IN THE SUPREME COURT OF FLORIDA

NO. 73869

PHILLIP ALEXANDER ATKINS

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

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

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I. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Atkins' capital conviction and sentence of death. This Court remanded Mr. Atkins' case for the trial court to reconsider its death sentence. Atkins v. State, 452 So. 2d 529 (Fla. 1984). Without reconvening a jury the trial court resentenced Mr. Atkins to death. Direct appeal was taken from the resentencing to this Court (see Atkins v. State, 497 So. 2d 1200 (Fla. 1986). Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Atkins to raise the claims presented herein. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson;

Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Atkins' capital conviction and sentence of death, and of this Court's appellate review. Mr. Atkins' claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n. 4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Atkins' claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Atkins' appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Atkins' claims, Knight v. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson, supra; Johnson, supra. This and other Florida courts have consistently

recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Atkins will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

Mr. Atkins' claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

B. REQUEST FOR STAY OF EXECUTION

Mr. Atkins' petition includes a request that the Court stay his execution presently scheduled for April 18, 1989. As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Lightbourne v. Dugger (No. 73,609, Fla. Jan. 31. 1989); Marek v. Dugger (No. 73,175, Fla. Nov. 8, 1988); Gore v. Dugger (No. 72,202, Fla. April 28, 1988); Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986). See also, Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla.), cert. denied, 107

S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

This is Mr. Atkins' first and only petition for a writ of habeas corpus. The claims he presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Phillip Alexander Atkins asserts that his convictions and his sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

In Mr. Atkins' case, substantial and fundamental errors occurred in both the guilt and penalty phases of trial. These errors were uncorrected by the appellate review process.

CLAIM I

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

At the closing of the State's evidence counsel for Mr. Atkins moved for a directed verdict of acquittal on the two counts of sexual battery. The Court granted the motion ordering directed verdicts of acquittal on counts two and three of the

indictment concerning both sexual battery charges (R. 832). The circuit court thus determined as a matter of law that there was insufficient evidence of a sexual battery upon which to convict. Despite this ruling that there was insufficient proof of a sexual battery, the circuit court decided to permit the jury to consider whether the homicide occurred in the course of a sexual battery and was thus felony murder.

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

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

Tony Castillo was killed, the Defendant is guilty of felony -- of first degree murder.

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

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

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

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

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

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

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

Park and everything else. Yet we get to those points and the story changes.

(R. 957, 958).

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

> Before you can find the Defendant guilty of first degree felony murder, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. The person alleged to have been killed is dead.
>
> 2. The death occurred as a consequence of and while the Defendant was engaged in the commission of, or was attempting to commit, or was escaping from the immediate scene of a sexual battery upon a person eleven years or younger by a person nineteen years or older, or a kidnapping.
>
> 3. The Defendant was the person who actually killed the deceased, or the deceased was killed by a person other than the Defendant who was involved in the commission or attempt to commit a sexual battery on a person eleven years of age or younger by a person eighteen years of age or older or a kidnapping, but the Defendant was present and did knowingly aid, abet, counsel, hire, or otherwise procure the commission of sexual battery upon a person eleven years of age or younger by a person eighteen years of age or older, or kidnapping.
>
> It is not necessary for the State to prove that the Defendant had a premeditated design or intent to kill.
>
> "Sexual battery" means oral, anal or vaginal penetration by or union with the sexual organ of another, or the anal or vaginal penetration of another by any object.

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

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

> There's another problem the Court has considered overnight and I'm very concerned with. I do not know what the appellate court

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

(R. 1126-1127).

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

The Florida Supreme Court has held that the state must prove the elements of the underlying felony under the felony-murder rule. Robles v. State, 188 So. 2d 789, 793 (Fla. 1966). The

United States Supreme Court has explicitly held that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In Re Winship, 397 U.S. 359 (1970). Where this principle is violated, at the very least, a new trial must be ordered in order to insure a defendant his right to a trial by a jury of his peers. Ballew v. Georgia, 435 U.S. 223 (1978). Here, the jury was improperly told that it could premise a felony murder conviction upon a sexual battery that the court had determined was not sufficiently proved.

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

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[1]The prosecutor conceded that he did not have "any physical evidence that a sexual battery occurred." (R. 663). Accordingly, "its in all honesty the State's feeling the Court would probably have to direct a verdict on the sexual battery counts." Id. Certainly, the prosecutor's acknowledgement that he knew that the sexual battery counts would result in directed verdicts of acquittal also raise questions about his motives in injecting into the trial unproveable but yet very inflammatory allegations of sexual battery.

it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon." Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988).

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

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

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

The Supreme Court in Stromberg v. California, 283 U.S. 359 (1931), held as a matter of due process that a verdict which might be based on an unconstitutional ground cannot stand, even if there are alternative theories to support the verdict. The principle of Stromberg has been consistently reaffirmed by the United States Supreme Court. Leary v. United States, 395 U.S. 6 (1969); Thomas v. Collins, 323 U.S. 516, 528-29 (1945); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Street v. New York, 394 U.S. 475, 585-88 (1969); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970). See also Zant v. Stephens, 462 U.S. 862, 77 L.Ed. 2d 235, 103 S.Ct. 2733 (1983). The Stromberg rule is that when the jury is instructed on alternative theories, "it is impossible to say under which clause of the statute the conviction is obtained," and thus the conviction must be overturned. Id. at 368 (emphasis added). Stromberg teaches that the reviewing courts are not to look at whether there is sufficient evidence to support a jury verdict on a legal ground where one of the grounds charged is unconstitutional. The reviewing court is only to consider whether the verdict may have rested on an impermissible ground and if so, reversed.

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

premeditated murder, unanimously of kidnapping felony-murder or unanimously of sexual battery felony-murder or any combination thereof. If the jury's verdict is based in any part on the nonexistent charge, the fourteenth amendment is violated, see Jackson v. Virginia, 443 U.S. 307 (1979), Mills v. Maryland, 108 S. Ct. 1860 (1988). Thus the guilty verdict is invalid under Stromberg.

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

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

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue -- it was properly litigated before the lower court. See Johnson

v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance or neglect, deprived Mr. Atkins of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

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

CLAIM II

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

After convicting Mr. Atkins of first degree murder, the jury deliberated for more than two hours before recommending by a vote of 7 to 5 that Phillip Atkins be sentenced to death (R. 1150). Shortly thereafter the court entered its order imposing the death sentence (R. 1155-1168), finding as an aggravating circumstance that "the murder was committed while the Defendant was engaged in the commission of a sexual battery" (R. 961). The jury, likewise, had been instructed that they could find, as an aggravating circumstance, that "[t]he crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of, in an attempt to commit, or flight after committing or attempting to commit the crime of sexual battery or kidnapping" (R. 1144).

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

judgment of acquittal on that count at the close of the State's case.

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

Id. at 532-33.

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

> "Because some mitigating circumstances were established to the satisfaction of the trial court, the court's erroneous finding of an improper aggravating circumstance may have injuriously affected the process of weighing aggravating and mitigating circumstances. See Elledge v. State, 346 So. 2d 998 (Fla. 1977).[2]

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

At the new sentencing, the circuit court heard additional argument by counsel, but chose not to convene a new jury in order to obtain a new recommendation. In its Findings of Fact, the circuit court said, "The [Florida Supreme Court] opinion is silent as to the necessity of reconvening the trial jury. This

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[2]The significance of the citation to Elledge cannot be overlooked and is explained infra.

Court concludes that it is not necessary to reconvene the jury" (RII 2). The trial court, without the aid of a new properly-instructed jury, simply omitted the aggravating factor found to be erroneous and resentenced Mr. Atkins to death. There was no proper "reweighing" of mitigation and aggravation by a jury and thus no jury recommendation based upon the proper aggravating circumstances as required under Fla. Stat. 921.141(1).[3]

On direct appeal from the resentencing, appellate counsel failed to argue that a new jury should have been reconvened in order to provide a valid jury recommendation for the trial court to consider. Consequently, the issue was not brought before this Court on direct appeal from the resentencing. This failure to raise the issue was ineffective assistance of counsel.

At the original penalty phase, the record clearly establishes that the jury had been presented with the improper evidence and argument of the sexual batteries. Counsel, by failing to raise a challenge to the tainted jury recommendation, did not consider the effect the sexual battery had on the jury recommendation to the court. Appellate counsel unreasonably failed to put before this Court the fact that the prosecutor's arguments to the jury during the penalty phase urged them to find the sexual battery as an aggravating circumstance (R. 1133). Counsel's failure in bringing these claims to this Court cannot be attributed to any reasonable tactical or strategic choice and clearly constituted deficient performance. This Court clearly held that the sexual battery counts should not have been considered in the penalty phase. Certainly, counsel should have pointed out that this Court's ruling was violated because the

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

jury recommendation resulted from a penalty phase proceeding in which the jury was told it could consider the sexual battery allegations as an aggravating circumstance. In light of this Court's finding of error in the trial court's consideration of the sexual battery and the fact that the jury considered this same unsubstantiated allegation in its sentencing recommendation, it is clear that Mr. Atkins' appellate counsel should have contested the failure to reconvene a penalty phase jury for the second sentencing. It also establishes the prejudice. These multiple omissions constitute ineffective assistance of counsel.

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

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

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

Atkins, supra, 452 So. 2d at 533.

Where improper aggravation was presented at a penalty phase and mitigating circumstances were found to exist, a new

sentencing jury must be empaneled in order to conduct a reweighing. In reversing for a resentencing, this Court cited Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977). There, the Florida Supreme Court, after noting that improper aggravation was considered and mitigation had been found, ordered a new sentencing trial. In doing so, the court stated:

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

346 So. 2d at 1003. Elledge makes clear that where improper aggravation was considered by a jury and where mitigation was present, a whole new penalty phase must be conducted with a new jury and a new jury recommendation. In reversing Mr. Atkins' death sentence because of consideration of improper aggravation and because of the existence of mitigation, this Court relied on Elledge. Yet, the circuit court refused to convene a new sentencing jury.

The United States Eleventh Circuit Court of Appeals' summary of the importance of the sentencing jury's role in the Florida capital sentencing scheme outlines the pivoted role a valid jury recommendation plays:

> A review of the case law shows that the Supreme Court of Florida has interpreted section 921.141 as evincing a legislative intent that the sentencing jury play a significant role in the Florida capital sentencing scheme. See Messer v. State, 330

> So.2d 137, 142 (Fla.1976)("[T]he legislative intent that can be gleaned from Section 921.141 [indicates that the legislature] sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part."); see also Riley v. Wainwright, 517 So.2d 656, 657 (Fla.1987) ("This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process."); Lamadline v. State, 303 So.2d 17, 20 (Fla.1974)(right to sentencing jury is "an essential right of the defendant under our death penalty legislation"). In the supreme court's view, the legislature created a role in the capital sentencing process for a jury because the jury is "the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors." Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977); see also McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982)(the jury's recommendation "represent[s] the judgment of the community as to whether the death sentence is appropriate"); Chambers v. State, 339 So.2d 204, 209 (Fla.1976)(England, J., concurring) (the sentencing jury "has been assigned by history and statute the responsibility to discern truth and mete out justice").

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

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

This Court in Hall v. State, ___ So. 2d ___, No. 73,029 (Fla., decided March 9, 1989), recently reiterated the importance of the jury recommendation in Florida's death penalty scheme. There, this Court found sentencing error which infected the proceedings before both the jury and the judge. In ordering a new jury to be empaneled, this Court concluded: "It is of no significance that the trial judge stated that he would have imposed the death penalty in any event." Slip op. at 6. This Court then held that in determining whether a new jury is required, "[t]he proper standard is whether a jury recommending

life imprisonment would have a reasonable basis for that recommendation." (Id.) Thus, the all important factor in determining whether the error was harmless is the effect the pervasive error may have had upon the jury, not the trial court. Thus, under Hall it is clear that Mr. Atkins should have had a new jury untainted by the error which occurred at the first proceeding.

The United States Supreme Court has recently explained that the question is "what a reasonable juror could have understood the charge as meaning." Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988), quoting Francis v. Franklin, 471 U.S. 307, 316 (1985). The Court reversed in Mills where it found sentencing error when the jury could have read the instructions in an erroneous and improper fashion. Therefore, under Mills, the question is whether there is a "substantial possibility that the jury based its recommendation on the improper, unsupported aggravating circumstance." Mills, supra, 108 S. Ct. at 1870.

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

Clearly, here the jury recommendation was tainted by the erroneous instruction, enough so that the case was remanded for new sentencing. Resentencing before the judge alone, however, did not adequately correct the error. This Court never

determined this case in light of "what a reasonable juror could have understood the charge as meaning." (Mills supra at 1866).

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

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

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

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

CLAIM III

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

The record indicates that the trial judge failed to define heinous, atrocious or cruel for the jury. The instruction given provided "the crime of which -- or for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel." (R. 1145). No further explanation of the aggravating circumstance was given. In Maynard v. Cartwright, 108 S. Ct. 1853 (1988), the Supreme Court held that the use of the aggravating circumstance in a capital case that the killing was "especially heinous, atrocious, or cruel" violated the eighth amendment in the absence of a limiting construction of that phrase which sufficiently channels the sentencer's discretion so as to minimize the risk of "arbitrary and capricious action." An affirmance of the death sentence on appeal is insufficient "to cure the jury's unchanneled discretion where the court fails" to apply its previously recognized limiting construction of the aggravating circumstance. Id. at 1859.

In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court approved the Florida Supreme Court's construction of this aggravating circumstance on the premise that this provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Id. at 255-56. See State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). In Maynard v. Cartwright, Oklahoma had adopted the unnecessarily torturous element through its wholesale adoption of Florida's construction of heinous, atrocious or cruel set out in Dixon. However, as occurred here the jury was not instructed on the interpretation to be given the words of art, "heinous, atrocious or cruel," nor was the limiting construction adopted in Dixon applied at any stage of the proceedings.

The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe any murder to be heinous, atrocious or cruel under the instructions. Mills v. Maryland, 108 U.S. 1860 (1988). These terms require definition in order for the statutory aggravating factor genuinely to narrow, and its undefined application here violated the eighth and fourteenth amendments. Godfrey v. Georgia, 466 U.S. 420 (1980). Jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988). Accordingly, Mr. Atkins' death sentence was obtained in violation of the eighth and fourteenth amendments, and must be vacated.

In Mr. Atkins' case, the Court offered no explanation or definition of "heinous, atrocious, or cruel" but simply instructed the jury that the seventh aggravating circumstance the jury could consider was whether the crime "was especially wicked, evil, atrocious or cruel." (R. 1145). The judge's oral instructions may have been interpreted by the jury as telling them that in fact the murder was wicked, evil, atrocious or cruel. This alone violated Mills v. Maryland, 108 S. Ct. 1860 (1988).

Even though the Florida Supreme Court had consistently held that in order to show "heinous, atrocious, and cruel" something more than the norm must be shown, see Cooper v. State, 336 So. 2d 1133 (Fla. 1976); Odom v. State, 403 So. 2d 936 (Fla. 1981); Parker v. State, 458 So. 2d 750 (Fla. 1984), the court found that "heinous, atrocious and cruel" applied to Mr. Atkins' case (R. 1158). In fact in Proffitt the circumstance was found to have sufficient guidance because the Florida Supreme Court had construed it as containing the requirement that the crime was

"conscienceless or pitiless" because it was "unnecessarily torturous to the victim." 428 U.S. at 255-56.

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

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

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

Id., 387 So. 2d at 922.

Maynard v. Cartwright, 108 S. Ct. 1853 (1988), like Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), satisfies the three Witt requirements. It is a United States Supreme Court decision. It is premised upon the eighth amendment to the United States Constitution. Finally, it constitutes a development of fundamental significance by concluding that state courts, such as the Florida Supreme Court, were misconstruing Godfrey v. Georgia, 446 U.S. 420 (1980). State courts had interpreted Godfrey as not requiring a sentencer to be instructed on or to apply limiting principles which were to guide and channel the sentencer's construction of the "heinous, atrocious or cruel" aggravating circumstance. Thus, the decision in Maynand v. Cartwright is very much akin to the decision in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), which held that the Florida Supreme Court and the

Eleventh Circuit Court of Appeals had failed to properly construe Lockett v. Ohio, 438 U.S. 586 (1978). Cartwright, like Hitchcock, changed the standard of review previously applied. See Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

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

In its decision in Maynard v. Cartwright, the United States Supreme Court held that state courts had failed to comply with Godfrey when they did not require adequate jury instructions which guided and channelled the jury's sentencing discretion. More is required than simply asking the jury if the homicide was "wicked, evil, atrocious or cruel." Maynard v. Cartwright also applies to the judge's sentencing where there has been a failure to apply the controlling limiting construction of "heinous, atrocious, or cruel." Adamson v. Ricketts, ___ F.2d ___, No. 84-2069 (9th Cir. Dec. 22, 1988)(en banc). This Court's prior limited reading of Godfrey (as only effecting appellate review of a death sentence) was thus in error. That error has been recognized and spelled out in Maynard v. Cartwright.

This issue involves the most fundamental of constitutional errors -- proceedings which violate the standards enunciated in Godfrey and explained in Maynard v. Cartwright render any ensuing sentence arbitrary and capricious. Id. For this reason also Mr. Atkins' eighth amendment claim is properly before the court. What Mr. Atkins has presented involves error of a fundamental magnitude no less serious than those found cognizable in post-conviction proceedings in Reynolds v. State, 429 So. 2d 1331,

1333 (Fla. App. 1983)(sentencing error); Palmes v. Wainwright, 460 So. 2d 362, 265 (Fla. 1984)(suppression of evidence); Nova v. State, 439 So. 2d 255, 261 (Fla. App. 1983)(right to jury trial); O'Neal v. State, 308 So. 2d 569, 570 (Fla. 2d DCA 1975)(right to notice); French v. State, 161 So. 2d 879, 881 (Fla. 1st DCA 1964)(denial of continuance); Flowers v. State, 351 So. 2d 3878, 390 (Fla. 1st DCA 1977)(sentencing error); Cole v. State, 181 So. 2d 698 (Fla. 3d DCA 1966)(right to presence of defendant at taking of testimony). Moreover, because human life is at stake, fundamental error is more closely considered and more likely to be present where the death sentence has been imposed. See, e.g., Wells v. State, 98 So. 2d 795, 801 (Fla. 1957)(overlook technical niceties where death penalty imposed); Burnette v. State, 157 So. 2d 65, 67 (Fla. 1963)(error found fundamental "in view of the imposition of the supreme penalty").

In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court approved the Florida Supreme Court's construction of the "heinous, atrocious or cruel" aggravating circumstance, holding:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d, at 9. See also Alford v. State, 307 So. 2d 433, 445 (1975); Halliwell v. State, [323 So. 2d 557], at 561 [Fla. 1975]. We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt, 428 U.S. at 255-56 (footnote omitted)(emphasis added).

The construction approved in Proffitt was not utilized at any stage of the proceedings in Mr. Atkins' case. The jury was simply instructed that one of the aggravating circumstances to

consider was whether the crime was "especially wicked, evil, atrocious, or cruel" (R. 1145). The explanatory or limiting language approved by Proffitt does not appear anywhere in the record. Nevertheless this Court affirmed the sentence of death. However, the sentencer failed to apply any limiting construction as did this Court.

The deletion of the Proffitt limitations renders the application of the aggravating circumstance in this case subject to the same attack found meritorious in Maynard v. Cartwright. The Supreme Court's eighth amendment analysis fully applies to Mr. Atkins' case; the identical factual circumstances upon which relief was mandated in Maynard v. Cartwright are present here, and the result here should be the same as in Maynard v. Cartwright:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).
>
> Furman held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not. E.g., id., at 310 (Stewart, J., concurring); id., at 311 (White, J., concurring). Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action. Gregg v. Georgia, 428 U.S. 153, 189, 206-207 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); id., at 220-222 (White, J., concurring in judgment); Spaziano v. Florida, 468 U.S. 447, 462 (1984); Lowenfield v. Phelps, 484 U.S. ___, ___ (1988).
>
> Godfrey v. Georgia, 446 U.S. 420 (1980), which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense "was outrageously or wantonly

vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at 422. The jury had been instructed in the words of the statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:

> "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation." Id., at 428-429 (footnote omitted).

The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance. Id., at 429, 432. This Court concluded that, as a result of the vague construction applied, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id., at 433. Compare Proffitt v. Florida, 428 U.S. 242, 254-256 (1976). It plainly rejected the submission that a particular set of facts surrounding a murder, however, shocking they might be, were enough in themselves, and without some

> narrowing principle to apply to those facts, to warrant the imposition of the death penalty.
>
> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue--"especially heinous, atrocious, or cruel"--gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. . . .
>
> Second, the conclusion of the Oklahoma court that the events recited by it "adequately supported the jury's finding" was indistinguishable from the action of the Georgia court in Godfrey, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment. The Oklahoma court relied on the facts that Cartwright had a motive of getting even with the victims, that he lay in wait for them, that the murder victim heard the blast that wounded his wife, that he again brutally attacked the surviving wife, that he attempted to conceal his deeds, and that he attempted to steal the victims' belongings. 695 P.2d, at 554. Its conclusion that on these facts the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance.

Maynard v. Cartwright, supra (emphasis added).

The sentencing court in imposing death noted that there was "no evidence as to when the child became unconscious so that he could suffer no further pain...but it is highly probable that the child suffered excruciating pain before dying." (R. 1160). However, the court also noted "[a]fter the victim threatened to tell his parents, the victim was hit and knocked unconscious." (R. 1158). In fact, there were two witnesses to his unconscious state. There is no evidence that he ever regained consciousness, and thus that the crime was unnecessarily torturous. The judge's recitation of facts did not contain any "narrowing principle to apply to those facts." 108 S. Ct. at 1859. Thus it could not have cured the error. Certainly, no conclusion could have been reached beyond a reasonable doubt. In Mr. Atkins' case, as in Maynard v. Cartwright, what was relied upon by the jury, trial

court, and Florida Supreme Court did not guide or channel sentencing discretion. Similarly, no "limiting construction" was ever applied to the "heinous, atrocious or cruel" aggravating circumstance. Finally, the error of unlimited discretion exercised by the jury and trial court was not cured on direct appeal. As in Maynard v. Cartwright, Mr. Atkins is entitled to a new sentencing.[4]

CLAIM IV

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

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

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[4]The error can certainly not be harmless because mitigation was present. Elledge v. State, 346 So. 2d 998 (Fla. 1977).

reliability of the sentencing determination, for they created the risk that the jury may have read the instructions so as to preclude a six-six deadlock.

During voir dire the state incorrectly informed the jury:

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

(R. 257)(emphasis added). Though this statement is true, it does not inform the jury that only six votes are needed to recommend life.

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

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

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

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

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

(R. 1147-48). As the latter quote demonstrates, Mr. Atkins' "Mann" claim is directly intertwined with the instant claim -- throughout the proceeding the Court and the prosecutor clearly

informed the jury that their sentencing "recommendation" was to be made by a mere majority, and that that "recommendation" could be flatly rejected by the trial court. In fact, misleading comments regarding the jury vote and the jury's "advisory sentence" went hand-in-hand.

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

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

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

(R. 1148). The record reflects that it was only after a deliberation exceeding two hours that the jury, by a mere majority of seven jurors, recommended death (R. 1150). It is entirely possible that a six-to-six vote, i.e., a life recommendation, was reached at some point during deliberations only to be abandoned on the basis of the trial court's erroneous instruction (R. 1147). It is clear that the final instruction regarding the jury's vote, particularly when combined with the reinforcement previously received from the judge and the prosecutor misled the jury, and gave them the erroneous impression that they could not return a valid sentencing verdict

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

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

Because these instructions and comments, in their entirety, created a misleading picture of the jury's role, Mr. Atkins need not show prejudice. The instructions and comments misled the jury, diminished the jury's sense of responsibility, injected arbitrary and capricious factors into the sentencing process, and undermined the reliability of that process. Mr. Atkins has been denied his fifth, sixth, eighth, and fourteenth amendment rights. These errors must not be allowed to stand uncorrected.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Atkins' death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which

undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

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

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

CLAIM V

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

In Florida, the "usual form" of indictment for first-degree murder under sec. 783.04, Fla. Stat. (1987), is to "charg[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968). The absence of felony murder language is of no moment: when a defendant is charged with a killing through premeditated design, he or she is also charged with felony-

murder, and the jury is free to return a verdict of first-degree murder on either theory. Blake v. State, 156 So. 2d 511 (Fla. 1963); Hill v. State, 133 So. 2d 68 (Fla. 1961); Larry v. State, 104 So. 2d 352 (Fla. 1958).

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

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

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

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

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

(R. 1156). The Florida Supreme Court, however, struck the improper aggravating circumstance of a sexual battery, since there had been no proof of that, and remanded for new sentencing. Atkins v. State, 452 So. 2d 529 (Fla. 1984). On resentencing without a jury the court still applied the automatic aggravating circumstances of kidnapping felony-murder. Moreover, the jury had been instructed that once an aggravating circumstance was found, there was, in essence, a presumption of death. Since the

question is how would a reasonable juror have interpreted the instruction (Mills v. Maryland, 108 S. Ct. 1860 (1988)), it cannot be said the jury did not presume the underlying felony, either kidnapping or sexual battery, to be an aggravating circumstance that warranted death. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments.

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

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976)(reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. Zant, supra, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").
>
> In Zant v. Stephens, supra, we upheld a sentence of death imposed pursuant to the

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

The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in Jurek v. Texas, 428 U.S. 262 (1976), establishes this point. The Jurek Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the evidence, the defendant's acts were an unreasonable response to the victim's provocation. Id., at 269. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. Id., at 271-274. But the Court noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of Gregg, supra, and Proffitt, supra:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal

> difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in Texas." 428 U.S., at 270-271 (citations omitted).
>
> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at 876, n. 13, discussing Jurek and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Id. at ____ (emphasis added).

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

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

the application of a statutory aggravating circumstance is automatic. The automatic application of all aggravating circumstance fails to constitutionally narrow the class of death eligible defendants.

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony, and . . . is foreseen," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but armed robbery, for example, is nevertheless an offense "for which the death penalty is plainly excessive." Id. at 1683. With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. Mr. Atkins' conviction and sentence required only a finding that he committed a felony during which a killing occurred, and no finding of intent to kill was necessary. There is no constitutionally valid criteria for distinguishing Mr. Atkins' sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

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

The jury did not find premeditation. "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948). The principle that

an appellate court cannot utilize a basis for review of a conviction different from that which was litigated and determined by the trial court applies with equal force to the penalty phase of a capital proceeding. In Presnell v. Georgia, 439 U.S. 14 (1978), the United States Supreme Court reversed a death sentence where there had been no jury finding of an aggravating circumstance, but the Georgia Supreme Court held on appeal there was sufficient evidence to support a separate aggravating circumstance on the record before it. Citing the above quote from Cole v. Arkansas, the United States Supreme Court reversed, holding:

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

Presnell, 439 U.S. at 18.

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

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

battery, even if the killing was totally accidental, it's still first degree murder under the felony murder theory.

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

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

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

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

(R. 937-939).

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

The Lowenfield violation is demonstrated by the closing argument of the prosecutor during the penalty phase. The State argued that the jury had already found one aggravating

circumstance merely because the defendant was convicted based on the theory of felony murder.

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

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

The imposition of the death sentence based on a felony murder conviction and the statutory aggravating factor that the crime was committed during the course of the robbery improperly allowed the imposition of a presumptive death sentence. The Florida capital sentencing has passed constitutional muster because the consideration of aggravating factors narrows the class of defendants that may receive a death sentence. See Lowenfield, supra; Proffitt. Since Mr. Atkins was convicted of felony murder the application of the aggravating circumstance did not serve this constitutionally mandated function.

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

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves error on direct appeal. The issue was raised but not addressed by this Court.

Moreover, it is clear under Florida law that if an aggravating circumstance is improperly found and any mitigating circumstances are present, as is the case here, a new sentencing proceeding must be held because it is impossible to know the weight given to the improper aggravator by the jury. Elledge, supra. Here, the sentencing judge identified three aggravating circumstances and two mitigating circumstance. Since the death sentence was improperly premised in part upon the in-the-course-of-a-sexual battery or kidnapping aggravating circumstance. Mr. Atkins' death sentence is unconstitutional.

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

CLAIM VI

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

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

Where that finding is clearly erroneous the defendant "is entitled to new resentencing." Id. at 1450.

The sentencing judge in Mr. Atkins' case found two statutory mitigating circumstances, but concluded that no statutory mitigation was present (R. 1163, R. II 5). Finding three aggravating circumstances, the court imposed death (R. 1156-1160). The court's conclusion that only two statutory mitigating circumstances was present, however, is belied by the record.

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

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

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

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

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

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

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

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

(R. 1086).

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

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

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

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

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

(R. 1085).

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

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

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

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

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

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

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

(R. 847-848). Kevin Marler, Mrs. Marler's son, had also known Phillip Atkins and saw him on September 23, 1981. He testified that Mr. Atkins had told Kevin that he'd taken "two Ludes and did a hit of speed" (R. 851) and that he'd been drinking beer (R. 851). Kevin saw Phillip later that evening and observed that, "He just, he was in a daze, you know. He just walked in the house, didn't even say nothing to nobody, hardly." (R. 852). Donna Atkins, Phillip's sister, testified that about 5:00 in the evening of September 23, 1981, her brother was drinking beer and sitting in the living room:

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

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

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

(R. 867).

All of this evidence was presented from first hand witnesses to Phillip Atkins' mental state on the night of the incident and it supported the findings made by Dr. Dee that Phillip was, in fact, under extreme mental or emotional disturbance, under extreme duress and that his capacity to appreciate the criminality of his conduct was substantially impaired. Yet the trial court found only one of these statutory mitigating circumstance. As to non-statutory mitigation, the court simply found none present. As a result, no consideration was given by the court to the fact that Mr. Atkins was intoxicated, under the influence of drugs, and emotionally and mentally disturbed. Apparently the court concluded that the mental or emotional disturbance shown by Mr. Atkins did not arise to the extreme level necessary for the statutory mitigating circumstance to be present. However, the court refused to consider this circumstance as non-statutory mitigation which failed to meet the statute's threshold. The sentencing court's belief that this mitigation could not be considered because it did not arise to the level of statutory mitigation violated the eighth amendment principles embodied in Lockett v. Ohio, 438 U.S. 586 (1978); Skipper v. South Carolina, 106 S. Ct. 1669 (1986); and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

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

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

(R. II 5).

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

Q. Will you tell the jury any unusual events of Phillip Atkins' childhood that you recall, Mr. Atkins?

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

Q. A lot of what?

A. Big dents in his head?

Q. Yes, sir.

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

Q. Yes, sir?

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

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

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

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

And the teacher wrote a note to his mom and said that Phil was immature. Other

words, she said his mind and his age didn't correspond. His mind wasn't up to his age. His mind was more lower than his age was.

So Phil, all along that line, uh, has had problems stumbling as he walks. He, uh, and walk hard. Like you would hear a horse a'coming. And I mentioned to him on different occasions, "Why do you walk that way? Why do you walk so hard?" And he said, "I don't, I don't know, Dad, I don't know why I do it."

So when Phil was fourteen years old, we were living in Michigan. We were living with my wife's brother and his wife. She was a school teacher. And they had two little boys. And I, I'd gotten a job in a auto factory in Michigan and we moved out. And we would go back occasionally and visit them.

So we'd gotten a letter from my wife's brother's wife, the teacher, stating that we should tell Phil the difference between a girl and a boy, but we didn't know what had occurred, we didn't know what was wrong. She never did explain what was wrong. We took for granted, for instance, that it was, uh, little boys playing with each others privacies, is the way we took it. We took upon her recommendation we should tell him, and we did that. And we taught him all along.

So we moved to Florida in 73 and we, uh, picked fruit, oranges, that's the way we were making a living. And the oranges got down low and we got to where we couldn't make nothing in them and we couldn't pay our rent and buy our groceries, so we moved in a tent. And we lived in a tent for six months. And we'd come in from picking oranges and our tent would be blown down and our clothes all wet and stuff. That's the way we lived for six months.

(R. 1106-08).

But probably the saddest fact, overlooked by the court was Phillip Atkins' sexual dysfunction and his futile attempts at treatment. His father explained:

So while we were living in that tent, Phil gotten a job a selling produce with this guy. This is a fruit stand on a corner, you've saw it, out on the corner where you sell avacados, tomatoes, and that sort. And I'd gotten a job as a security officer with Burns Security in Tampa. I was working in Mulberry. And we managed to get enough money to move into a trailer.

So we rented this trailer and moved into it. And Phil was working with the produce and I was working as a security officer. I hurt my back in Mulberry, I stepped in a hole and strained my back and I was on workmen's compensation at that time.

And Phil came in from work and told us that he had quit, but he didn't tell us why or anything like that. So I questioned him, "Why did you quit?" He said, "Well, Dad, he's not paying me enough money." I believe he was making about $15 a day I believe is what he was making.

So I went farther and talked to his boss. And his boss, he hadn't quit, his boss had fired him. And I said, "Why did you fire him?" Because his boss had always said he was the best worker that he'd ever had on his job in selling produce. His boss said, well, he had an affair on the job with a boy, sex.

So I told his mother. I said, "Mom," I said -- that's what I always called her. I said, "Mom, we'd better get something done for Phil." And Phil came to me, and he said "Dad," he said, "I need help. Could you get me help?"

I said, "Phil, we're gonna try and get you help."

I made appointment with the state mental clinic in Plant City. Okay. We taken Phil down there. This lady taken Phil off in a room, she kept him in there between 45 minutes and an hour. And he told her his problems. And she asked him was he in trouble with the law? And he said no. And at that time he was not in trouble with the law, no.

So she told him that he would have to help his self and they couldn't help him, for him to start noticing girls instead of boys.

So they came out of the room and she approached us at the counter. She said, "Mr. and Mrs. Atkins?" She said, "I interviewed Phil." She said, "We can't help Phil, he's going to have to help his self." And we told him to start noticing girls instead of boys. She said, "The only way that you can get help for Phillip, you're gonna have to hire a private psychiatrist."

We told her, we said, "Ma'am, we can not afford a private psychiatrist." I was only drawing $42 a week, that was my income. I said, "We can not afford a psychiatrist."

So she didn't offer. We found out later that the state had clinics, had doctors

to treat mental patients like Phillip, our son, was and pay according to how much salary you have coming in. But she did not tell us that and she did not direct us to that or any other clinic to get help with Phil.

So what could we do? I looked at Mom, Mom looked at me, I said, "Now what we gonna do?" And we turned and walked out. After we had been denied and turned away.

I said, "All I know to do is try to do the best we can with Phil, because I'm no psychiatrist, I'm not in that field, but," I said, "we'll do the best we can with him." Mom said, "They's no need to go and try to get more help for him, because if one state clinic will turn us away, another one will turn us away."

So we tried to help Phil. I talked to, oh, Gee.

Q. What would you do, Mr. Atkins? How would you try to help Phil?

A. I would talk to him. I would encourage him to start to going with girls instead of boys. And I even went far enough with him to tell him, I say, "Phil, if you don't start noticing girls, stay away from little boys, you're going to get in trouble." But he said, "Dad, I can't help myself. I can't control this sexual problem that I've got."

That was our idea of taking him to the clinic, to get help for him, to get him psychiatric help before he did get in trouble. This is what we tried to prevent. But we didn't get the help that we went and sought. And he begged for help, and he didn't get it.

Okay, we were turned away.

Q. Did you ever quit talking to him about it, Mr. Atkins?

A. No, sir. No, sir.

Q Did you ever quit trying to help him?

A. No, sir, we tried ever since then. Day after day I would talk to him. When he would go off, when he'd be a'drinking I would talk to him, I say, Phil -- Phil always kept little boys around him all the time. All the time. He would not play with boys his age. They was always younger kids. And that made me think where the teacher said when he was in the first grade that his mind didn't correspond with his age, he's got the mind of a twelve- or thirteen-year-old boy. And he's got that mind today of that. That's the mind

> he's got. He is not a man of twenty-six years old.

(R. 1108-1112).

This testimony was clearly evidence of an individual that was, at best, developmentally and emotionally delayed with severe psycho-sexual problems for which he had sought help. This was non-statutory mitigation that went unrefuted by the State and yet completely ignored and unconsidered by the court. This is clearly in violation of the spirit and intent of Lockett and Hitchcock.

Despite the presence of clearly mitigating circumstances, the court concluded that only two mitigating circumstances were present, one with "little weight." The Florida Supreme Court has recognized that factors such as poverty, emotional deprivation, lack of parental care, cultural deprivation, and a previous history of good character are mitigating. See, e.g., Perry v. State, 522 So. 2d 817 (Fla. 1988)(non-violent background is mitigating).

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

> In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstance. See Okla. State., Tit. 21, Section 701.10 (1980). Nonetheless, in sentencing the petitioner (which occurred about one month before Lockett was decided), the judge remarked that he could not "in following the law. . . consider the fact of this young man's violent background." App. 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in Lockett compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S., at 605, 98 S. Ct., at 2965.
>
> I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation

> of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

455 U.S. at 119-20. Justice O'Connor's opinion makes clear that the sentencer is entitled to determine the weight due a particular mitigating circumstance; however, the sentencer may not refuse to consider that circumstance as a mitigating factor.

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

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

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

The substantial denial of appellate effective assistance of counsel occurred by the failure to present this issue on appeal. This claim is now properly before this Court under this Court's habeas corpus authority. The issue is one involving violations of classic principles of Florida law. See Lockett, Eddings, supra. The issue virtually "leap[s] out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). It is clearly one in which the Court need only be directed to the issue. No elaborate presentation was required to establish such per se error. The Court, properly directed, would have done its duty as established from longstanding Florida and eighth amendment standards.

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

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

CLAIM VII

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

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

> told that the state must establish the existence of one or more aggravating

> circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

Accord State v. Dixon, 283 So. 2d 1 (Fla. 1973). This Court, in fact, held in Arango that shifting the burden to the defendant to establish that the mitigating circumstances outweigh the aggravating circumstances would conflict with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as with Dixon. Mr. Atkins' sentencing proceeding did not follow this straightforward due process and eighth amendment requirement. Rather, Mr. Atkins' sentencing jury was specifically and repeatedly instructed that Mr. Atkins bore the burden of proof on the issue of whether he should live or die.

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

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

(R. 1037).

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

> [The legislature has] made a list of things that you are to consider in determining

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

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

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

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

(R. 1144) and to emphasize it again:

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

(R. 1145).

The instructions, and the standard upon which the court based its own determination, violated the eighth amendment, Arango and Dixon, supra, and Mullaney v. Wilbur, 421 U.S. 684 (1975). The burden of proof was shifted to Mr. Atkins on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Atkins' due process rights under Mullaney, supra. See also, Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Atkins' rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See, Jackson, supra; Arango v. State, 411 So. 2d 172 (Fla. 1982); State v. Dixon, 383 So. 2d 1 (Fla. 1973); see also, Arango v. Wainwright, 716 F.2d 1353, 1354 n.1 (11th Cir. 1983).

Where a jury recommends a life sentence, the jury recommendation may not be overridden if "valid mitigating factors are discernible from the record." Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987). "When there is some reasonable basis for the jury's recommendation of life, clearly it takes more than a difference of opinion for the judge to override that recommendation." Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988). Thus under Florida law the proper analysis is not whether the mitigation outweighs the aggravation, but whether despite the presence of aggravation, the mitigation present affords a reasonable basis for the exercise of mercy and the imposition of a life sentence. The death penalty was intended "to be applied 'to only the most aggravated and unmitigated of most serious crimes.'" Holsworth, supra at 355, quoting State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). The instructions in this case provided erroneous and inaccurate information which placed a non-existent burden of proof upon Mr. Atkins and applied a presumption of death. The jury should have been instructed that the question for it to resolve was whether after weighing the aggravation against the mitigation, it found the aggravation outweighed the mitigation to such an extent that a death sentence should be imposed.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Atkins' trial and death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.[5]

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[5]This error can only be held to be harmless where it is clear that if the jury recommended life, that life recommendation would have properly been overridden. Hall v. State, ___ So. 2d ___, No. 73,029 (Fla., decided March 9, 1989).

Substantial denial of effective assistance of counsel on appeal brings this claim properly before this Court under this Court's habeas corpus authority. The issue is one involving violations of classic principles of Florida law. See Arango, Dixon, Mullaney, supra. An issue such as this which "leap[s] out upon even a casual reading of transcript" Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987) is clearly one in which the Court need only be directed to the issue for resolution. No elaborate presentation was required to establish such per se error. This Court, properly directed, would have done its duty as established from longstanding Florida and federal constitutional standards.

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

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

CLAIM VIII

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

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

> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause--that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif.L.Rev. 839, 857-60 (1969).

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

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

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

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

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

> This court, in Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) stated:

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
>
> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

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

Here the prosecution introduced hearsay evidence of Mr. Atkins' mental illness, i.e., pedophilia, to aggravate the crime. At sentencing Officer Yevchak testified that he had seized a "list of names" from Mr. Atkins (R. 1042) that had 45 male names on it. When he confronted Mr. Atkins about it in the early morning hours of the 24th, Mr. Atkins stated that these were all males with whom he'd had sexual encounters, "some as young as ten years old" (R. 1044-1046). Counsel had attempted to suppress this evidence as having been illegally seized (R. 34-35).

Presumably this was evidence brought in to rebut the mitigating factor of no significant criminal history but the prejudice inherent is obvious. The state focused on Mr. Atkins' sexual dysfunction consistently throughout the trial, even though it was known before trial that the sexual batteries could not be proven. Even after the court had directed verdicts on the two sexual batteries, the state continued to argue them and to emphasize them throughout closing and at sentencing.

Also, over objection by the defense (R. 1056), the State produced hearsay testimony of Officer Joseph Keil who testified as to Mr. Atkins' alleged sexual contact with two minor boys, Frank and Raymond Grubba. The court over objection permitted this testimony although there is no indication of why the

testimony was submitted in the first place. Clearly this was impermissible evidence under the Proffitt, supra, Elledge, supra, line of cases.

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

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

The substantial denial of appellate effective assistance of counsel brings this claim properly before this Court under this Court's habeas corpus jurisdiction. The issue is one involving violations of classic principles of Florida law. See Proffitt and Elledge, supra. This is an issue which "leap[s] out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). It is clearly one in which the Court need only be directed to the issue. No elaborate presentation was required to establish such per se error. The Court, properly directed, would have done its duty as established from longstanding Florida and federal constitutional standards.

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

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

CLAIM IX

THE CORPUS DELICTI OF KIDNAPPING WAS NOT PROVED BY SUBSTANTIAL EVIDENCE AS REQUIRED IN ORDER TO SUPPORT THE ADMISSION OF MR. ATKINS' STATEMENT FOR THE PURPOSE OF PROVING KIDNAPPING. THE ADMISSION OF THE STATEMENT TO PROVE KIDNAPPING VIOLATED MR. ATKINS' RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, FOURTEENTH AND EIGHTH AMENDMENTS. THE FAILURE TO RAISE THIS CLAIM ON DIRECT APPEAL DEPRIVED MR. ATKINS OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The State did not prove by substantial evidence the corpus delicti for the charge of kidnapping and the trial court improperly shifted the burden of proof for corpus delicti required to admit Mr. Atkins' statement for the purpose of proving kidnapping. The admission of the statement for the purposes of proving kidnapping violated Mr. Atkins' right to due process of law and equal protection, as well as rights under the fifth, fourteenth and eighth amendments.

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

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

(R. 674).

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

Under the court's analysis the burden of proving that there was parental consent was placed on Mr. Atkins even before the State had concluded its case in chief and consequently, before Mr. Atkins could present evidence in his own behalf. This certainly violated Mullaney v. Wilbur, 421 U.S. 684 (1975). Due to the court's unconstitutional shifting of the burden of proving the corpus delicti for the crime of kidnapping, the confession was improperly admitted for the purpose of proving the charge of kidnapping. Notwithstanding the trial judge shifting of the burden of proof on corpus delicti, the State did not carry its burden of proof on the corpus delicti for the charge of kidnapping.

Prior to the admission of Mr. Atkins' confession for the purpose of proving kidnapping, the State had the burden to bring forth 'substantial evidence' tending to show the commission of the charged crime, State v. Allen, 335 So. 2d 823 (1976). The term "corpus delicti" has been regularly used in appellate decisions to mean the legal elements necessary to show that a crime was committed. State v. Allen. As to each crime -- with

the exception of murder -- this requirement is the same as showing the existence of every element of the particular offense. Ruiz v. State, 388 So. 2d 610 (Fla. 3d DCA 1980)(rev. den. 1981) 392 So. 2d 1380. The State had the burden to show the commission of the charged crime. It must show at least the existence of each element of the crime. State v. Allen, 335 So. 2d 823 (1976).

Under the Florida kidnapping statute, Fla. Stat. Ch. 787.01 the State must prove intent beyond a reasonable doubt. The State must prove the person was held against his will with the intent to either hold for ransom; facilitate commission of any felony; inflict bodily harm upon the victim; to terrorize the victim or to interfere with the performance of any government function.

The State did not produce one scintilla of evidence that Mr. Atkins had the requisite specific intent before the admission into evidence of Mr. Atkins' statement. It is clear that there was not substantial evidence of this key element of the corpus delicti.

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

of similar circumstances that could be inferred as showing intent. The State produced no witness who testified that Mr. Atkins had planned to hold the victim against his will in order to inflict bodily harm.

All the State produced prior to its admission of the taped statement was that Mr. Atkins and the victim were together behind the Taco Bell and that the victim was injured. The State did not bring forth any information that showed that Mr. Atkins inflicted the injury on the victim. In fact, the only evidence produced was that the victim had fallen down. The State only produced evidence that the victim was found at the train yard. Prior to the admission of the statement there was no evidence put forth that Mr. Atkins in any way inflicted bodily harm on the victim, much less that he inflicted bodily harm on the victim with intent. The evidence brought forth actually showed that the injuries to the victim could have been caused by an automobile accident (R. 483, 609). The State only showed that Mr. Atkins was with the victim. The record is devoid of any evidence as to the time the injuries were inflicted upon the victim. Circumstantial evidence that Mr. Atkins was with the victim does not prove by substantial evidence that he had intent to commit bodily harm.

It is clear that the State did not prove by substantial evidence that the victim was abducted with the intent to commit sexual battery. The only evidence of sexual battery appears in Mr. Atkins' statement. The State had no physical evidence that a sexual battery had occurred. Mr. Atkins was acquitted of the two sexual battery charges.

Prior to the admission of the statement there was no substantial evidence that Mr. Atkins had held the victim against his will, much less showed by substantial evidence that he had the requisite intent to commit a felony or cause bodily harm. Clearly the State did not prove by substantial evidence the

corpus delicti of the kidnapping. It was error for the court to admit Mr. Atkins' statement without proof by substantial evidence that all the elements of kidnapping existed.

The State also did not prove by substantial evidence that there was no consent by the parents of the victim for Mr. Atkins to take the victim anywhere. The record shows that the parents had never objected to the victim being with Mr. Atkins in the past. The State did not prove by substantial evidence the intent or consent elements of kidnapping prior to the admission of Mr. Atkins' statement into evidence. The State was required to prove the existence of every element of the crime in order to prove the crime charged occurred. Clearly it was error for the judge to admit the statement for the purpose of proving kidnapping, and to require Mr. Atkins' to prove the absence of an element of the crime; parental consent.

Mr. Atkins' conviction and sentence for kidnapping are unconstitutional. Mr. Atkins' sentence of death is invalid due to the unconstitutional use of the kidnapping conviction as an aggravating factor.

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

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

Cir. 1987). It is clearly one in which the Court need only be directed to the issue. No elaborate presentation was required to establish the error. The Court, properly directed, would have done its duty as established from longstanding Florida and federal constitutional standards.

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

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

CLAIM X

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

During the course of the trial, the state and the court informed the jurors chosen to sit on Mr. Atkins' trial that sympathy was an improper factor for their consideration.

During voir dire, Mr. Pickard instructed the jury as to things they should not consider:

> Number one is sympathy or emotion. It's difficult . . . it's easy for us to say that but sometimes difficult for you to do is not to have some sort of sympathy . . .

(R. 260).

The court then instructed the jury:

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

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

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

(R. 1023)(emphasis added).

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

> The clear impact of the [prosecutor's statement's] is that a sense of mercy should not dissuade one from punishing criminals to the maximum extent possible. This position on mercy is diametrically opposed to the Georgia death penalty statute, which directs that "the jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant." O.C.G.A. Section 17-10-2(c)(Michie 1982). Thus, as we held in Drake, the content of the [prosecutor's closing] is "fundamentally opposed to current death penalty jurisprudence." 762 F.2d at 1460. Indeed, the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976)(striking down North Carolina's mandatory death penalty statute for the reason, inter alia, that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death"); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)(striking down Ohio's death penalty statute, which allowed consideration only of certain mitigating circumstances, on the grounds that the sentencer may not "be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death")(emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play

> for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The [prosecutor's closing] in strongly suggesting otherwise, misrepresents this important legal principle.

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

Requesting the jury to dispel any sympathy they may have towards the defendant undermined the jury's ability to reliably weigh and evaluate mitigating evidence. Parks v. Brown, No. 86-1400 slip op., ___ F.2d ___ (10th Cir. Oct. 28, 1988)(en banc). The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition to disregard the consideration of sympathy improperly suggests to "the jury that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring).

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

> The capital defendant's constitutional right to present and have the jury consider mitigating evidence during the capital phase of the trial is very broad. The Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
>
> The sentencer must give "individualized" consideration to the mitigating circumstances surrounding the defendant and the crime, Brown, 479 U.S. at 541; Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddings, 455 U.S. at 114. See also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).

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

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

In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Court struck down mandatory death sentences as incompatible with the required individualized treatment of defendants. A plurality of the Court stated that mandatory death penalties treated defendants "not as uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." Id. at 304. The Court held that "the fundamental respect for humanity underlying the Eight Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. The Court explained that mitigating evidence is allowed during the sentencing phase of capital trial in order to provide for the consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind." Id.

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

"humane and sensible to the uniqueness of the individual." Id. at 110.

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

In Skipper v. South Carolina, 476 U.S. 1 (1986), the trial court had precluded the defendant from introducing evidence of his good behavior while in prison awaiting trial. The Court held that the petitioner had a constitutional right to introduce the evidence, even though the evidence did not relate to his culpability for the crime. Id. at 4-5. The Court found that excluding the evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Id. at 8.

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

Without placing an undue technical emphasis on definitions, it seems to us that sympathy is likely to be perceived by a reasonable juror as an essential or important ingredient of, if not a synonym for, "mercy,"

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

Parks v. Brown, No. 86-1400, slip op. at 20-26.

The remarks by the prosecutor during voir dire coupled with the court's instruction may have served to constrain the jury in their evaluation of mitigating factors. Under Mills v. Maryland, 108 S. Ct. 1860 (1978), the question is whether reasonable jurors may have understood what they were told as precluding consideration of mercy or sympathy towards Mr. Atkins.

Certainly, here reasonable jurors could have understood the instructions as precluding them from allowing the natural tendencies of human sympathy from entering into their determination of whether any aspect of Mr. Atkins' character required the imposition of a sentence other than death.

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

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

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

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this

issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Atkins of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM XI

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

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

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

> MR. PICKARD: Judge, Jack is half right. I've done some research on this, too, because the issue concerned me, also, that the law is fairly clear that you cannot have a conviction of an individual based solely on his confession that he committed a crime without some proof that the crime occurred.
>
> I guess analogizing like somebody walking into the police station and saying, "I killed X out there," and the police never can find the body or don't know who X is, they can't charge him with murder.
>
> In this case, there has not been, and I agree there will not be, any physical evidence that a sexual battery occurred. The pathologist saw no physical evidence of that. The lab tests were all either inconclusive or

> negative as far as that; and even jumping ahead further, when we get to the point of the State resting it's case, it's in all honesty the State's feeling the Court would probably have to direct a verdict on the sexual battery counts simply because I do not think I can prove the crime was committed independently of the confession.

(R. 662-663).

If the State had no evidence to present to the jury to prove the elements of sexual battery, there can be no valid reason for allowing inflammatory accusations to be inserted into a capital trial. The insertion of baseless accusations that serious crimes had been committed surely distracted the jury from objectively determining Mr. Atkins' guilt or innocence of murder and kidnapping and more importantly, whether Mr. Atkins should live or die.

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

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

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

(R. 1126-1127).

The State should not be free to sidetrack a court and jury with baseless inflammatory charges. This is particularly so in a trial with the possibility of a death sentence. Mr. Atkins was forced to defend himself against two sexual battery charges for which the State admittedly had no proof. This happened during the legal proceeding that not only decided his guilt or innocence but determined whether he should live or die. There must be some limitation to prosecutorial discretion.

As evidenced by the claims in this pleading and the record as a whole, Mr. Atkins was denied his right to a fundamentally fair trial as demanded by due process. Clearly it was prosecutorial misconduct for the State to charge two life felonies of which there was admittedly no proof.

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

Counsel for Mr. Atkins preserved this issue. An objection and motion for a mistrial were made because the State had brought these baseless inflammatory charges (R. 863). Counsel also moved for a new trial because the inclusion of the unsubstantiated

sexual battery charges had infected the jury's guilt phase deliberations (R. 1222). However, counsel then failed to raise this issue on appeal. This was clearly ineffective assistane of appellate counsel for which no tactical reason can be ascribed. Particularly where, as here, trial counsel and appellate counsel were one and the same. The carefully preserved trial issue was ignored on direct appeal.

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

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

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

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

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Phillip Alexander Atkins, through counsel, respectfully urges that the Court issue its writ of habeas corpus and grant him the relief he seeks and a stay of execution. Since this action presents certain questions of fact, Mr. Atkins requests that the Court relinquish jurisdiction to the trial court for the resolution of evidentiary factual questions regarding appellate counsel's decision making process or lack thereof. Mr. Atkins alternatively urges that the Court grant him a new appeal for all of the reasons stated herein, and that the Court grant all other and further relief which the Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Hardy Pickard, Assistant State Attorney, Office of

the State Attorney, Post Office Box 9000 - Drawer SA, Bartow, Florida 33830, and to Robert J. Landry, Assistant Attorney General, Park Trammel Building, 8th Floor, 1313 Tampa Street, Tampa, Florida 33602, this 20th day of March, 1989.

Attorney