IN THE SUPREME COURT OF FLORIDA

CASE NO. SC94865

JEFFREY LEE ATWATER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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Introductory Statement

The undersigned relies on the facts and arguments set out in Appellant's Amended Initial Brief and Petition For Writ of Habeas Corpus with regard to all matters not specifically addressed herein.

References to the record are in the same form as in the amended initial brief. That is, references to the record on direct appeal are in the form, e.g., (Dir. 123) and references to the record of postconviction proceedings in the lower court are in the form, e.g., (R. 123). References to Appellant's Amended Initial Brief are of the form, e.g., (IB 123) and references to Respondent's Answer Brief are of the form, e.g., (AB 123).

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.[1]

This issue is now before this Court without the benefit of a finding of fact by the lower court. In its order denying relief, lower court recognized that there was a factual dispute at the

[1]This issue was originally raised in Claims VI and XVII of the motion for postconviction relief and argued in Argument I of the initial brief.

evidentiary hearing over whether the defendant's lawyers discussed the strategy of conceding guilt with him and obtained his consent. (R. 366, -7). Atwater testified that they had not. The lawyers testified that they could not remember whether they did or not in this case, but that it would have been their ordinary practice to do so. However, as pointed out in the initial brief, the defense lawyer who delivered the closing argument and actually made the concession of guilt, Mr. Schwartzberg, incorrectly suggested his concession of guilt to second degree murder was only offered as an alternative defense during rebuttal argument. (R. 487 – 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 [that he had not committed the murder but only discovered the body after the fact], 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. (See IB, page 10). In fact, Mr. Schwartzberg unequivocally conceded Atwater's guilt of second degree murder in closing argument. (Dir. 1458 et seq). This testimony from Mr. Schwartzberg at the evidentiary hearing

and its point blank refutation by the record show that his testimony of routine practice was merely a matter of (in this case false) speculation and excuse-making.[2]

In any case, the lower court did not resolve this factual dispute. Instead, the lower court found that the concession of guilt was a ". . . legitimate trial strategy even without the defendant's knowledge or consent" citing McNeal v. Washington and McNeal v. State, infra:

> Defendant's second issue, that his counsel were ineffective because they conceded his guilt during closing argument at the guilt phase of the trial, is also without merit. Defense counsel argued to the jury that they should find defendant guilty of second degree murder and no robbery conviction. At the hearing, defendant's attorney testified that the argument, which was used in the rebuttal closing, was a trial strategy fashioned to try to save the defendant's life, in light of the strong and detailed evidence presented by the State against him. (EXHIBIT 3). The attorney testified that he had no reason to believe that he had not discussed that strategy with the defendant, and he could not recall the defendant ever expressing any desire for him not to take that route. (EXHIBIT 4). Defendant's co-counsel testified that he did not have an independent recollection of discussing the second-degree murder strategy

[2]With regard to the probative value or lack thereof of routine practice testimony by trial counsel in this case, it is worth noting the disparity between theory and reality in Mr. White's handling of the mental mitigation expert witness (Dr. Merin) discussed below in Argument III. Mr. White described his usual practice as being very, very thorough, whereas the expert had testified in his deposition he had not had any meaningful contact with either of the defense lawyers prior to his deposition and did not even know that the case had gone to trial.

> with the defendant, but that his standard practice would have been to discuss all options before going forward. (EXHIBIT 5). The Court finds that the defense's plea to the jury to consider a second degree murder verdict was an attempt to save the defendant's life. Such a strategy is a legitimate trial strategy even without the defendant's knowledge or consent. 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. 367).

In its answer brief, the State noted that this Court will not substitute its judgment for that of the lower court on questions of fact as long as they are supported by competent substantial evidence, citing Melendez v. State, 718 So.2d 746 (Fla. 1998). (AB 26). However, the next line in the State's brief correctly observed that the lower court's decision on this issue was that the defense lawyers' concession of guilt was a legitimate trial strategy regardless of the defendant's waiver or lack thereof, not that the defendant had knowingly assented to the strategy. Id. The standard of review regarding factual disputes is inapposite because the lower court clearly did not resolve the factual dispute, but rather noted its existence and then based its decision on a separate interpretation of case law.

Between the filing of the Appellant's amended initial brief and the State's answer brief in these proceedings, this Court decided Nixon v. Singletary, 25 Fla. L. Weekly S59 (Jan. 27, 2000 reh. den. June 9, 2000). In Nixon, the defendant sought

postconviction relief alleging that his trial counsel's strategy of admitting guilt to the jury in an effort to obtain leniency in the penalty phase was the equivalent of a guilty plea to which he had not given his consent. This Court held: "Because counsel's comments were the functional equivalent of a guilty plea, we conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy," citing Koenig v. State, (Fla.1992) 597 So.2d 256; Fla. R. Crim. P. 3.172; Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934; Boykin v. Alabama, 395 U.S. 238, 89 S.Ct.1709, 23 L.Ed.2d 274(1969) and cases cited therein.

Now, the State argues that Nixon is distinguishable because it dealt with defense counsel's concession of guilt as to the crime as charged rather than to a lesser included offense. (AB page 26). That is indeed a factual distinction between this case and Nixon, but the decision in Nixon did not depend on the distinction. In Nixon this Court noted that: " [T]he [US] Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship. [Citations omitted]. Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather, the question is whether Nixon approved of the

course." Nixon, slip op. Page 6. As this Court put it: "[T]he dispositive issue in this case is whether Nixon gave his consent to his trial counsel to concede guilt during the guilt phase of the trial." Id.5.

The State also cites Brown v. State, SC90540, 2000 WL 263425 (Fla. 2000), where this Court concluded that the defendant had not been denied the effective assistance of counsel. Brown was a case where defense counsel conceded guilt to a lesser included offense rather than to the offense as charged. Also, admittedly, Brown was a case where defense counsel argued affirmatively that his client was guilty of the lesser offense rather than simply attack the element of premeditation, a practice which was criticized by the undersigned in the initial brief. Nevertheless, the dispositive issue in Brown, as in Nixon, was whether the defendant had expressly agreed with counsel's tactics, not whether the plea to a jury to convict the defendant of a lesser included offense rather than the offense charged was in and of itself enough to dispense with the requirement that the defendant consent to counsel's tactics:

> On this record, it is clear that [defense counsel] repeatedly informed Brown of his strategy, believed that Brown understood it, and concluded that Brown agreed with the strategic approach. As to trial strategy, [defense counsel] testified that Brown was cooperative and "agreeable to pretty much everything we did." We note that Brown did not testify as to this or any other claim during the postconviction hearing. Thus, on this record, we find that Brown has demonstrated no ineffectiveness because the evidence

> presented during the postconviction hearing was that [defense counsel] insured Brown's understanding of the implications of conceding guilt to a lesser homicide charge and that Brown consented to [defense counsel's] strategy.

Brown, SC90540, 2000 WL 263425 (Fla. 2000), Slip op. Page 12, (emphasis added). Moreover, defense counsel in Brown also had at least some specific recollection about discussing strategy with his client and respecting his client's decisions. He recalled discussing the possibility of pleading as charged to the offense and proceeding to a penalty phase, and had acquiesced in his client's decision to proceed to trial. Id. 8. By contrast, Atwater's attorneys did not have any specific recollection of having such a discussion, and Atwater testified that such a discussion did not occur.

In contrast to the facts in Brown, here Atwater testified at the evidentiary hearing that his lawyers had not discussed their strategy of conceding guilt with him and that he would not have agreed with it if they had done so:

> Q. Did you at any time express a desire to concede guilt and seek second -- degree murder in the case?
>
> [Atwater]. No. No, ma'am, I did not.
>
> Q. Do you recall having discussions with Mr. Schwartzberg about his closing argument and conceding guilt in the case?
>
> A. There was never a discussion of any such magnitude about conceding guilt. If there had been a discussion about conceding guilt, I would have told them point blank, no, you are

not to do it. (R. 513).

In Nixon and Brown, this Court consistently analogized defense counsel's concession of guilt during argument to an actual guilty plea made by a defendant. In fact, in Nixon, this Court explicitly stated: "[C]ounsel's comments were the functional equivalent of a guilty plea." Id. page 6. It is well recognized that a plea of guilty or no contest is a plea to each essential element of the offense. Fla. R. Crim. P.3.170(k) (Responsibility of Court on Pleas. No plea of guilty or nolo contendere shall be accepted by a court without the court first determining, in open court, with means of recording the proceedings stenographically or mechanically, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness and that there is a factual basis for the plea of guilty); Hightower v. State, 622 So. 2d 176 (Fla. Dist. Ct. App. 5th Dist. 1993) (Factual basis for guilt must be established even when there is nolo contendere plea.); Meredith v. State, 508 So.2d 473 (Fla. 4th DCA 1987)(Defendant was entitled to withdraw guilty plea to first-degree murder where material in file on which trial court relied in accepting plea reflected lack of essential element of premeditation and thus did not establish factual basis for the plea.); United States v. Montoya-Camacho, 644 F.2d 480, 486 (5th Cir. Unit A May 1981)(A factual basis for each essential element

of crime must be shown in order to comply with rule governing acceptance of guilty pleas)(Fed.Rules Cr.Proc. Rule 11, 18 U.S.C.A.); State v. Wood, 112 Ohio App.3d 621, 627, 679 N.E.2d 735 (1996)(In a no contest situation, a conviction is improper if statements of factual matter presented to court in support of complaint fail to address all of the essential elements of the offense. Rules Crim.Proc., Rule 11(B)(2)); e.g. Nixon, ("In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based on upon proof beyond a reasonable doubt. Without Nixon's consent to do otherwise, this should have been the strategy utilized by defense counsel. If this strategy worked to Nixon's detriment, Nixon himself must bear the responsibility for that decision").

This principle generally holds true where the plea is to a lesser included offense. McCarthy v. United States, 394 U.S. 459, 467 fn. 20, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969):

> The nature of the inquiry required by Rule 11 must necessarily vary from case to case, and, therefore, we do not establish any general guidelines other than those expressed in the Rule itself. As our discussion of the facts in this particular case suggests, however, where the charge encompasses lesser included offenses, personally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequisite to a determination that he understands the

> meaning of the charge. In all such inquiries, '(m)atters of reality, and not mere ritual, should be controlling.' Kennedy v. United States, 397 F.2d 16, 17 (C.A.6th Cir. 1968).

Also, United States v. Adams, 566 F.2d 962, 966 (5th Cir.1978)(When there is a lesser included offense, trial court, in accepting defendant's guilty plea, should personally address defendant as to his understanding of the essential elements of the charge to which he pleads guilty); State v. Norris, 113 Ariz. 558, 558 P.2d 903 (1976)(Regardless of whether defendant pleads guilty to the original charge or to an amended or lesser charge, the trial judge must be satisfied that there is a factual basis to support all the essential elements of whatever charge the defendant pleads to).

As with pleas to the offense charged, it must appear from the record that a defendant’s plea to a lesser included offense is voluntarily and knowingly given. Counsel’s words and acts alone are not enough, nor is the defendant’s silence presumed to be acquiescence. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274; Merrill v. United States, 338 F.2d 763 (5th Cir. 1964), (Although counsel's argument virtually conceded defendant's guilt of the acts charged and was calculated to lead the court and jury to believe that defendant had admitted his guilt unless jury found him insane, such argument did not constitute a voluntary and understanding plea of guilty by defendant, and did not relieve the court of its duty to instruct

the jury on all essential elements of the offenses charged, including an instruction on the presumption of innocence, and such failure to charge, together with improper denial of certain surrebuttal testimony by defendant constituted prejudicial error.) See Sheppard v. State, Del.Supr., 367 A.2d 992 (1976)(Before a guilty plea can be considered valid and voluntary, even if entered on advice of competent counsel in face of overwhelming evidence of guilt, there must be intelligent statement by accused in open court that he is aware of all essential elements of offense).

The logic of these cases compels the conclusion that to the extent that the requirements for the entry of a plea to a lesser included offense are the same as for as plea to the offense charged, so the requirements of counsel's concession of guilt to a lesser offense before a jury are the same as for a concession of guilt to the offense charged. If a defense lawyer's concession of guilt to a jury is the functional equivalent of a guilty plea, which in turn is a plea to each of the essential elements of the offense charged, then the prerequisites of such a concession should also apply to a concession to each of the essential elements. The overall holding of Nixon, that evidence adduced from the record on direct appeal or at a postconviction evidentiary hearing must establish an affirmative, explicit acceptance by the defendant of counsel's strategic concession of

guilt – that silent acquiescence is not enough – should apply equally to concessions of guilt to each of the essential elements of the offense charged, and a concession of some of these elements should require the same showing as to those elements.

In Harvey v. Dugger, 656 So.2d 1253, (Fla.1995), this Court held inter alia as follows:

> Harvey argues that he was denied effective assistance of counsel in the guilt phase of the trial when without his consent, defense counsel conceded Harvey's guilt in the opening argument. Harvey maintains that this concession nullified his fundamental right to have the issue of guilt or innocence presented to the jury as an adversarial issue. Because the record before us is unclear as to whether Harvey was informed of the strategy to concede guilt and argue for second-degree murder, we remand to the trial court for an evidentiary hearing on this issue. See Nixon v. State, 572 So.2d 1336 (Fla.1990), cert. denied, 502 U.S. 854, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991). Id. 1257.

Thus, there is already precedent from this Court establishing that a defense lawyer's strategic concession of guilt to a lesser included offense must be based on the defendant's informed consent.

The State concludes this portion of its answer brief by arguing that Atwater's claim should fail because it failed to meet the harmful error and prejudice requirements of Strickland and Holland v. State, 503 So.2d 1250 (Fla. 1987). AB 30, 31. Nowhere did the State cite the per se rule announced in United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), which was a key precedent in the Nixon decision, and

which was cited here in the initial brief at page 17. The State's summary of argument on this issue in its entirety is as follows:

> Issue I: Atwater argues that trial counsel's concession during closing argument that the facts established the lesser offense of second degree murder was without his permission or knowledge and amounted to ineffective assistance of counsel. It is the state's position that Atwater failed to establish that he did not give his consent, that counsel's strategic decisions were unreasonable and that there exists a reasonable probability that the outcome of the proceedings would be different. Therefore, the trial court properly denied relief. (AB 11).

Cronic is not mentioned here or anywhere in the body of the State's argument on this issue. Moreover, the State cited this Court's opinion in Holland v. State, 503 So.2d 1250 (Fla. 1250) for the following proposition:

> Furthermore, as this Court in Holland [id] acknowledged, the harmless error analysis is applicable. Harmless error analysis for issues of ineffective assistance of counsel are governed by Strickland [supra]. (AB 30) (citations omitted).

The undersigned has read Holland and sees no support for this proposition anywhere in the opinion. In fact, the Holland Court reversed the lower (district) court's denial of relief based on a harmless error analysis because the harmless error doctrine did not apply to the summary denial of Holland's postconviction motion. What is more, Holland's postconviction motion, which was

deemed facially sufficient to require a hearing, alleged that his trial counsel had conceded his guilt to a lesser included offense without his consent. In ruling on the issue presented therein, this Court stated:

> It is axiomatic and almost unnecessary to note that those statutes and rules which require hearings prior to a judgment derive from the most basic of all rights under our legal system, the right to due process of law. The danger is obvious when one considers that the same analysis could be used to obviate the need for any trial at all in a case, for example, where the crime had been televised or videotaped. Harmless error can never be applied to those procedures by which the state has insured the defendant's right to be heard. Id 1252.

In Nixon, this Court cited the following language from Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969): "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Thus, Holland does not support the position argued by the State; it supports the position taken here.

However, even assuming arguendo that the harmless error doctrine should apply here, as urged by the State, the failure of the lower court to make a factual finding on the issue in question (also on the urging of the State) precludes its use. See Holland at 1252: "In a case such as the one presently before us where the district court determined that the right to an

evidentiary hearing had been erroneously denied, the impact of the error in precluding the presentation of evidence can never be harmless for the self-evident reason that a reviewing court does not know what that evidence would be."

It is apparent that the State is taking the position, as it must in seeking to uphold the lower court's order, that the defendant's consent or lack of it is irrelevant where his lawyer's concession of guilt was to a lesser included offense. That position is inconsistent with Nixon and Brown and in direct conflict with this Court's decision in Harvey, which all indicate that the defendant's informed consent is essential where his lawyer enters the "functional equivalent" of a guilty plea.

At a minimum, this cause must be remanded to the lower court to make a factual finding as to whether or not Atwater affirmatively and explicitly accepted trial counsel's strategy. However, given that the lower court was confronted with this factual issue and chose (at the State's urging) to decide the issue on another (legal) ground, the matter is now before this Court for de novo review. Atwater has testified that he did not make such an explicit and voluntary acceptance. The record on appeal reflects no such explicit acceptance. The lawyers have testified that they have no specific recollection about the matter. The testimony from the hearing is undisputed that Atwater's account of his actions to his attorneys (that he

arrived on the scene after the fact) would not have supported a plea to second degree murder.[3] This Court should remand this case for a new trial.

ARGUMENT II

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 DID NOT PERMIT HIM TO TESTIFY IN HIS OWN DEFENSE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Claim VI of the motion for postconviction relief filed herein originally 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, inter alia, failure to adequately communicate with Atwater. The lower court took the view that all of these allegations were interrelated, and that they could, in fact, have

[3]The factual statement given by Atwater to Dr. Merin, which is consistent with what his trial lawyers remembered him telling them, is recited verbatim in the State's answer brief at pages 36 through 41.

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." The summary of argument portion of the amended initial brief states in part: "In Argument I, Atwater challenges his trial counsel's concession of guilt and failure to allow him to testify in his own 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)." (IB 12).

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.

Mr. Atwater testified at the evidentiary hearing. (R. 507 to 532). 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 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):

> Q. Did Mr Schwartzberg or Mr. White ever explain to you your constitutional right to testify?
>
> [Atwater]: No they did not. (R. 598).
>
> * * *
>
> Q. Before trial, did you express a desire on your own behalf to testify?
>
> A. Yes, I did. (R. 599).
>
> * * *
>
> Q. You stated that you wanted to testify.

And if you had testified, would you have admitted guilt?

A. Definitely not. (R. 510).

* * *

A. [I] always maintained my innocence with them[defense counsel] and they – if I had testified, that's what I would have done. (R. 510 – 511).

This testimony is consistent with what defense counsel could remember with any particularity at the evidentiary hearing.

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?

[Mr. White]. I do not recall that, but it's sort of ringing a bell now that you're saying it...

(R. 448 - 449).

Mr. White said that he did not remember Atwater ever conceding guilt to him. (R. 447). Mr. White said rather unequivocally that he had no recollection of discussing Atwater's rights with him:

Q. Do you recall having any discussions with Mr. Atwater about his right to testify on his own behalf?

A. I do not. (R. 448 - 449).

It was Mr. Schwartzberg's job to talk to their client about these issues:

[Mr. White]. ...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.

(R. 456, 457).

Mr. Schwartzberg also recalled that Atwater claimed he was not guilty:

> Q. What was Mr. Atwater's desire in this case? What were his wishes; do you recall?
>
> [Mr. Schwartzberg]. The answer to that question is that 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 discovery that we performed concerning some statements that he had made to us about potential alibis or places that he was at the time the crime was committed that we followed up on. I mean, that's the best that I can recall. (R. 488).
>
> * * *
>
> Q. You did testify today that you do recall Mr. Atwater stating that he was innocent, that he was not guilty?
>
> A. Yes.

(R. 490).

Atwater's testimony about what he told his lawyers is also consistent with what he told Dr. Merin prior to the trial. (See verbatim citation at State's AB 36 -- 41). And finally, as noted above, the lower court made findings of fact that the attorneys

had no recollection of advising Atwater that he had a right to testify and that the record did not contain a waiver of that right. The lower court then declined to base its ruling on whether or not counsel's performance was deficient, and instead found insufficient prejudice to warrant relief. Supra.

In response to this claim the state cited Oisorio v. State, 676 So. 2d 1363 (Fla. 1996)) which holds that a claim of ineffective assistance of counsel based on counsel's interference with his right to testify requires both that counsel's performance was deficient and that deficient performance prejudiced the defense. While Oisorio holds that there is no per se rule based on counsel's interference with the right to testify, the evidence in this record is sufficient to warrant relief because a defendant does have a right to testify in his own defense and the denial of that right renders the trial proceedings unfair. Moreover, if Atwater's right to testify in his own defense had been honored by defense counsel, the Nixon error described above would almost certainly not have occurred.

Also, Atwater would have done more than merely declare his innocence. As noted above and as cited in the State's answer brief, Atwater was prepared to testify at length and in detail about his activities at the time of the offense. In contrast the fourth district denied relief where the record showed that the defendant would merely have declared his innocence if he had been

allowed to testify:

> In our prior opinion, we also reversed based on Appellant's second ground for relief, which alleged counsel was ineffective for failing to allow Appellant to testify. However, we now conclude that Appellant's allegations did not satisfy the prejudice prong. See Oisorio v. State, 676 So.2d 1363 (Fla.1996)(no per se rule of ineffectiveness when a defendant claims a right to postconviction relief based on counsel's interference with the right to testify; claimant must show both counsel's deficiency and that counsel's deficient performance prejudiced the defense). Here, Appellant alleged merely that he would have declared his innocence, rebutting the testimony of state witnesses. To be entitled to an evidentiary hearing on a claim that counsel deprived the defendant of the right to testify, even where no waiver is shown to be of record, a postconviction movant must show more. See, e.g., Jennings v. State, 685 So.2d 879 (Fla. 2d DCA 1996)(reversing summary denial where defendant would have testified, in sexual battery case, to victim's consent, a defense which could be advanced only through testimony of defendant); Smith v. State, 700 So.2d 469 (Fla. 1st DCA 1997)(reversing summary denial where defendant would have offered a reasonable explanation for presence of his fingerprints at scene, the only evidence tying him to the crime).

Jackson v. State, 711 So.2d 1371, (Fla. 4th 1998) n.1. Because the record demonstrates that Atwater could do more than merely declare his innocence, this case is more like Jennings v. State, supra, than Oisorio. Thus the record shows prejudice and Atwater is entitled to relief.

See also "Requirement that court advise accused of, and make

inquiry with respect to, waiver of right to testify," 72 A.L.R.5th 403, §10 (1999).

ARGUMENT III

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.[4]

As authority for its position that Atwater is not entitled to an evidentiary hearing on his penalty phase ineffective assistance claim, the State cites[5] -- almost verbatim -- this excerpt from Robinson v. State, 707 So.2d 688, 695 (Fla.1998):

> To merit relief, Robinson must show not only deficient performance, but also that the deficient performance so prejudiced his defense that, without the alleged errors, there is a "reasonable probability that the balance of aggravating and mitigating circumstances would have been different." Bolender v. Singletary, 16 F.3d 1547, 1556-57 (11th Cir.1994). See also Rose v. State, 675 So.2d 567, 570-71 (Fla.1996); Hildwin v. Dugger, 654 So.2d 107, 109 (Fla.1995).

The State did not cite the following line:

> Relevant factors for inquiry include counsel's failure to investigate and present available mitigating evidence, along with the reasons for not doing so. Id

The point here is that Robinson was decided after an evidentiary

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[4]This issue was raised in Claim XI of the motion for postconviction relief and argued as Arument II in the amended initial brief.

[5]AB, 44 to 45.

hearing on penalty phase ineffectiveness issues. For that matter so were Rose and Hildwin. In Bolender, the state trial court had earlier conducted a postconviction evidentiary hearing and actually vacated the death sentences, a decision which was later reversed on appeal, and the federal district court had conducted a two day nonevidentiary hearing. But here, the "relevant factors for inquiry" were not inquired into because the lower court denied Atwater's request for an evidentiary hearing.

The State also cites Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987), cert. den. 487 U.S.1241 (1988) for the proposition that. "The mere fact that other witnesses might have been available or other testimony might have been elicited is not a sufficient ground to prove ineffectiveness." (AB 45). That may be, but the issue of whether ineffectiveness has or has not been proven is not before this Court because there was no evidentiary hearing conducted in the lower court, and more has been alleged than just the availability of additional witnesses and mitigation. As discussed at some length elsewhere in these proceedings, trial counsel inter alia admitted lack of preparation in their motion for a continuance (IB 42 -- 43), their expert changed his story adversely to the defense from his deposition testimony to when he took the stand (IB 44 -- 54), both defense counsel and their expert belittled what mitigation they did present and in fact told the jury point blank not to believe it (IB 29 - 37), and defense

counsel's closing arguments, coupled with the court's somewhat mysterious inclusion of a totally inapplicable Enmund/Tyson instruction, amounted in effect to a request (albeit inadvertent) that their client be sentenced to death (Pet. For Writ of Habeas Corpus, Claim I, page 16).[6] In any event, Foster had been sentenced and resentenced and his case reviewed five times prior to the opinion cited by the State. The State also cites Spaziano v. Singletary, 36 F.3d 1028 (11th Cir. 1994) for similar reasons, but it is worth noting that this Court eventually remanded Spaziano's case for an evidentiary hearing on a newly discovered evidence claim at Spaziano v. State, 660 So.2d 1363 (Fla.1995), cert. den. 516 U.S. 1053, 166 S.Ct. 722, 133 L.Ed.2d 674 (1996), ultimately resulting in vacation of the conviction. See State v. Spaziano, 692 So.2d 174 (Fla. 1997).

Moreover, the Attorney General, if not the State's Attorney, arguably conceded the appropriateness of an evidentiary hearing on penalty phase ineffectiveness issues at the Huff hearing. Ms. Marie King appeared for the State's Attorney's Office and Ms. Candance Sabella appeared for the Attorney General's Office. (R. 398). The following exchange occurred:

> [Ms. King]: In my response I felt they were

[6]Also in Foster v. State, 654 So.2d 112 (Fla. 1995), this Court (on direct appeal of resentencing) considered on the merits, but rejected as harmless, error under Jackson v. State, 648 So.2d 85 (Fla. 1994), which is also raised here in these proceedings in Claim X of the postconviction motion and Argument VI of the initial brief.

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. Those are the issues that Mr. DeBock has raised here, today and defense counsel's alleged admission of guilt by arguing for the lesser included offense of second degree murder at the time the closing argument was reached after the presentation of the State's evidence.

The included issue of lack of proper mitigation evidence may also be presented in issue number 11. I think any testimony about issue 17 and 6 is probably going to of necessity cover issue 11. Therefore, the attorney general's office, Candance Sabella here today, has indicated to me that we better not be objecting too strenuously to an evidentiary hearing on those issues, even though I feel and the attorney general's office feels that what I have put in my response is the correct answer that they have failed to show prejudice of defense counsel on this particular record and that we will be able to rely on that throughout regardless of testimony received from defense attorneys. They feel that the record should be made. And have I said that properly, Candance?

MS. SABELLA: I just want to expand on what she said in the sense that we don't agree that there is merit to it, and I don't want the Court to say that by me agreeing that we need an evidentiary hearing that it's a meritorious claim. It is in an abundance of caution.

THE COURT: I understand what she is saying that deal with it now or deal with it later, that somebody is going to ask for it to be clarified, but that is not a concession. (R. 414).

Claim XI was the penalty phase ineffective assistance claim in the

motion for postconviction relief. (R.24). Claims VI (R. 17) and XVII (R. 41) actually use the phrase "guilt phase" and could not reasonably have been construed to apply to the penalty phase, so the State Attorney's assertion that lack of mitigation would be covered in considering Claims VI and XVII is more than a little perplexing.[7] In any event, the lower court judge concluded the Huff hearing with the following statement:

> We are going to try and craft an order that is going to identify with specificity the issues that are actually established and that exist and that will be the subject of this hearing. And we are not going to go outside the lines of that and go into these other matters. . . Many of the points in the other counts of the motion are not going to be the subject of this hearing, therefore would not be the subject of the discovery deposition. (R. 421).

The lower court's order denying an evidentiary hearing on penalty phase ineffective assistance is unequivocal. (R. 233, 234). The State's written response to Claim XI and an excerpt from the lower court's order adopting the State's position as set out therein are cited verbatim at IB 22, 23. Neither comport with the views expressed in the Huff hearing as shown above.

The motion for postconviction relief alleged sufficient facts to require an evidentiary hearing on the general issue of ineffective assistance of counsel at the penalty phase. The postconviction motion alleges detailed mitigation that could have

[7]Assuming the accuracy of the transcript.

and should have been presented to the court. (IB 23 -- 26). Moreover, the record on direct appeal shows a number of relevant things. One is the fact that defense counsel claimed lack of preparedness for the penalty phase in a hearing on a motion to continue the trial. (IB 37 -- 42). Because there was no evidentiary hearing on penalty phase ineffectiveness issues this is the only evidence in the record that speaks directly to defense counsels' investigation, preparation and presentation of their penalty phase case.

Another is an apparent lack of communication between defense counsel and their expert witness. This fact is especially obvious from the record. The pre-trial motion for a continuance based on lack of preparation for the penalty phase was argued by Mr. White. He said that his normal routine with mental health experts was to prepare thoroughly:

> 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. (Dir. 1900).

Contrast this with Dr. Merin's testimony at his deposition:

> 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. (Dir. 607).

* * *

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? (Dir. 642, -3).

Dr. Merin said that he had little if any communication with counsel and did not even know that Atwater had been to trial and been found guilty. It is certain from this excerpt from Dr. Merin's deposition that defense counsel waived Dr. Merin's confidential status without discussing the matter with Dr. Merin, and virtually certain from this and the rest of the record that the decision was made without discussing the matter with Atwater.

This factor should be considered along with the fact that the

expert changed his testimony between his deposition and his court appearance from what he himself considered to be mitigation to what amounted to nonstatutory aggravation. This fact is emphasized by the prosecutor's largely unobjected--to use of the defense lawyers' star penalty phase expert's testimony against them in his closing argument. The obvious inferences are that the defense lawyers did not bother to consult with their client about whether to waive Dr. Merin's confidential status prior to his deposition, that they had no idea what he would say at either the deposition or at the penalty phase, that they were caught completely off guard when he changed his testimony from mitigation to aggravation, and that they then let the prosecutor roll right over them in his closing argument.

Also, the State has pressed the argument that the defense expert presented evidence of Atwater's background in mitigation. This argument overlooks the fact, shown on the record, that both defense counsel and their expert presented that information *as being false.* There is no explanation on this record for why they did that, but ignorance of penalty phase evidentiary law is the most likely candidate. Moreover, the combination of defense counsel's guilt phase argument that his client was emphatically guilty of second degree murder, in which ". . .the act itself indicates indifference to human life," coupled with the court's unobjected–to and flatly inappropriate Enmund/Tison penalty phase

instruction – “In order to recommend a sentence of death, you must find that. . .his state of mind was one of reckless indifference to the value of human life” – amounted to an assertion by defense counsel, albeit almost certainly inadvertent, that his client was an appropriate candidate for the death penalty. Defense counsel failed to object to this instruction, and: “[I]t is appropriate to consider both the preserved and unpreserved errors in determining whether the preserved error was harmless beyond a reasonable doubt.” Martinez v. State, 2000 WL 766454, 25 Fla. L. Weekly S471 (Fla. Jun 15, 2000) (NO. SC90952); citing Gore v. State, 719 So.2d 1197, 1202 (Fla.1998); ." Whitton v. State, 649 So.2d 861, 865 (Fla.1994); Jackson v. State, 575 So.2d 181, 189 (Fla.1991). It short, it appears from the record that defense counsels’ acts and omissions made matters worse for their client than if they had done nothing at all. The record does not conclusively refute the allegation of ineffective assistance of counsel at the penalty phase. If anything it conclusively supports it, and Atwater should have been granted an evidentiary hearing on this issue.

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 Reply Brief of Appellant, which has been typed in Courier New, Font size 12, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 20th day of July, 2000.

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