IN THE

SUPREME COURT OF FLORIDA

CASE NOS. 73,869 AND 73,910

PHILLIP ALEXANDER ATKINS,

Petitioner,

versus

RICHARD L. DUGGER,

Respondent.

PHILLIP ALEXANDER ATKINS,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative
Fla. Bar #0125540

K. LESLIE DELK
MARTIN J. McCLAIN
Fla. Bar #0754773
BRET STRAND
Fla. Bar #780431

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

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

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

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

All other citations will be self-explanatory or will be otherwise explained.

For the Court's clarification, this reply uses the captions from the first three claims as presented in our initial brief, to respond to the arguments made by the State in its analysis of those claims. As to the remaining claims, Mr. Atkins would rely upon his previously submitted pleadings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant would rely on the Statement of the Case and Procedural History presented in Mr. Atkins' Initial Brief.

ARGUMENT I

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

In its brief, the State contends that this issue was not preserved for appeal and thus there could be no ineffective assistance of appellate counsel in failing to raise the issue previously. However, it should be first noted that in ruling on the Rule 3.850 motion the circuit court believed this issue had been presented at trial. In fact, looking at the trial transcript it is clear that the circuit judge understood and sympathized with the defendant's argument. He noted that it was offensive that the evidence of a sexual battery was insufficient to convict on that charge but could be used to allow the jury to find the sexual battery as the underlying felony. The judge opined that his understanding of the law "offends my common sense, it offends [me because] the public has the right to expect consistency from the legal system." (R. 1126-27). However, the judge would not go against his reading of Jefferson v. State, 128

So. 2d 132 (Fla. 1961)[1](R.II 1-2)("[T]he portions [of the confession] dealing with the Sexual Battery charges were submitted to the jury as proof of the underlying felony under the State's Felony Murder theory. This appears to be in accord with the holding in Jefferson v. Florida, 128 So. 2d 132."

The issue was very clearly preserved. The judge in fact seemed to express a desire that defense counsel pursue this issue on appeal. Yet despite this, counsel did not raise the issue on appeal. Counsel's performance fell short of what was required in Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985)("It is the unique role of [a zealous] advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process.").

On the merits, the State does not challenge because it cannot challenge the logic of Mr. Atkins' argument. If under Robles v. State, 188 So. 2d 789 (Fla. 1966), the State must prove the elements of the underlying felony in order to convict of felony murder, then surely an uncontested judicial determination

---

[1]The judge misconstrued Jefferson. In Jefferson, before expiring, the decedent identified the defendant as the man who robbed him and then shot him. The defendant then confessed. The question on appeal as specifically noted by the opinion, did not concern the admissibility of the confession. 128 So. 2d at 135. The issue was whether there was sufficient evidence to support a conviction beyond a reasonable doubt of either premeditation or felony murder. The court concluded that there was no requirement that the specific type of first degree murder be established so long as there was sufficient evidence of a conviction of murder. The court there was not concerned at all with the question of whether a felony on which the defendant was acquitted could then be used as the underlying felony for a felony murder conviction.

that an acquittal of the underlying felony must be entered precludes a felony murder conviction premised upon that felony.[2] Certainly this clearly meritorious issue should have been brought to this Court's attention on appeal.

ARGUMENT II

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

As to this claim the State seems to contend that it is procedurally barred. During Mr. Atkins' trial, the defense continually objected to the consideration by the jury of evidence that Mr. Atkins had committed a sexual battery upon the decedent. As the State concedes in its Response in Opposition to Petition for Extraordinary Relief, for a Writ of Habeas Corpus, page 7, counsel objected "during a conference on penalty phase instructions." Yet having objected to the jury's consideration of the evidence, argument, and instruction regarding this sexual battery, in counsel's brief to this Court on appeal,[3] the only challenge mounted was to the judge's consideration of the sexual battery. Counsel's failure to explain that the jury as well as the judge was exposed to and considered this evidence was

---

[2]It must be remembered that the State conceded that there was insufficient evidence to convict of a sexual battery.

[3]It should be noted that the same counsel, Mr. Jack Edmund represented Mr. Atkins at trial, on appeal, at resentencing, and in the second appeal.

ineffective assistance of counsel, particularly since he had preserved this issue at trial. See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985).

Following this Court's decision the State filed a Motion to Clarify in which the State noted "the previous opinions of this Honorable Court, when requiring that a new jury be seated for the penalty phase, generally so state." Despite the State's expressed concern about whether a new jury was required, counsel failed to respond and advocate for Mr. Atkins that the jury's weighing was contaminated by exactly the same factors which contaminated the judge's weighing.

In the circuit court's order reimposing a death sentence, it was stated:

> The death penalty was imposed by the Court and an appeal was taken. The appellate court determined that this Court incorrectly considered the alleged sexual battery as an aggravating factor and returned the matter for sentencing. The opinion is silent as to the necessity of reconvening the trial jury. This Court concludes that it is not necessary to reconvene the jury.

(emphasis added). Thus it is clear that the circuit court considered and decided the question of whether a new jury was necessary. This should have been sufficient to preserve the issue for appeal. However, it is not clear from the record whether Mr. Edmund advocated on Mr. Atkins' behalf that a new jury was required. To the extent that the State argues now that the sentencing court's determination of this issue was not adequate to preserve this issue for review in the second appeal, Mr. Edmund was ineffective in not making an objection of record.

Again on this claim as on the previous one, the State fails to address the merits. This is because on the merits, the law is clear, Mr. Atkins is entitled to relief. However, in both of his appeals, he lacked a zealous advocate to argue and present his meritorious claims. This was ineffective assistance. Wilson v. Wainwright, supra. At this time this Court must grant him the relief to which the law indicates he is entitled.

ARGUMENT III

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

The State confuses the question of a diminished capacity defense with that of voluntary intoxication. Expert testimony as to the effect of alcohol on an individual is admissible to negate the specific intent. That is clear from Gurganus v. State, 451 So. 2d 817 (Fla. 1984), Chestnut v. State, 14 F.L.W. 9 (Fla. 1989), and Lambrix v. State, 534 So. 2d 1151 (Fla. 1988). The fact that the State is unclear as to whether to call the defense "diminished capacity" or "voluntary intoxication" is immaterial. This Court has long held that evidence to negate specific intent is admissible and more recently the Court has held that expert evidence to explain the effects of alcohol on the defendant is desirable, admissible, even critical. The State's efforts to paint Mr. Atkins' claim as going to "diminished capacity" and violative of Chestnut should not be permitted to obscure the real import of the claim.

The affidavit of both Mr. Edmund and Dr. Dee were proffered as evidence supporting the claim of ineffective assistance of

counsel and the need for an evidentiary hearing. These establish expert testimony regarding the effects of intoxication upon Mr. Atkins was available and not used for no strategic reason. Clearly the files and records do not refute the proffer nor do the files and records "conclusively" show that Mr. Atkins is not entitled to an evidentiary hearing.

CONCLUSION AND RELIEF SOUGHT

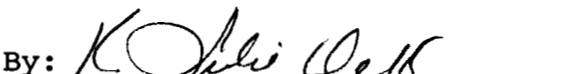
For these and the foregoing reasons, and those previously stated, Mr. Atkins respectfully requests that this Honorable Court enter a stay of execution and vacate the conviction and sentence of death.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

K. LESLIE DELK
MARTIN J. McCLAIN
Fla. Bar #0754773
BRET STRAND
Fla. Bar #780431

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: 
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Mr. Robert Landry, Assistant Attorney General, Department of Legal Affairs, Park Trammel Building, 1313 Tampa Street, Tampa, Florida 33602, this 11 day of April, 1989.

By: _____
Attorney