IN THE SUPREME COURT OF FLORIDA

PHILLIP ATKINS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 73,910

EMERGENCY PLEADING; DEATH WARRANT SIGNED; EXECUTION IMMINENT.

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

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

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

> I. THE TRIAL JUDGE SHOULD HAVE FOUND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES.
>
> II. THE IMPOSITION OF CAPITAL PUNISHMENT FOR FELONY-MURDER CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.
>
> III. THE FACT THAT A MURDER WAS COMMITTED DURING THE COURSE OF A FELONY MAY NOT BE CONSIDERED AS AN AGGRAVATING CIRCUMSTANCE FOR PUNISHMENT PURPOSES WHEN THE BASIS OF THE CONVICTION IS OR MAY BE THE FELONY-MURDER RULE.
>
> IV. THE TRIAL JUDGE IMPROPERLY FOUND AS TWO SEPARATE AGGRAVATING CIRCUMSTANCES THE FACT THAT THE MURDER WAS COMMITTED IN THE COURSE OF KIDNAPPING AND SEXUAL BATTERY.
>
> V. THERE WAS INSUFFICIENT EVIDENCE FOR THE TRIAL JUDGE TO MAKE A FINDING THAT THE MURDER WAS COMMITTED WHILE DEFENDANT WAS ENGAGED IN THE COMMISSION OF A SEXUAL BATTERY.
>
> VI. THERE WAS INSUFFICIENT EVIDENCE FOR THE TRIAL JUDGE TO FIND THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

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

> I. IF A DEFENDANT MAKES INCRIMINATING STATEMENTS AND CONSENTS TO SEARCHES SUBSEQUENT TO AN UNLAWFUL ARREST, MADE WITHOUT PROBABLE CAUSE, SHOULD THE STATEMENTS

AND ANY EVIDENCE SEIZED DURING THE SEARCHES, BE SUPPRESSED AS "FRUIT OF THE POISONED TREE"?

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

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

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

The Governor thereafter signed a warrant of execution and on February 22, 1989, Atkins filed a motion for post-conviction relief pursuant to Rule 3.850, Fla. R. Crim. P., raising the following claims:

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.

CLAIM II

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

CLAIM III

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

CLAIM IV

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.

CLAIM V

THE TRIAL COURT'S FAILURE TO CONVENE A NEW JURY TO AID IN RESENTENCING DENIED PHILLIP ATKINS HIS FOURTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM VI

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

CLAIM VII

MR. ATKINS' SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S.CT. 2633 (1985), ADAMS V. DUGGER, 816 F.2D 1443 (11TH CIR. 1987), AND MANN V. DUGGER, 844 F.2D 1446 (11TH CIR. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VIII

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.

CLAIM IX

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

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.

CLAIM XI

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

CLAIM XII

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, EQUAL PROTECTION AS WELL AS HIS RIGHTS UNDER THE FOURTH, FIFTH, FOURTEENTH AND EIGHTH AMENDMENTS.

CLAIM XIII

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.

CLAIM XIV

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

CLAIM XV

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

CLAIM XVI

THE STATE'S ATTEMPT TO TRY MR. ATKINS ON TWO COUNTS OF SEXUAL BATTERY WHEN PROSECUTION 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 trial court denied relief and Atkins now appeals.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING 3.850 RELIEF.

ARGUMENT

As a preliminary matter, the state first calls the court's attention to the fact that many of Atkins' asserted bases for relief may not be considered via collateral motion because they are matters which either were considered or could have been raised on direct appeal. Since 3.850 is not a substitute for, nor does it constitute a second appeal, consideration of such issues is now precluded. See Raulerson v. State, 420 So.2d 567 (Fla. 1982); Booker v. State, 441 So.2d 148 (Fla. 1983); Palmes v. State, 425 So.2d 4 (Fla. 1983); Hall v. State, 420 So.2d 872 (Fla. 1982); Bundy v. State, 490 So.2d 1258 (Fla. 1986).

Moreover, Atkins' failure to properly raise the issue at trial and on appeal constitutes a procedural default precluding collateral review. Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977); Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 397 (1986); Smith v. Murray, 477 U.S. 527, 91 L.Ed.2d 434 (1986); Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783 (1982).

Thus, Atkins is precluded from litigating most of the issues now urged in his motion for post-conviction relief and the trial court correctly refused to grant relief.

Thus, issues I, II, IV, V, VI, VII, VIII, X, XI, XII, XIII, XIV, XV, XVI are precluded from collateral litigation.

Appellee would respectfully request this Court to declare affirmatively that it will not consider the substance of claims which are improperly urged via Rule 3.850 when such issues either were considered or would have and/or should have been raised on direct appeal and are thus now precluded from collateral attack.

If this Court continues to articulate its enforcement of procedural default policy the federal courts will respect the enforcement of that policy. See, e.g., Hall v. Wainwright, 733 F.2d 766, at 777 (11th Cir. 1984). On the other hand, if the Court chooses instead to reach the merits of claims defaulted, federal courts will feel free to substitute their judgment for that of this Court and may find a constitutional violation where this Court finds none. County Court of Ulster County v. Allen, 442 U.S. 140, 60 L.Ed.2d 777 (1979). Similarly, ambiguous statements from the state appellate courts will result in the federal courts' refusal to rely on the state's legitimate procedural default rule policy. See Harris v. Reed, __ U.S. __, __ L.Ed.2d __, 44 Cr.L. 3120 (Case No. 87-5677, Feb. 22, 1989).

This Court in the past has consistently announced that many of the particular claims urged by the petitioner below need not be considered collaterally. For example, claims of burden-shifting instructions are barred from collateral review. Clark v. State, 533 So.2d 1144 (Fla. 1988); Jones v. Dugger, 533 So.2d 290, 293 (Fla. 1988).

Failure to raise the issue of Caldwell v. Mississippi on direct appeal precludes collateral consideration of it. Copeland

v. Wainwright, 505 So.2d 425 (Fla. 1987); Dugger v. Adams, __ U.S. __, __ L.Ed.2d __, 44 Cr.L. 3162 (Case No. 87-121, Feb. 28, 1989). Because of the extreme importance of the state's procedural default rule policy, the state will not address the merits of Atkins' claims which have been procedurally defaulted.

Appellant is further procedurally barred from raising some issues in his 3.850 motion because they were previously litigated and resolved on direct appeal. We note that in the opinion affirming appellant's judgment, the Court rejected the contention "that he could not make a knowing and intelligent waiver." 452 So.2d at 531-532.

Similarly, this Court approved the trial court's finding of heinous, atrocious or cruel. 497 So.2d 1200, 1201-1203. Appellant may not attempt to litigate or relitigate the claim collaterally either by a similar or different argument. See, Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Suarez v. Dugger, 527 So.2d 190 (Fla. 1988).

Appellant's claim that the death sentence rests on an unconstitutional automatic aggravating circumstance is defaulted for failure to raise on direct appeal. Bertolotti v. State, 534 So.2d 386, 387 fn. 3 (Fla. 1988); Porter v. Wainwright, 805 F.2d 930, 942 (11th Cir. 1986).

As to the issue raised in ground one below - that the jury verdict is void because there is no way of knowing whether the verdict was based on a constitutionally permissible basis and there is no way of determining whether there was juror unanimity - the trial court in rejecting the claim opined that:

> "This claim was raised on appeal and the judgment was affirmed by the Florida Supreme Court. Atkins v. State, (Atkins I), 452 So.2d 529 (Fla. 1984). Therefore, the claim is not reviewable by this Court."

To the extent the trial judge meant that appellant's Stromberg v. California, 283 U.S. 359 (1931) claim and jury unanimity arguments were raised on direct appeal, the court erred; those arguments were not advanced on direct appeal. But, a trial court's ruling must be sustained if it is correct for any reason. See Smith v. Phillips, 455 U.S. 209, 215, 71 L.Ed.2d 78, 85 (1982) fn. 6; Trenary v. State, 423 So.2d 458 (Fla. 2d DCA 1982); Grant v. State, 474 So.2d 259 (Fla. 1st DCA 1985); Stuart v. State, 360 So.2d 406 (Fla. 1978); Cohen v. Mohawk, Inc., 137 So.2d 222 (Fla. 1962).

The trial court was correct in the denial of relief because the claims could have been and/or should have been raised on direct appeal. Thus, it was not reviewable collaterally. See cases cited, supra, at page 6.

Appellant claimed in issue VI, below, that the aggravating factor of heinous, atrocious or cruel was applied in violation of Maynard v. Cartwright, __ U.S. __, 100 L.Ed.2d 372 (1988). This issue may not be raised or relitigated collaterally as it is one for direct appeal. Atkins' contends that this is new law satisfying the requirements of Witt v. State, 387 So.2d 922 (Fla. 1980), but he is mistaken; Maynard is simply an application of Godfrey v. Georgia, 466 U.S. 420, 64 L.Ed.2d 398 (1980), which

approved Proffitt v. Wainwright, 428 U.S. 272, 49 L.Ed.2d 913 (1976). See Daugherty v. Dugger, 699 F.Supp. 1517, 1520, fn. 3 (M.D. Fla. 1988).

The ineffective assistance of trial counsel claim -

The lower court also correctly denied relief summarily on the claim of ineffective assistance of counsel.

In claim III below, appellant contended that counsel was ineffective for failing to investigate, develop and present a defense based on Atkins' abnormal mental condition that allegedly made it impossible for him to have the requisite specific intent.

As the prosecutor correctly and ably responded in his motion to dismiss the motion for post-conviction relief, the record shows that appellant was examined by three local experts prior to trial: Dr. Dee, Dr. Kremper and Dr. Kaplan, and all three determined that Atkins was competent and sane at the time of the offense. See Exhibits A, B, and C, attached to State's Motion to Dismiss.

Dr. Kremper's report, Exhibit B, especially is supportive of the trial court's rejection of the motion for post-conviction relief where he states:

> Based on this examiner's interview with Mr. Atkins, Mr. Atkins' parents and Detective Nipper of the Lakeland Police Department, it is likely Mr. Atkins was sane at the time of the alleged offense and is considered responsible for his behavior in a legal sense, Mr. Atkins' use of drugs and alcohol were not thought sufficient to impair his judgment to the extent of causing him to lose his ability to understand what he was doing and the consequences of his actions with

reference to right and wrong. Mr. Atkins was able to provide a consistent, logical, detailed accounting of his behavior before and during the incident, though claims amnesia for some events such as signing waivers after being picked up by the police.

According to Mr. Atkins, he performed oral sex on Antonio Costello and had anal sex with him. Afterwards, Antonio Costello went to look for a haunted house, ran away from Mr. Atkins and refused to go home. Antonio Costello threatened telling his parents what happened unless Mr. Atkins consented to go look for the haunted house. Mr. Atkins admitted feeling afraid Antonio Costello's parents would find out what happened and would call the police. After being told "I will tell if we don't go look", Mr. Atkins recalls getting a pipe from his car, running after Antonio Costello and striking him, causing him to fall. He continued to strike Antonio Costello.

Mr. Atkins reported feeling mad and angry with Antonio Costello when he picked up the iron bar. Shortly after striking Antonio Costello, Mr. Atkins reported a pickup truck drove up. He thought he could not let the people in the truck see somebody lying there, so he picked up Costello and took him back to his car. When the individuals in the vehicle inquired as to what the problem was, he told them he was taking the boy to the hospital. He reported trying to figure out what to do with Mr. Costello, thinking he was dead. He finally decided to just sit him out of the car. Afterwards, he went to a friend's house who told him his parents were looking for him. He mentions going in his friend's house and smoking a joint. He offered he wanted to tell his friend what happened, though didn't. He then went home where he was arrested.

* * *

3. Mr. Atkins is considered sane at the time of the offense. He gives evidence of understanding the nature and quality of his acts at the time of the offense and the consequence of his acts. Though alcohol and

> substance abuse may have compromised his judgment somewhat, it is likely his behavior would not have been altered appreciably were he not under their influence.

To the extent that appellant criticizes his trial counsel by reliance on the dicta in Gurganis v. State, 451 So.2d 817 (Fla. 1984), suffice it to say that trial counsel cannot be deemed ineffective when this very court ruled on January 5, 1989, that evidence of an abnormal mental condition not constituting legal insanity was not admissible for proving the accused could not or did not entertain the specific intent or state of mind essential to prove the offense. Chestnut v. State, __ So.2d __, 14 F.L.W. 9 (Fla. 1989).

Trial counsel was not deficient in attempting to persuade the jury that appellant may have been guilty only of a lesser degree of homicide (R 834-934; R 959-994).

In point IX of his claims raised below appellant urged that his trial counsel rendered ineffective assistance at the guilt and penalty phases. The trial court correctly denied relief.

(a) Guilt Phase - The failure to present an insanity defense -

As urged in the previous section, trial counsel cannot be deemed to have been ineffective in light of the evaluations by Dr. Kremper and Dr. Kaplan that Atkins was not insane. Atkins is not entitled to relief merely on the basis that he now has found a different expert to provide an alternative opinion. See Booker v. State, 431 So.2d 756, 757 (Fla. 1982).

Appellant argues that counsel was deficient in failing to argue that the state had failed to prove the corpus delicti of the kidnapping charge. Whatever may be said as to whether counsel's performance was deficient, appellant cannot meet the prejudice prong of Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984), since this Court approved the trial court's finding as an aggravating factor that the murder was committed while the defendant was engaged in the crime of kidnapping. Atkins v. State, 497 So.2d 1200, 1201 (Fla. 1986).

(b) Penalty Phase -

Significantly, trial counsel did present to the jury evidence regarding the defendant's personality problems through witnesses Dr. Henry Dee (R 1057-1096), appellant's father, Don Atkins (R 1106-1111) and appellant Atkins (R 1112-1119). The criticism that trial counsel did not add the cumulative testimony of current counsel's on-call expert does not require either the granting of relief or even the conducting of an evidentiary hearing. See Glock v. Dugger, __ So.2d __, 14 F.L.W. 29, 30 (Fla., Jan. 12, 1989).

Moreover, trial counsel did not fail to present to the jury appellant's abnormal sexual problems. Witness Dr. Dee testified ad nauseam about Philip Atkins (R 1057-1096). That collateral counsel now has dug up yet another expert does not demonstrate that more is better. See Woods v. State, 531 So.2d 79, 82 (Fla. 1988):

> "The jury, however, heard about Woods' problems, and the testimony now advanced, while possibly more detailed than that presented at sentencing, is essentially, just cumulative to the prior testimony. More is not necessarily better."

And see Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987); Cape v. Francis, 741 F.2d 1287, 1301 (11th Cir. 1984); Boykins v. Wainwright, 737 F.2d 1539, 1543 (11th Cir. 1984) (failure to elicit additional testimony from witnesses did not lead to breakdown of adversarial system supporting a claim of ineffective assistance of counsel); Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986) (the fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient); Harris v. State, 528 So.2d 361 (Fla. 1988); Stone v. State, 481 So.2d 478 (Fla. 1985).

Appellant also complains that counsel failed to utilize an expert in the field of intoxicants. The fact remains that trial counsel presented evidence pertaining to appellant's use of intoxicants through appellant's family members, the appellant and Dr. Dee. As in Lambrix v. State, 534 So.2d 1151 (Fla. 1988), the additional expert witness would not have made a difference: the trial court found in its sentencing order that the defendant's ability to conform his conduct to the requirements of law was substantially impaired and still concluded, and this Court agreed, that death was the appropriate sanction. Atkins v. State, 497 So.2d 1200, 1203 (Fla. 1986).

Appellant's sexual difficulties were presented to the jury (R 1106-1113).

The trial court correctly determined that relief should be denied. Despite trial counsel's apparent willingness via affidavit to issue a mea culpa (and thereby continue the effective representation of his former client), the record demonstrates that appellant was examined by three experts prior to trial. Dr. Kaplan thought Atkins was sane at the time of the offense; Dr. Kremper added that it was not likely the accused's behavior would have been altered appreciably were he not under the influence of alcohol and drugs; Dr. Dee concluded that the defendant was not prevented by reason of his mental illness to appreciate that the nature of his act was wrong in the sexual offense but that it was not clear whether the defendant was able to consider its consequences. Failure to utilize even the most favorable report which was inconclusive at best cannot be deemed a serious deficiency. Defense counsel had attempted to pursue a "diminished capacity" defense but the trial court ruled that they were bound by the M. Naghten standard. And this Court has most recently reconfirmed that evidence of a defendant's abnormal mental condition is not admissible to negate specific intent unless it rises to the level of insanity. Chestnut v. State, __ So.2d __, 14 F.L.W. 9 (Fla. Jan. 5, 1989).

Moreover, even had trial counsel sought to use Dr. Dee additionally at the penalty phase, as the trial court found, the state could have countered that with experts like Dr. Kaplan and

Dr. Kremper or others. Atkins was better off with the state not being given the opportunity to rebut the defense claim with psychiatric testimony. Cf. Strickland v. Washington, 466 U.S. 668, at 700, 80 L.Ed.2d 674, at 701. Thus, Atkins fails to meet either the deficiency prong or the prejudice prong of Strickland.

Appellant argued in a rehearing motion below that the trial court erred in its analysis rejecting the ineffective counsel claim because Chestnut v. State, 14 F.L.W. 9 (Fla. 1989) was a diminished capacity claim whereas Atkins involves an intoxication defense. First of all, claim III in Atkins Rule 3.850 motion reads:

> "Mr. Atkins' Rights Under The Fifth, Sixth, Eighth And Fourteenth Amendments Were Denied When Defense Counsel Rendered Ineffective Assistance Of Counsel By Failing To Investigate, Develop And To Present A Defense At Trial Based On Mr. Atkins' Abnormal Mental Condition That Made It Impossible For Him To Have The Requisite Specific Intent."
>
> (p. 18 of Motion To Vacate)

This appears to be the substantial equivalent of the question presented Chestnut, supra.

> "Is Evidence Of An Abnormal Mental Condition Not Constituting Legal Insanity Admissible For The Purpose Of Proving Either That The Accused Could Not Or Did Not Entertain The Specific Intent Or State Of Mind Essential To Proof Of The Offense, In Order To Determine Whether The Crime Charged, Or A Lesser Degree Thereof, Was In Fact Committed?"
>
> (14 F.L.W. at 10)

In Chestnut, this Court decided to "answer the question in the negative."

Since appellant presented the same issue below as was presented in Chestnut, the lower court did not err in relying on that case.

Moreover, quite apart from Dr. Dee, trial counsel cannot be deemed deficient for failing to pursue present counsel's suggestions in light of the report of Dr. Kaplan (Exhibit A to State's Motion To Dismiss Defendant's Motion for Post-Conviction Relief, p.5) wherein he reports:

> "A. Mr. Atkins' statement to the police following his arrest and his statement to the examiner during the interview indicate that he was aware of his actions and that he was not suffering from any significant psycho-pathological behaviors which would have resulted in his being insane.
>
> B. Offense report statements by witnesses who observed the suspect at the time of the offense indicate that the suspect was aware of his actions and was able to communicate logically.
>
> C. Although Mr. Atkins indicated that he drank several quarts of alcohol and consumed two Quaaludes prior to the offense, the use of these substances did not prevent him from functioning in a sane manner. At worst, these substances may have somewhat impaired his judgment so that he did not pursue options to the behaviors he displayed.

and the report of Dr. Kremper (Exhibit B to State's Motion to Dismiss, pp. 4 & 5) which has been quoted from at page 11 of this brief.

Even if Atkins did not have the fully formed conscious purpose to kill as current counsel contends, that would not establish that he lacked the intent to commit a sexual battery or

to inflict bodily harm on the victim as part of the kidnapping to support a felony murder (R 1014). Cf. Buford v. State, 492 So.2d 355, 359 (Fla. 1986) (ample evidence to support a finding of guilty under a felony murder theory even if the jury would have found that he was too intoxicated to have had premeditated intent to kill).

Moreover, the jury was instructed on voluntariness intoxication as a potential defense to rebut specific intent (R 1016-1017); thus, the instant case does not suffer the same alleged infirmity as was presented in Lambrix v. State, 534 So.2d 1151 (Fla. 1988).

Trial counsel adequately urged to the jury that they should find appellant guilty of a lesser degree of homicide based upon his intoxicated condition (R 962-965; R 967; R 973; R 982-984; R 987-988). The current criticism of his efforts by collateral counsel constitutes merely the type of second-guessing condemned in Strickland v. Washington, 466 U.S. 668, 88 L.Ed.2d 674, at 694-695 (1984).

As to appellant's reliance on affidavits by capital collateral representative's expert Dr. Merikangas and various family members, suffice it to say that as in Glock v. state, __ So.2d __, 14 F.L.W. 29 (Fla. 1989), the appellant is simply attempting to fill in more details cumulatively to that presented at trial. The record reflects that during the guilt phase Danny Atkins, Don Atkins, Shirley Atkins and Donna Atkins all testified (R 855-895) and at penalty phase Dr. Dee testified about Atkins'

developmental history (including the dents in his head after birth) (R 1064), the surgery on his ear and slowness at school (R 1065), and his inadequacy as a person (R 1073-78). Obviously, defense counsel need not have had family members testify about abuse in light of Atkins' admission to Dr. Dee that he did not feel he was punished excessively (R 1076).

Should this Court disagree with appellee and conclude that appellant Atkins has made a sufficient showing in his allegations to warrant an evidentiary hearing, the Court should remand with instructions to conduct a hearing rather than to summarily grant relief, so that the state can have the opportunity, among other things, to challenge uncorroborated affidavits. Cf. Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985), footnote at page 211:

> "Attached to the habeas petition is the affidavit of one of the lawyers who represented Johnson on appeal. The lawyer states that he did not omit the point in question for any tactical reason but simply 'did not spot it.' We do not find the lawyer's apparent willingness to confess incompetence on behalf of his former client, who faces execution, determinative or persuasive of the question of whether appellant received the effective assistance of counsel on appeal. Even though a lawyer who does not raise some possibly arguable matter on appeal does not consciously bypass or forego the issue, but simply is not struck with its possible arguability when reviewing the record, does not mean that the counsel was not functioning as legal counsel in a meaningful way. *See Strickland v. Washington.*

See also, Francis v. State, 529 So.2d 670, 672 fn 4 (Fla. 1988) (noting that a defense attorney admission of being negligent in some areas has little meaning or value).

CONCLUSION

Based on the foregoing arguments and citations of authority, the denial of appellant's Motion for Post-Conviction Relief pursuant to Rule 3.850 should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

OF COUNSEL FOR APPELLEE