IN THE SUPREME COURT OF FLORIDA

NO. 80108

PHILLIP ALEXANDER ATKINS,

Petitioner,

v.

HARRY K. SINGLETARY,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR EXTRAORDINARY RELIEF
AND FOR A WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Atkins' second habeas corpus petition in this Court. It is being filed now because recent decisions by the United States Supreme Court have established that Mr. Atkins is entitled to habeas corpus relief, and that the prior dispositions of Mr. Atkins' claims by this Court were in error. Mr. Atkins previously challenged the jury's death recommendation. On direct appeal, he argued that the improper consideration of the aggravating circumstance, in-the-course-of-a-sexual-battery, warranted a new jury. In post-conviction, Mr. Atkins reraised that issue and further argued that the instructions regarding "heinous, atrocious or cruel" and "cold, calculated and premeditated" were in violation of Maynard v. Cartwright, 486 U.S. 356 (1988).

On June 8, 1992, the United States Supreme Court reversed this Court's longstanding jurisprudence and held Maynard v. Cartwright, 486 U.S. 356 (1988), is applicable in Florida. Sochor v. Florida, 112 S. Ct. ____ (1992). Thus, Eighth Amendment error before either of the constituent sentencers (in Florida the constituent sentencers are the judge and the jury) requires application of the harmless-beyond-a-reasonable-doubt standard. Specifically, the Supreme Court held:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. See *Clemons v. Mississippi*, 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," *Stringer v. Black*, 503 U.S. ____, ____ (1992)(slip op., at 12), by placing a "thumb [on] death's side of the scale," *id.*, at ____ (slip op., at 8), thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," *id.*, at ___ (slip op., at 12). Even when other valid aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons, supra*, at 752 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)); see *Parker v. Dugger*, 498 U.S. ____, ____ (1991) (slip op., at 11). While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error. *Id.*, at ____ (slip op., at 10).

Sochor, 51 Cr. L. at 2130.

On June 29, 1992, in Espinosa v. Florida, 112 S. Ct. ____, 51 Cr. L. 3097 (1992), the United States Supreme Court again reversed this Court and held that this Court had previously failed to correctly apply Maynard and Godfrey v. Georgia, 446 U.S. 420 (1980):

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), or death, see *Smith v. State*, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 435 U.S. 971 (1988); *Grossman v. State*, 525 So. 2d 833, 839 n.1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
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> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see *Mills v. Maryland*, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. *Walton v. Arizona*, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. *Baldwin v. Alabama*, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

51 Cr. L. at 3097.

In light of Sochor and Espinosa, the United States Supreme Court granted certiorari review and reversed five other Florida Supreme Court decisions. See Beltran-Lopez v. Florida, 112 S. Ct. ____ (1992); Davis v. Florida, 112 S. Ct. ___ (1992); Gaskin v. Florida, 112 S. Ct. ____ (1992); Henry v. Florida, 112 S. Ct. ___ (1992); Hitchcock v. Florida, 112 S. Ct. ___ (1992).

Espinosa and Sochor represent a change in Florida law which must now be applied to Mr. Atkins' claims. In Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), this Court held Hitchcock v. Dugger, 481 U.S. 393 (1987), to be a change in Florida law because it "represent[ed]

a sufficient change in the law that potentially affect[ed] a class of petitioners, including Thompson, to defeat the claim of a procedural default." The same can be said for Espinosa and Sochor. The United States Supreme Court demonstrated this proposition by reversing a total of seven Florida death cases on the basis of the error outlined in Espinosa and Sochor.

Moreover, an examination of this Court's jurisprudence demonstrates that Espinosa overturned two longstanding positions of this Court. First, this Court's belief that Proffitt v. Florida, 428 U.S. 242 (197), insulated Florida's "heinous, atrocious or cruel" circumstance from Maynard error was soundly rejected. ("The State here does not argue that the 'especially wicked, evil, atrocious, or cruel' instruction given in this case was any less vague than the instructions we found lacking in Shell, Cartwright or Godfrey"). Second, this Court's precedent that eighth amendment error before the jury was cured or insulated from review by the judge's sentencing decision was also specifically overturned. ("We merely hold that, if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances").

The first proposition was discussed at length in Smalley v. State, 546 So. 2d 720 (Fla. 1989). There, this Court held that, because of Proffitt, Florida was exempted from the scope of Maynard:

> It was because of this narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious, or cruel against a specific eighth amendment vagueness challenge in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. *E.g., Garron v. State*, 528 So.2d 353 (Fla. 1988); *Jackson v. State*, 502 So.2d 409 (Fla. 1986), *cert. denied*, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); *Teffeteller v. State*, 439 So.2d 840 (Fla. 1983), *cert. denied*, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). That *Proffitt* continues to be good law today is evident from *Maynard v. Cartwright*, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. *See Maynard v. Cartwright*, 108 S.Ct. at 1859.

546 So. 2d at 722. However, Espinosa clearly held that Proffitt did not insulate Florida's standard

jury instruction from compliance with the Eighth Amendment.

The second longstanding rule of law overturned by Espinosa was the view that the judge's sentencing process somehow cured error before the jury. In Breedlove v. State, 413 So. 2d 1, 9 (Fla. 1982), this Court held that impermissible prosecutorial argument to the jury regarding aggravating circumstances was neither prejudicial nor reversible because the judge was not misled and did not err in his sentencing order. Under Espinosa, this conclusion was erroneous. Similarly, in Deaton v. State, 480 So. 2d 1279, 1282 (Fla. 1985), this Court held that the prosecutor's jury argument in favor of improper doubling of aggravating factors was, in essence, cured when the judge properly merged the aggravating circumstances in his sentencing order. Under Espinosa, this conclusion was erroneous. In Suarez v. State, 481 So. 2d 1201, 1209 (Fla. 1985), this Court rejected a challenge to the jury instructions which failed to advise the jury of the prohibition against improper doubling. There, this Court concluded improper doubling was only error if the judge doubled up aggravators in his sentencing order ("it is this sentencing order which is subject to review vis-a-vis doubling"). Espinosa specifically rejects this reasoning. In Smalley, this Court distinguished Maynard on this basis: "In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence." 546 So. 2d at 722. Espinosa clearly overturns this distinction ("neither actor must be permitted to weigh invalid aggravating circumstances," 51 Cr. L. at 3097).

Espinosa clearly rejected both of this Court's prior lines of reasoning. Florida jury instructions must comply with Maynard and Godfrey despite Proffitt.[1] Further, Florida juries must be correctly instructed on the applicable law regardless of the judge's awareness of the law.

This Court has steadfastly held for many years that Maynard and Godfrey did not affect Florida's capital jury instructions regarding aggravating circumstances. This Court repeatedly held that those cases and their progeny had no application in Florida. See Porter v. Dugger, 559 So. 2d

[1]In fact, in Sochor, the United States Supreme Court questioned whether "the Supreme Court of Florida has [] confined its discussion on the matter to the Dixon language we approved in Proffitt." 51 Cr. L. at 2131.

201, 203 (Fla. 1990)("Maynard does not affect Florida's death sentencing procedures"); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990)("We have previously found Maynard inapposite to Florida's death penalty sentencing"); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990)("Maynard [citation] did not make Florida's penalty instructions on cold, calculated, and premeditated and heinous, atrocious, or cruel unconstitutionally vague"); Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990) (Maynard is "inapplicable to Florida, [does] not constitute such change[] in law as to provide post conviction relief").

In fact, this Court has specifically and repeatedly upheld the standard jury instructions against any Eighth Amendment challenge. In Vaught v. State, 410 So. 2d 147, 150 (Fla. 1982), Vaught argued "that the trial court failed to provide the jury with complete instructions on aggravating and mitigating circumstances." The contention was found to be "without merit. The trial court gave the standard jury instruction on aggravating and mitigating circumstances." Similarly, in Valle v.State, 474 So. 2d 796 (Fla. 1985), this Court concluded, "the standard jury instructions on aggravating and mitigating circumstances, which were given in this case, are sufficient and do not require further refinements." 474 So. 2d at 805.[2]

The standard jury instruction regarding "heinous, atrocious and cruel" was upheld by this Court in Smalley v. State.[3] However, as noted, Espinosa specifically and pointedly rejected this Court's reasoning in Smalley (when the sentencing judge gives great weight to the jury recommendation, he "indirectly weigh[s] the invalid aggravating factor we must presume the jury found." 51 Cr. L. at 3097). This Court relied upon Smalley to reject Maynard claims in a multitude of cases. Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990); Clark v. Dugger, 559 So. 2d 192,

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[2]In Valle, this Court cited Demps v. State, 395 So. 2d 501, 505 (Fla. 1981), for the proposition that the standard jury instructions "are sufficient and do not require further refinements." At issue in Demps was the failure to instruct the jury regarding nonstatutory mitigating factors. When the United States Supreme Court subsequently disagreed with the standard jury instructions on that point, it was held to be a substantial change in law which "defeat[ed] a claimed procedural default." Demps v. Dugger, 514 So. 2d 1092, 1093 (Fla. 1987).

[3]This Court had relied on Smalley in rejecting the identical claim made in Espinosa. See Espinosa v. Florida, 51 Cr. L. at 3096.

194 (Fla. 1990); Randolph v. State, 562 So. 2d 331, 339 (Fla. 1990); Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990); Smith v. Dugger, 565 So. 2d 1293, 1295 n.3 (Fla. 1990); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990); Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990); Engle v. Dugger, 576 So. 2d 696, 704 (Fla. 1991); Hitchcock v. State, 578 So. 2d 685, 688 (Fla. 1990); Shere v. State, 579 So. 2d 86, 95 (Fla. 1991); Davis v. State, 586 So. 2d 1038, 1040 (Fla. 1991).

This Court rejected still many other challenges to the adequacy of the standard jury instructions without reference to Smalley or any other authority. As previously noted in Vaught, this Court gave the standard jury instructions regarding aggravating circumstances a nod of approval. Those standard instructions provided as to "heinous, atrocious or cruel":

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> * * *
>
> 8. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

Since this language was in the standard instructions at the time of Vaught, this Court's opinion therein constituted a clear ruling that the instruction was adequate.

In Chandler v. State, 442 So. 2d 171, 172 (Fla. 1983), a challenge was again made to the standard jury instructions given at the penalty phase of a capital proceeding. The lengthy challenge contained in the Initial Brief as Point XII specifically included an attack on the instruction on "heinous, atrocious, or cruel" in light of Godfrey v. Georgia. See Initial Brief of Appellant, Chandler v. State, Case No. 60,790, at 32-34. As to this challenge, this Court in a footnote said, "We find no merit to these issues." 442 So. 2d at 172.

Subsequently, this Court addressed the matter again in Parker v. State, 456 So. 2d 436 (Fla. 1984). There, Parker argued that the death recommendation was invalid due to inadequate jury instructions:

> We must submit that the jury's advisory recommendation of death was invalid in that it was based on improper prosecution argument and inadequate jury instructions. As a consequence of this invalidity, the resulting death sentence must be vacated.
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> * * *
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> Accord Godfrey v. Georgia, 446 U.S. 420, 428-429, 100 S.Ct. 1759 (1980)(reversing death sentence based upon finding of aggravating circumstance not properly charged). The importance of jury instructions in the sentencing process was clearly demonstrated by the Fifth Circuit in Washington v. Watkins, 655 F.2d 1346, 1373-77 (5th Cir. 1981). Instructions in that case informed the jury, contrary to Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), that mitigating circumstances were those enumerated by the court. The Fifth Circuit held that even though no mitigating evidence was excluded and counsel had argued unenumerated mitigation, the jury was prevented from properly weighing the sentencing evidence and, therefore, the death sentence could not be constitutionally imposed.
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> Here, without being familiar with the applicable legal standard and in the absence of any appropriation instructions, it cannot be said that the jury could properly exercise its decision making authority. The advisory recommendation is consequently a nullity. The sentence imposed as a result of that recommendation cannot stand.

See Initial Brief of Appellant, Parker v. State, Case No. 61,52, at 56, 62. In affirming the death sentence, this Court rejected Parker's arguments:

> Defendant argues that the trial judge erred in denying requested jury instructions. There was no error; the requested instructions were encompassed within the standard jury instructions which were properly given. *Jones v. State*, 411 So.2d 165 (Fla.), *cert. denied*, 459 U.S. 891, 103 S.Ct. 189, 74 L.Ed.2d 153 (1982).

456 So. 2d at 444.[4]

The challenge presented in Lemon v. State, 456 So.2d 885, 887 (Fla. 1984), was similarly rejected:

> Appellant complains that the trial court erred in refusing to instruct the jury on the definition of heinous, atrocious, or cruel from *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); refusing to instruct the

[4]The citation to Jones v. State refers to the holding there that the standard jury instructions pre-Lockett did not warrant a reversal.

> jury that a life recommendation could be returned even if no mitigating circumstances were found; and failing to instruct the jury on all the aggravating and mitigating circumstances of section 921.141, Florida Statutes (1981). We find no error. The standard jury instructions given by the trial court were adequate under the circumstances of this case.

Likewise, in Kennedy v. State, 455 So. 2d 351, 354 (Fla. 1984), this Court held the standard jury instructions were adequate under the Eighth Amendment. "The trial court acted properly by reading the standard jury instructions." 455 So. 2d at 354. Numerous other decisions were issued by this Court specifically approving the standard jury instructions against Eighth Amendment challenges. Lara v. State, 464 So. 2d 1173, 1179 (Fla. 1985)("The judge followed the standard jury instructions. * * * We conclude there was no error in the instructions given by the trial judge regarding aggravating and mitigating circumstances."); Johnson v. State, 465 So. 2d 499, 507 (Fla. 1985)("The instruction on and finding that the murder was especially heinous, atrocious or cruel were also proper"); Bertolotti v. State, 476 So. 2d 130, 132 (Fal. 1985)("Appellant's proposed jury instruction is subsumed in the standard jury instruction given at the close of the penalty phase"); Jennings v. State, 512 So. 2d 169, 176 (Fla. 1987)(the challenge was found meritless without discussion); Hildwin v. State, 531 So. 2d 124, 129 (Fla. 1988)(challenge found meritless without discussion); Mendyk v. State, 545 So. 2d 846, 850 (Fla. 1989)(in response to Mendyk's challenge regarding adequacy of standard instruction on heinous, atrocious or cruel, this Court held "standard jury instructions properly and adequately cover the matters raised by appellant").[5]

Following the decision in Smalley, specifically rejecting the Maynard challenge, this Court rejected a number of challenges to the standard jury instructions by citing Smalley as noted previously. However, there was still a number of cases where the challenges to the standard instructions were rejected without specific reference to Smalley. Haliburton v. State, 561 So. 2d

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[5]This list of cases is by no mens exhaustive. It has been compiled rather hurriedly. Moreover, a number of cases where the issue was raised have not been included on this list because this Court's opinion failed to refer to the issue in any fashion.

248, 252 (Fla. 1990); Bruno v. State, 574 So. 2d 76, 83 (Fla. 1991); Hayes v. State, 581 So. 2d 121, 127 (Fla. 1991); Green v. State, 583 So. 2d 647 (Fla. 1991); Henry v. State, 586 So. 2d 1033 (Fla. 1991); Dougan v. State, 595 So. 2d 1, 4 (Fla. 1992); Hodges v. State, 595 So. 2d 929, 934 (1992).[6]

This Court recognized Hitchcock was a change in law because it declared the standard jury instruction given prior to Lockett to be in violation of the Eighth Amendment. In addition, it rejected the notion that mere presentation of the nonstatutory mitigation cured the instructional defect. After Hitchcock, this Court recognized the significance of this change, Thompson v. Dugger, and declared, "[w]e thus can think of no clearer rejection of the 'mere presentation' standard reflected in the prior opinions of this Court, and conclude that this standard can no longer be considered controlling law." Downs v. Dugger, 514 So. 2d 1069, 1071 (1987). So too here, Espinosa can be no clearer in its rejection of the standard jury instruction and the notion that the judge sentencing insulated the jury instructions regarding aggravating factors from compliance with eighth amendment jurisprudence.

In Delap v. Dugger, 513 So. 2d 659 (Fla. 1987), this Court held that the change brought by Hitchcock was so significant that the failure to previously raise a timely challenge to the jury instruction would not preclude consideration of a Hitchcock claim in post-conviction proceedings. Again, the instruction rejected in Hitchcock was, as it is here, a standard jury instruction repeatedly approved by this Court. See Demps v. State, 395 So. 2d at 505. Such an approach is warranted where attorneys in reliance on this Court's jurisprudence which conclusively, albeit erroneously, settled the issue adversely to the client, chose to forego arguments which appear to be meritless in favor of issues with a greater chance of success. This Court should treat Espinosa's reversal of this Court's jurisprudence as a substantial change in law. An attorney is expected to "winnow[] out weaker argument[] and focus[] on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). An attorney should not be required to

[6]Again, this list is not exhaustive either. It is but a quick compilation.

present issues this Court has ruled to be meritless in order to preserve the issue for the day eight years later that the United States Supreme Court declares this Court's ruling to be in error.

"Fundamental fairness" may override the State's interest in finality. Moreland v. State, 582 So. 2d 618, 619 (Fla. 1991). "The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness." Witt v. State, 387 So. 2d 922, 925 (Fla. 1980). "Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." Id. Accordingly, this Court held in Witt "that only major constitutional changes of law" as determined by either this Court or the United States Supreme Court are cognizable in post-conviction proceedings. 387 So. 2d at 929-30. Here, the decisions at issue have emanated from the United States Supreme Court. Espinosa; Sochor. Obviously, the decisions qualify under Witt to be changes in law.[7] The question is whether the decisions change Florida's law to such magnitude as to warrant retroactive application.

To some extent, the question has already been decided by the United States Supreme Court in Stringer v. Black, 112 S. Ct. 1130 (1992). There, the issue was whether Maynard v. Cartwright was dictated by Godfrey v. Georgia or was new law. The Supreme Court held, "Maynard was [] controlled by Godfrey and it did not announce a new rule." 112 S. Ct. at 1136. Thus, according to the United States Supreme Court, Florida has been in violation of the Eighth Amendment since 1980, the year Godfrey was decided. The standard jury instructions which have been followed explicitly by this Court throughout that time period were not in conformity with the federal constitution.[8]

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[7]In Witt, this Court cited Gideon v. Wainwright, 372 U.S. 335 (1963), as an example of a change in law which defeated any procedural default. As a result of Gideon, it was necessary "to allow prisoners the opportunity and a forum to challenge those prior convictions which might be affected by Gideon's law change." Witt, 387 So. 2d at 927.

[8]In Gideon, it was determined by the federal courts that the new rule applied retrospectively. Linkletter v. Walker, 381 U.S. 618, 628 n.13 (1965). Thus, there as here, the question was whether those affected by the new rule have a state forum for presenting their claims. This Court must do as it did in Gideon and provide the forum.

This was the precise situation this Court faced in Thompson v. Dugger, Downs v. Dugger, and Delap v. Dugger, wherein this Court ruled finality must give way to fairness. It is only fair that this Court give those with Espinosa and Sochor claims a forum. The error dates back to the adoption by this Court of erroneous jury instructions. The error was perpetuated by this Court in repeatedly denying the precise Eighth Amendment challenge found meritorious in Espinosa and Sochor. It was this Court's error that now taints Mr. Atkins' sentence of death.

In light of this Court's pronouncements following Hitchcock, this Court must find Espinosa and Sochor to constitute a change in law which defeats a procedural bar and permits consideration of Espinosa and Sochor claims in post-conviction proceedings. As this Court held in Adams v. State, 543 So. 2d 1244 (Fla. 1989), capital defendants must be given two years to file claims arising under Espinosa. Pursuant thereto, Mr. Atkins files this petition representing his claims which were initially presented in his first direct appeal and then represented in his first habeas petition and in his Rule 3.850 motion.

I. PROCEDURAL HISTORY

Mr. Atkins was tried on February 15-19, 1982. After convicting Mr. Atkins, the jury by a seven-to-five vote recommended a death sentence. The jury received improper instructions regarding aggravating circumstances. The jury was told that it could find as an aggravating circumstance the fact that the homicide occurred in the course of a sexual battery (despite the fact that a directed verdict acquitting of the sexual battery had been returned). In addition, the jury was told that it could find as an aggravating circumstance "[t]he crime of which -- or for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel" (R. 1145).[9] This instruction was the standard jury instruction affirmed in Vaught six weeks before Mr. Atkins' trial commenced. The jury was also instructed that it could find as an aggravating circumstance "[t]he crime for which the Defendant is to be sentenced was committed in a cold, calculated,

[9]In this petition, the record from Mr. Atkins' first direct appeal will be designated as "R. ____," with the appropriate page number. The record from Mr. Atkins' second direct appeal will be designated as "R2 ____," with the appropriate page numbers.

premeditated manner without any pretense of moral or legal justification" (R. 1145). The judge, relying upon the jury's recommendation, imposed death. The judge did find as an aggravating factor that the homicide occurred in the course of a sexual battery (R. 1156). The sentencing judge did find two statutory mitigating circumstances to have been established by the defense. These mitigating circumstances were (1) no significant history of criminal activity, and (2) substantial impairment of capacity to conform to the requirements of law.

In his direct appeal, Mr. Atkins received a new sentencing when this Court found that "the consideration of the occurrence of a sexual battery as an aggravating circumstance in the capital felony sentencing process was error." Atkins v. State, 452 So. 2d 529, 533 (Fla. 1984). Even though Mr. Atkins argued the error required a new jury sentencing (Initial Brief at 22-23), this Court did not order a new jury convened. Thereafter, the State filed a motion to clarify, stating:

> It is the belief of the undersigned that the previous opinions of this Honorable Court, when requiring that a new jury be seated for the penalty phase, generally so state.
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> The opinion of this Court in the regard to the above-styled case does not so state, and a reading of the opinion at page 4, paragraph 2 leads the Appellee to believe that this Honorable Court wishes the trial judge to reweigh his imposition of the death sentence without the aggravating circumstance dealing with the sexual battery.
>
> WHEREFORE the Appellee would ask this Honorable Court to clarify its opinion in this regard with the understanding that if no clarification is rendered, the Appellee will rely on the interpretation stated above.

(Motion to Clarify filed June 25, 1984).

This Court denied the motion to clarify, thus ruling that a new jury was not necessary (July 26, 1984, denial of rehearing and motion to clarify). In reliance on this ruling, a new jury was not called. Resentencing occurred before a judge only. The judge did "consider[] the [death] recommendation of the jury" (R2 at 7). Under Florida law, he was required to follow that recommendation unless it was unsupported by a reasonable basis. Death was thereafter reimposed and affirmed on appeal. Atkins v. State, 497 So. 2d 1200 (Fla. 1986). This Court expressly found

no fault with consideration of the jury's death recommendation. 497 So. 2d at 1201.

Mr. Atkins filed a Petition for Habeas Corpus Relief in this Court and a Motion to Vacate Judgment and Sentence in the state circuit court on February 22, 1989. Mr. Atkins, therein, argued the failure to convene a second jury was error. However, this Court refused to address Mr. Atkins' claim that a new jury should have been convened, saying that this issue was previously considered on direct appeal and therefore barred. In the Rule 3.850 motion, Mr. Atkins also argued that the instructions that the jury received on "heinous, atrocious and cruel" and "cold, calculated and premeditated" violated Godfrey and Maynard. Mr. Atkins urged this Court to consider the issue because Maynard was new law which in conjunction with Hitchcock required a Florida capital jury to receive correct and adequate jury instructions which comported with the eighth amendment. However, consistent with this Court's view that Maynard did not apply to Florida, the Court refused to treat Maynard as a change in law.

II. JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

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.

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 involve the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); 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., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson.

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. Way; Wilson; Porter; 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. 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; Porter, 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). 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.

This Court therefore has jurisdiction to entertain Mr. Atkins' claims to grant habeas corpus relief. This and other Florida courts have consistently recognized that the writ must issue where fundamental error occurs on crucial and dispositive points, or where a defendant received ineffective assistance of appellate 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, 287 So. 2d 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968).

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

III. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner asserts that his convention and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the 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 his capital trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

THE FAILURE TO CONVENE A NEW JURY AT RESENTENCING DENIED MR. ATKINS HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, WHERE THE JURY'S DEATH RECOMMENDATION WHICH WAS ACCORDED GREAT WEIGHT WAS TAINTED BY CONSIDERATION OF INVALID AGGRAVATING CIRCUMSTANCES.

The resentencing court refused to convene a new jury, but "considered [ ] the recommendation of the jury" (R2 7). On direct appeal of Mr. Atkins' resentencing, this Court affirmed, saying, "[w]e found no fault with the evidence or argument presented to the jury at the sentencing phase." Atkins v. State, 497 So. 2d 1200, 1201 (Fla. 1986).

However, the jury's recommendation was tainted by Eighth Amendment error. The original jury was instructed that it could consider as an aggravating circumstance the fact that the homicide occurred in the course of a sexual battery, even though a directed verdict acquitting Mr.

Atkins of a sexual battery had been returned. On direct appeal, this Court found "the circumstance [] was error." Atkins, 452 So. 2d at 533. However, neither then nor subsequently was consideration given to the effect of this error on the jury's weighing process and resulting death sentence.

The issue must now be considered because of new law. Espinosa v. Florida, 112 S. Ct. ___ (1992); Sochor v. Florida, 112 S. Ct. ___ (1992); Stringer v. Black, 112 S. Ct. 1130 (1992). The failure to analyze the jury's reliance upon invalid aggravation requires a reversal in light of Espinosa, Sochor and Stringer. Since Espinosa must be considered a substantial change in law, this Court must now revisit the issue.

In considering Mr. Atkins' arguments in his original direct appeal, this Court remanded for resentencing after determining that "consideration of the occurrence of a sexual battery as an aggravating circumstance" was error. This Court found error ("[t]he sentence of death, having been tainted by the improper consideration of an erroneous aggravating circumstance, is vacated") and remanded the cause because the trial judge found mitigating circumstances. Atkins v. State, 452 So. 2d 529, 533 (Fla. 1984). However, this Court failed to address the improper consideration of these aggravators by the jury.

Mr. Atkins' jury was told to consider and weigh the invalid aggravating circumstance. 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 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.
>
> * * *

You can find that there was a sexual battery but there wasn't a kidnapping, and it would still be first degree murder.

(R. 937-38, 939)(emphasis added). The court, over objection, incorrectly instructed the jury that the sexual battery could be utilized to find felony murder (R. 1009-10). During the penalty phase charge conference, the court voiced its concern over permitting the jury to find felony murder based upon sexual battery as the underlying felony after it directed a verdict of acquittal on those two counts because the State had not proved sexual battery beyond a reasonable doubt (R. 1126-27). Clearly, the trial judge had considered this issue when raised by trial counsel and was troubled by it.

Nonetheless, the jury was instructed over objection that they could find, as an aggravating circumstance, that the homicide occurred while the defendant was engaged in the commission of a sexual battery (R. 1144). After convicting Mr. Atkins of first degree murder and receiving evidence of this sexual battery, 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. 1155-68), 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 trial court did not cure the errors occurring before the jury; in fact, the judge adopted the error himself. He considered and gave great weight to the jury's recommendation. As explained in Espinosa, by giving great weight to the jury recommendation, the judge "indirectly weighed the invalid aggravating factor." 51 Cr. L. at 3097. Thus, the subsequent resentencing did not cure the error because the judge expressly indicated, as he did during the first sentencing, that he considered the death recommendation in imposing death. Under Espinosa, the resentencing resulted in a death sentence which violates the Eighth Amendment.

Moreover, the jury received the standard jury instruction regarding "heinous, atrocious or

cruel."[10] The jury had received none of this Court's limiting constructions regarding "heinous, atrocious or cruel". The instructions were erroneous, and the jury considered an invalid aggravating circumstance, as Espinosa v. Florida and Shell v. Mississippi, 111 S. Ct. 313 (1990), explicitly hold. Under Espinosa, it must be presumed that the erroneous instruction tainted the jury's recommendation with Eighth Amendment error. Under these circumstances, it must be presumed that the judge's death sentence was tainted with Eighth Amendment error as well. Espinosa v. Florida.

Further, the jury also received the standard jury instruction regarding "cold, calculated and premeditated." The jury did not receive any of this Court's limiting constructions regarding "cold, calculated and premeditated." In Espinosa, the Supreme Court explained that "an aggravating circumstance is invalid . . . if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." 51 Cr. L. at 3096. This Court has held that "calculated" consists "of a careful plan or prearranged design," Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), and that "premeditated" refers to a "heightened" form of premeditation which is greater than the premeditation required to establish first-degree murder. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). This Court requires trial judges to apply these limiting constructions and consistently rejects this aggravator when these limitations are not met. See, e.g., Waterhouse v. State, 17 F.L.W. S277, 280-81 (Fla. May 7, 1992); Gore v. State, 17 F.L.W. S247, 250 (Fla. Apr. 16, 1992); Jackson v. State, 17 F.L.W. S237, 239 (Fla. Apr. 9, 1992); Green v. State, 583 So. 2d 647, 652-53 (Fla. 1991); Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985).

In Sochor, the United States Supreme Court held that this Court's striking of the "cold, calculated and premeditated" aggravating factor meant that Eight Amendment error had occurred.

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[10]Again, Mr. Atkins' trial was a mere six weeks after this Court had issued its opinion in Vaught approving the standard jury instructions against a charge they were "incomplete" and did not "reflect the refinements provided by decisions of this Court." 410 So. 2d at 150.

The aggravating factor was "invalid in the sense that the Supreme Court of Florida had found [it] to be unsupported by the evidence . . . . It follows that Eighth Amendment error did occurr when the trial judge weighed the coldness factor in the instant case." Sochor, 60 U.S.L.W. at 4489.[11]

Mr. Atkins' jury was not told about these limitations but presumably found this aggravator present. Espinosa, 51 Cr.L. at 3097. The only instruction the jury ever received regarding the definition of "premeditated" was the instruction given at the guilt phase regarding the premeditation necessary to establish guilt of first-degree murder. As this Court has held, this definition does not establish the "cold, calculated and premeditated" aggravator. Under these circumstances, it must be presumed that the erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error. Espinosa, 51 Cr. L. at 3097.

At the resentencing, Mr. Atkins was sentenced to death. The judge specifically indicated he considered the jury's death recommendation in reaching his decision to impose death. Again, Espinosa clearly holds that because Florida law requires great weight be given to the jury's death recommendation, the Eighth Amendment errors before the jury infected the judge's imposition of death. Thus, a reversal is required unless the errors were harmless beyond a reasonable doubt. Stringer v. Black.

The legislature intended the sentencing jury's recommendation to be an integral part of the determination of whether a capital defendant lives or dies. The validity of the jury's recommendation is directly related to the reliability of the information it receives to form a basis for such recommendation. Messer v. State, 330 So. 2d 137, 142 (Fla. 1976). Here, it cannot be contested that mitigating circumstances were present which would have constituted a reasonable basis for a life recommendation; the judge acknowledged that two statutory mitigating factors had been established. However, the jury was given erroneous instructions which resulted in improper

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[11]In Sochor, this Court had struck the "cold, calculated and premeditated" aggravating factor because the evidence did not satisfy the limiting construction requiring "heightened" premeditation. Sochor v. State, 580 So. 2d 595, 603 (Fla. 1991).

aggravation to weigh against the mitigation. In light of the seven-to-five vote, it is clear that the balance may have been different but for the error.

As Judge Tjoflat recently stated:

> I cannot conceive of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after finding a sentencing error that relates, as the error does here, to the balancing of aggravating and mitigating circumstances. It is simply impossible to tell what recommendation a properly instructed jury would have made or the decision the sentencing judge would have reached.

Booker v. Dugger, 922 F.2d 633, 644 (11th Cir. 1991)(Tjoflat, C.J. specially concurring).

The affirmance of Mr. Atkins' death sentence was consistent with this Court's view (rejected in Espinosa) that a Florida trial court's resentencing cured jury instructional error. However, the trial judge expressly relied upon the previously rendered death recommendation and readopted his previous findings by simply omitting from the sentencing order the aggravating factor found to be erroneous and resentenced Mr. Atkins to death. Under Espinosa, it must be presumed that great weight was given the death recommendation.

In Mr. Atkins' case, this Court said it "found no fault with the evidence or argument presented to the jury," yet the jury was instructed to consider the exact same invalid aggravating circumstance found to have been improperly considered by the judge. This was error, as the United States Court explicitly held:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.

Stringer v. Black, 112 S. Ct. 1130, 1137 (1992).

On direct appeal, an aggravating circumstance was found to be invalid. Moreover, as to "heinous, atrocious or cruel" and "cold, calculated and premeditated," the jury instructions were erroneous as a matter of law. Espinosa. The jury instructions and prosecutorial argument directed the jury to misapply these three aggravating factors.

Although the Court indicated a new jury was not necessary at resentencing, there was no

mention that the jury had been misinformed on the law. "[A] jury is unlikely to disregard a theory flawed in law." Sochor v. Florida, 112 S. Ct. at ___, 51 Cr.L. at 2132. The Sochor/Espinosa due process standard is that bad instructions require resentencing by a new jury, untainted by the unconstitutionality. Here, the jury's recommendation was clearly tainted by bad instructions.

Mr. Atkins' jury was given legally invalid circumstances to apply and weigh, and the jury by the slimmest of margins after two hours of deliberations recommended death. No limiting constructions adopted by this Court were given to the jury as to "heinous, atrocious or cruel" or "cold, calculated and premeditated." The jury's death recommendation was clearly tainted by invalid aggravating circumstances. See Maynard v. Cartwright; Shell v. Mississippi; Stringer v. Black; Sochor v. Florida; Espinosa v. Florida. In Clemons v. Mississippi, 110 S. Ct. 1441, 1451 (1990), the Supreme Court explained, "it would require a detailed explanation based upon the record for us possibly to agree that the error in giving the invalid 'especially heinous' instruction was harmless." Similarly, harmless error analysis must be conducted as to the jury's consideration of the invalid in-the-course-of-a-sexual-battery aggravator and of the "cold, calculated and remeditated" aggravating factor upon which the jury was inadequately instructed. However, no analysis of the Eighth Amendment errors before the jury has been conducted. This Court has failed to comply with Eighth Amendment jurisprudence based upon its erroneous understanding outlined in Smalley, which was overturned in Espinosa.

Clearly, then, the jury's death recommendation is tainted by Eighth Amendment errors. An invalid aggravating circumstance was considered by the jury. As to other aggravating circumstances, the jury received inadequate instructions which must be presumed to have affected the consideration of that circumstance and resulted in additional extra thumbs on the death side of the scales. Espinosa; Stringer. Under Espinosa, Sochor and Stringer, this Court must revisit the issue and conduct the appropriate analysis. In light of the mitigation before the jury, the error cannot be harmless beyond a reasonable doubt, and a new jury sentencing must be ordered.

CLAIM II

THIS COURT ERRED IN DENYING THE RULE 3.850 APPEAL WITHOUT PERMITTING COLLATERAL COUNSEL TO COMPLETE INVESTIGATION AND OBTAIN A PROFFER OF EVIDENCE INITIALLY DISCOVERED IMMEDIATELY BEFORE ORAL ARGUMENT.

On April 1, 1989, Ms. K. Leslie Delk argued Mr. Atkins' appeal of the denial of Rule 3.850 relief. A warrant for Mr. Atkins' execution was outstanding at the time. On April 13, 1989, this Court denied the appeal.

During the oral argument, Ms. Delk advised this Court of new evidence discovered hours before the argument. She indicated that an investigator used by trial counsel stated, in a phone conversation on April 11, 1989, that he had uncovered evidence that Anthony Castillo's fatal injuries were inflicted by a passing car after Mr. Atkins had left the unconscious Mr. Castillo lying in the roadway. An affidavit from the investigator, Ron Hill, was obtained on April 14, 1989; however, that was after this Court had denied relief, a stay, and the ability to file a rehearing.

At trial Mr. Edmund, defense counsel, had been disturbed by the fact that the decedent's injuries were significantly different between the first sighting by Samuel Hazell (R. 426) and William Powell (R. 452)[12] and later when the boy was found at the railroad tracks by Gale Lovelady (R. 385). The testimony of Mr. Hazell was that the body was held by Mr. Atkins and:

> . . . he just like a sack of potatoes, but his eyes were open and his head did fall around to where I could see it. I saw no apparent injuries as far as blood, I couldn't see any blood whatsoever.

(R. 432)(emphasis added). Mr. Powell testified about his observation of the boy's condition:

> There was a mark on his cheek, and, uh, just part of his head (indicating) but there was no actual blood.

(R. 459)(emphasis added).

Mr. Lovelady testified that on September 23, 1981, while traveling a dirt-graded road in the dark of the night, he saw an object in the road. He stopped and discovered a human body that was moving (R. 386-88). Mr. Lovelady also testified that the road had a 45-degree curve up to the

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[12]These individuals observed Mr. Atkins with the unconscious child in a fast food parking lot.

point where the body was located (R. 389). The body was in fact located on the graded roadway with the feet in the "ruts" of travel (R. 388).

Given the condition that the boy was in when observed by the police officer that responded to Mr. Lovelady's call, it was clear that something had occurred between the two sightings. State Trooper Berry testified:

> The child appeared to have severe head injuries, was bleeding from the head, the neck, and upper chest area were bruised.

(R. 399).

Mr. Edmund had questions about the intervening events. At trial, while cross-examining Dr. Drake, the medical examiner, Mr. Edmund learned that the injuries were not inconsistent with the child having been struck by a moving vehicle (R. 483). Counsel unfortunately had failed to investigate this possible intervening cause before trial. In his closing argument, counsel argued to the jury:

> First of all, as is very unusual, Hardy and I are agreeing about one thing going in, and that is, he made the statement that back behind Taco Bell this Defendant pitches away the murder weapon.
>
> And that, ladies and gentlemen, I say to you, is one of the most, is not the most critical aspect of this entire case. For unless you decide that actually Phillip Atkins delivered the blows that resulted in the death of this child, you don't find him guilty of first degree murder and it's just that simple.
>
> And if he pitched away the murder weapon as he said he did and as Mr. Pickard said he did, there was no weapon, there is nothing with him -- let me see these photographs of the child, please ma'am -- there was nothing with him out at the scene where that child was found that could have inflicted wounds on that child of that magnitude, that depth, that severity. And I'll get into that when I get into my argument.
>
> If, as Hardy said, he pitched away the murder weapon, something intervened that resulted ultimately in the death of this child, Tony Castillo. And if something else intervened, whether accidental or otherwise, provided he didn't do it, . . . unless you find that he inflicted the wounds that show there that this child died, from he's not guilty of first degree murder.

(R. 960-61). However, counsel failed to investigate and present the available evidence suggesting that after Mr. Atkins panicked and left the decedent by the dirt road, the decedent was hit by a motor vehicle.

According to the affidavit of trial counsel's investigator, Ron Hill, Mr. Edmund did not pursue this line of investigation until the second to the last day of trial:

> Regarding the 1982 first degree murder trial of Phillip Atkins, I was acquainted with Mr. Edmund but had not specifically been employed to work on that case.
>
> On the next to last day of the trial, I had occasion to go to the courtroom and confer with Jack Edmund during a recess. Mr. Edmund asked me to inspect some photographs that he had pertaining to the Atkins' trial. The photographs depicted the condition of the victim's face and body. Also there were photographs of the scene and the vehicle driven by the male subject that found the body. Mr. Edmund was concerned and not completely satisfied that the damage inflicted on the victim was done by a single pipe allegedly wielded by his client. Upon inspection of the photographs I also agreed that there were some particulars and some inconsistencies with the findings.

(App. 1).

Mr. Hill investigated the matter by going with Mr. Atkins' brother to the scene where the victim had been found and conducting an experiment:

> Driving a 1980 Thunderbird I turned around and proceeded around the bend in the direction of the spot in which the client's brother was standing and retraced the route taken by the individual who had found the body. I was proceeding at the designated speed, the same speed that the driver of the pickup who found the body was allegedly proceeding after he left work on that particular night. The reconstruction that I was doing was during daylight. I was informed that the body was found during evening hours and darkened conditions as I drove in the direction of the "spot" and proceeding around a curve in the road, the speed of 35 miles per hour was excessive for that condition. I slowed to a speed of 25 and proceeded and had difficulty locating the client's brother. Slowing even to a greater degree, I was then able to locate the brother.
>
> Realizing that there was some discrepancy in the scenario, I made plans to return to the scene during the darkened conditions. Later that night I arrived on the scene accompanied by my wife. I requested that she lay in the road at the spot. She was wearing light colored clothing. I proceeded back into the road and duplicated my earlier run to the spot. At no time did I travel faster than 25 miles per hour. My instructions to my wife had been that if, in fact, I appeared to be closing in for her to leave the scene and get off the road. As I came around the bend, traveling at 25 miles per hour I immediately slammed on my breaks to decrease my speed to 15 miles per hour. I could not see her in the road. I slowed to a speed of 10 miles per hour and still could not see her. I knew I was approaching the area of the "spot." At that time my wife left the spot in haste. I was in actuality almost at the spot without my headlights picking her up.

> It is my conclusion that the driver of the pickup, the individual who found the body could in no way have seen the body of the victim as he came around the curve and approached him. With the damage done to the boy's face it would appear that the victim was possibly on his knees maybe in a semiconscious state when the pickup truck driver came upon him and struck him. In the inspection of the photos during the first contact with them, I noticed that the tracks from the pickup truck ended twelve feet from where the body was found which would indicate a possible flight of the body after being struck.
>
> . . . Mr. Edmund stated to me that my investigational scenario was very logical however, it was too late to introduce me as a witness.

(App. 1).

Clearly, Mr. Edmund could have pursued this information before trial:

> I am sure that Mr. Edmund had these photographs prior to trial but I was not asked to look at them or investigate until the second to the last day of trial.

(App. 1).

Had this information been effectively investigated in a timely manner, Mr. Edmund could have presented witnesses as to a possible intervening cause of death. It was uncontested that the victim was alive after the blow to the head administered by Mr. Atkins in a panic. Certainly, evidence that Mr. Atkins abandoned any efforts to kidnap or assault the victim and that the victim died as a result of being struck by a third party's car, was critical to the defense. It explained what happened. Had this evidence been presented to the jury, there is a substantial likelihood of a different outcome, as Mr. Edmund has attested:

> **BEFORE ME**, the undersigned authority, duly authorized to administer oaths and take acknowledgements, personally this day personally appeared **JACK T. EDMUND**, who, being by me first duly cautioned and sworn upon his oath, deposes and says:
>
> 1. That he was trial counsel for PHILLIP ALEXANDER ATKINS at the trial upon which his present death penalty was imposed.
>
> 2. That he has read the Affidavit of Ron Hill dated April 14, 1989, concerning Hill's attempt to reconstruct the discover of victim, decedent.
>
> 3. That Affiant is of the opinion that had this reconstruction be offered and admitted at trial, it would likely have effected the verdict and/or the imposition of the death penalty, and

should have been discovered prior to trial.

(App. 2). However, a last minute cursory look at this important issue was all the defense attorney gave, and counsel for no reason failed to present the evidence to the jury, either at the guilt or penalty phase.

This was in fact a critical issue since Mr. Atkins confessed to hitting the boy with a lead pipe while behind Taco Bell (R. 910), but threw the bar away when the land cruiser drove up. According to the testimony of Mr. Hazell and Mr. Powell, at that time, the body was not bleeding but merely appeared to be unconscious. There was no sign of severe head injuries (R. 432, 453). Mr. Atkins remembered taking the body to the area of the railroad tracks and placing him outside the car and leaving (R. 914). Mr. Atkins, according to the police, "confessed" to hitting the body with his fists since he had no other explanation for the boy's condition; however, that "confession" is highly suspect given Mr. Atkins' mental illness and state of intoxication at the time. At least according to Dr. Dee, Mr. Atkins stated that he told the police he had struck the boy with his fists "in order to stop them asking him questions over and over" (February 11, 1982 report, App. 12 to Rule 3.850 motion). But for counsel's deficient performance, there is a reasonable probability of a different outcome of Mr. Atkins' trial. Counsel's argument at closing, no matter how strenuous, could not correct his failure to produce the available evidence for the jury to consider. As in Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989), counsel's failure to investigate pretrial left him unprepared to present critical evidence at trial.

Clearly, Mr. Edmund failed to adequately investigate these discrepancies. As in Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc), this was a critical area for defense counsel to have pursued; the failure to develop and present this evidence undermines confidence in the outcome. These were critical errors on counsel's part that seriously prejudiced Mr. Atkins' trial by denying him an adversarial testing. Mr. Atkins did not get "a reliable adversarial testing" of his guilt. Counsel's deficient performance undermines confidence in both the guilt and penalty phase determinations.

In his Rule 3.850 motion, Mr. Atkins alleged that trial counsel's performance was deficient. Unfortunately, by virtue of Rule 3.851 and the pendency of numerous death warrants, an overworked CCR was unable to adequately and timely investigate. When the matter was learned of and brought to this Court's attention, this Court failed to provide collateral counsel with the necessary time to investigate. In light of the evidence now available, this Court must order an evidentiary hearing on this issue.

Trial counsel had tried to suggest to the jury that there was an intervening cause of death in that Mr. Atkins had placed the child on the road and another vehicle came along and struck the child. However, counsel never presented the evidence that would have supported that argument. Therein lies the deficient performance. The prejudice was that Mr. Atkins may have in fact been "not guilty" of first-degree murder and therefore would have been convicted of a lesser charge and thus not eligible for the sentence of death. Mr. Atkins may thus have been "innocent" of first-degree murder and therefore "innocent" of the death penalty. See Henderson v. Sergeant, 926 F.2d 706 (8th Cir. 1991).

The facts upon which this claim is predicated were unknown to Mr. Atkins. Trial counsel failed to comply with his constitutionally mandated duty and learn of these facts. Henderson v. Sargeant; Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc); Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986). Collateral counsel failed to comply with his statutorily mandated duty and learn of these facts. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). These facts establish Mr. Atkins' innocence of the homicide charged and of the death sentence. The ends of justice require consideration of these facts now. McCleskey v. Zant, 111 S. Ct. 1454 (1991). "Fundamental fairness" may override the State's interest in finality. Moreland v. State, 582 So. 2d 618, 619 (Fla. 1991). "The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness." Witt v. State, 387 So. 2d 922, 925 (Fla. 1980).

It would be a gross miscarriage of justice to refuse to consider Mr. Atkins' claim. The interests of justice mandate that the claim be fully determined on its merits after full and fair

evidentiary development: the constitutional error herein asserted "precluded the development of true facts" and "perverted the jury's deliberations concerning the ultimate question[s] whether in fact [Phillip Atkins was guilty of first-degree murder and should have been sentenced to die.]" Smith v. Murray, 477 U.S. 527, 537 (1986)(emphasis in original). Under such circumstances, no procedural bars can be applied, for the ends of justice require that the claim be heard. McCleskey; Moreland; Witt.

CONCLUSION

For each of the foregoing reasons, Petitioner asks this Court to vacate his unconstitutional conviction and death sentence, and grant all other relief which is just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 7th, 1992.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
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Appendix 1

AFF-HILL.PAA; (SALLY); 4/14/89; FINAL; BARBARA

STATE OF FLORIDA)
) ss:
COUNTY OF Polk)

AFFIDAVIT OF RON HILL

Before me, the undersigned authority, this day personally appeared RON HILL, who, being by me duly sworn says:

1. My name is Ron Hill and I am a private investigator in Auburndale, Florida.

2. I have been in the business of investigation for over twenty years and have frequently been employed by defense attorneys including Mr. Jack Edmund of Ft. Meade, Florida.

3. Regarding the 1982 first degree murder trial of Phillip Atkins, I was acquainted with Mr. Edmund but had not specifically been employed to work on that case.

4. On the next to the last day of the trial, I had occasion to go to the courtroom and confer with Jack Edmund during a recess. Mr. Edmund asked me to inspect some photographs that he had pertaining to the Atkin's trial. The photographs depicted the condition of the victim's face and body. Also there were photographs of the scene and the vehicle driven by the male subject that found the body. Mr. Edmund was concerned and not completely satisfied that the damage inflicted on the victim was done by a single pipe

allegedly wielded by his client. Upon inspection of the photographs I also agreed that there were some particulars and some inconsistencies with the findings.

5. Upon the request of Mr. Edmund and with my agreement, I went to the scene where the victim's body was found. I was accompanied by the client's brother. After locating the vicinity of the scene, I made contact with a homeowner that lived at the end of the dirt road where the scene was located.

6. When I questioned the male homeowner, he stated that a male individual came to his home stating that he had found a dead body in the road. This individual was very nervous and had asked to call the police.

7. This investigator asked if there was anything unusual about the disposition of the male subject who requested the use of the phone. The homeowner stated that he was extremely nervous and the homeowner also stated that he believed that the caller had killed somebody.

8. After receiving more accurate directions as to the exact spot when the victim had been found, I proceeded with the client's brother to the spot in the road. Upon reaching the scene I requested that the client's brother stand on the "spot" while I proceeded back into the dirt road in the direction from where the individual who found the body had

stated he was coming from. The homeowner had told me that the individual who had came to his house had told him that he had found the body as he was coming from work at a railroad company that is based down the dirt road.

9. Driving a 1980 Thunderbird I turned around and proceeded around the bend in the direction of the spot in which the client's brother was standing and retraced the route taken by the individual who had found the body. I was proceeding at a designated speed, the same speed that the driver of the pickup who found the body was allegedly proceeding after he left work on that particular night. The reconstruction that I was doing was during daylight. I was informed that the body was found during evening hours and darkened conditions as I drove in the direction of the "spot" and proceeding around a curve in the road, the speed of 35 miles per hour was excessive for that condition. I slowed to a speed of 25 and proceeded and had difficulty locating the client's brother. Slowing even to a greater degree, I was then able to locate the brother.

10. Realizing that there was some discrepancy in the scenario, I made plans to return to the scene during the darkened conditions. Later that night I arrived on the scene accompanied by my wife. I requested that she lay in the road at the spot. She was wearing light colored clothing. I

proceeded back into the road and duplicated my earlier run to the spot. At no time did I travel faster than 25 miles per hour. My instructions to my wife had been that if, in fact, I appeared to be closing in for her to leave the scene and get off the road. As I came around the bend, traveling at 25 miles per hour I immediately slammed on my brakes to decrease my speed to 15 miles per hour. I could not see her in the road. I slowed to a speed of 10 miles per hour and still could not see her. I knew I was approaching the area of the "spot." At that time my wife left the spot in haste. I was in actuality almost at the spot without my headlights picking her up.

11. It is my conclusion that the driver of the pickup, the individual who found the body could in no way have seen the body of the victim as he came around the curve and approached him. With the damage done to the boy's face it would appear that the victim was possibly on his knees maybe in a semi-conscious state when the pickup truck driver came upon him and struck him. In the inspection of the photos during the first contact with them, I noticed that the tracks from the pickup truck ended twelve feet from where the body was found which would indicate a possible flight of the body after being struck.

12. After my experiment reinacting the finding of the body, I telephoned Jack Edmund to tell him my conclusions. The next day, the last day of the trial, I met personally with attorney Edmund at the courthouse before he made his closing statements. Mr. Edmund stated to me that my investigational scenario was very logical however, it was too late to introduce me as a witness.

13. During Mr. Edmund's closing argument, he attempted to bring this information to the jury by pointing out the problem of the body having been found 12 feet from the tire tracks with no tracks connecting. He pointed out that even one of great strength could not have held the boy and leaped 12 feet.

14. I am sure that Mr. Edmund had these photographs prior to trial but I was not asked to look at them or investigate until the second to the last day of trial.

15. My reason for not making my findings public was that I thought attorney Edmund would use this in his appeal. When I realized through the recent newspaper accounts that Philip was scheduled for execution on April 18, 1989, I then came

AFF-HILL.PAA; (SALLY); 4/14/89; FINAL; BARBARA

forward and offered the information to CCR on the afternoon of April 11, 1989.

FURTHER AFFIANT SAYETH NOT.

Ron Hill

RON HILL

Sworn to and subscribed before me this 14Th day of April, 1989.

Notary Public
State of Florida

My Commission expires:
Notary Public, State of Florida at Large
My Commission Expires April 28, 1991
Bonded thru Agent's Notary Brokerage

Appendix 2

AFFIDAVIT

STATE OF FLORIDA)

)

COUNTY OF POLK)

BEFORE ME, the undersigned authority, duly authorized to administer oaths and take acknowledgements, personally this day personally appeared **JACK T. EDMUND**, who, being by me first duly cautioned and sworn upon his oath, deposes and says:

1. That he was trial counsel for PHILLIP ALEXANDER ATKINS at the trial upon which his present death penalty was imposed.

2. That he has read the Affidavit of Ron Hill dated April 14, 1989, concerning Hill's attempt to reconstruct the discovery of victim, decedent.

3. That Affiant is of the opinion that had this reconstruction be offered and admitted at trial it would likely have effected the verdict and/or the imposition of the death penalty, and should have been discovered prior to trial.

FURTHER AFFIANT SAYETH NOT.

JACK T. EDMUND

SWORN TO AND SUBSCRIBED before me this 6TH day of July, A.D. 1992.

Regina L. Boxx
NOTARY PUBLIC

My commission expires:

REGINA L. BOXX
Notary Public, State of Florida
My comm. expires Feb. 27, 1996
Comm. No. CC175091