IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,865

JEFFREY LEE ATWATER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
PINELLAS COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT ABOUT REFERENCES

This is an appeal of the circuit court's denial of Atwater's Rule 3.850 motion for postconviction relief. Ten of the fifteen claims raised in the motion were summarily denied and the rest were denied after an evidentiary hearing.

The record on appeal comprises the record initially compiled by the clerk, and exhibits which were admitted into evidence at the evidentiary hearing and references to this portion of the record are of the form, e.g., (R. 123). The exhibits were not repaginated for appeal purposes and are simply referred to descriptively; e.g., "Defense exhibit 3." References are also made to the record prepared in the direct appeal of the appellant's conviction and sentence and are of the form, e.g., (Dir. 123). The direct appeal record also contains depositions which were not repaginated, and the few references made to them are clearly described.

"Collateral counsel" refers to the lawyers representing Mr. Atwater in these postconviction proceedings. Where there is a reason to draw attention to counsel at the trial for either side, they are referred to as "the prosecutor" or "defense counsel." The phrase "evidentiary hearing" refers to the evidentiary hearing conducted on Atwater's motion for postconviction relief. Generally, the phrase "trial court" means the circuit court which presided over the defendant's trial, whereas "lower court" means

the circuit court which presided over his postconviction proceedings.

REQUEST FOR ORAL ARGUMENT

Mr. Atwater has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the gravity of the penalty. Mr. Atwater, through counsel, accordingly urges that the Court permit oral argument.

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CASE AND PROCEDURAL HISTORY

Mr. Atwater was indicted by the grand jury in Pinellas County, Florida, on September 7, 1989 (Dir. 4-5). He was charged with first-degree murder in count I and armed robbery in count II. Jury trial commenced May 1, 1990. A summary of the facts adduced by the State was set out in this Court's opinion on direct appeal. Atwater v. State, 626 So.2d 1325 (Fla. 1993). Briefly, the defendant was convicted of murdering the 64-year-old fiancee of his aunt by stabbing him repeatedly. At the close of the four day trial, the jury found Mr. Atwater guilty of all counts. (Dir. 560-561). The penalty phase took place on May 16 and 17, 1990, and the jury rendered an advisory verdict of death. (Dir. 675). After hearing argument on June 15, 1990, the court sentenced Mr. Atwater on June 25, 1990, to death on count I and ten (10) years on count II, sentences to run concurrent (Dir. 716-718). The trial court entered written findings (Dir. 707-715).

A timely direct appeal was filed and this Court affirmed Atwater's convictions and sentences. Atwater 626 So.2d 1325 (Fla. 1993). The United States Supreme Court denied certiorari on April 18, 1994. Atwater v. State, 114 S. Ct. 1578 (1994). Because Mr. Atwater's conviction and sentence became final after January 1, 1994, Mr. Atwater was required to file his motion for postconviction relief within one (1) year pursuant to the newly-enacted Rule 3.851. This Court granted Mr. Atwater an extension of

time in which to file his postconviction motion. (Atwater v. State, No. 76,327, Order August 15, 1995). An Amended 3.850 motion was timely filed on October 13, 1995. The lower court's eventual denial of that motion is the subject of this appeal.

The motion for postconviction relief raised twenty four claims for relief. The lower court conducted a Huff hearing[1] on May 15, 1998. By order dated June 29, 1998, the lower court summarily denied all claims except (amended) Claim VI and Claim XVII. (R. 226 to 242). After an evidentiary hearing on these two claims conducted September 11, 1998, the lower court denied them as well. (R. 364 to 367, order dated January 5, 1999).

Claims V, VIII, XI, XIII, XIV, XV, XVI, XVII, XVIII, XIX , XXI challenged the imposition of the death penalty in this case. Claim I was a discovery issue. Claim II addressed record omissions. Claims III, IV, VI, VII, IX. X, XII, XXII, XXIII, and XXIV raised guilt phase issues. Cumulative error was alleged in Claim XX. In short, the trial court granted an evidentiary hearing on a few guilt phase issues and denied an evidentiary hearing on any penalty phase issues.

The allegations contained in collateral counsel's challenge to the death penalty are detailed in the argument portion of this brief. In particular, Claim XI challenged trial counsel's failure to investigate, prepare and present mitigation in the penalty

[1]Huff v. State, 622 So.2d 982 (Fla. 1993).

phase. The record on direct appeal is cited extensively in Argument II of this brief on this issue. The lower court denied the request for an evidentiary hearing on this point, noting that collateral counsel had not pled the names of witnesses who would have been called to testify and finding that the background mitigation described in the motion to vacate would have been cumulative to the testimony of the psychologist who testified for the defense at trial:

> The Court has reviewed the record and agrees with the State's contention that defense mitigation witness Dr. Merin, a psychologist, testified to essentially the same information about defendant's early life and family situation as outlined in defendant's claim. Defense counsel also presented testimony from Dr. Merin and from three witnesses regarding defendant's alcohol use. The State points out that the defendant does not suggest what other witnesses should have been called by the defense counsel to testify to mitigation. The Court adopts the State's response as to this claim, and finds that defendant does not meet the performance component of Strickland v. Washington 466 U. S. 668 (1984). Therefore, this ground has no merit.

(R. 234). Argument II in this brief points out inter alia that the background information provided to the jury at trial through the psychologist was never presented as being true, that the psychologist changed his testimony between his deposition and the penalty phase, that the record does not reflect any but the most minimal background investigation, and that ultimately the defense presentation in the penalty phase did Atwater more harm than good.

It is only noted here that the record in these proceedings does not contain any new evidence about defense counsels' acts and omissions with regard to the penalty phase because the lower court did not grant an evidentiary hearing on this issue.

Claim VI as originally pled addressed trial counsel's concession that Atwater was guilty of second degree murder. At the Huff hearing, collateral counsel also argued that defense counsel had prevented Atwater from testifying in his own defense. With the permission of the court, Claim VI was subsequently amended to include this additional argument. (R.214 to 218). Claim XVII was a broad allegation of ineffective assistance at the guilt phase which addressed defense counsel's concession of guilt, failure to support the argument that the defendant was guilty of only second degree murder with adequate investigation, preparation, and presentation, counsel's failure to secure expert testimony supporting this theory, and failure to communicate with Atwater about any of these issues. The lower court took the view that all of these allegations were interrelated, and that they could, in fact, have been raised in one claim. (R. 428). As the lower court characterized it at the beginning of the evidentiary hearing, "Essentially, we're dealing with claims of ineffective assistance in the guilt phase of the trial because of the Defendant's attorney conceding his guilt to the lesser crime and some charges that arise out of that." Id.

Actually, the characterization of defense counsel's actions as a "concession" understates the event. The defense lawyer who delivered the closing argument on behalf of Mr. Atwater actively urged a verdict of second degree murder instead of merely attacking the element of premeditation. In the postconviction evidentiary hearing he admitted displaying the gruesome crime scene photographs at the point in his closing argument where, in his paraphrase, he told the jury, "if this isn't an act of doing evil, malice, what is?" (R. 489). The record on direct appeal also shows that he argued against manslaughter because, he insisted, the evidence supported a more serious crime. (Dir. 1461).

Atwater's trial defense lawyers were John Thor White and Michael Schwartzberg. They testified at the evidentiary hearing. Mr. White generally conceded that he had felt the evidence of guilt was strong, that he expected the case to go to a penalty phase, and that a "pitch" was made to the jury for second degree murder in an effort to avoid the death penalty. (R. 439 to 447, 455).

Mr. White said that he agreed with the general principle that the defendant, not the lawyer, has the final say on whether to testify or whether to concede guilt. (R. 448). Mr. White said that he did not remember Atwater ever conceding guilt to him. (R. 447). He also said that Atwater had never expressed a desire to testify in the case to him personally. Id. When asked about the extent of his discussions with Mr. Atwater about these issues, the following exchange took place:

> Q. Do you recall any discussions that you had with Mr. Atwater about the decision to concede guilt during the closing statement?
>
> A. I do not.
>
> Q. Do you recall having any discussions with Mr. Atwater about his right to testify on his own behalf?
>
> A. I do not.
>
> Q. Do you recall at any time explaining to Mr. Atwater your role in the case?
>
> A. I do not.
>
> Q. Do you recall at any time explaining to Mr. Atwater his legal rights at trial?
>
> A. I do not.
>
> Q. Do you recall making a statement – or that Mr. Atwater made a statement to the detective in the case, as well as Dr. Sidney Merin, that he had found the body in this case; that he was not guilty and had found the body in this case?
>
> A. I do not recall that, but it's sort of ringing a bell now that you're saying it...

(R. 448 - 449). On cross examination, Mr. White explained that Mr. Schwartzberg had the primary responsibility to confer with Mr. Atwater, and that some communication about these issues may have occurred between them without his knowing about it:

> A. ...Can I just clarify my response to that? It may be helpful to understand that during this trial, my best recollection is that when we divided up responsibilities, Co-counsel Schwartzberg was the – his responsibility was to interact with Mr. Atwater and sort of leave me alone so I could strategize and keep an eye on things, and so on and so forth.

> So all I'm trying to say is during the course of the trial, my direct conversations to Mr. Atwater, to my recollection, were minimal. So that's that.
>
> Q. So within the contact that you did have, he never did express any complaint about the way the case was going?
>
> A. No. I guess I'm trying to say maybe something went on between him and Schwartzberg.
>
> Q. As far as you and him, it did not happen?
>
> A. Exactly. That's what I'm trying to get to.
>
> Q. Do you have any knowledge that anything would have happened between him and Mr. Schwartzberg, for that matter?
>
> A. I have no knowledge of that.

(R. 456, 457). Mr. White did recall a recess after the close of the state's case where he may have had a discussion with his client about whether to testify, but he did not remember anything more about it than that it happened. (R. 468, 469). The record does not contain any colloquy about the defendant testifying.

Mr. Schwartzberg said that his normal practice would have been to discuss these issues with his client, but he also said that he did not recall if such discussions took place specifically in this case:

> A. ... I can tell you that my standard practice now – and, granted, I've done more than two [capital cases] – is I don't, first of all, make an evaluation until after I've completed taking all the discovery.

> At which point in time, I tell my client, this is what I believe the State has, this is what I believe your risks are, this is what I believe we may be able to do. And the decision lies in their hands.
>
> Q. Do you recall that the client wished to testify in this case, or whether or not he wished to testify in the case?
>
> A. I do not recall.
>
> Q. Do you recall ever having a discussion about him testifying in the case?
>
> A. Do I have an independent recollection? Again, the answer to that is no, I do not recall having a discussion with Jeff about that. But at the time that we would have either put testimony on, rested or done whatever, we would have had a discussion about that.

(R. 476, 477).

* * *

> Q. Do you recall at trial the portion where the State rested and there was a short recess to discuss whether or not the defense would rest or be calling any witnesses? Do you recall what transpired during that recess?
>
> A. The answer is I do not have an independent recollection.

(R. 478). Defense counsel did not remember much. On the other hand, he did recall that Atwater had denied guilt, but that he had nevertheless argued that Atwater was guilty of second degree murder to the jury. During the evidentiary hearing, Schwartzberg was confronted with portions of the transcript of his closing argument showing that he had unequivocally and somewhat graphically conceded Atwater's guilt in his closing argument. (R. 488). Instead of

contending that he and Atwater had discussed strategically admitting guilt to second degree murder he suggested that the concession of guilt at trial was only made as an argument in the alternative:

> Q. What was Mr. Atwater's desire in this case? What were his wishes; do you recall?
>
> A. The answer to that question is I believe originally Jeff told us that he did not kill Kenny Smith. And again, it's off the top of my head. And I recall because there were some that we performed concerning some statements that he made to us about potential alibis or places that he was at the time the crime was committed that we followed up on. So, I mean, that's the best that I can recall.
>
> Q. If the client stated that he was not guilty, then why would you concede guilt in the closing argument?
>
> A. Well, I think that sometimes we argue in the alternative, which may not be the best way in the world to argue that a client is not guilty; however, if you believe that the evidence discloses – has proven beyond a reasonable doubt that the client is guilty, then the only thing that he is guilty of is X or Y.

(R. 487, 488).

* * *

> ...I think what you're reading from is my rebuttal argument.
>
> Because after every argument was made, including the argument of the state attorney at that point in time, I believed that we argued what was in our client's best interests, knowing what we had coming up with Dr. Merin.
>
> And I may well at that point – I know that I stood there with the photographs in

> front of the jury, saying, if this isn't an act doing evil, malice, what is? And by definition, that's second-degree murder. But that was my rebuttal argument.

(488, 489). The record on direct appeal does not bear out the implication that defense counsel did argue Mr. Atwater's position in his first argument, and then responded to the state's argument by shifting to an alternate theory of second degree murder. Rather, the record reflects that Mr. Schwartzberg addressed only the theory of felony murder during the first portion of his closing argument, without any reference to the premeditated murder charge other than to say that he would address it after the state had its say. (Dir. 1425). The prosecutor commented on Mr. Schwarzberg's failure to address premeditated murder in his first closing argument, and in that context told the jury that any contention that Atwater had not been present would be "ludicrous" under the circumstances. (Dir. 1445, 1452). Mr. Schwarzberg then devoted the second portion of his closing argument to the lesser included offense theory of defense. (Dir 1458 et seq.). Thus, Mr. Schwartzberg, whether intentionally or not, misrepresented his conduct at trial when he testified at the evidentiary hearing, and Mr. Atwater's position as stated to his to his lawyers, that he did not commit the murder, was not presented to the jury.

Mr. Atwater testified at the evidentiary hearing. (R. 507 to 532). He said that he was twenty five years old at the time of his trial, had a tenth grade education, and that he had not been

through a trial prior to this one; that his prior experience before a court had been limited to plea negotiations and entering pleas. (R. 507, 508). He said that his attorneys had told him that they did not want him to testify, that they did not explain his options and rights with regard to testifying, and that he did not know that he had the right to overrule their decision on the matter. (R. 508 to 511). In fact, he said that he thought if he had stood up in the courtroom and protested the way his attorneys were handling the case he would have been held in contempt. (R. 515). Moreover, he said that he had told Mr. Schwartzberg before the trial that he wanted to testify, and that if he had been permitted to testify, he would have told the jury that he was not guilty. (R. 510). He also said that there had never been a discussion between him and his attorneys about conceding guilt at any level, but that if there had been a discussion he would have told them "point blank, no." (R. 513). The lower court found that counsel's concession of guilt was a legitimate trial strategy even without the defendant's knowledge or consent, expressly relying on McNeal v. Washington, 722 F.2d 674 (11th Cir. 1984); McNeal v. State, 409 So.2d 528 (Fla 5th DCA), rev. den., 413 So.2d 876 (Fla. 1982). (R.366, 367).

With regard to the issue of the defendant's not testifying, the lower court's order denying postconviction relief contains these findings of fact:

> The Court finds that the testimony of the defendant's two attorneys shows that neither attorney had an independent recollection of

> informing the defendant that he could override their advice and testify in his own behalf. The attorneys described the defendant as acquiescing to their advice to avoid testifying. No waiver of the right to testify was made on the record by the defendant, and there is no record of the Court conducting an inquiry regarding such a waiver. The defendant did admit that he knew he had the right to testify, but stated that he did not know he could overrule his attorneys' decisions and testify on his own behalf.

(R. 366). The lower court nevertheless found that insufficient prejudice had been shown to meet the second prong of Strickland and that it was therefore unnecessary to address any deficiencies in representation. Id.

A timely notice of appeal was filed on January 21, 1999.

SUMMARY OF ARGUMENT

In Argument I, Atwater challenges his trial counsel's concession of guilt and failure to allow him to testify in his iwn defense. The lower court granted an evidentiary hearing on this and related sub issues and then denied relief based on McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984). In fact, the characterization of counsel's acts as a "concession of guilt" understates what actually happened. Trial counsel actively argued in favor of a second degree murder conviction rather than merely attack the element of premeditation. It was precisely this distinction that was recognized by the McNeal court, and McNeal in fact requires that the lower court's denial of relief be reversed.

Argument II addresses ineffective representation at the

penalty phase. The lower court denied an evidentiary hearing on this issue, either because the facts pled below were cumulative or did not meet the second prong of Strickland. An examination of the record shows that the facts presented in mitigation at the penalty phase were not presented as being true, and that the additional mitigation pled by collateral counsel therefore could not have been cumulative to anything because there was nothing for it to be cumulative to. Moreover, virtually every aspect of defense investigation, preparation and presentation in the penalty phase is rife with deficiencies, and the overall result was that the counsel's presentation to the jury did more harm than good. An evidentiary hearing on this issue should have been granted because the prejudice was manifest – e.g. the testimony of the defense star expert witness was a principle part of the prosecutor's closing argument – the reasons for counsel's acts and omissions cannot be determined by reference to the record, and therefore the allegations of the motion to vacate cannot be conclusively refuted on their face or by the record.

The remaining arguments presented herein address record omissions, prosecutorial elicitation of false and misleading evidence and unqualified opinion testimony, improper jury instructions in the penalty phase, an undisclosed deal with a state witness, the trial court's failure to find mitigation existing in the record, Mr. Atwater's absence during critical stages of the proceedings, failure of proof, erroneous guilt phase instructions,

improper argument and voir dire, improper aggravation, constitutionality of the death penalty statute, inadequate pre trial preparation by the defense, the cumulative effect of these errors, improper introduction of gruesome photographs, actual innocence, and failure to discover and present impeaching evidence. These claims were summarily denied, but an evidentiary hearing should have been granted because they cannot be conclusively refuted by references to the record and the court file in this case.

ARGUMENT I

MR. ATWATER WAS DENIED DUE PROCESS, A FAIR TRIAL, AN ADVERSARIAL TESTING AND EFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT PHASE OF THE TRIAL WHEN WITHOUT HIS CONSENT, DEFENSE COUNSEL CONCEDED MR. ATWATER'S GUILT, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

This issue was pled in Claim VI of the postconviction motion filed on April 9, 1998. (R.17). Counsel was later permitted to amend this Claim, and the lower court granted an evidentiary hearing under the heading “Claim 17" of its preliminary order. (R. 230, 238). As noted above, the lower court expressly relied on McNeal v. Wainwright, 722 F.2d 674 (11th Cir.1984) and McNeal v. State, 409 So.2d 528 (Fla. 5th DCA), rev. denied, 413 So.2d 876 (Fla. 1982) in rejecting the claim that counsel’s concession of guilt amounted to ineffective assistance of counsel. Also as noted

above in the factual statement of this brief, the characterization of counsel's argument as a "concession" understates what counsel actually did. Mr. Schwartzberg forcefully argued in favor of a second degree murder conviction, he displayed gruesome crime scene photographs to the jury while arguing that the crime was one of malice, and he rejected any consideration of manslaughter because the facts supported the more serious offense. In short, defense counsel argued as would a prosecutor arguing for a guilty verdict in a second degree murder conviction. There is a difference between merely attacking the element of premeditation and actively arguing that the evidence provided proof of the other elements of the offense and therefore required a conviction of second degree murder. It is precisely this distinction which was cited by the federal court in affirming McNeal's conviction:

> McNeal claims the attorney's statements amounted to a guilty plea entered without his consent, relying on a Sixth Circuit case, Wiley v. Sowders, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981). Wiley is distinguishable from the case at bar. There the attorney repeatedly stated that his clients were guilty of the offenses charged, that the state had proven their guilt, but requested that the jury show leniency. Id. at 644-45. In the case at bar, McNeal was being tried for first degree murder. His attorney did not state that McNeal was guilty of murder. Instead, he stated that "at best" the government had proven only manslaughter because they did not prove premeditation. The majority of his defense case centered around this proposition. During the trial, his attorney tried to establish a self-defense claim. In view of the tape recorded confession played at trial,

> however, such a defense did not play a central role.

McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984). Thus the Eleventh Circuit recognized precisely the point made here, that there is a distinction between an affirmative insistent by defense counsel that his client is guilty of a crime included within the crime charged on one hand, and an argument criticizing the state's case as "at best" amounting to proof of a lesser included offense. The record in this case shows that defense counsel's argument fell within the former category, and was thus proscribed by Wiley. The lower court's reliance on McNeal was not only misplaced: in fact the lower court cited a case which requires that its failure to grant relief must be reversed.

During his closing statement, defense counsel repeatedly conceded Mr. Atwater's guilt (R1. 662-672, 704-712). These concessions included, inter alia, the following:

> We're not hiding anything from you. We're asking you to do your duty, to render the only verdict that is fair and just, and that is as to Count One of the indictment, that Jeffrey Atwater is guilty of Murder in the Second Degree . . .
>
> ***
>
> This is an act of a depraved mind regardless of human life, done out of ill will, spite, hatred or an evil intent. It is the only verdict that you can return and do what you swore to do, do justice

(Dir. 1402) (emphasis added). Mr. Atwater was not informed of defense counsel's plan to concede guilt. Had Mr. Atwater been so

informed, he would not have agreed to defense counsel's concession of guilt.

Defense counsel's concession of guilt denied Mr. Atwater due process, a fair trial, and a right to a jury verdict under the Fourteenth Amendment to the United States Constitution. In addition, defense counsel's concession of guilt denied Mr. Atwater effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Strickland v. Washington, 466 U.S. 668 (1984).

Defense counsel's concession of Mr. Atwater's guilt resulted in a "complete breakdown in the adversarial process which resulted in a complete denial of his right to counsel" and thus constitutes ineffective assistance of counsel. Nixon v. State, 572 So.2d 1336 (Fla. 1990), citing cases, United States v. Cronic, 104 S. Ct. 2039 (1984); see e.g., Wiley v. Sowders, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981) (petitioner was deprived of effective assistance of counsel when defense counsel admitted petitioner's guilt, without first obtaining petitioner's consent to the strategy), cert. denied; People v. Hattery, 109 Ill. 2d 449, 488 N.E.2d 513 (Ill. 1985) (defense counsel is per se ineffective where counsel conceded defendant's guilt, unless the record shows that the defendant knowingly and intelligently consented to this strategy), cert. denied, 106 S. Ct. 3314 ((1986); State v. Harbison, 315 N.C. 175,

337 S.E.2d 504 (N.C. 1985) (it is per se ineffective assistance of trial counsel where counsel admits defendant's guilt without the defendant's consent), cert. denied, 106 S. Ct. 1992 (1986); see also Harvey v. Duggger, 656 So.2d 1253, 1256 (Fla. 1995); Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983).

In this case, the trial court failed to conduct any inquiry or establish on the record that Mr. Atwater knowingly, intelligently, and voluntarily consented to defense counsel's concession of guilt.

In counsel's opening, he told the jury:

> [T]his case is about relationships. It is important for you to listen to all of the evidence, and that evidence will concern various relationships, the relationship between Jeffrey Atwater and Adele Coderre, the relationship between Jeffrey Atwater and his natural mother, the relationship between Jeffrey Atwater and his natural father. It will concern the relationship between Jeffrey Atwater and Kenny Smith.
>
> It is important for you to listen to the evidence concerning Jeffrey Atwater and those people, but it is important for you also to listen to the relationship between Adele Coderre and Kenny Smith and the way that it affected Jeffrey Atwater.
>
> It is important for you to listen to the evidence concerning Janet Coderre and her relationship with Kenny Smith. Because this case is about relationships.

(Dir. 1012-1013). Counsel seemed to have been preparing the jury to argue against a finding of premeditation, either by acquittal or a finding of second degree murder. On closing, counsel argued:

> Ladies and gentlemen, this is a case about murder. Pure and simple. Nobody is going to

> stand before you and say that Kenneth Smith was not murdered. The evidence before you is overwhelming, but the question is degree. Is that the act of a depraved mind with no regard for human life?
>
> Ladies and gentlemen, the law gives you alternatives. You must decide from the facts the degree of murder. Mr. Ripplinger made light of the fact of Murder in the Second Degree, but by definition, that's what this crime is all about. It is an act of a depraved mind, and it was done out of ill will, hatred, spite or an evil intent.

(Dir. 1459).

> There have been a lot of things going on during the course of this trial, back and forth between the State of Florida and the Defense, questions, comments, attacks, but it all boils down to that, pure and simple. We're not hiding anything from you. We're asking you to do your duty, to render the only verdict that is fair and just, and that is as to Count One of the indictment, that Jeffrey Atwater is guilty of Murder in the Second Degree, and as to Count Two of the indictment, that Jeffrey Atwater is not guilty as to robbery.

(Dir. 1459-1462). Whether counsel started trial with the strategy of arguing for second degree murder,[2] or whether that decision was reached during trial, it is clear that at closing argument counsel argued that second degree was the proper verdict. Given that, counsel failed to put on the testimony to substantiate his theory of second degree.

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[2]Counsel never advised his client of this "strategy" so even if it was a legitimate trial strategy, it was without his client's consent.

Counsel started trial by telling the jurors this case was about relationships but did not investigate sufficiently or seek expert assistance that could have very effectively explained the dynamics in this family that could have led Jeff Atwater to commit such a crime.[3]

Experts in several cases, mental health, substance abuse, and social work were available and would have testified as to the dysfunctional dynamics within this family -- how manipulative Adele was, how Jeff's sense of loyalty to her stemmed for his neglected upbringing and his exaggerated and often misperceived sense of duty. Where these factors are considered in context with Jeff's difficulty in understanding the subtleties of relationship, communication and the world at large, it is not difficult to see that his actions stemmed from impulse, from his need to protect his "mom."

Counsel's failure to thoroughly investigate this tortured family history and to secure appropriate experts meant that this viable defense theory was completely lost. There can be no strategic reason for failing to investigate the chosen theory of defense. Without investigating counsel didn't know what was available that could have been prevented.

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[3]Undersigned counsel is not conceding Mr. Atwater's guilt at any level but is only pointing out since trial counsel's theory seemed to be second degree, he failed by not putting on the available evidence to support it.

Counsel also failed to object to Mr. Atwater not being present at critical stages throughout the proceedings, including depositions. In fact counsel conducted the majority of depositions before they even met their client. It is difficult to see how they would know what to ask without even discussing their client's account of events. Their client could have proved invaluable to challenge some of the witnesses' credibility.

Defense counsel's concession of guilt, without his consent, denied Mr. Atwater his fundamental right to have the issue of guilt or innocence presented to the jury as an adversarial issue. Absent such an adversarial testing, Mr. Atwater's conviction is unreliable in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

Defense counsel's concession of guilt undermined the reliability of Mr. Atwater's conviction for first degree murder. As a result, Mr. Atwater's death sentence is tainted and unreliable because his penalty phase jury relied upon his unconstitutional conviction in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

ARGUMENT II

THE LOWER COURT ERRED BY FAILING TO GRANT AN EVIDENTIARY HEARING ON MR. ATWATER'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL.

Mr. Atwater was denied the effective assistance of counsel at the penalty phase of his trial, in violation of the sixth, eighth, and fourteenth amendments. Trial counsel failed to adequately investigate and present mitigation and failed to adequately challenge the state's case. Trial counsel was rendered ineffective by actions of the prosecution and the trial court. Defense counsel was also ineffective in failing to request the time and resources to adequately investigate, prepare and present mitigating evidence. Mr. Atwater was denied an adversarial testing and therefore his death sentence is unreliable.

This issue was pled in Claim XI of Atwater's motion for postconviction relief. The averments under this claim included a biographical history of the defendant. The State responded:

> DEFENDANT does not suggest what other witnesses should have been put on the stand concerning mitigation from intoxication.
>
> DEPENDANT'S additional information about his background presented in this Claim is not significantly different as to show that it would have made a difference in the outcome.

(R. 83). The lower court ruled:

> The Court has reviewed the record and agrees with the State's contention that defense mitigation witness Dr. Merin, a psychologist, testified to essentially the same information

> about defendant's early life and family situation as outlined in defendant's claim. Defense counsel also presented testimony from Dr. Merin and from three witnesses regarding defendant's alcohol use. The State points out that the defendant does not suggest what other witnesses should have been called by the defense counsel to testify to mitigation. The Court adopts the State's response as to this claim, and finds that defendant does not meet the performance component of Strickland v. Washington. 466 U. S. 668 (1984). Therefore, this ground has no merit.

(R. 234). The lower court then denied this claim without granting an evidentiary hearing.

The motion for post conviction relief contains the following biographical account which might have been developed and presented at an evidentiary hearing:

> Jeffrey Lee Atwater was born on December 24, 1963, in a hospital in Southington, Connecticut. Due to circumstances beyond his control Mr. Atwater's father had never met or seen Jeffrey Atwater.
>
> Jeffrey and his mother lived in Plainville, Connecticut, a small factory town that frowned on illegitimate children and teenage mothers. They received public welfare assistance and moved from one small town to another in the Plainville area. On December 11, 1965, Jeffrey's sister, Croceann Atwater, was born. Her father Ronald Nolan never married her mother and was a small part of their lives. Atwater's mother, now had two children to raise and support on her own. She was unskilled and unable to provide for them. They were inadequately clothed and emotionally deprived.
>
> Ms. Atwater began working as a cleaning woman at a fuel company that was located next to her home. Mr. Atwater's mother dated various men, and when they did not show up for a pre-

arranged dates she would drink gin to drown her sorrows.

At age three, Jeffrey was taken to a hospital because of constant nose bleeds that would not coagulate. This condition had continued for a year before he received medical attention. When he appeared before a physician he had black and blue marks on his chin and other parts of his body. He was diagnosed with Von Willebrand Syndrome and an Upper Respiratory Infection.

When Jeffrey entered elementary school he was placed in "special reading" classes. He had difficulty grasping concepts and required tutorial help. What is now known is that Jeffrey has ADD, Attention Deficit Disorder with a particular language based learning disability. This kind of disability causes one to misunderstood the information he receives. People with ADD and in particular with a learning disability such as this often tune out the world and react to it from the "disinformation." Little wonder that Jeffrey lacked self-confidence and was unable to focus or concentrate on the subject matter being presented in class.

In 1968, Atwater's mother became pregnant with her third child. This time she married the child's father. Jeffrey's step-father began to physically and emotionally abuse him.

In 1974, Jeffrey's younger sister was hit by a car while crossing the street near their home. She was hospitalized with a fractured skull and placed on a respirator. Two days later her mother had the respirator removed and she died. Jeff was distraught over his young sister's death. When he went to his mother for comfort she responded to him by saying "Now there's one less mouth to feed."

When Jeff entered high school he developed an interest in athletics and joined the football team and participated in cross country running. He was forced to leave his athletic endeavors because of his economic situation.

> He found a job and gave his mother fifty dollars a week to contribute to the family's expenses.
>
> Still looking for emotional support and comfort Jeff attended a local church and began to participate in its youth services program. His mother did not approve of the Pastor at the church and the relationship he and Jeff developed. He often had Jeff join him and his family for dinner. The Pastor described Jeff as one of the "walking wounded." Jeff had been abused and abandoned and screamed out for attention. He responded to simple human kindness as an extraordinary act and would develop strong loyalties to who ever was kind to him.
>
> When the Pastor was transferred out of state to another church Jeff was again left on his own without a support system. His relationship with his mother had deteriorated and he was forced out of her home and into the local Salvation Army facility. He was eighteen years old at the time. He continued to attend high school hoping to be able to graduate. He began to drink and use drugs which only exaggerated his emotional problems. He sought counseling to cope and overcome his addictions but his financial problems interfered with any consistent care.
>
> The mitigation witnesses offered by defense counsel did not properly and fully explain the issues surrounding defendant's intoxication. Four of the five witnesses presented were state witnesses, with the only non-state defense witness being Dr. Merin. Moreover, defense counsel's failure to object timely to prejudicial statements made by Mr. Painter (R: 1602) further demonstrates his ineffectiveness.

CR. 24 to 27. Thus, collateral counsel was prepared to show:

1. Poverty.

2. Lack of a father and, later on, a bad father figure.

3. Illegitimacy and community opprobrium.

4. A nomadic family lifestyle.

5. Emotional deprivation as a child.

6. Alcohol abuse by his mother.

7. Physical and emotional abuse.

8. Learning disorders and retention in school.

9. Grief over the death of his sister.

10. Drug and alcohol addiction

11. Early potential demonstrated by his participation in school athletics, economic support for his family, church activities, voluntary association with a beneficial male role model, and voluntary counseling, all of which were curtailed by his mother and poverty.

Such evidence of family background and personal history may be considered in mitigation. Stevens, 552 So.2d at 1086; Brown v. State, 526 So.2d 903, 908 (Fla.), cert. denied, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988). Thus, there existed nonstatutory mitigating evidence which could have been presented to the trial court, but which was not due to the ineffectiveness of trial counsel. Potential for rehabilitation was a recognized mitigator at the time of Atwater's trial and appeal. Brown v. State, 526 So.2d 903 (Fla.1988). The potential for rehabilitation constitutes a valid mitigating factor. Francis v. Dugger, 514 So.2d 1097, 1098 (Fla.1987); Valle v. State, 502 So.2d 1225, 1226 (Fla.1987); see also Songer v. State, 544 So.2d 1010, 1011-12 (Fla.1989) (mitigation found in, among other things, unrebutted evidence that defendant experienced positive change and

self-improvement while in prison; and defendant was adaptable to structured prison life); cf. Carter v. State, 560 So.2d 1166, 1169 (Fla.1990) (defendant's amenability to rehabilitation considered a factor in reversing jury override). Evidence that a defendant is a caring family person was also recognized mitigation, *e.g.* Caruthers v. State, 465 So.2d 496 (Fla.1985), as is evidence that Mr. Atwater had a good employment history and positive character traits, see Fead v. State, 512 So.2d 176 (Fla.1987); McCampbell v. State, 421 So.2d 1072 (Fla.1982) cited in *Holsworth v. State*, 522 So.2d 348 (Fla. 1988); as well as evidence of church activities, *McRae v. State*, 582 So.2d 613 (Fla. 1991); and that he developed and evidenced strong spiritual and religious standards. *Id*. Lack of a father figure is a mitigator, Sinclair v. State, 657 So.2d 1138, (Fla.1995), as is emotional deprivation as a child. See Hall v. State, 614 So.2d 473 (Fla.1993) (Barkett, C.J., dissenting), and evidence of a learning disorder, Morgan v. State, 639 So.2d 6, 14 (Fla.1994).

Although the lower court expressly agreed with the state's arguments in summarily denying this claim, the record is not entirely clear on what the State argued and what the court agreed with. Collateral counsel presented two factual matters in this claim: 1) biographical or "background" mitigation, and 2) intoxication at the time of the offense. The state's observation that Dr. Merin did provide mitigating evidence at the trial, and

that additional evidence would therefore have been merely cumulative, was addressed only to the intoxication issue. (R. 83). That was the point at which the State noted that the defendant's motion did not allege the names of additional witnesses. Id. With regard to the first matter, family and background mitigation, the State only argued that the "additional information" presented in the claim would not suffice to alter the outcome of the result. Id. In other words, the State appeared to concede that the claim had presented additional information, but argued that it did not meet the second prong of Strickland, while the lower court appeared to believe that the facts pled in the postconviction motion did not present new information and were merely cumulative to Dr. Merin's testimony.

Be that as it may, the question is whether the pleadings raise of issues of fact which could only be resolved at an evidentiary hearing. This Court's opinion in Gaskin v. State, 737 So.2d 509 (Fla. 1999) speaks to a number of issues presented in this case. One is the point that the defendant does not need to plead the names of witnesses in order to survive an argument that his postconviction motion is insufficiently pled. Id. 513, n. 10, citing Valle v. State, 705 So.2d 1331 (Fla. 1997). The lower court did not have the benefit of Gaskin when it issued its order. It is not clear whether or not the lower court based its decision on the failure of collateral counsel to list the names of witnesses who

would be available to testify to background mitigation, but if it did it erred.

At trial, the only argument made by defense counsel with regard to background mitigation was as follows:

> Lastly, given the history that this man gave to Dr. Merin, a history that – and evaluation that Dr. Merin thought was significant enough for you all to contemplate and give what weight you thought was appropriate, given all of his background of no father, I won't repeat it, I'm sure you can remember the details, this man was a product of that. Given all that, is it no wonder that no one was here in the penalty phase to speak up for him?

(Dir. 1815). In other words, defense counsel did not argue the existence of any mitigating biographical facts at all, other than to belittle them as details. In fact, this "presentation" of background mitigation was only an excuse for not presenting it.

If anything, the State argued the defendant's background as a nonstatutory aggravating circumstance more than defense counsel argued anything about it at all. The first thing the prosecutor said in penalty phase closing argument was:

> Members of the jury, Jeffrey Atwater's mother didn't do this. She's not responsible for this. Society didn't do this. Society is not responsible for what happened to Kenny Smith. Jeffrey Atwater is responsible for what happened to Kenny Smith.
>
> You returned in the first part of this phase a unanimous verdict indicating he was absolutely guilty of Murder in the First Degree and robbery of Kenny Smith, and because of his responsibility, because of the aggravation in this case and the lack of mitigation in this

> case, it is his responsibility to die for his actions.

(Dir. 1770). The prosecutor then discussed Dr. Merin's testimony while sounding the responsibility theme and said:

> These are character disorders. These are reflected in a lifestyle that he has chosen, from the many decisions he has had to make over the course of his life. From childhood, from adolescence, through adulthood.

(Dir. 1772, -3). The legality of the prosecutor's remarks is questionable:

> I cannot agree with the majority that it was permissible for the State to tell the jury that the appellant's entire case for mitigation was "the most aggravating factor of all" in determining whether appellant should be sentenced to death. This assertion constitutes a violation of this Court's consistent and repeated admonitions that the only matters that may be asserted in aggravation are those set out in the death penalty statute. Grossman v. State, 525 So.2d 833 (Fla.1988);Floyd v. State, 497 So.2d 1211 (Fla.1986); Drake v. State, 441 So.2d 1079 (Fla.1983); Purdy v. State, 343 So.2d 4 (Fla.1977). A jury can hardly be expected to engage in a reasoned process of balancing aggravation and mitigation when it has been told by the State that it can and should add the defendant's evidence of mitigation to the aggravation side of the scales, especially when this assertion is given legitimacy by the trial court's rejection of an objection.

Moore v. State, 701 So.2d 545, 552 (Fla.1997) (Anstead, J., concurring in part and dissenting in part), cert. denied, -- U.S. -- , 118 S.Ct. 1536, 140 L.Ed.2d 685 (1998).

Defense counsel should have objected to the prosecutor's use of background mitigation as a nonstatutory aggravating

circumstance. In this regard, defense counsel was also ineffective for failing to object when the prosecution made the following flatly improper remark during penalty phase closing argument:

> I guess there could be more horrible deaths than this, but can you imagine a worse way to end your life? Look at the final position he was found, his hands, his final -- final gasps of life, agony, blood under his fingernails as if he was holding his face or his throat, left there bleeding to death on the floor of his own house, his own blood.

(Dir. 1789). [Emphasis added.] This argument was improper. Bertolotti v. State, 476 So.2d 130 (Fla.1985) (such violations of the "Golden Rule" against placing the jury in the position of the victim, and having them imagine their pain are clearly prohibited); Garron v. State, 528 So.2d 353 (Fla.1988) at 358-59 & n. 6 (Fla.1988) (stating that "golden rule" arguments which inject emotion and fear into jury deliberations are outside scope of proper argument). This point was not preserved by an objection, and this Court has already found that another clearly improper use of a nonstatutory aggravating circumstance (lack of remorse) was harmless error in this case. Atwater v. State, 626 So.2d 1325 (Fla.1993). Nevertheless, the issue of ineffective assistance counsel has not been before this Court, and the overall pattern of prosecutorial overreaching and defense counsel's failure to act is relevant to that issue.[4]

[4]E.g., Harvey v. Dugger, 656 So.2d 1253, 1257 (Fla.1995)("A number of Harvey's other penalty phase claims relating to

Most importantly, the state's argument and the lower court's ruling on this issue are both based on a false premise. As noted above, the State appears to have argued that family background mitigation was "additional" evidence, but that the failure to introduce it was non prejudicial, whereas the lower court appears to have summarily denied this aspect of the claim on the ground that it was cumulative to the testimony of Dr. Merin. Both positions overlook the fact that this evidence was never presented to the jury as being true. In fact, both defense counsel and Dr. Merin did just the opposite.

Dr. Merin's penalty phase testimony regarding Atwater's background was introduced to the jury with the following exchange:

> Q ...I want you to take your time and tell the jury what was involved in this so-called presented history, what you learned, what significance it had, what the sources were, also, if you would, please.
>
> A. Yes. The presented history is essentially that, that is what he is telling me. What he is telling me may or not be factual.

(Dir. 1658). Dr. Merin further testified:

> ...There's certain facts you do rely upon, such as his age and birth date and some other conditions, but given areas where you could shade things or incline things or lean things

---

ineffectiveness of counsel do not appear to be such as would warrant relief under the prejudice prong of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, the cumulative effect of such claims, if proven, might bear on the ultimate determination of the effectiveness of Harvey's counsel.)

> and he has the discretion to do so, this type of personality will do that.

(Dir. 1703). In other words, both defense counsel ("so-called presented history") and Dr. Merin told the jury that the facts presented were being were not being offered as the truth, and Dr. Merin as much as told the jury not to believe them. This manner in which this testimony was introduced was consistent with basic law governing expert witness testimony in jury trial settings other than a capital penalty phase and counsel may have felt it necessary to introduce Dr. Merin's testimony this way in order to forestall an objection:

> As a rule, experts may express opinions drawn from data that itself may not be admissible. Robinson v. Hunter, 506 So.2d 1106 (Fla. 4th DCA), rev. denied, 518 So.2d 1277 (Fla.1987); Bender v. State, 472 So.2d 1370 (Fla. 3d DCA 1985); § 90.704, Fla. Stat. However, an expert's testimony may not be used merely to serve as a conduit to place otherwise inadmissible evidence before a jury. Hungerford v. Mathews, 511 So.2d 1127 (Fla. 4th DCA 1987); Smithson v. V.M.S. Realty, Inc., 536 So.2d 260 (Fla. 3d DCA 1988); 3-M Corporation-McGhan Medical Reports Division v. Brown, 475 So.2d 994 (Fla. 1st DCA 1985). See also Ehrhardt, Florida Evidence § 704.1 [at 569 (1998 Edition)].

Kelly v. State Farm Mutual, 720 So.2d 1145 (5th DCA 1998); also, Dept. of Corrections, State of Fla. v. Williams, 549 So.2d 1071 (Fla. 5th DCA 1989); Riggins v. Mariner Boat Works, Inc., 545 So.2d 430 (Fla. 2d DCA 1989); Smithson v. V.M.S. Realty, Inc., 536 So.2d 260 (Fla. 3d DCA 1988); 3-M Corp.-McGhan Medical Reports Div. v. Brown, 475 So.2d 994 (Fla. 1st DCA 1985). Fla. Stat. §921.141, on

the other hand, expressly permits hearsay in capital penalty phase proceedings:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

(Id. Fla. Stat. 1990). Thus, counsel appears to have provided ineffective assistance due to a misunderstanding of applicable evidentiary law. Counsel's testimony about this issue is unavailable because the lower court did not grant an evidentiary hearing on this claim. Any speculation that counsel may have presented this evidence in the fashion he did because of a strategic decision would merely highlight the point that there exist issues of fact which need to be addressed in an evidentiary hearing.

With regard to family background or personal history mitigation, this is not like a case where trial counsel presented some evidence and collateral counsel claims that it was not enough. Rather this is a case where no such evidence was presented as being true. In fact, to the extent that it was presented, it was presented by the defense as being false. Whatever mitigating value the information had was sabotaged by both defense counsel and by

Dr. Merin by the way it was presented. Likewise, the lower court's ruling that this evidence was cumulative to Dr. Merin's testimony is inapposite, because there was no substantive evidence to be cumulative to. Moreover, as noted above, the prosecution was then able to use Dr. Merin's testimony about background and character against the defendant, essentially as a nonstatutory aggravating circumstance. It should also be noted here that the appearance of these facts on the record regardless of how they were used or presented demonstrates that defense counsel was aware that this avenue of mitigation existed, but the way the issue was presented (or not presented) by defense counsel shows that it was not adequately investigated and prepared. Issues such as why defense counsel did not present background mitigation, whether there were strategic reasons for taking that course, whether defense counsel made any effort in that direction and if so how much, defense counsel's understanding or misunderstanding of evidentiary law as it applies to the penalty phase of a capital case and the use of expert testimony, the extent of defense counsel's awareness of what Dr. Merin was going to say on the stand, and so on, all remain mysteries because the lower court denied the request for an evidentiary hearing on this claim.

When Dr. Merin did testify about the defendant's family history, he did not have much to say about it, and counsel's questions did not help the defense cause:

A. And finally, as I indicated in the body of my report, Mr. Atwater had experienced significant emotional trauma as he grew up. There was an abusive and depriving mother, virtually no significant male in his life, a number of males who were knowingly involved inappropriately with his mother, poor schooling, the early development of a substance abuse configuration, and few solid resources, stuff that's inside an individual that makes up a good character.

(Dir. 1697).

* * *

Q. Okay. Doctor, you have described someone with a significantly deprived background, and so on and so forth, and the jury's heard your own words and those of Mr. Atwater's through you. Is it possible that some other person who grew up in, we'll say, an identical environment, would have come out of the meat grinder, so to speak, very much different than my client, Mr. Atwater.

A. It's possible, but given the nature of his background, it would have been kind of difficult to do so. This type of deprivation is somewhat different from the kid who grows up in a war, reasonable family that's entirely broke, lives in a bad end of town, that sort of thing, or even the youngster who has some internal assets but whose father is a drunk ad never home, or beats the mother, or the mother is out working in a laundry, whatever, and then he decides he's going to make something of himself and moves along in school and in life and does indeed do something with himself. Many of those kids turn out to be pretty good.

But given this background, I think the crucial element is, he had no identity. He had no idea who he is. He still doesn't know who he is.

Q. How can that lead up to this, where we are today?

> A. He follows no rules, he's an opportunist, he's hedonistic, he's impulsive. He doesn't much care about social values or social rules. He'll follow a social rule if it also happens to meet his own needs, but if it doesn't, he'll go his own way.
>
> Q. Well, Doctor, you've talked about Mr. Atwater as being hedonistic, someone who acts on impulses, somewhat immature from the standpoint that he does what the hell he wants to do it when he wants to do it, right. . .

(Dir. 1698, 1699). Defense counsel went on to ask Dr. Merin whether the defendant's "personality disorder" was of his own making, or whether it was the product of his external environment (Dir. 1699). Dr. Merin said it was a function of both. (Dir. 1700).

The breakdown in the defense presentation of mitigation, to the extent it ever got started in the first place, began before the trial. Mr. White, the more experienced of the two defense lawyers, recalled at the evidentiary hearing that he felt the evidence of guilt was overwhelming and that expected the case to go into a penalty phase. (R. 433). The record reflects that defense counsel were appointed sometime on or before December 19, 1989 (dir. 25) and that a confidential expert mental health advisor (Dr. Merin) was appointed January 11, 1990, (Dir. 337). On April 26, 1990, a few days before the scheduled trial, defense counsel filed a motion for continuance stating:

> 3. Counsel for the Defendant is not prepared for the <u>penalty</u> phase in that:

> a. Various motions are pending which if granted will allow the defense to spend public funds to secure copies of photographs, to travel out-of-state to investigate potential penalty phase witnesses, to retain a polygraph expert to examine the Defendant, and to pay for deposition transcriptions.
>
> b. Counsel has no witnesses listed for penalty phase. Counsel needs additional time to investigate whether the Defendant's mother (living in Texas) and the Defendant's brother (living in Connecticut) constitute viable defense witnesses for penalty phase and to determine whether these relatives know of other potential witnesses or information for use in penalty phase.

(Dir 446 - 7). At a hearing held on this motion, defense counsel described the status of his preparation for the penalty phase in the following terms:

> What concerns me the most, however, is the first portion of my motion to continue, which deals with our inability or our lack of preparation at this point in time for the penalty phase. Now, of course, I do anticipate a penalty phase, because of the, as I said before, amount and the quality and quantity of evidence is fairly overwhelming that this, in fact, was a first degree murder case. So we are expecting to go into penalty phase.
>
> Now, this particular defendant, your Honor, this is over simplification, but I think it satisfactorily illustrates the point. This particular defendant is almost like a transient. I conceded he lived in this area for a period of time, and so on and so forth, but in our efforts to locate people in Pinellas County and nearby environments, people that would speak up on behalf of this man for penalty phase, come up a big zero. I mean, all the people that he has suggested don't have anything good to say about him. So we have come up with a complete blank locally

in terms of people that might speak on his behalf.

I then reached out and spoke to his brother who lives in Connecticut in the hopes that he might personally have something he could testify to in terms of mitigation during the penalty phase. I'm hoping that he might do that or that he might be able to tell me other sources of information that would be initiation. He has been extremely guarded over the phone, and I just don't know what other approach I could take to him as a source, other than to go see him in Connecticut myself, fly up and conduct an investigation there, because he still resides, the brother does, in the so-called home town of the defendant, as I understand the situation.

So, I mean, he might be able to say, "This is where the guy went to school, or these were his teachers, or these were his closest friends." He might be able to develop other areas of mitigating information, even if he himself is unwilling to speak up in that fashion on behalf of his brother. So that is an area that I am, in fact, very keen on exploring for penalty phase, and it's inconceivable that I could do that under the time constraints as they now exist.

Secondly, I've indicated in my motion that a similar source needs to be investigated, and that is the defendant's mother. She resides in Texas, and she has no phone number, that we have access to, at least, and so I have been unable to talk to her on the phone to see where she stands on this.

However, Mr. Ripplinger, from his sources, indicates to me — and at this point, I don't have any reason to suspect that his information is incorrect, but he's told me this morning that the mother is in that group of people that does not want to speak out or help out in terms of mitigation in the penalty phase. So I cannot tell you as I speak that

this is a viable situation, but I think it's certainly incumbent upon me to explore it. She is the natural mother of the defendant in the case. And we don't have time to do that either.

Most importantly, from my perspective, is the fact that months ago, early January, I believe, we had a confidential expert appointed to evaluate this particular defendant. And during that period of time, up to today's date, I have, on a regular basis, tunneled information to this psychologist, Dr. Merin. He has indicated to me that he has not even seen the defendant yet, and again, I didn't challenge him on the phone and try to put him in an awkward position of focusing my energies on getting the job done. He indicated he will see my client on Friday.

Let me say this about that topic, your Honor. Back in the seventies, I won a capital case on an insanity defense, okay? Pretty rare event. 1989, just last year, I prevailed in a kidnaping/aggravated battery case, and so on and so forth, utilizing the defense of insanity. I believe in '88 or '89, on a rape case, I got a departure sentence downward utilizing a psychologist in mitigation of potential penalty after my client was convicted. Again, in a capital case, just last year, the jury recommended life, and I assure you it was solely based upon the testimony of the psychologist.

So I am familiar with dealing with psychiatrists and psychologists in this type offsetting. And my procedure that I've developed over the years is to give that psychologist every conceivable piece of information, the good and the bad, everything, so that he can get a true and honest evaluation of the defendant in the case, and that's the course of action I've been taking in this case.

If we get a deposition, he gets the deposition. If we get a police report, he gets it. If we interview our client, he gets

it. So when he is subjected to cross examination, there is no excuse for him not to be aware of everything, from photographs to the Medical Examiner's report, and so on and so forth.

In addition, it is my custom when I get a psychologist or psychiatrist in this kind of a setting to meet with them, to talk to them, to pressure them, to beat on them, to point out areas they're overlooking, to point out areas they need to work on, and. to really get them to do a plenary, professional, across-the-board job, especially in a death penalty case, and I am dead in the water in this particular case.

There is no possible way this psychologist is running to the jail to get this job done, and that was not his charge. He was charged with doing tests, with sitting with this guy, with meeting with me, to develop everything in the world conceivable about this client so that I can understand what in the world went on in this case.

THE COURT: If I understand you correctly, there's not a thought of an insanity defense, but to have the psychologist speak in the penalty phase.

MR. WHITE: I don't know if he will come back and say, "Your guy's bonkers." Number one, I'm grasping for straws to begin with. Number two, I believe a confidential expert should be undertaken in every murder case. They probably are. I'm not trying to act like I'm certain on that issue. It is conceivable he'll come back and say that this guy is really crazy, and I say that because this crime is a really bizarre crime.

I know that we have some discovery, and the State's aware of it, of course, to suggest that this is a premeditated robbery on somebody, that he went to rob this victim just to get his money because he had some kind of a drug habit, or was just greedy or something. I mean, that's possible, and there's evidence to

> suggest that's the case. But, Judge, this sixty-some-year-old victim had his pants pulled down to his knees. His genitals were exposed in this case. That's a bizarre thing.
>
> The fact that my client went and told his relatives and his friends afterwards all about it and told them that he wished he could do it again to this same victim, the fact that the defendant has told others that his aunt that lives locally was really his surrogate mother and she is dating the decedent and he was unhappy with the relationship between his aunt — his mom as he would call her — and the decedent, that this was his motivating factor, that he was getting some kind of a revenge for their relationship is certainly bizarre, at best, in part, because everyone else says that he didn't have this kind of relationship with this woman.
>
> Our client — I can't get into confidential communications at this juncture, but everything he tells us about this offense doesn't make sense relative to what we perceive to be the true facts of the case. His cavalier appearance in custody, his cavalier approach to this whole thing suggests to me that he's got the potential — I'm convinced there's something very, very psychologically wrong with this man. To suggest to you that he's schizophrenic is another thing. I'm not prepared to make that assertion, but I do think there's got to be something there for our psychologist to discover. But now, he's trying to cover himself, so to speak. I don't want to speak for him, but he's rushing through a job that should take another one hundred hours, two hundred hours of labor, and I don't think there's any way, and it's all coming together at one time with just a couple of days left.

(Dir. 1896 - 1902). The motion was denied, (Dir. 448), and trial commenced May 1, 1990, a few days later. In short, the defense had not done anything to prepare for a penalty phase prior to the guilt

phase trial. The record before this Court does not contain any other direct account of defense counsel's investigation and preparation of mitigation because the lower court did not permit an evidentiary hearing on the issue.

Dr. Merin was deposed after the trial but before the penalty phase. At that time he was asked about the contact he had had with Atwater's lawyers and his family:

> Q. (By Mr. Ripplinger) Do you have any plans to do any additional tests on Mr. Atwater, or do any additional interviews with him?
>
> A. No.
>
> Q. Have you interviewed – you've probably spoken to either Mr. White or Mr. Schwartzburg, and you said you've spoken to the defendant. Have you interviewed anybody else on this case?
>
> A. No. I haven't even talked to them. I may have talked to – maybe Mr. Schwartzburg, somebody on the telephone, but very briefly, not even enough to take – to make notes, but I have not spoken to anybody else.
>
> Q. And have you spoken to anybody in Atwater's family?
>
> A. No.
>
> Q. Have you reviewed – seen any letters that he has written to his mother?
>
> A. No.
>
> Q. Or any mother – any letters his mother has written about this case?
>
> A. No.

(Dir. 607). Because the lower court denied an evidentiary hearing, the only information on this record about defense preparation for the penalty phase is the motion for a continuance due to lack of preparation, Dr. Merin's deposition, and the penalty phase itself. Thus what evidence there is on this record shows that defense counsel did little or nothing by way of factual investigation or preparation of background or family history mitigation at any time other than to get Dr. Merin appointed and to leave him to his own devices. This issue was specifically pled at Claim XI, paragraph 2 of the postconviction motion. (R. 24). The State cited Mendyk v. State, 592 So.2d 1076, 1079 (Fla. 1992), Breedlove v. State, 692 So.2d 874, 877 (Fla. 1997); and Robinson v. State, 707 So.2d 688 (Fla.1998) in support of its contention that "DEFENDANT'S additional information about his background presented in this Claim is not significantly different as to show that it would have made a difference in the outcome." (R. 83). While the defendants in the cases cited by the State ultimately were denied relief on an adverse prejudice analysis, it is notable that both Breedlove and Robinson were decided on a record created by an evidentiary hearing on the very issue in question and Mendyk was allowed leave to file a new 3.850 motion.

Dr. Merin's opinions changed subtly but importantly after he found out that Atwater had been convicted. He changed his story. The only way to get the flavor of this point is to consider his deposition at some length and then compare it to his testimony at

the penalty phase. Early on in the deposition, when asked questions involving the terms "antisocial" and "borderline personality," he said:

> Q. So you're saying you believe him to be more of a Borderline Personality Disorder with traits of the antisocial?
>
> A. Yes. And I say that largely because he's had problems with rules and the law, but there is – there's so much in him to suggest the poor judgment, the labile emotions, the inadequate rearing, problems he's had throughout his life, the emotional instability, behavioral instability, difficulty maintaining a job, difficulty maintaining good interpersonal relationships. That is more consistent with Borderline Personality Disorder than with an Antisocial Personality Disorder per se.
>
> Antisocial Personality Disorders are not necessarily persons who use poor judgment, or persons who have the type of disorganization in their judgment or in their upbringing that this man has. An antisocial personality may be a very brilliant Mafia member, or some people may even refer to Miliken as being an antisocial personality, even though much of his life much of his behavior is very well organized, very appropriate and so on.
>
> So an antisocial personality is not necessarily – does not necessarily have the type of disturbance in their make-up as does this man.

(Dir. 611). While neither description is particularly flattering, the description of an antisocial personality as potentially a brilliant mafia member is considerably less mitigating than that of a borderline personality as one who, because of his background, is unable to cope with life.

Early in the deposition, while Dr. Merin still believed that the trial had not commenced, and that he might be called by the defense in the guilt phase, he stuck with his story:

> MR. SMITH: You're assuming that he might not have done it, but you're also assuming, based upon his statements to you, that he just walked in there, stood over the body and walked out?
>
> THE DEPONENT: That is correct.
>
> MR. SMITH: Would it change your opinion at all if you were told that bloody footprints were found both near the body and in other parts of the house, which is –
>
> THE DEPONENT: I'm sorry?
>
> MR. SMITH: – which is in direct contravention to what he told you, that he did not walk around the house.
>
> THE DEPONENT: I don't think I would change my opinion. The type of personality he has would lend itself to being deceptive if – and he's bright enough to know that if he admitted to me that he had walked elsewhere and there were bloody footprints observed elsewhere, that that certainly could implicate him further. He would have the type of mentality would be more likely to deny it if it were self-serving enough.

(Dir. 625). Shortly thereafter, Dr. Merin was advised that the defendant had been found guilty:

> Q. Okay. Well now that the verdict is in as to the guilt phase –
>
> A. Excuse me, has there been a trial already?
>
> MR. RIPPLINGER: He was found guilty about a week and a half ago.

THE DEPONENT: I'm not even aware of that. Yeah.

MR. WHITE: Okay. That was the guilt phase.

THE DEPONENT: Okay. I'm not even aware of that. I thought it was coming up sometime this week, and then I would be testifying –

Q. (By Mr. White) Penalty phase is coming up. Okay? So now I think it's fair to assume that they, having found him guilty of First Degree Murder, that he was, in fact, guilty of First Degree Murder. Does that hypothetical, making that assumption now, does that impact upon the – in you estimation upon the validity of your evaluation or your findings?

A. No. Not at all. Again, because the type of personality he has, as I've said, had we known who and what he was all about ten years ago, we could have almost predicted that he was going to be in some significant trouble with the law.

Q. Along the same lines, assuming, if you would, that he was lying to you when he said that he went in and found the body and hastily retreated and so on and so forth, if, in fact, he was lying when he made that description of the events, does that fact change any of your findings or your valuation [sic] of him?

A. No. No.

(Dir. 642, -3). Thereafter, Dr. Merin maintained both the substantive truth about his account of the defendant's background and his own value as a mitigation witness:

Q. Okay, Again, just for your personal opinion, I'm not suggesting that this would necessarily be admissible into evidence, but do you think all of the things that you know

about Mr. Atwater do, in fact, constitute a mitigating factor, albeit a non-statutory one?

A. Yes. It would be –

* * *

Q. How would you place these factors, on the mitigating side or the aggravating side?

A. I would place these on the mitigating side clearly. I think that there is enough in this man's background to warrant having it heard by a jury. Whether they accept it as something mitigating, that's going to be entirely up to them, but I do believe that it's enough. It's not just a hit or miss sort of thing, the kid trips and fell and his mother didn't take him to the hospital when he was a kid, or he fell off his hobby horse and his daddy scolded him, and that's about the extent of it.

You have here a man who grew up in, and I'll repeat the phrase, a terrible, terrible background. He had nothing going for him. He had no identity, and as we emerge into adult life, identity is exceptionally important. We have to know who we are, where we're from in terms of our psychological background, and we have to have some – some plan for ourselves, some understanding of the values of society and how we relate to those values. This man never really had that. He just kind of rocked along and existed.

Q. But if you were a one-man jury, you would consider these to be mitigating?

A. I would consider, yes. I've had – I've evaluated 350 homicides in my career, and this type of background would be one of the types that I would want a jury to hear. I don't see anything in the statutory mitigating factors that I could accept, but given this background, I think they ought to hear it.

* * *

BY MR. SMITH:

Q. Would that be enough for you to vote life as opposed to death?

A. I think so.

(Dir. 649, 659). Dr. Merin did talk briefly about antisocial characteristics some more in the deposition, in fact he said that "antisocial personality" would be an aggravating factor in this case until one understood where it came from. (Dir. 651, -2). Nevertheless, he did not address the distinction between his use of the terms borderline and antisocial, nor was he asked to do so, nor did he alter his earlier statement that the his concept of a borderline personality would fit the defendant better than antisocial personality. Likewise, he maintained that the defendant's "terrible, terrible background" was a fact and that it constituted a mitigating circumstance.

A couple of days later at the penalty phase, as noted above, the defendant's "terrible, terrible background" was not presented as fact. If anything, it was presented by defense counsel and by Dr. Merin as a self serving lie, and defense counsel repeatedly belittled its significance. Also, Dr. Merin now decided that Atwater had an antisocial, rather than borderline, personality disorder:

> [W]hat we're dealing with is a behavioral problem, that is a behavioral disorder, that is a disorder wherein he does have control of his thought processes, can make decisions, can make choices but whose lifestyle is often in disagreement with the general social norm,

with the main stream of social thinking. There's a disdain for social values on the basis of the manner in which he answered this examination.

(Dir. 1645, -5).

* * *

Q. It suggests a significant or minimum behavioral disorder.

A. A significant behavioral disorder.

(Dir. 1649).

* * *

But what we find here was that he was high on a scale referred to as the PD scale. We used to refer to it as the psychopathic deviate scale . . .

(Dir. 1651).

* * *

Q. Okay. Now, Mr. Atwater's been found guilty as charged, First Degree Murder, robbery and yet he denied to you that he committed the murder. What significance do you attach to his denial of that offense, if any?

A. Well, that would be consistent with what we refer to as an antisocial or sociopathic personality.

(Dir. 1703). Dr. Merin's conclusion of the defense's case in chief in the penalty phase was:

When one grows in that direction, you have a certain disdain for social values, for rules, for law, for order, for organization, and it's pretty much the way he operated. He would accede to the rules if it happened to meet his needs, if the rules and his own needs were opposed to one another, he would follow his own urges, unlike the typical individual who suppresses and submerges our own impulsive needs to the welfare of society, or to the rules of society, or to the values of the

> church or to whatever. With him, he would operate on the basis of what's best for me, what can I do, and I don't much care about anybody else.
>
> But at that point, he was making decisions. As he grew beyond that, it would be virtually just a matter of time before something would occur that would reflect the extent to which he did not care about society, the extent to which he was insensitive to others, the extent to which he would behave in an unfeeling sort of way, the extent to which he would not learn from experience, the extent to which his behavior would reflect shallow attitudes toward other people.
>
> It was almost something that perhaps could have been predicted. We couldn't have predicted necessarily that he was going to kill somebody, but we could have predicted that this was the sort of personality that gets into trouble with the social order. Not a matter of neurosis, not a matter of psychosis. It's a matter of how he chose to behave.
>
> MR. WHITE: Thank you.

(Dir.1711). Dr. Merin's shift to a diagnosis of antisocial personality disorder was established in cross examination:

> Q. In making your diagnosis of an antisocial personality disorder, did you feel that he failed to conform to social norms with respect to lawful behavior as indicated by repeated performing antisocial acts that are grounds for arrest?
>
> A. Yes.

(Dir. 1723). The prosecutor then went on to elicit the "no remorse" testimony which was considered by this Court on direct appeal.

From these excerpts from Dr. Merin's deposition and penalty phase testimony, it can be seen that he first diagnosed, in his terms, borderline personality disorder and rejected an overall diagnosis of antisocial personality disorder, although he found what he described as "antisocial traits." Later on in the deposition, he stuck to this diagnosis even in the face of a hypothetical question based on an assumption that Atwater had lied about the facts of the crime and even after being informed of the guilty verdict. He expressly distinguished his concepts of borderline personality disorder and antisocial personality disorder by describing the first as a mitigating circumstance and the second as an aggravating circumstance. When he found out during the deposition that the defendant had been found guilty and that he would likely be called as a penalty phase mitigation witness, he expounded on Atwater's "terrible, terrible background." At the penalty phase, whether following the lead of defense counsel or on his own initiative, Dr. Merin presented Atwater's background mitigation as something other than the truth. Moreover, his diagnosis was now firmly on the side of antisocial personality disorder, a condition which he had earlier described as an aggravating circumstance.

This last point is important. To any one other than a mental health expert, perhaps to anyone other than Dr. Merin, the use of and the distinction between the terms antisocial and borderline may seem of little consequence. To Dr. Merin, however, the first was

an overall aggravating circumstance and the second implied the existence of mitigating circumstances. If Dr. Merin had merely applied a technical label and them moved on to something else, the matter would be trivial. In fact, he did the opposite. He used these labels to describe a type of personality and then with all the authority of an expert witness called by the defense expounded on that type of personality's origins, causes, thoughts, feelings, values, relationships, actions and behaviors with concrete language that a jury would understand. It is thus no exaggeration – it is in fact an accurate description – to say that defense counsel called as its star witness an expert who provided extensive evidence of nonstatutory aggravating circumstances. Unsurprisingly, the prosecutor effectively used Dr. Merin's testimony in his closing argument:

> And what did Dr. Merin tell you about these personality profiles? His choices. He chose – chooses to be hedonistic, selfish, self-gratifying, manipulative, deceptive, self-serving with no regard for the truth, not governed by a great sense of guilt or conscience, doesn't care about his affects of his behavior on other people, and he sadistically enjoys hurting other people just for the sake of hurting other people.

(Dir. 1780). Contrary to the state's response and the lower court's ruling, this case is not like those in which defense counsel presented mitigation and collateral counsel argues that it was not enough. Rather, it is more like those cases where the defense at trial did more harm than good. See Horton v. Zant, 941

F.2d 1449 (11th Cir.1991) (attorney attacked defendant's character and separated himself from defendant); Clark v. State, 690 So.2d 1280 (Fla.1997) (portions of counsel's argument had the effect of encouraging the jury to impose the death penalty); Dobbs v. Turpin, 142 F.3d 1383, 1386-87 (11th Cir.1998) (counsel's closing argument minimized jury's responsibility for determining appropriateness of death penalty); Rose v. State, 675 So.2d 567 (Fla.1996) (counsel latched onto a strategy which even he believed to be ill-conceived).

There are thus numerous factual issues regarding counsel's investigation, preparation and presentation of mitigation plus counsel's errors and omissions during the penalty phase that require an evidentiary hearing:

> While the postconviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief. In essence, the burden is upon the State to demonstrate that the motion is legally flawed or that the record conclusively demonstrates no entitlement to relief. The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion. To the contrary, the "rule was promulgated to establish an effective procedure in the courts best equipped to adjudicate the rights of those originally tried in those courts." Roy v. Wainwright, 151 So.2d 825, 828 (Fla.1963). Its purpose was to provide a simplified but "complete and efficacious postconviction remedy to correct convictions on any grounds which subject them to collateral attack." Id. It is especially important that initial motions in capital cases predicated upon a

> claim of ineffective assistance of counsel be carefully reviewed to determine the need for a hearing. Cf. Rivera, 517 717 So.2d at 487 (reversing for evidentiary hearing on claim of ineffective assistance of counsel where defendant alleged extensive evidence of mitigation in 3.850 motion compared to limited mitigation actually presented at trial); Ragsdale v. State, 720 So.2d 203 (Fla.1998) (same holding).

Gaskin v. State, 737 So.2d 509 (Fla. 1999) (footnotes omitted). This cause should be reversed for a new penalty phase or, alternatively, with directions to conduct an evidentiary hearing on the issue of ineffective assistance of counsel in the penalty phase.

ARGUMENT III

MR. ATWATER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS, RELIABLE APPELLATE REVIEW WAS AND IS NOT POSSIBLE, THERE IS NO WAY TO ENSURE THAT WHICH OCCURRED IN THE TRIAL COURT WAS OR CAN BE REVIEWED ON APPEAL, AND THE JUDGMENT AND SENTENCE MUST BE VACATED.

In his motion for postconviction relief, Atwater raised two claims regarding the trial record. Claim I was that Mr. Atwater's Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution were violated because no reliable transcript of his capital trial exists, reliable appellate review was and is not possible, and there is no way to ensure that what occurred in the trial court was or can be reviewed on appeal. (R. 4). Claim II was that Mr. Atwater was denied a proper direct appeal from his

judgment of conviction and a proper appeal from his sentence of death in violation of Art. 5, Sec. 3(b)(1) of the Florida Constitution and Florida Statutes, Sec. 921.141(4) as well as the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, due to omissions in the record. (R. 9). In addition, Mr. Atwater asserted that his former counsel rendered ineffective assistance in failing to assure that a proper record was provided to the court.

The State responded that "this is an issue raising ineffective assistance of appellate counsel, an issue which may only be raised in the appellate court," citing Breedlove v. Singletary, 595 So.2d 8, 10 (Fla. 1992).

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). The existence of an accurate trial transcript is crucial for adequate appellate review. Id. at 119. The Sixth amendment also mandates a complete transcript. In Hardy v. United States, 375 U.S. 277, 288 (1964), Justice Goldberg, in his concurring opinion, wrote that since the function of appellate counsel is to be an effective advocate for the client, counsel must be equipped with "the most basic and fundamental tool of his profession...the complete trial transcript...anything short of a complete transcript is incompatible with effective appellate advocacy."

Mr. Atwater filed a Motion to Recall the Mandate and/or to Reopen the Direct Appeal and a Motion to Supplement the Record on Appeal. This motion was denied by Order of this Court dated October 16, 1995. At the time of appeal, counsel was provided with an inadequate record where substantial pre-trial and trial proceedings were made off the record. Mr. Atwater was arrested on August 11, 1989, and his trial commenced on May 1, 1990. Except for two motions for continuances in late April of 1990, the record on appeal is completely devoid of any transcripts from proceedings occurring before the start of trial. The transcribed record which does exist makes plain that prior proceedings had taken place, motions filed and argued and issues otherwise litigated, including ex-parte communications between the State and the trial court.

Complete and effective appellate advocacy requires a complete trial record. A trial record should not have missing portions of the voir dire or be so incomplete and with errors that it is incomprehensible. The trial record does not reflect any significant pretrial proceedings or pretrial conferences, including the withdrawal of the public defender four months after Mr. Atwater's arrest. Also missing from the record is the packet of jury instructions at the penalty phase. With the record provided, it is impossible to know what actually occurred.

The United States Supreme Court in Entsminger v. Iowa, 386 U.S. 748 (1967), held that appellants are entitled to a complete and accurate record. Lower courts rely upon Entsminger. The

concurring opinion in Commonwealth v. Bricker, 487 A.2d 346 (Pa. 1985), citing Entsminger, condemned the trial court's failure to record and transcribe the sidebar conferences so that appellate review could obtain an accurate picture of the trial proceedings. In Commonwealth v. Shields, 383 A.2d 844 (Pa. 1978), the Supreme Court of Pennsylvania reversed a second-degree murder and statutory rape conviction solely because a tape of the prosecutor's closing argument became lost in the mail. "[I]n order to assure that a defendant's right to appeal will not be an empty, illusory right... a full transcript must be furnished." The court went on to say that meaningful appellate review is otherwise impossible.

Entsminger was cited in Evitts v. Lucey, 105 S. Ct. 830 (1985), in which the Court reiterated that effective appellate review begins with giving an appellant an advocate, and the tools necessary to do an effective job.

Finally, in Gardner v. Florida, 430 U.S. 349 (1977), where the defendant was not allowed to view a confidential presentence report, the Court held that even if it was proper to withhold the report at trial, it had to be part of the record for appeal. The record must disclose considerations which motivated the imposition of the death sentence. "Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to defects..." under Furman v. Georgia, 408 U.S. at 361.

This Court's death sentence review process involves at least two functions:

> First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. This type of review is illustrated in Elledge v. State, 346 So.2d 998 (Fla. 1977), where we remanded for resentencing because the procedure was flawed – in that case a nonstatutory aggravating circumstance was considered.
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and the jury have acted with procedural regularity, we compare the case under review with all past cases to determine whether or not the punishment is too great. In those cases where we find death to be comparatively inappropriate, we have reduced the sentence to life imprisonment.

Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). The court has emphasized that "[t]o satisfactorily perform our responsibility we must be able to discern from the record that the trial judge fulfilled that responsibility" of acting with procedural rectitude. Lucas v. State, 417 So.2d 250 (Fla. 1982).

Mr. Atwater's record is incomplete, in a way which prevented this Court from conducting meaningful appellate review. A new appeal must be allowed. This result is constitutionally required:

> Since the State must administer its capital sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S. at 250-58, 96 S.Ct. at 2966-67, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed.

* * *

> In this particular case, the only explanation for the lack of disclosure is the failure of defense counsel to request access to the full report. That failure cannot justify the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death.

Gardner v. Florida, 430 U.S. 349, 361 (1977) (emphasis added). By statute, this Court is required to review all death penalty cases. The review occurs "after certification by the sentencing court of the entire record..." Fla. Stat. sec. 921.141(4). In furtherance of this statutory mandate, this Court has issued administrative orders requiring "the appropriate chief judge to monitor the preparation of the complete record for timely filing in this Court."

The record in this case is incomplete, inaccurate, and unreliable. Confidence in the outcome is undermined. Mr. Atwater was denied due process, a reliable appellate process, effective assistance of counsel on appeal, and a meaningful and trustworthy review of his conviction and sentence of death. Mr. Atwater's statutory and constitutional rights to review his sentence by the highest court in the State upon a complete and accurate record, in violation of the Sixth, Eighth and Fourteenth Amendments.

The circuit court is required to certify the record on appeal in capital cases, Fla. Stat. Ann. sec. 921.141(4), Fla. Const. art. 5, sec. 3(b)(1). When errors or omissions appear, re-examination of the complete record in the lower tribunal is required. Delap v.

State, 350 So.2d 462 (Fla. 1977). Portions of the record were missing from Mr. Atwater's appeal.

ARGUMENT IV

MR. ATWATER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, AN ADVERSARIAL TESTING, AND A FAIR TRIAL WHEN THE STATE ELICITED FALSE AND MISLEADING EVIDENCE AND EXPERT TESTIMONY FROM FBI AGENTS IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

During the guilt phase of Mr. Atwater's trial, the State relied almost exclusively upon the Federal Bureau of Investigation's crime lab for processing forensic evidence.

The State called three forensic experts from the Federal Bureau of Investigation: Allison Simons (Dir. 1154-1169), David Attenberger (Dir. 1171-1180), and Mark Babyak (Dir. 1182-1204, 1224-1228). The State elicited from these FBI agents extensive and prejudicial evidence and expert opinion against Mr. Atwater.

The testimony and evidence offered by FBI agents at Mr. Atwater's trial was biased in favor of the prosecution, false, unreliable, and misleading. Counsel has learned that agents of the FBI crime lab have committed perjury in other cases with respect to training experience and findings.

The FBI crime lab has operated for many years without the scrutiny of independent oversight and scientific quality assurance. Recent court testimony and FBI memoranda have documented perjury, overreaching, and evidence tampering by special agents employed by

the FBI crime lab. These allegations include: (1) that FBI agents, as a matter of habit and custom, routinely change FBI reports by removing information which they think might be helpful to the defense; (2) agents ordered that reports prepared by more experienced scientists be changed to either alter the conclusions or eliminate exculpatory information; (c) that agents add overly technical information to reports, specifically intending to confuse the defense and thwart effective defense investigation and cross-examination; (4) that agents regularly testify about matters in which they lack training, expertise, and experience; (5) that agents knowingly and intentionally carry out FBI policy to suppress information which might be helpful to the defense and to produce results that will only help the prosecution; (6) that agents have testified falsely in a number of cases.

The FBI agents unreliable testimony at Mr. Atwater's trial undermines the reliability of Mr. Atwater's conviction and sentence of death in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Mr. Atwater was also denied a fair trial and effective assistance of counsel because he was denied the opportunity to meaningfully cross examine or impeach these FBI witnesses. Kyles v. Whitley, 115 S. Ct. 1555 (1995); Giglio v. United States, 92 S. Ct. 763 (1972); Brady v. Maryland, 83 S. Ct. 1194 (1963); Napue v. Illinois, 79 S. Ct. 1173, 1178 (1959); Mooney v. Holohan, 55 S. Ct. 340 (1935).

Whether this evidence was withheld by the State or whether counsel failed to investigate and develop the evidence, the result was the same. No adversarial testing occurred. Mr. Atwater was deprived of a fair trial, equal protection, and due process of law in violation of his Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This issue was raised in Claim III of the postconviction motion. (R. 10). Relying on the State's response, the lower court summarily denied it. (R. 228).

The law strongly favors full evidentiary hearings in death penalty post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters. Gaskin, supra; Gorham v. State, 521 So.2d 1076, 1069 (Fla. 1988). See also LeDuc v. State, 415 So.2d 721, 722 (Fla. 1982). "This Court must determine whether the two allegations...are sufficient to require an evidentiary hearing. Under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is not entitled to relief (citations omitted)." Harich v. State, 484 So.2d 1239, 1240 (Fla. 1986) (emphasis added). "Because an evidentiary hearing has not been held...we must treat [the] allegations as true except to the extent that they are conclusively rebutted by the record." Harich, 484 So.2d at 1241 (emphasis added)[5].

[5]See also Hoffman v. State, 571 So.2d 449, 450 (Fla. 1990); Mills v. State, 559 So.2d 578, 578-579 (Fla. 1990); O'Callaghan

Some fact-based post-conviction claims by their nature can only be considered after an evidentiary hearing. Heiney v. State, 558 So.2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such an evidentiary hearing, denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So.2d 1250, 1252-53 (Fla. 1987). "The movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." State v. Crews, 477 So.2d 984, 984-985 (Fla. 1985).

The trial court's order fails to address the facts alleged by the motion, and the order fails to include those portions of the record which refute the facts alleged. The trial court's order should be reversed and the case remanded for an evidentiary hearing for the reasons listed below.

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v. State, 461 So.2d 1354, 1355 (Fla. 1984).

ARGUMENT V

THE PROSECUTOR ELICITED OPINION TESTIMONY REGARDING BLOOD SPATTER EVIDENCE FROM AN UNQUALIFIED WITNESSES AND THE TRIAL COURT ERRED IN ADMITTING THIS TESTIMONY IN VIOLATION OF THE FLORIDA RULES OF EVIDENCE AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

During Mr. Atwater's guilt phase, the prosecutor elicited prejudicial and damaging opinion testimony from Dallas Holtman (Dir. 1100) and Fred Marini (Dir. 1291-1296). Neither of these individuals possess the requisite credentials and qualifications to provide expert testimony regarding blood stain pattern analysis.

The trial court should not have allowed these witnesses to offer expert opinions regarding bloodstain evidence. The prosecutor committed misconduct by eliciting this misleading and prejudicial testimony and commenting upon it.

Defense counsel was rendered ineffective by the state's presentation of blood spatter evidence. During the guilt phase, trial counsel put the State and the trial court on notice that defense counsel lacked any knowledge of blood stain pattern analysis and interpretation. As a consequence, counsel admitted to being unable to provide effective assistance of counsel during cross examination, investigation, and preparation. Counsel also lacked notice that blood stain pattern evidence would be used during the trial and failed to hire a defense expert (Dir. 1217).

Mr. Atwater was denied a fair trial, denied the effective assistance of counsel, and his convictions and sentence were rendered unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments. An evidentiary hearing and relief are proper.

To the extent that trial counsel failed to adequately preserve this issue or failed to raise it Mr. Atwater was denied effective assistance of counsel.

This issue was pled in Claim IV of the postconviction (R. 12), and the lower court summarily denied it. (R. 228). It raises a factual issue which is not conclusively rebutted on the record and should have been the subject of an evidentiary hearing.

ARGUMENT VI

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR IS UNCONSTITUTIONALLY VAGUE. MR. ATWATER'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This issue was pled in Claim V of the motion to vacate, (R. 13), and summarily denied. (R. 229).

Mr. Atwater's sentencing jury was instructed that they could consider the aggravating circumstance that "the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal

justification" (Dir. 1818). This jury instruction was unconstitutionally vague.

The Court did not instruct Mr. Atwater's jury regarding the cold, calculated, and premeditated aggravating factor in accordance with this Court's limiting construction. Jackson v. State, 648 So.2d 85 (Fla. 1994). This Court has adopted several limiting instructions regarding this aggravating factor. That Court recently held that the jury should be instructed on the limiting constructions of this aggravating circumstance, whenever they are allowed to consider it. The instruction authorized by this Court reads as follows:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, and calculated, and premeditated, and that there was no pretense of moral or legal justification. 'Cold' means the murder was the product of calm and cool reflection. 'Calculated' means the defendant had a careful plan or prearranged design to commit the murder. 'Premeditated' means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A 'pretense of moral or legal justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Jackson, 648 So.2d at 90. Mr. Atwater's jury was instead given an invalid instruction on the cold, calculated and premeditated

aggravating circumstance. Additionally, no evidence supported this aggravator so the instruction should not have been given.

In Jackson, this Court invalidated as unconstitutionally vague a jury instruction on the cold, calculating, and premeditated aggravating circumstance that mirrored the statute. The instruction in Mr. Atwater's case is similarly vague and unconstitutional.

The instruction given to Mr. Atwater's jury violates this Court's decision in Jackson and Kearse v. State, 662 So.2d 677 (Fla. 1995), the United States Supreme Court decisions in Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Atwater v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988), and the Eighth and Fourteenth Amendments to the United States Constitution.

This Court requires trial juries and judges to apply these limiting constructions, often and consistently rejecting the aggravator when these limitations are not met, yet, Mr. Atwater's sentencing jury was not told about the aforementioned limitations but is presumed to have found this aggravator established. Jackson; Espinosa, 112 S. Ct. at 2928.

Mr. Atwater's jury was inadequately guided and channeled in its sentencing discretion. The jury received the standard jury instruction regarding the "cold, calculated and premeditated" aggravating factor, but was not instructed on any of this Court's limiting constructions regarding this aggravating circumstance. In

Espinosa, the United States Supreme Court explicitly held 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." Espinosa, 112 S. Ct. at 2928.

Mr. Atwater's jury was not told about the limitations on the cold, calculated and premeditated aggravating factor. Espinosa, 112 S. Ct. at 2928. It must be presumed that the erroneous instructions tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error. Espinosa, 112 S. Ct. at 2928. 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.

This aggravating factor was overbroadly applied, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988), failed to genuinely narrow the class of persons eligible for the death sentence, see Zant v. Stephens, 462 U.S. 862, 876 (1983), and did not apply as a matter of law. As a result, Mr. Atwater's death sentence was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Failure of trial counsel to raise this issue denied Mr. Atwater of the effective assistance of counsel.

This issue was pled in Claim V of the postconviction motion and summarily denied based on this Court's holding in Phillips v. State, 705 So.2d 1320(1997). (R. 230). In Phillips this Court observed:

> Phillips does not challenge the sufficiency of the evidence presented in support of the CCP aggravator, nor does he challenge the language of the CCP instruction given to the jury. He instead argues that the CCP aggravator is inherently vague, subject to overbroad, unconstitutional application irrespective of any definitions of its terms, and should not be applied in capital cases. This Court has previously rejected the contention that the CCP aggravator is unconstitutionally vague. Jackson v. State, 648 So.2d 85 (Fla.1994). In Jackson, we ruled that the jury should receive more expansive instructions defining the terms "cold," "calculated," and "premeditated," but we rejected a challenge to the statutory CCP aggravator itself. In this case, even though Phillips' resentencing occurred prior to this Court's decision in Jackson, the jury was given a proper narrowing instruction consistent with that decision.

Id, 1323. By contrast, Claim V addressed the overbroad jury instruction given in this case. Thus, the lower court's order denying this Claim missed the point. If anything, Phillips supports the position set out in the Claim. The lower court's decision denying relief should be reversed on this point.

ARGUMENT VII

THE STATE FAILED TO REVEAL THAT IT HAD MADE PROMISES OF LENIENT TREATMENT TO WITNESSES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This issue was pled in Claim VII of the motion to vacate, (R.20), and summarily denied. (R. 231). Michael Painter, an acquaintance of Mr. Atwater's was arrested and incarcerated on sexual battery charges prior to Mr. Atwater's trial. After testifying for the State, Mr. Painter's sentence on serious charges, i.e. sexual battery on a mentally disturbed woman including sodomy, vaginal and oral copulation, was only two years of which he served only six months. Without knowing the State was granting special favors of Painter, defense counsel could not adequately cross-examine him. Because the lower court denied the request for an evidentiary hearing on this matter, neither Michael Painter nor counsel fro the state and defense could be examined on this issue. The matter should have been addressed in an evidentiary hearing.

ARGUMENT VIII

THE TRIAL COURT IMPROPERLY FAILED TO FIND THE STATUTORY MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT CRIMINAL HISTORY AND MR. ATWATER'S RESULTING DEATH SENTENCE IS UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This issue was pled in Claim VIII of the motion to vacate, (R. 20), and summarily denied. (R.231).

The judge heard and considered evidence and argument presented by the prosecutor regarding Mr. Atwater's prior criminal convictions. The trial court relied upon these prior convictions in failing to find the statutory mitigating circumstance of "no significant history of prior criminal activity" (Dir. 712). This resulted in harmful error and skewed the trial court's sentencing calculus in favor of death.

The underlying convictions upon which Mr. Atwater's sentence of death rests were obtained in violation of Mr. Atwater's rights under the Sixth, Eighth, and Fourteenth amendments. His death sentence, founded upon that unconstitutionally obtained prior conviction, thus also violates his constitutional rights. Johnson v. Mississippi, 108 S. Ct. 1981 (1988); Duest v. Singletary, 967 F.2d 462 (11th Cir. 1992).

ARGUMENT IX

THE TRIAL COURT'S FAILURE TO ASSURE MR. ATWATER'S PRESENCE DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS, AND THE PREJUDICE RESULTING THEREFROM, VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This issue was pled in Claim IX of the motion to vacate, (R. 21), and summarily denied. (R. 232).

A criminal defendant's Sixth and Fourteenth Amendment right to be present at all critical stages of the proceedings against him is a settled question. See, e.g., Francis v. State, 413 So.2d 493 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v.

Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); see also Fla. R. Crim. P. 3.180. The standard announced in Hall v. Wainwright, 805 F.2d 945, 947 (11th Cir. 1986), is that "[w]here there is any reasonable possibility of prejudice from the defendant's absence at any stage of the proceedings, a conviction cannot stand. Estes v. United States, 335 F.2d 609, 618 (5th Cir. 1964), cert. denied, 379 U.S. 964 (1965); Proffitt, 685 F.2d at 1260."

Mr. Atwater was involuntarily absent from critical stages of the proceedings which resulted in his conviction and sentence of death. Mr. Atwater never validly waived his right to be present. However, during his involuntary absence, important matters were attended to, discussed and resolved. Except for his first appearance, Mr. Atwater never attended any court proceedings until the first day of his trial. Nor was Mr. Atwater present at any bench conferences which occurred during either his guilt or penalty phases. Critical exchanges transpired at these bench conferences and pretrial proceedings in Mr. Atwater's absence. It would also appear that Mr. Atwater was involuntarily absent during the course of off the record proceedings.

The denial of Mr. Atwater's right to be present violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Defense counsel should have objected and presented the issue but, ineffectively, did not. This was deficient

performance that prejudiced Mr. Atwater. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991).

ARGUMENT X

THE STATE FAILED TO PROVE EACH AND EVERY ELEMENT OF THE OFFENSES CHARGED AGAINST MR. ATWATER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This issue was pled in Claim X of the motion for postconviction relief, (R. 23), and summarily denied. (R. 233).

The State was not able to prove each and every element of the offenses with which Mr. Atwater was charged in violation of Jackson v. Virginia, 443 U.S. 307 (1979). There was not sufficient evidence presented to prove premeditation on the part of Mr. Atwater.

It was critical for the State to show that Mr. Atwater was not intoxicated or otherwise mentally capable of forming specific intent on the night of the crime since specific intent can be negated. If the State could not prove specific intent it could not prove each and every element of the offenses charged against Mr. Atwater. Linehan v. State, 476 So.2d 1262 (Fla. 1985). Mr. Atwater was charged with premeditated murder and robbery. Intoxication or inability to form specific intent is also a defense to felony murder when the underlying crime requires specific intent. The trial court was incorrect when it failed to instruct the jury on Mr. Atwater's theory of defense.

The failure of trial counsel to fully investigate this claim and to properly present it to the jury denied Mr. Atwater the effective assistance of counsel. Mr. Atwater is entitled to relief.

ARGUMENT XI

MR. ATWATER'S GUILT/INNOCENCE PHASE JURY INSTRUCTIONS WERE ERRONEOUS, UNRELIABLE, UNSUPPORTED BY THE EVIDENCE, AND DENIED HIM DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL, A PROPERLY INSTRUCTED JURY, AND HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

This issue was pled in Claim XII of the motion to vacate, (R.27), and summarily denied. (R. 234).

During Mr. Atwater's guilt/innocence phase, the jury was erroneously instructed and/or failed to receive proper instructions regarding the following: armed robbery and felony murder, voluntary intoxication, third degree murder, sufficiency of the evidence, sanity, and corpus delicti.

These instructions were materially erroneous and constituted fundamental error. Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989); Franklin v. State, 403 So.2d 975 (Fla. 1981); Anderson v. State, 276 So.2d 17 (Fla. 1973); Robles v. State, 188 So.2d 789, 793 (Fla. 1966). Mr. Atwater is entitled to a new trial.

The erroneous guilt phase jury instructions infected Mr. Atwater's penalty phase and undermined the reliability of his death

sentence. The penalty phase jury was instructed that if the homicide occurred during a robbery this constituted an aggravating circumstance (Dir. 1818). The prosecutor argued robbery as an aggravating circumstance. It is likely the jury relied upon and gave this aggravating circumstance more weight than it deserved based upon its misunderstanding of robbery stemming from the trial court's erroneous instructions and the prosecutors argument. The erroneous guilt phase instruction on robbery as well as other guilt phase instructions, demonstrated that neither the judge nor penalty phase jury understood robbery. As a result, Mr. Atwater's death sentence is arbitrary and capricious and his is entitled to a new sentencing proceeding.

Mr. Atwater's erroneous and/or omitted guilt phase jury instructions were unsupported by the evidence, denied him due process of law, effective assistance of counsel, a properly instructed jury, and violated his Fifth, Sixth, Eighth, and Fourteenth amendment rights under the United States Constitution and the corresponding provisions of the Florida Constitution.

To the extent that trial counsel failed to adequately preserve this issue or failed to raise it Mr. Atwater was denied effective assistance of counsel.

ARGUMENT XII

MR. ATWATER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY THE JURY'S AND THE JUDGE'S CONSIDERATION OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES. THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENT, NON-STATUTORY AGGRAVATING FACTORS AND THE SENTENCING COURT'S RELIANCE ON THESE NON-STATUTORY AGGRAVATING FACTORS RENDERED MR. ATWATER'S CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This issue was pled in Claim XIII of the motion to vacate, (R.29), and summarily denied. (R. 234).

Evidence and argument was presented to the jury concerning the character of the victim. This amounted to urging the jury to consider a non-statutory aggravating circumstance and was inadmissible victim impact information as defined by Booth v. Maryland, 482 U.S. 496 (1987). Even though a portion of Booth was later overturned at the time of Mr. Atwater's trial it was the law. These comments also violated the prohibition against victim impact information except in a limited manner. Windom v. State, 656 So.2d 432 (Fla. April 27, 1995).

The judge and jury that sentenced Mr. Atwater were presented with and considered non-statutory aggravating circumstances. The sentencer's consideration of improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth and Fourteenth Amendments to the United States Constitution, and

prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response," a clear violation of Mr. Atwater's constitutional rights. Penry v. Lynaugh, 108 S. Ct. 2934 (1989).

Limitation of the sentencer's ability to consider aggravating circumstances other than those specified by statute is required by the Eighth Amendment. Maynard v. Cartwright, 486 U.S. 356 (1988). Aggravating circumstances specified in Florida's capital sentencing statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So.2d 882 (Fla. 1979).

The penalty phase of Mr. Atwater's trial did not comport with these essential principles. Rather, the State introduced evidence which was not relevant to any statutory aggravating factors and argued this evidence and other impermissible matters as a basis for imposing death. See Windom.

The prosecutor also elicited opinion testimony from witnesses regarding the guilt of Mr. Atwater. The record is replete with numerous other instances of prosecutorial misconduct.

The opinion of a witness as to the guilt of the accused is not admissible. Gibbs v. State, 193 So.2d 460, 463 (Fla. 2d DCA 1967). Testimony that the police or prosecutors are of the opinion based

on investigations and discussions that the accused is guilt is fundamental error. Pait v. State, 112 So.2d 380, 384-389 (Fla. 1959). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974); see also United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991). In Rosso v. State, 505 So.2d 611 (Fla. 3rd DCA 1987) the court defined a proper closing argument:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may be reasonably drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Rosso, 505 So.2d at 614. The prosecutor's argument went beyond a review of the evidence and permissible inferences. He intended his argument to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of Penry v. Lynaugh, supra. He intended that Mr. Atwater's jury consider factors outside the scope of the evidence.

Following the United States Supreme Court opinion in Berger v. United States, 295 U.S. 78 (1935), the Florida courts have held that "a prosecutor's concern' in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike

foul ones.'" Rosso, 505 So.2d at 614. This Court has called such improper prosecutorial commentary "troublesome." Bertolotti v. State, 476 So.2d 130, 132 (Fla. 1985).

To the extent that trial counsel failed to object Mr. Atwater was denied the effective assistance of counsel.

This Court had held that when improper conduct by the prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So.2d 1346 (Fla. 1990).

ARGUMENT XIII

MR. ATWATER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE VOIR DIRE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY ACTIONS OF THE PROSECUTION AND THE TRIAL COURT.

This issue was pled in Claim XIV of the motion to vacate, (R. 32), and summarily denied. (R. 235). Defense counsel failed to question jurors about their views regarding the major issues in Mr. Atwater's case. The potential jurors were never questioned about their views regarding mental illness, drugs, child abuse and only superficially questioned regarding their views on capital punishment and alcohol abuse.

The failure of trial counsel to raise any aspect of this issue denied Mr. Atwater the effective assistance of counsel. Mr. Atwater is entitled to relief.

ARGUMENT XIV

MR. ATWATER'S SENTENCE RESTS UPON UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This issue was pled in Claim XV of the postconviction motion, (R. 33), and summarily denied. (R. 236). Mr. Atwater's jury was unconstitutionally instructed to consider an automatic aggravating factor: "committed while engaged in the commission or attempt to commit a robbery." The jury's consideration of this aggravating circumstance violated Mr. Atwater's Eighth and Fourteenth Amendment rights because it allowed the jury to consider an aggravating circumstance which applied automatically to Mr. Atwater's case once the jury had convicted Mr. Atwater theory of felony murder during the guilt phase of the trial.[6] The prosecutor's argument for the application of this aggravating circumstance urged the jury to find it automatically.

The use of the underlying felony, armed robbery, as a basis for any aggravating factor, rendered that aggravating circumstances "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). Due to the outcome of the guilt phase, the jury's consideration of automatic aggravating circumstances served as a

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[6]Alternatively, even assuming sufficient evidence to support a premeditated first degree murder conviction, the vague "cold, calculated, and premeditated" aggravating circumstance would similarly result in an automatic aggravating circumstance, equally violating the Eighth and Fourteenth Amendments.

basis for Mr. Atwater's death sentence. This was error and Mr. Atwater is entitled to relief.

The death penalty in this case was predicated upon unreliable automatic findings of statutory aggravating circumstances by the judge, which expressly acknowledged the jury's automatic consideration of this aggravating circumstance:

> By its verdict finding the Defendant guilty of Robbery With a Deadly Weapon, it is obvious that the jury found this factor to exist beyond a reasonable doubt. The Court, having heard the testimony elicited at trial, concurs and finds that this aggravating factor does exist beyond a reasonable doubt.

(Dir. 707) (emphasis added). The jury was told:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: One, the crime for which the defendant is to be sentenced was committed while he was engaged in or an accomplice in the commission or an attempt to commit or flight after committing or attempting to commit the crime of robbery.

(Dir. 1817-1818). Furthermore, the jury was instructed on and considered a vague aggravating circumstance:

> [T]he crime from which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(Dir. 1818). Aggravating factors must channel and narrow the sentencer's discretion. A State cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black. The use of this automatic aggravating circumstance did not "genuinely narrow the class of

persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983); therefore, the sentencing process was unconstitutionally unreliable, particularly since the jury could count two circumstances in its finding. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988).

The Wyoming Supreme Court addressed this issue in Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991) and found that the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance violated the Eighth Amendment to the United States Constitution. That court said:

> In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.
>
> Additionally, we find a further Furman/Gregg problem because both aggravating factors overlap in that they refer to the same aspect

> of the defendant's crime of robbery. While it is true that the jury's analysis in capital sentencing is to be qualitative rather than a quantitative weighing of aggravating factors merely because the underlying felony was robbery, rather than some other felony. The mere finding of an aggravating circumstance implies a qualitative value as to that circumstance. The qualitative value of an aggravating circumstance is unjustly enhanced when the same underlying fact is used to create multiple aggravating factors.
>
> When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at lest one "aggravating circumstance" be found for a death sentence becomes meaningless. Black's Law Dictionary, 60 (5th ed. 1979) defines aggravation as follows:
>
> > "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself." (emphasis added).
> >
> > As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the Furman/Gregg weeding-out process fails.

820 P.2d at 89-90. This is precisely what occurred in Mr. Atwater's case and Mr. Atwater is entitled to relief.

Wyoming, like Florida, provides that the narrowing occur at the penalty phase. See Stringer v. Black. Weighing of invalid

aggravating circumstances at the penalty phase defeats the narrowing which must occur there:

> [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. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 112 S. Ct. at 1137. Mr. Atwater was denied a reliable and individualized capital sentencing determination in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

To the extent that this issue was not raised by trial counsel Mr. Atwater was denied effective assistance of counsel. This Court must grant relief.

ARGUMENT XV

MR. ATWATER'S EIGHTH AMENDMENT RIGHTS WERE VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND WEIGH THE MITIGATING CIRCUMSTANCES SET OUT IN THE RECORD.

This issue was pled in Claim XVI of the motion to vacate, (R.38), and summarily denied. (R. 237). The proceedings resulting in Mr. Atwater's sentence of death violated the constitutional mandate of Eddings v. Oklahoma, 455 U.S. 104 (1982). Sentencing judges are required to specifically address nonstatutory mitigation presented and/or argued by the defense. Campbell v. State, 571

So.2d 415 (Fla. 1990). The failure to give meaningful consideration and effect to the evidence in mitigation requires reversal of a death sentence. Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 6.Ed. 2d 256 (1989).

Evidence was presented showing Mr. Atwater's abusive upbringing, his poverty as a child, his history of alcoholism, drug abuse and his mental instability.

"When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990). See Maxwell v. State, 603 So.2d 490 (Fla. 1992).

This Court has recognized that trial courts "continue to experience difficulty in uniformly addressing mitigating circumstances." Campbell, 571 So.2d 415, 419 (Fla. 1990). Moreover, the failure to set forth specific findings concerning all aggravating and mitigating circumstances could prevent the appellate court from adequately carrying out its responsibility of providing the constitutionally required meaningful appellate review, including proportionality review. Campbell, 571 So.2d 419-20; State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Indeed, lack of uniformity in the application of aggravating and mitigating circumstances invariably results in the arbitrary and capricious imposition of the death penalty. Furman v. Georgia, 408 U.S. 238

(1972); see Grossman v. State, 525 So.2d 833, 850 (Fla. 1988) (Shaw, J., concurring).

In Campbell, the requirements on sentencing courts respect to findings regarding mitigating circumstances was set forth:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature... The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence... The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981).

Campbell, 571 So.2d at 419-20 (footnotes and citations omitted) (emphasis added), see also, Ferrell v. State, 20 Fla. L. Weekly S74 (Fla. Feb. 16, 1995), Larkins v. State, No. 78,866 (Fla. May 11, 1995).

In Eddings, Justice O'Connor wrote separately explaining why she concurred in the reversal:

> In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating

> circumstance. See Okla. State., Tit. 21, Section 701.10 (1980). Nonetheless, in sentencing the petitioner (which occurred about one month before Lockett was decided), the judge remarked that he could not "in following the law. . . consider the fact of this young man's violent background." App. 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in Lockett compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S., at 605, 98 S. Ct., at 2965.

Eddings, 455 U.S. at 119-20. Justice O'Connor's opinion makes clear that the sentencer is entitled to determine the weight due a particular mitigating circumstance; however, the sentencer may not refuse to consider that circumstance as a mitigating factor. See Parker v. Dugger, 489 U.S. 308 (1991). Here the trial court improperly rejected nonstatutory mitigation. This was Eighth Amendment error.

To the extent that counsel failed to litigate this issue at trial, Mr. Atwater was denied effective assistance of counsel. Mr. Atwater is entitled to relief.

ARGUMENT XVI

A) FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

This issue was pled in Claim XVIII of the motion to vacate. (R. 45). The lower court denied it on the merits:

> The State responds that the Florida Supreme Court does not agree that the capital sentencing statute is unconstitutional, nor that electrocution is cruel and unusual punishment, and cites supporting case law. Since there was no meritorious issue to preserver, defendant's counsel was not ineffective. The Court agrees, and finds that this issue has no merit.

(R. 239). Florida's capital sentencing scheme denies Mr. Atwater his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution.

Execution by electrocution imposes physical and psychological torture without commensurate justification, and therefore

constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious imposition of the death penalty and violate the Eighth Amendment to the United States Constitution.

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992).

Florida law creates a presumption of death if a single aggravating circumstance is found. This creates a presumption of death in every felony murder case, and in nearly every premeditated murder case. Once an aggravating factor is found, Florida law provides that death is presumed to be the appropriate punishment,

which can only be overcome by mitigating evidence so strong as to outweigh the aggravating factor. This systematic presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); Richmond v. Lewis, 113 S. Ct. 528 (1992). To the extent trial counsel failed to properly preserve this issue, defense counsel rendered prejudicially deficient assistance. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

§ 921.141, Fla. Stat. (1983) is unconstitutional in that it concerns matters of court practice and procedures in violation of Art. V, § 2(a), Fla. Const. which requires the Supreme Court of Florida to adopt all rules for practice and procedure in the courts of the State of Florida. The Legislature of the State of Florida has no constitutional power to enact the aforementioned law.

ARGUMENT XVII

MR. ATWATER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PRE-TRIAL PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY ACTIONS OF THE PROSECUTION AND THE TRIAL COURT.

Mr. Atwater was arraigned over the television monitor at the jail. He then went for some time before ever meeting his trial attorneys. In fact the defendant's trial attorneys conducted depositions before their meeting with Mr. Atwater. Then did not allow for any meaningful relationship to exist between counsel and

their client. The lack of a trusting relationship affected the defense especially in the areas of impeachment of State witnesses, depositions, investigation and plea negotiations.

Counsel failed to object to Mr. Atwater not being present at any pretrial hearing.

Counsel's omissions deprived Mr. Atwater of his Sixth Amendment right to counsel under the United States Constitution.

This issue was pled in Claim XIX of the motion to vacate, (R. 47), and summarily denied. (R. 239).

ARGUMENT XVIII

MR. ATWATER'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This issue was pled in Claim XX of the motion to vacate. (R. 48) The lower court summarily denied this claim in its preliminary order dated June 29, 1999, stating:

> Claim 20: The defendant’s court proceedings were fraught with procedural and substantive errors which cannot be harmless when viewed as a whole.
>
> The State responds that the defendant argues cumulative error and relies on this Rule 3.850 pleading and the defendant’s direct appeal. The State states it has refuted the allegation that any prior claim constitutes error warranting a new trial on postconviction review. The Court finds no merit in this claim.

(R. 240). This portion of the lower court's order is problematic on its face and in context. It appears to simply adopt the state's position that all of the particular claims raised in the postconviction process failed to justify relief for one reason or another, and that therefore the cumulative effect of the various acts and omissions complained of could not warrant relief either. It also appears in the same order granting an evidentiary hearing on certain guilt phase issues. The lower court did not rule on those issues until January of 1999, (R. 367), so it is difficult to see how the lower court could have decided that there was no error and therefore could be no cumulative error unless the lower court had prejudged those issues and was merely granting an evidentiary hearing as a matter of going through the motions. In fact, the language of the state's response to the defendant's motion and many of the lower court's comments during the course of these proceedings indicate that both the lower court and the state conceded the necessity of an evidentiary hearing on those claims merely as a matter of appeasing this Court. A Huff hearing counsel for the state attorney's office said:

> ...Now, the attorney general's office is telling me that we need to have an evidentiary hearing on some of the ones that I did not think so, but they are pointing to the issue that was repeated at two different places, issue 17 and issue 6.
>
> MS. SABELLA: Yes.
>
> MS. KING: In my response I felt they were duplicated, and I answered it at issue

> 17. Issue 17, I did not feel raised to an issue requiring an evidentiary hearing, but the attorney general's office is not comfortable with that, and they feel that the Florida Supreme Court may not be comfortable with that . . . They feel that the record should be made.

(R.413, 414). The court responded by saying that it understood the state's position as "deal with it now or deal with it later," (R. 414), and in its order granting an evidentiary hearing on those issues the lower court cited the state's position that the Florida Supreme Court required a hearing. (R. 238). Be that as it may, if the court determined that an evidentiary hearing was required to resolve those issues, then it could not logically have determined that there were no errors and that therefore there could not be a problem with their cumulative effect.

In Jones v. State, 569 So.2d 1234 (Fla. 1990) this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So.2d 1346 (Fla. 1990) cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether:

> even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this State and this nation.

Jackson v. State, 575 So.2d 181, 189 (Fla. 1991). See also Ellis v. State, 622 So.2d 991 (Fla. 1993) (new trial ordered because of prejudice resulting from cumulative error); Taylor v. State, 640 So.2d 1127 (Fla. 4th DCA 1994).

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U.S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Larkins v. State, No. 78,866 (Fla. May 11, 1995).

The flaws in the system which convicted Mr. Atwater of murder and sentenced him to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Atwater's direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an

individual basis will not afford adequate safeguards against an improperly imposed death sentence – safeguards which are required by the Constitution.

ARGUMENT XIX

MR. ATWATER WAS DEPRIVED OF HIS RIGHT TO AN INDIVIDUALIZED SENTENCING IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN THE COURT SUBMITTED TO THE JURY DURING DELIBERATIONS A COPY OF A DEATH PENALTY SENTENCING OUTLINE DESIGNED AS A JUDICIAL TOOL TO ASSIST THE COURTS IN CONDUCTING A PENALTY PHASE TRIAL.

During the penalty phase instruction conference, the court and the attorneys discussed an "outline" by Judge Susan Schaeffer that is designed to assist circuit judges in handling death penalty cases (Dir. 1760).

This outline was marked at as exhibit (Dir. 1761) and while the assistant state attorney said it was for "identification", there is no way to tell from the incomplete record if this document accompanied the other evidence that went to the jury room during deliberations.

If it did, of course, it totally skewed the deliberations process by providing instructions on both aggravating and mitigating circumstances that were never at issue. There is no way of knowing how much of an impact this created on the jury's verdict. Any undue influence on the jury's deliberations violates the Eighth Amendment to the United States Constitution.

This issue was raised in Claim XXI of the motion to vacate. The state responded that this argument was mere speculation (R.98), and the lower court denied the request for an evidentiary hearing on it for that reason. (241). This was error. The claim was sufficiently pled to identify the issue and to provide focus at an evidentiary hearing, which would then have resolved the matter. As it is, the outcome of the penalty phase remains unreliable.

ARGUMENT XX

MR. ATWATER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. WHEN THE DEFENSE ATTORNEY FAILED TO OBJECT TO THE INTRODUCTION OF GRUESOME AND SHOCKING AUTOPSY PHOTOGRAPHS.

The prosecution was permitted to introduce into evidence numerous gruesome photographs that were inflammatory, cumulative, and prejudicial, even though there existed no legitimate issue as to the victim's manner of death or identity. These photographs were admitted solely to inflame the passion of the jurors based on impermissible factors. These included a video tape of the crime scene and photographs of the victim's partially nude body taken at the scene of the crime, and numerous pictures of the victim's deceased body at the medical examiners office.

The admission of these photographs permitted the State to elicit the passion of the jurors by shocking them with graphic pictures and inflaming their passions. The probative value of

these photographs was not only outweighed by their prejudice, but these photographs were cumulative to each other. Their graphic content was further emphasized through the testimony of witnesses.

The prejudicial effect of the photographs undermined the reliability of Mr. Atwater's conviction and death sentence. The photographs themselves did not independently establish any material part of the state's case nor were they necessary to corroborate a disputed fact. The trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt. Chapman v. California, 87 S. Ct. 824 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). O'Neal v. McAninch, 56 Cr. L. 2144 (U.S. Sup. Ct. 1995).

Use of these gruesome photographs, which were cumulative, inflammatory, and appealed improperly to the jury's emotions, denied Mr. Atwater a fair trial in violation of Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

To the extent that trial counsel failed to adequately preserve this issue or failed to raise it, Mr. Atwater was denied effective assistance of counsel.

This issue was pled in Claim XXII of the motion to vacate, (R. 51), and summarily denied. (R. 241).

ARGUMENT XXI

MR. ATWATER IS INNOCENT OF FIRST DEGREE MURDER AND SECOND DEGREE MURDER AND WAS DENIED ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Atwater's counsel argued that a conviction of second degree was the maximum conviction the jury should find. This argument was presented without the consultation or consent of Mr. Atwater resulting in prejudice to the jury. Mr. Atwater was again denied effective assistance of counsel. This issue was pled in Claim XXIII of the motion to vacate, (R. 53), and summarily denied. (R. 242).

ARGUMENT XXII

MR. ATWATER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. A FULL ADVERSARIAL TESTING DID NOT OCCUR. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT MR. ATWATER'S CONVICTION IS UNRELIABLE.

Defense counsel in Mr. Atwater's case failed in his "overarching duty to advocate the defendant's cause," Strickland v. Washington, 104 S. Ct. 2052, 2065 (1984). Counsel's actions were "not simply poor strategic choices; he acted with reckless disregard for his client's best interests and, at times, apparently with the intention of weakening his client's case." Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1983).

Trial counsel failed to discover and/or discover credible evidence which would have impeached the testimony of Joan Camarato. Ms. Camarato had testified that she had seen Mr. Atwater, on specific days and specific times, just days before the murder.

The police inventory list contained pay slips of Mr. Atwater that would have contradicted the time line stated by Ms. Camarato. The pay slip would have shown that Mr. Atwater was on the job site at the times stated by Joan Camarato.

This issue was pled in Claim XXIV of the motion to vacate, (R. 53), and summarily denied. (R. 242).

CONCLUSION AND RELIEF SOUGHT

The lower court's order denying relief should be reversed. Mr. Atwater is entitled to a new trial or at least an evidentiary hearing on those claims which were summarily denied. With regard to Claims VI and XVII, the only claims on which the lower court held an evidentiary hearing, Atwater should receive a new trial or at least a new evidentiary hearing. With regard to the remaining claims, Atwater should receive at least an evidentiary hearing because the motion and the files and records in the case do not conclusively show that the prisoner is entitled to no relief. Fla.R.Crim. P. 3.850; O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984); Mason v. State, 489 So.2d 734, 735-37 (Fla. 1986).

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Initial Brief of Appellant, which has been typed in Courier 12 Font, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 22nd day of November, 1999.

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