supra; and Lindsey v Smith, 820 F.2d 1137, 1143 (11th Cir. 1987). Even if the claim were not barred it would be denied since the petitioner has not overcome the presumption that trial counsel's investigation was constitutionally sufficient nor has he raised a reasonable probability of prejudice.

Trial counsel had the duty to investigate but the scope of

that investigation was governed by a standard of reasonableness. Mitchell v. Kemp, 762 F.2d 886, 888 (11th Cir. 1985) cert. denied 107 S. Ct. 3248, 97 L.Ed.2d 774 (1987). His duty was to make reasonable investigations or reasonable decisions which rendered particular investigations unnecessary. Id. See also Strickland, supra at 691. The petitioner admitted to beating the boy over the head with a steel bar countless times and medical testimony indicated that the victim's head injuries (exceeding 30 points of impact) were "totally inconsistent" with the theory that he was run over by a car. TT at 422. The petitioner has not shown any reasonable probability that, had trial counsel investigated the crime scene (assuming he did not), he would have uncovered evidence sufficient to alter the outcome of the trial or sentencing. Trial counsel himself argued to the jury that the only issue was whether the murder was first or second degree. TT at 195-96.

B. Ineffectiveness During Sentencing Phase

(i) The petitioner claims his counsel erred by not offering in mitigation, at the sentencing phase, evidence as to his intoxication and evidence tending to show that someone else (i.e. the driver of another car) actually inflicted death. Since the jury which sentenced the petitioner was also the jury which convicted him, further evidence regarding his intoxication would have been cumulative and further evidence regarding guilt (i.e., regarding who or what inflicted the fatal blows) cumulative and irrelevant. Counsel's "failure" was neither ineffective nor prejudicial under Strickland.

(ii) The petitioner alluded to a Caldwell[14] violation and his trial counsel's lack of familiarity with the eighth amendment but apparently did not find either claim worth elaboration under Claim II. Petition, at 54. Since the Court has concluded that there was no Caldwell violation, see Claim XVII, infra, it finds that trial counsel's failure to raise the claim at trial was neither ineffective nor prejudicial.

(iii) The petitioner claims his counsel erred in failing to submit sufficient witnesses in mitigation; specifically, that he should have produced expert mental health and other testimony regarding petitioner's retarded social and mental development. Petition, at 53-63. The claim is patently frivolous. Dr. Dee, the mental health expert whose testimony the petitioner seeks to introduce, is the same expert who testified on his behalf, in mitigation, at the trial's sentencing phase. See TT at 862-902. In addition, the petitioner himself and his father testified in mitigation and, along with Dr. Dee, adequately canvassed the petitioner's background--from his congenital head injuries, to his retarded development, to his obsession for sex with little boys. The Court has reviewed the additional evidence petitioner wishes he had offered in mitigation and has found it of no significance. See Woods v. State, 531 So.2d 79, 82 (Fla. 1988) ("More is not necessarily better"); Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987).

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[14]See Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); and Claim XVII, infra.

Trial counsel's "failure" to present the additional, largely cumulative testimony was not ineffective, nor the results prejudicial.

Accordingly, Claim II warrants no relief.

CLAIM III

The petitioner claims that his counsel was constitutionally ineffective for failing to argue on direct appeal that his mental impairment and intoxication on the night in question precluded a finding that the petitioner's confession was voluntary and his waiver of Miranda rights knowing and intelligent. Petition, at 63-70. On direct appeal, petitioner's counsel did argue that intoxication prevented a knowing and intelligent waiver of Miranda rights, but Florida's Supreme Court disagreed. Atkins, 452 So.2d at 532. In the instant Claim, petitioner faults his former appellate counsel for not coupling his intoxication argument with a "mental impairment" theory and presenting expert testimony to the effect that the intoxicants exacerbated the existing impairment. Nonetheless, the instant ineffectiveness claim is procedurally barred since it was not raised in petitioner's Rule 3.850 motion and since the petitioner cannot show cause for and actual prejudice from the default. See Harmon v. Barton, 894 F.2d 1268, 1270 (11th Cir. 1990); Wainwright v. Sykes, supra; Lindsey v. Smith, supra. See also, Petition, Exhibit 007 (although the 3.850 motion raised the involuntariness of the petitioner's confession and waiver, it did not raise his counsel's failure to argue the issue on direct appeal. Indeed, the trial judge found that the involuntariness

claim was raised [and denied] on direct appeal. See Petition, Exhibit 010 at 1, par. 2.).

To the extent the mental impairment theory presents a claim independent of the claim that intoxication precluded a knowing, intelligent and voluntary waiver, the Court finds, as an alternative to its finding that the claim is procedurally barred, that the claim is without merit: Counsel filed a pre-trial motion to suppress the confession; and he lost. He argued to the jury that the confession was involuntary; and he lost. He did not believe himself to have legitimate grounds on which to appeal. While the mental state of a defendant can be a significant factor in the voluntariness calculus, a mental state is not, by itself, sufficient to make an otherwise proper waiver involuntary. See Colorado v. Connelly, 479 U.S. 157, 164, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); Singleton v. Thigpen, 847 F.2d 668, 670 (11th Cir. 1988); and U.S. v. Scheigert, 809 F.2d 1532 (11th Cir. 1987). "Rather, 'coercive police activity is a necessary predicate' to a finding that the [waiver] by a person with a low intelligence level is voluntary." Singleton, 847 F.2d at 671 quoting Connelly, 479 U.S. at 167. Dr. Dee found the petitioner's intelligence low but "well within the normal range." TT at 882. Failure to raise the issue again on appeal did not render counsel's performance ineffective. And the petitioner has no evidence to show coercion.

Moreover, the petitioner has not shown prejudice. The trial court found the confession admissible and the petitioner has not demonstrated any reasonable probability that the trial court's

decision would have been reversed had it been challenged on appeal. See Martin v. Wainwright, 770 F.2d 918, 925 (11th Cir. 1985) (the burden is on the petitioner to show that his waiver was involuntary). All 14 of the independent witnesses testified that the petitioner was in control of his faculties at or near the time of his waiver. Dr. Kaplan concluded that he was sane at the time of the offense. Dr. Kremper agreed and added that it was not likely that his behavior would have been altered appreciably were he not under the influence of alcohol and drugs (assuming that he was); and even Dr. Dee concluded that his mental state did not prevent him from appreciating the nature of his sexual offenses. See Order denying 3.850 Motion, Exhibit 010 to the Petition, at 3.

Accordingly, Claim III warrants no relief.

CLAIM IV

The petitioner claims his appellate counsel was ineffective on appeal for an assortment of reasons. The Court will address them seriatim. Petition at 71-85.

(i) The petitioner faults his counsel for not challenging the voluntariness of his confession on appeal. Petition at 72. The assertion is false. Counsel raised the issue on appeal but the Florida Supreme Court denied it in light of the substantial amount of evidence attesting to the petitioner's sobriety at the time of the offenses. Atkins, 452 So.2d at 531-32. See also, Claim III, supra.

(ii) The petitioner faults his counsel for not contesting, on appeal, the trial court's admission of that part of his confession

which dealt with sexual battery. Petition at 72-73, and 81. This claim is procedurally barred since the performance of appellate counsel must be challenged by way of a habeas corpus petition in a state's appellate court, see Smith v. State, 400 So.2d 956 (Fla. 1981); and this one was not. See State Habeas Petition, Exhibit 015 to the federal Petition (wherein the issue is not raised), and Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989) (the issue is not among those considered by the court). The issue raised in the state habeas petition was whether appellate counsel was constitutionally ineffective for failing to argue that Atkins was deprived of a fundamentally fair trial by the state's seeking a conviction for two counts of sexual battery which it could not have proved.[15] Exhibit 015 at 75.

Even so, appellate counsel's "failure" to appeal the trial court's admission of that part of the confession dealing with sexual battery was not prejudicial:

> [T]he confession concerning what Atkins did with the boy before he killed him would have been admissible as explaining the circumstances of the murder even if there had been no charges of sexual battery. See Amoros v. State, 531 So.2d 1256 (Fla. 1988). ...[T]he point was not preserved for appeal, and there has been no contention that trial counsel was ineffective in this regard.

Atkins, 541 So.2d at 1168 (J. Grimes, specially concurring).

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[15]The Florida Supreme Court held that counsel's failure to raise this issue on appeal was not ineffective since "successful appellate counsel agree that[,] from a tactical standpoint[,] it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points." Atkins, 541 So.2d at 1167.

(iii) The petitioner faults his counsel for not arguing, on appeal, that his murder conviction was unconstitutional under Stromberg v. California, 283 U.S. 359, 75 L.Ed. 1117 (1931) since his jury may have convicted him under a felony-murder theory for which sexual battery was the underlying felony. Petition, at 78-80. Appellate counsel could not have argued the issue on appeal since it was not preserved for appellate review by specific objection in the trial court. Atkins, 541 So.2d at 1166-67, n. 2. See also, Suarez v. Dugger, 427 So.2d 190 (Fla. 1988); Parker v. Dugger, 537 So.2d 969 (Fla. 1988); and Card v. State, 497 So.2d 1169 (Fla. 1986). Even so, as indicated in the discussion of Claim VII, infra, the claim is without merit. Therefore appellate counsel's performance was neither constitutionally ineffective nor prejudicial.

(iv) The petitioner faults his counsel for not arguing, on appeal, that his resentencing was improper since the sentencing judge did not convene a new jury. Petition, at 81-84. Appellate counsel could not have argued the issue on appeal since it was not preserved for appellate review by specific objection in the trial court. Atkins, 541 So.2d at 1166-67, n. 2. Even so, the issue raised is one of state law not subject to federal habeas review, see Clemons v. Mississippi, ___ U.S. ___, ___ S.Ct. ___, ____ L.Ed.2d ___ (March 28, 1990); Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); and Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983); and the Florida Supreme Court affirmed the resentencing. Atkins v. State, 497

So.2d 1200 (Fla. 1986). In so doing, the Florida Supreme Court noted that it "found no fault with the evidence or argument presented to the jury at the sentencing phase." Id. at 1201. Finally, as indicated within the Court's consideration of Claim XI, the claim is without merit. Accordingly, counsel's "failure" did not constitute ineffectiveness, nor was it prejudicial.

(v) The petitioner faults his counsel for not arguing, on appeal, that the trial court unconstitutionally shifted the burden of proof in its sentencing instructions. Counsel could not have argued this issue on appeal since the Florida Supreme Court found that it had not been preserved by adequate objection at the trial. Atkins, 541 So.2d at 1166-67, n. 2. Nonetheless, as indicated within the Court's consideration of Claim VI, infra, the claim is without merit and, therefore, the "failure" did not constitute ineffectiveness, nor was it prejudicial.

Accordingly, Claim IV warrants no relief.

CLAIM V

The petitioner claims that the Florida Supreme Court denied him equal protection and due process of law as contemplated in the fourteenth amendment to the United States Constitution since the court granted him only a thirty day extension of time in which to file his Rule 3.850 motion and since execution was scheduled for two months after expiration of that 30 day period. The claim is entirely without merit as is evidenced, in part, by the 121 legal-sized pages which the Rule 3.850 motion consumes, and by the minute detail with which counsel was able to document even the most frivo-

lous of his many frivolous contentions, most of which are raised again in the instant petition.[16] State law providing indigent prisoners the right to assistance of counsel in collateral post-conviction proceedings does not require the full procedural protection guaranteed by the federal constitution for criminal trials and for first appeals as of right. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The petitioner was sentenced to death seven years before the Rule 3.850 motion reached the Florida Supreme Court; the issues had clearly materialized. The time constraints imposed did not violate due process or equal protection. Moreover, the claim is procedurally barred because it was not raised before the Florida court. See Wainwright v. Sykes, supra; Harris v. Reed, supra, and Lindsey v. Smith, supra.

Claim V warrants no relief.

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[16]See e.g., Motion to Vacate Judgment and Sentence via Rule 3.850 (arguing that his Caldwell Claim could not have been raised earlier since Caldwell had only been recently decided, p. 51, and then, at p. 74, arguing that his counsel was ineffective for not having raised his Caldwell claim earlier). Now, after Dugger v. Adams, 489 U.S. ___, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989), the petitioner argues that "longstanding Florida case law established the basis for [his Caldwell-type] objection." Petition, at 221. On top of that, the instant facts do not even come close to substantiating a Caldwell Claim. See Claim XIII, infra. The Court also notes the numerous instances in which the petitioner faults counsel for failing to raise a claim on direct appeal--thereby admitting that the substantive claim is procedurally barred--and then proceeds to argue the substantive claim, in addition to the ineffectiveness claim, as if it had not been procedurally barred by the failure for which counsel was faulted. This petition also raises ineffectiveness claims not raised before Florida's courts, and other claims which have no basis in fact or law.

CLAIM VI

The petitioner claims that imposition of the death penalty against him violated the eighth amendment to the United States Constitution because the prosecutor's arguments and the judge's instruction to the sentencing jury shifted to the petitioner the burden of showing that the death sentence would be inappropriate. Petition, at 88-104, citing Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). See also, Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). This claim is, and has already been found to be, procedurally barred, see Atkins, 541 So.2d at 1166 n. 1., and the petitioner has not shown cause for nor prejudice from the failure to raise it. See Wainwright v. Sykes, supra; Harris v. Reed, supra and U.S. v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982).

Moreover, this Court has searched the sentencing transcript and has concluded that nothing the prosecutor or trial judge said can be reasonably construed to have misled the jury into thinking that death was presumed to be an appropriate sentence nor that the petitioner had the burden of proving otherwise. Despite 16 pages of argument on the evils of a presumptive death penalty, petitioner cites to only the following four passages in support of his contention that the burden was improperly shifted:

1) Prior to the introduction of evidence at the sentencing phase, the trial judge instructed the jury that:

> [T]he state and the Defendant...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.

TT at 842.

2) The prosecutor said:

> [The legislature has] made a list of things[17] 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.[18]

TT at 936

3) After the introduction of evidence at the sentencing phase, the judge instructed the jurors as follows:

> [I]t 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.

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[17]The prosecutor referred to this "list of things" as legislative "guidelines." TT at 936.

[18]Note that the prosecutor did not even say that aggravating circumstances would indicate that the death penalty would be the proper sentence, only that it would indicate that death was a proper sentence.

TT at 949.

4) The judge also instructed that:

> 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.

Finally, and perhaps most importantly, the trial judge specifically instructed the jury that the state must prove the existence of aggravating circumstances beyond a reasonable doubt. TT at 951.

Accordingly, Claim VI warrants no relief.

Claim VII

The petitioner claims that his murder conviction is void under Stromberg v. California, 283 U.S. 359, 75 L.Ed. 117 (1931), since the jury may have convicted him of a felony-murder for which sexual battery was the underlying felony. Petition at 104-120. As the Florida Supreme Court concluded, the claim is procedurally barred because it was not raised on direct appeal.[19] Atkins, 541 So.2d at 1166, n. 1. Petitioner has not shown cause for nor prejudice from the failure to raise it on direct appeal. See Wainwright v. Sykes, supra; and Harris v. Reed, supra. Moreover, the claim is without merit.

Stromberg held that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds and one of those grounds was constitutionally impermissible. The petitioner's jury was not instructed that it

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[19]The petitioner also reasserted his counsel's alleged ineffectiveness for not raising this issue on appeal. That claim was disposed of within the Court's consideration of Claim IV, supra.

could rely on an impermissible basis. In a decision squarely on point, Florida's Supreme Court ruled that a confession to a felony during the course of which the confessor committed murder provides sufficient evidence for a jury to convict the confessor of felony-murder even though the confession was insufficient, by itself, to sustain a separate conviction for the felony. Jefferson v. State, 128 So.2d 132 (Fla. 1961); see also, Atkins, 541 So.2d at 1167 (J. Grimes, specially concurring) (noting that counsel could not have been deemed ineffective for not raising this argument at trial or on appeal because Jefferson squarely refuted it).

Finally, the Court hereby finds that any error was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); and Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460, 471 (1986).

The trial record in this case is replete with evidence that the petitioner murdered his six-year old victim, if not with premeditation, at least during the course of a kidnapping. A unanimous jury convicted him of kidnapping and there is no suggestion whatsoever that the murder did not take place "during the course of" that kidnapping. Consequently, there is not the slightest possibility that the jury found the petitioner guilty of a felony-murder and found that sexual battery was the only underlying felony. To do so, the jury (or, a juror) would have had to conclude that the kidnapping ended prior to the time of the murder. No evidence suggests it. No reasonable juror could think it.

Claim VII warrants no relief.

CLAIM VIII

The petitioner claims that the state's attempt to convict him of two sexual battery charges which the state could not prove alunde the petitioner's confession deprived him of a trial which was fundamentally fair and a sentencing procedure which was reliable. Petition, at 120-127. He also faults counsel for failing to raise this issue on direct appeal. Id. Since the issue was not raised on direct appeal it is, and has already been found to be, procedurally barred. Atkins, 541 So.2d at 1166, n. 1 (14); Wainwright v. Sykes, supra; Harris v. Reed, supra. Even so, it is without merit

The petitioner's sexual proclivities would have been central to the trial even had he not been indicted for two counts of sexua battery. The petitioner confessed to the sexual battery and made his sexual obsession for young boys a mainstay in his plea for leniency during the guilt and sentencing phases of his trial. Trial counsel sought, like the instant counsel now seeks, albeit it in a different way, to use the petitioner's sexual deviance to his advantage by arguing that he has fallen victim to a mental deficiency which overwhelms him to the point that he cannot control, or even remember, the most incriminating of his actions.[20] The con-

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[20]At the sentencing phase, the state apprised the Court of its intent to introduce, through the testimony of several police officers, additional evidence about the petitioner's homosexual encounters with underaged youths. TT at 845. Not only did the petitioner's trial counsel not object, he responded that:

> As a matter of fact, Your Honor, I've made a tactical decision that that was to be a part of my testimony, also. I don't say turn [the prospective witnesses] loose, I say I don't think you'll need them.
>
> * * *
>
> I don't care whether the officers testify or not. Id.

fession to sexual battery would have been admitted into evidence to explain the murder even if the sexual battery counts had not been brought. Atkins, 541 So.2d at 1167 (J. Grimes, specially concurring). Moreover, the fact that the original sentencing was vacated and the trial judge instructed to resentence the petitioner without consideration of the sexual battery as an aggravating circumstance is proof positive that allegations of sexual battery did not taint sentencing. The Florida Supreme Court affirmed. Atkins, 497 So.2d at 1200.[21]

Counsel's decision not to raise the issue on appeal does not amount to constitutionally ineffective assistance since, and for the reasons that, this Court found the claim to be without merit and since, as the Florida Supreme Court has noted, counsel cannot be faulted for failing to raise every conceivable issue on appeal. Atkins, 541 So.2d at 1167. Since all evidence as to the sexual battery would have been admitted even in the absence of sexual battery counts, there is no reasonable probability that, had the counts not been brought, the outcome of the other counts or the sentencing would have been different. In other words, there is not

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[21]Throughout his petition, the petitioner refers to the sexual battery counts as "baseless", see e.g., Petition, at 124, and insists that the state brought them with "no evidence" whatsoever to prove them. See e.g., Petition, at 120-127. In so doing, he entirely overlooks the fact that the state did have evidence, his own confession, but that the law of Florida simply forbids a conviction without more. When the indictment was filed and throughout the course of prosecution, the state could not assure itself that sufficient corroborating evidence would not have surfaced--particularly when it was in the process of investigating the 45 other incidents of homosexual encounters with young boys to which the petitioner confessed. See e.g., TT at 849-60, 902-08 and 919.

a reasonable probability that the jury thought the petitioner not guilty of kidnapping or murder but, since he was indicted (even though acquitted) for sexual battery, decided to convict him of both. Neither is there any reasonable probability that, but for appellate counsel's failure to argue the issue on appeal, the outcome of the appeal would have been different. Therefore, there is no prejudice. See also, Claim XVI, infra.

Claim VIII warrants no relief.

CLAIM IX

The petitioner claims the prosecutor's closing argument at the guilt and sentencing phases deprived him of a fundamentally fair and reliable sentencing determination. Petition, at 127-34. This claim is, and has already been determined by Florida's Supreme Court to be, procedurally barred. Atkins, 541 So.2d at 1166 n. 1 (14). See Wainwright v. Sykes, supra; and Harris v. Reed, supra. Even so, it is without merit.

The allegedly improper statements were references to the sexual batteries. See Petition, at 127-31. The argument was:

> [I]t 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.

As indicated within the Court's consideration of Claim VII, it is irrefutable that the jury unanimously found the petitioner guilty of kidnapping. Therefore, the aggravating circumstance for

which the prosecutor argued was clearly present. Moreover, the Florida Supreme Court found nothing improper about what was argued to the jury, but ordered the trial judge to resentence the petitioner without relying on sexual battery as an aggravating circumstance. The trial judge did so; and the new sentence was affirmed. No error which might be assessed to the closing arguments gives rise to a claim of constitutional magnitude.

CLAIM X

The petitioner claims that his sentence is violative of the eighth amendment as construed in Maynard v. Cartwright, 486 U.S. __, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) since the jury was instructed that it could find, as an aggravating circumstance, that the murder was committing in an "especially wicked, evil, atrocious or cruel" manner but was not instructed as to the meaning of the words "especially," "wicked," "evil," "atrocious," or "cruel," nor given any narrowing principles by which to distinguish between those murders which are especially wicked, evil, atrocious or cruel and those which are not. Petition, at 134-47. The claim is, and has already been determined to be, procedurally barred.[22] Atkins,

[22]Petitioner's counsel apparently did not even object to the instruction at trial. See TT at 950, 952.

541 So.2d at 1166 n. 1 (5).[23] See Wainwright v. Sykes, supra; Harris v. Reed, supra.

The Maynard decision was controlled by Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)--an opinion issued even prior to the time of the offenses. Maynard, 108 S.Ct. at 1859. The United States Supreme Court held that Maynard merely represented the application of a "central tenet of [the] Eighth Amendment." Id. 108 S.Ct. at 1858. The petitioner himself admits that Maynard is "merely an extension of Godfrey [--a decision] which did exist at the time of" trial. Petition, at 142.[24] Therefore, he cannot show cause for his failure. That failure obviates

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[23]On direct appeal, petitioner argued that there was insufficient evidence to prove that his crime was "especially heinous..." as the phrase had been construed through the narrowing principles previously applied by the Florida Supreme Court. See Petition, at Exhibit 002, Brief of Appellant on direct appeal, at 19. In State v. Dixon, 283 So.2d 1 (Fla. 1973), Florida's Supreme Court has defined each of the words "heinous", "atrocious", and "cruel" and held that the phrase "heinous, atrocious and cruel" was meant to cover:

> those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Id. at 9. The Appeal never mentions Godfrey nor alleges an ambiguity in the phrase "especially, heinous, atrocious or cruel." It argues that the petitioner did not act without conscience or pity or to unnecessarily torture his victim, but that he acted without control of his mental faculties and therefore the "especially heinous..." standard was not met. Brief of Appellant on direct appeal, at 19-21.

[24]The petitioner claims Maynard should "appl[y] retroactively to Godfrey" because state courts, "such as the Florida Supreme Court," have been misconstruing Godfrey. Petition, at 142. Yet the Florida Supreme Court had no opportunity to misconstrue Godfrey in the instant case since neither Godfrey nor the issue with which it dealt was ever raised.

the need for this Court to determine whether Maynard established a "new rule" as the term is defined in Butler v. McKellar, ___ U.S. _ _, ___ S.Ct. ___, ___ L.Ed.2d ___, (March 5, 1990).[25]

In any event, the claim is without merit. The 11th Circuit has interpreted Cartwright and Godfrey to require a federal habeas court to consider three factors in ruling on eighth amendment vagueness challenges such as the one asserted here:

> First, the appellate courts of the state must have narrowed the meaning of the words 'heinous, atrocious or cruel' by consistently limiting their application to a relatively narrow class of cases, so that their use 'inform[s] [the sentencer of] what [it] must find to impose the death penalty.' (cite omitted). Second, the sentencing court must have made either an explicit finding that the crime was 'especially heinous, atrocious or cruel'[26] or an explicit finding that the crime exhibited the narrowing characteristics set forth in the state-court decisions interpreting those words. Third, the sentencer's conclusion--that the facts of the case under consideration place the crime within the class of cases defined by the state court's narrowing construction of

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[25]Even so, if Maynard did not announce a new rule then the petitioner cannot be excused for failing to raise his claim earlier. If Maynard did announce a new rule and the petitioner had raised the claim, it (the claim) would be denied, under Butler, so long as the Florida Supreme Court's disposition of same was debatable among reasonable minds in light of precedent existing at the time. Butler, ___ U.S. at ___; Penry v. Lynaugh, 492 U.S. ____, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); and Teague v. Lane, 489 U.S. ___, at ___, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989). That the decision would have been debatable at the time is made clear by a 1986 11th Circuit decision which noted that Florida's statute which designates "especially heinous, atrocious or cruel" murders an aggravating circumstance is neither unconstitutionally vague nor ambiguous." Porter v. Wainwright, 805 F.2d 930, 943 n. 15 (11th Cir. 1986).

[26]This is sufficient since a sentencing judge "'who is presumed to know and apply the appropriate, narrow construction' of the aggravating circumstance," can be presumed to have been "guided by the Florida appellate [courts'] construction of the words 'especially heinous, atrocious or cruel.'" Bertolotti, 883 F.2d at 1527, citing Lindsey, 875 F.2d at 1514 n. 5.

> the term 'heinous, atrocious or cruel'--must not have subverted the narrowing function of those words by obscuring the boundaries of the class of cases to which they apply.

Lindsey v. Thigpen, 875 F.2d 1509, 1514 (11th Cir. 1989), quoted in Bertolotti v. Dugger, 883 F.2d 1503, 1526 (11th Cir. 1989).

Consideration of the those factors in this case compels the Court to reject the petitioner's claim. The Florida courts have sufficiently narrowed the meaning of the phrase "especially heinous, atrocious or cruel" to satisfy the 11th Circuit Court of Appeals and the United States Supreme Court. See, Bertolotti, 883 F.2d at 1526 citing Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 2968 (1976)(plurality opinion of Stewart, Powell & Stevens, JJ). The petitioner's sentencing judge made explicit findings that his capital felony was especially heinous, atrocious and cruel. See Atkins, 497 So.2d at 1201-02. Finally, even though not required to survive an eighth amendment challenge, the aggravating circumstances existing here involved "torture or serious physical abuse" thereby providing a "'principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.'" Bertolotti, 883 F.2d at 1527, citing to Cartwright, 108 S.Ct. at 1859 and Godfrey, 446 U.S. at 433.

Claim X warrants no relief.

CLAIM XI

The petitioner claims the federal constitution required the trial judge to reconvene a new jury upon remand for resentencing by the Florida Supreme Court. Petition, at 148-160. The issue is, and has been determined to be, procedurally barred since it

was not raised on direct appeal from the resentencing procedure. See Atkins, 541 So.2d at 1166, n. 1 (4); and Wainwright v. Sykes, supra; and Harris v. Reed, supra. Even so, it is without merit.

The Florida Supreme Court remanded the case for resentencing only because the trial judge had improperly considered sexual battery as an aggravating circumstance. Atkins, 497 So.2d at 1201. The Florida Supreme Court found no fault with the evidence or argument presented to the jury. Id. And the resentencing was affirmed on appeal. Atkins, 541 So. 2d 1165. In Clemons v. Mississippi, __ U.S. ___, 1990 Lexis 1667 (March 28, 1990), the United States Supreme Court reaffirmed that "[a]ny argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court [cite omitted]." Id. at _ _.[27] To the extent the petitioner wishes to argue the importance Florida law places on the recommendation of a jury, his argument is better addressed to the Florida, not the federal, courts.[28] That a new sentencing jury was not required by Florida law in this case is evidenced by the facts that no statute nor legal decision specifies

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[27]Although remanding the case for resentencing absent consideration of an impermissible aggravating circumstance, the Clemons' Court held that the state's appellate court could itself reweigh the aggravating and mitigating factors and that it did not have to resubmit the case to a jury for its recommendation. Clemons ___ U.S. at ___. If the appellate court can reweigh the circumstances itself, it can certainly remand the case to the trial judge to reweigh the circumstances without requiring him to reconvene a new jury.

[28]See also, Barclay and Wainwright v. Goode, text, supra. (th issue is one of state law).

it, the Florida Supreme Court did not mandate it, and the resentencing was affirmed on appeal.

Claim XI warrants no relief.

CLAIM XII

The petitioner claims the corpus delicti of kidnapping was not sufficiently proved to allow the admission of his confession to the kidnapping offense. Petition, at 160-68. The petitioner also claims his counsel was ineffective for failing to raise this issue on appeal. Id. Both issues are, and have previously been found to be, procedurally barred. Atkins, 541 So.2d at 1166 n. 1 (10); and n. 2 (6). See Wainwright v. Sykes, supra; and Harris v. Reed, supra. Even so, they are without merit. A rational trier of fact could conclude on the evidence, apart from petitioner's admissions, that the petitioner was guilty of kidnapping. Therefore the claim is due to be denied. See e.g., Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Counsel's alleged ineffectiveness for not raising this issue on appeal was sufficiently addressed within the Court's consideration of Claim II (iii), supra.

Claim XII warrants no relief.

CLAIM XIII

The petitioner claims that the jury was instructed that only a majority vote would be sufficient to recommend a life sentence while Florida law holds that an equally divided jury produces the same result. Petition, at 168-73. See Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); and Dugger v.

Adams, 489 U.S. ___, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989). Petitioner also claims his counsel was ineffective for failing to raise the issue on appeal. Each claim is, and has already been determined to be, procedurally barred. See Atkins, 541 So. 2d at 1166 n. 1 (7) and n. 2 (3). See Wainwright v. Sykes, supra; and Harris v. Reed, supra. Even so, both are without merit.

The jury never reported an impasse and its vote was seven to five. Moreover, any confusion which the prosecutor created as to the number of votes required to recommend a sentence of life was remedied by the trial court in the following instruction:

> On the other hand, if six or more votes, if by six or more votes the jury determines the Defendant should not be sentenced to death, your advisory sentence will be, "The jury advises and recommends to the Court that it impose a sentence of life imprisonment...."

TT at 952-53. Failure to raise every conceivable issue, regardless of how trivial or unsubstantiated, does not constitute ineffective assistance of counsel of a constitutional magnitude. This particular issue could not have been raised in any event because it was not properly reserved by objection at trial. The counsel's performance was neither ineffective nor prejudicial.

Claim XIII warrants no relief.

CLAIM XIV

The petitioner claims that his sentence is unconstitutional since, in all probability, he was convicted for felony-murder (as opposed to premeditated murder) and the felony (i.e., kidnapping) was found to be an aggravating circumstance. Petition, at 174-88. He argues that, since the underlying felony is considered an agg-

ravating circumstance, all felony-murders automatically result in the death penalty and are therefore forbidden under Zant v. Stephens, 462 U.S. 862, 876, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). He buttresses his argument with the already rejected proposition that his jury was told to presume death to be the proper penalty upon proof of any aggravating circumstance. See Claim VI, supra. This issue is, and has already been determined to be, procedurally barred. Atkins, 541 So.2d at 1166, n. 1 (9). See, Wainwright v. Sykes, supra; and Harris v. Reed, supra. Even so, it is without merit.

The argument that details about the underlying felony may not aggravate the felony-murder has been rejected by the federal and the state courts. See e.g., Lowenfield v. Phelps, 484 U.S. 231, 241, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); Bertolotti v. State, 534 So.2d 386, n. 3 (Fla. 1988); Clark v. State, 443 So.2d 973, 978 (Fla. 1983); Menendez v. State, 419 So.2d 312, 315 (Fla. 1982); White v. State, 403 So.3d 331 (Fla. 1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983); see also, Porter v. Wainwright, 805 F.2d 930, 943 n. 15 (11th Cir. 1986); Henry v. Wainwright, 721 F.2d 990, 996 (11th Cir. 1983).

Claim XIV warrants no relief.

CLAIM XV

The petitioner claims the trial judge violated the eighth amendment by refusing to find the presence of certain mitigating circumstances. Petition, at 189-202. Specifically, petitioner faults the sentencing judge for not finding the petitioner incom-

petent and under extreme emotional duress at the time of the offenses. The claim is, and has already been determined to be, procedurally barred. Atkins, 541 So.2d at 1166, n. 1(12). See Wainwright v. Sykes, supra; and Harris v. Reed, supra. Even so, it is without merit. If properly raised, the question on review would have been whether there was support for the trial judge's finding that certain mitigating circumstances were not present. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). The issue would not have been, as the petitioner seems to argue, whether there was evidence to support his contention that certain mitigating circumstances were present. See e.g., Petition, at 190, 192. The trial judge's findings can be set aside only if they are arbitrary and capricious. Magwood, 791 F.2d at 1450.

The trial judge's findings could not have been set aside in this case since there is evidence to support the conclusion that the petitioner did not act under extreme duress or the substantial domination of another and that he was sufficiently competent, at the time of the offenses, to appreciate the criminality of his conduct. See e.g., the Court's consideration of Claim I, supra, describing numerous physical and mental functions which the petitioner performed at or near the time of the crimes. The petitioner made every effort to conceal his offenses; Dr. Dee characterized his seduction of the victim as "skillful." The petitioner offers no suggestion that he acted at the direction of another. Even so, the trial judge did find as a mitigating circumstance that, because of exaggerated distress and anxiety, the petitioner's ability to

conform his conduct to the requirements of law was substantially impaired. TT at 967-68. This Court agrees with the Florida Supreme Court's conclusion that, "the point [raised in this claim] ha[s] so little merit" that there was no use even raising it on appeal. Atkins, 541 So.2d at 1167.

As indicated in the Court's consideration of Claim IV, Dr. Kaplan found that the petitioner was sane at the time of the offenses. Dr. Kremper agreed and added that it was not likely that his behavior would have been altered appreciably were he not under the influence of alcohol and drugs (assuming that he was); and even Dr. Dee concluded that his mental state did not prevent him from appreciating the nature of his sexual offenses. See Order denying 3.850 Motion, Exhibit 010 to the Petition, at 3.

Accordingly, Claim XV warrants no relief.

CLAIM XVI

The petitioner claims that the introduction of non-statutory aggravating circumstances during the trial's sentencing phase so perverted the proceedings that they produced a "totally arbitrary and capricious imposition of the death penalty in violation of the eighth and fourteenth amendments...." Petition, at 202-06. He also claims that his counsel was constitutionally ineffective for failing to raise the issue on appeal. Petition, at 207. By raising the latter claim, he necessarily admits that the former is procedurally barred. Indeed, it is procedurally barred and has already been determined to be so. Atkins, 541 So.2d at 1166, n. 1(11). Moreover, the claim that his appellate counsel was ineffec-

tive for failing to raise the issue on appeal is also procedurally barred and, again, has already been found to be so. Id. at 1167, n. 2(5). Even so, both claims are without merit.

The evidence of non-statutory aggravating circumstances the introduction of which the petitioner challenges is the testimony of several police officers about a list of 45 names taken from the petitioner upon his arrest. By the petitioner's own admission, the names belonged to boys with whom he had had sexual encounters. TT at 849. Not only did trial counsel not object to the introduction of such evidence, he stipulated that, "[a]s a matter of fact, Your Honor, I've made a tactical decision that that has to be a part of my testimony, also." TT at 845. He said, "I don't care whether the officers testify or not." Id. The judge and the prosecutor argued over whether such testimony could be introduced prior to the time the petitioner argued that he had no significant prior criminal history that would warrant imposition of the death penalty. Id. at 846-47. Petitioner's counsel truncated the discussion:

> PETITIONER'S COUNSEL: May I say this? I think we're straining at a gnat. This has got to come out in my testimony anyway, it's the only way I can establish what I'm attempting to establish in hopes to get a recommendation of a life sentence....
>
> THE COURT: Do you have any objection to [the prosecutor] bringing out whatever he wants to bring out--
>
> PETITIONER'S COUNSEL: No, sir, if he wants to back off and take a run at it in his case in chief, fine. It's got to become a part of my testimony anyway....

Id. at 847.

Counsel also elicited from Dr. Dee the fact that the petitioner had been fired "because he had been having intercourse with a

boy on the job." TT at 873. The petitioner's father testified about the family's efforts to get the petitioner to "start noticing girls instead of boys." Id. at 915. And the petitioner testified about his sexual preference for young boys. TT at 918-19. There is no probability that trial counsel would have benefited by changing strategy on appeal and attempting to fault the trial judge for admitting evidence the introduction of which counsel had previously invited. See McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971); and State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980). Accordingly, the evidence introduced did not so pervert the sentencing phase as to produce an arbitrary and capricious imposition of the death penalty. And, in light of his adopted trial and sentencing strategy, counsel's decision not to raise the issue on appeal was neither ineffective nor prejudicial.

Claim XVI warrants no relief.

CLAIM XVII

The petitioner claims his sentencing jury was misled in a manner that diluted its sense of responsibility in violation of the fourteenth amendment as construed in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). Petition, at 207-22. The petitioner also claims his counsel was constitutionally ineffective for failing to raise the issue on appeal. Petition, at 221-22. By raising the latter claim, the petitioner necessarily admits that the former is procedurally barred. Indeed, it is procedurally barred and has already been determined to be so. Atkins, 541 So.2d

at 1166, n. 1(6). Moreover, the claim that his appellate counsel was ineffective for failing to raise the issue on appeal is also procedurally barred since it was not raised before the instant petition. Even so, both claims are without merit.

Specifically, the petitioner alleges that the jury's sense of responsibility was diminished by repeated instructions, from the prosecutor and the trial judge, that the jury's role was to provide the court with a sentencing recommendation. As explained in Mann, Caldwell's jurors were misled into believing that their judgment call on the evidence would be reviewed de novo when the truth was that the reviewing court would apply a presumption of correctness to the jury's decision and could overturn it only in three narrow sets of circumstances. Mann, 844 F.2d at 1449. See Caldwell, supra. The Supreme Court held, in Caldwell, that the sentence of death was invalid under the eighth amendment "because it rested on 'a determination made by a sentencer who ha[d] been led to believe that the responsibility for determining the appropriateness of the defendant's death rest[ed] elsewhere.'" Mann, 844 F.2d at 1446, citing Caldwell, 472 U.S. at 328-29, 105 S.Ct. at 2639.

In Mann, the 11th Circuit went on to hold that Caldwell is "triggered when a Florida sentencing jury is misled into believing that its role is unimportant." Id. at 1454. Mann's prosecutor had repeatedly informed the jury that the judge was "not bound by" its recommendation, that it did "not impose the death penalty," that the penalty was "not on [its] shoulders," that the decision was not "ultimately" for the jury, that the jury acted "in an advisory

capacity only," and that, the "ultimate responsibility rest[ed] with the Court...not the jury...." Id. at 1455. Instead of clarifying the prosecutor's misleading instructions, the trial judge exacerbated them: "[a]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge." Id. at 1456. The trial judge also refused the defendant's request that he instruct the jury that its recommendation was entitled to "great weight." Id. at 1455.

The instructions to which the instant petitioner objects are by no means misleading. Nor did they diminish the responsibility entrusted to the jury. The jury was instructed by the court and the prosecutor that its role was to issue a sentencing recommendation. This is an accurate statement of the Florida law. As the 11th Circuit has recently noted, "emphasizing the 'advisory' role of the jury, or the fact that the jury is making a 'recommendation' to the judge, does not support a Caldwell claim. Such statements are neither inaccurate nor misleading." Harich v. Dugger, 844 F.2d 1464, 1474-75 (11th Cir. 1988). The fact that a jury knows it is making a recommendation does not diminish the importance attached to the decision. Id. at 1475. Accordingly, the petitioner cannot establish a Caldwell violation and it was neither ineffective nor prejudicial for his counsel not to raise the issue on appeal.

Claim XVII warrants no relief.

CLAIM XVIII

The petitioner claims that the prosecutor and the court improperly instructed the jury not to have sympathy for the defend-

ant. Petition, at 222-231. The petitioner also claims that his counsel's "failure to litigate" this claim constitutes ineffective assistance. Id. at 231. These claim are, and have already been determined to be, procedurally barred. Atkins, 541 So.2d at 1166, n. 1(8) and at 1167, n. 2(7). Wainwright v. Sykes, supra; and Harris v. Reed, supra. Even so, they are without merit.

The statements about which the petitioner now complains were made during voir dire examination of the jury and at the trial's guilt phase. None of them were made during the sentencing phase. Jurors are not entitled to consider sympathy for the defendant (or the victim) when deciding on the former's guilt or innocence.

Accordingly, Claim XVIII warrants no relief.

The Court having carefully considered the petitioner's claims and having concluded that none of them warrant relief, it is ordered that the Petition for a Writ of Habeas Corpus pursuant to Title 28 U.S.C. §2254 is hereby DENIED.

DONE AND ORDERED in Chambers in Tampa, Florida this 3rd day of May, 1990.

UNITED STATES DISTRICT JUDGE