IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,865

JEFFREY LEE ATWATER,

Appellant,

v.

MICHAEL W. MOORE,
secretary,

Florida Department of Corrections,

Respondent.

and

ROBERT BUTTERWORTH,
Attorney General,

Additional Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ARGUMENT

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 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).

While it is clear that the State wishes this Court to deny the present petition, it is not clear whether the State wishes the Court to base its decision only on procedural default or to address the merits as well. The introductory portion of the Response, **from pages 4 through 6,** appears to urge procedural default only, but then concludes with the line: "Nevertheless, as **the following establishes no relief is warranted** on **any** of **the** claims **raised."** Id. The response then proceeds to address each claim on the merits.

CLAIM I

FUNDAMENTAL ERROR OCCURRED WHEN THE TRIAL COURT GAVE A NONSTANDARD ENMUND/TISON JURY INSTRUCTION IN THE PENALTY PHASE. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE.

Contrary to the State's assertion, this claim has not been raised before. The State's Response characterizes this claim as an "unpreserved challenge to penalty phase instructions," (Response, page 7), which would seem to be purely a procedural default argument. In any event, the Response addresses only two conclusory sentences to this claim, to the effect that it "failed to establish either fundamental error" or "deficient performance."[1]

In Harsrave v. State, 427 So.2d 713 (Fla.1983) this Court stated:

> If an impropriety at trial rises to the level of a due process violation of a fundamental constitutional right, it may be considered fundamental error which can be raised on appeal in spite of a failure to object at trial. Id. at 715.

Recently, this Court found fundamental error where the error had ". . .a qualitative effect on the sentencing process." Parks v. State, 2000 WL 963861 (Fla. Jul 13, 2000) (NO. SC94286); also Charles v. State, 2000 WL 963888 (Fla. Jul 13, 2000) (NO. SC95753)(If a sentencing error occurred that is patent and

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[1] The latter assertion clearly calls for a determination on the merits.

serious because it has a quantitative effect on the sentence and a qualitative effect on the sentencing process, the error should be corrected as fundamental error); Maddox v, State, 25 Fla. L. Weekly S367, S369 (Fla. May 11, 2000)(Appellate court may correct on direct appeal as fundamental error an unpreserved sentencing error that is both patent and serious. Id. at S369); State v. Mancino, 714 So.2d 429, 433 (Fla.1998)("A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal',"); Bain v. State, 730 So.2d 296, 304 (Fla. 2d DCA 1999) ("[F]undamental error" is an important term of art in the law. . . Florida's appellate courts are meant to continue exercising jurisdiction in cases presenting such circumstances)(but see State v. Jefferson, No. SC94630, --- So.2d ----, 2000 WL 565104 (Fla. May 11, 2000)).

Habeas corpus relief is appropriate where appellate counsel failed to raise fundamental error appearing on the record. Lowman v. Moore, (Fla. 2d DCA 1999) 24 Fla. L. Weekly D2554, citing Ferrer v. Manning, 682 So.2d 659 (Fla. 3d DCA 1996).

> Appellate counsel may be deemed to have rendered ineffective assistance in failing to raise a meritorious issue on appeal even if trial counsel did not preserve it for appeal if the error or impropriety rises to the level of a due process violation, constitutional violation, or another matter of fundamental error. Those, of course, cannot be waived by failure to object. See Hargrave v. State, [supra].

Mever v. Sinsletarv, 610 So.2d 1329 (Fla. 4th DCA 1992).

The instant Claim is based on three separate facts:

1. Presumably by mistake, the trial court gave the jury an Enmund/Tison penalty phase instruction in a case where the instruction was wholly inappropriate. In effect, the instruction told the jury that the defendant was a candidate for the death penalty if ". . .his state of mind was one of reckless indifference to the value of human life." (Dir. 1820).

2. Defense counsel emphatically and graphically argued that his client was guilty of second degree murder, which was defined by the court as one "...of such a nature that the act itself indicates an indifference to human life." (Dir. 1472).

3. Appellate counsel failed to perceive or raise the point that the combination of the two amounted to defense counsel telling the jury that his client was an appropriate candidate for the death penalty.

In Grubbs v Sinsletarv (1995, MD Fla) 900 F Supp 425, 9 FLW Fed D 358 the district court granted habeas corpus relief based on ineffectiveness both of trial and appellate counsel.

> Appellate counsel had the option of bringing petitioner's claim of ineffective assistance of trial counsel pursuant to a Rule 3.850 motion, as is customarily done. Appellate counsel declined to file either a direct appeal or a Rule 3.850 motion. This Court is still convinced that valid grounds for a claim were apparent on this record, therefore, appellate counsel was ineffective based on the failure to pursue this claim by one of the available procedures.

* * *

> It is not sufficient to state, as Respondent did in this motion, that appellate counsel is not ineffective because the petitioner proceeded to file a 3.850 motion for ineffective assistance of trial counsel. The prejudice created by appellate counsel's ineffective assistance is not negated by the Petitioner's filing of a pro se motion. Appellate counsel failed to assert any and all reasonable grounds for the claim in the Anders brief. This resulted in prejudice to the defendant because the state court was not presented with an accurate depiction of the grounds which might support an appeal. Therefore, appellate counsel's failure to comply with the Anders requirement does constitute ineffective assistance of counsel according to the standard established by Strickland.
>
> In Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), the Supreme Court held that appellate counsel was not ineffective when he selected certain grounds to support an appeal and did not include other "weaker" arguments in the Anders brief. The appellate court found that this violated the Anders requirement because counsel abandoned nonfrivolous issues on appeal; however, the Supreme Court reversed and held that counsel had satisfied Anders by supporting his client to the best of his ability. Id.
>
> The present case is distinguishable because the grounds asserted by the Petitioner, which were not included in the brief by appellate counsel, were not "weaker" arguments. *The grounds now* asserted *by the* Petitioner *appear to be* strong grounds *for an appeal based on ineffective assistance of trial counsel.* Id (Emphasis added).

Thus, the mere fact that the error could have been raised in the form of a motion for postconviction relief alleging ineffective assistance of trial counsel does not bar habeas relief where

appellate counsel's failure to raise the issue prejudiced the defendant by failing to present to this Court an "accurate depiction of the grounds which might support an appeal." The prejudicial failure of appellate counsel to challenge an erroneous jury instruction may constitute ineffective assistance of appellate **counsel warranting** habeas relief. Ford v Sinsletarv (1997, Fla App D3) 689 So 2d 392, 22 FLW D575 (Appellate counsel's failure to challenge defendant's attempted first-degree murder conviction on ground jury had been charged alternatively on attempted felony murder and attempted premeditated murder, and Supreme Court had abolished crime of attempted felony murder, was ineffective assistance); also see Stokes v. State, 685 So.2d 1368 (Fla. 2d DCA 1996):

> Neither the state nor Mr. Stokes' appellate counsel brought the Gray [State v. Gray, 654 So.2d 552 (Fla.1995)] decision to our attention.
>
> Mr. stokes' rule 3.850 motion first contended that because Gray was decided while his appeal was pending, his conviction for attempted first-degree felony murder must be vacated. The trial court denied relief, reasoning that this issue should have been resolved in the direct appeal. We have elected to treat this aspect of Mr. Stokes' present appeal as a petition for writ of habeas corpus, alleging ineffective assistance of appellate counsel. After reviewing the state's response on this issue, we conclude that Gray requires us to vacate Mr. Stokes' conviction for attempted first-degree felony murder. Id.

Thus there is no procedural bar preventing this Court's consideration of the issue on the merits. The deficiency of

counsel and the prejudice resulting from it are manifest, because the effect of the instruction coupled with defense counsel's argument was that both defense counsel and the judge told the jury that Atwater was a suitable candidate for the death penalty.

CONCLUSION AND RELIEF SOUGHT

The appellate review process in Mr. Atwater's case was fundamentally flawed. The issues raised herein should be considered on their merits and habeas corpus relief should be granted. The cause should be remanded for a new direct appeal.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus, 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 21 day of July, 2000.

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