IN THE SUPREME COURT OF THE STATE OF FLORIDA

PHILLIP ATKINS, :

Appellant, :

vs. : CASE NO. ~~61,851~~ 65974

STATE OF FLORIDA, :

Appellee. :



# INITIAL BRIEF OF APPELLANT

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

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## TABLE OF CITATIONS

## PRELIMINARY STATEMENT

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

## POINT ON APPEAL

### POINT I

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

## STATEMENT OF FACTS

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

## STATEMENT OF THE CASE

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

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

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

## POINT I

## ARGUMENT

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

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

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

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

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

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

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

## CONCLUSION

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

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CERTIFICATE OF SERVICE

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

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