

IN THE SUPREME COURT OF FLORIDA

CASE NO. ~~94,865~~ 1999-179

JEFFREY LEE ATWATER,
Appellant,
v.

MICHAEL W. MOORE,
Secretary,
Florida Department of Corrections,
Respondent.

and

ROBERT BUTTERWORTH,
Attorney General,
Additional Respondent.

FILED
DEBBIE CAUSSEAU

DEC 27 1999

CLERK, SUPREME COURT
BY DC

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT ABOUT REFERENCES

The Petitioner herein filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850. The lower court's denial of that motion is now on appeal before this Court in Atwater v. State, Case No. 94,865. References to the record on appeal in that case are of the form, e.g., (R. 123). References are also made to the record prepared in the direct appeal of the petitioner's conviction and sentence in Atwater v. State, 626 So.2d 1325 (Fla. 1993), and are of the form, e.g., (Dir. 123).

Where there is a reason to draw attention to trial counsel in this case, they are referred to as "the prosecutor" or "defense counsel." "Appellate counsel" is the attorney who represented Mr. Atwater on direct appeal. 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.

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 premeditated murder in count I and armed robbery in count II. He was not charged with felony murder. (Dir. 4). 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 fiancée of his aunt by stabbing him repeatedly. The jury was instructed on both theories of first degree murder. (Dir. 514 et. seq.). The jury found Mr. Atwater guilty as charged on May 4, 1990. The first degree murder verdict was a general form. (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 found three aggravating factors: (1) committed during the **commision** of a robbery; (2) heinous, atrocious or cruel; and (3) cold, calculated, and premeditated. (Dir. 707-715).

A timely direct appeal was filed and this Court affirmed Mr. Atwater's convictions and sentences in Atwater v. State, 626 So.2d 1325 (Fla. 1993). The United States Supreme Court denied certiorari. Atwater v. State, 114 S. Ct. 1578 (1994).

On direct appeal, counsel raised twelve issues. They were:
Issue I: The state's evidence failed to rebut the reasonable hypothesis of innocence that (1) the theft if any was an afterthought and (2) [the victim] did not have money in his pocket. Issue II: Because the robbery was not proved, Atwater did not receive a fair trial by jury on premeditated murder, and instructing the jury on felony murder was harmful error. Issue III: Excluding the sole black juror in the venire was error because the record did not support the conclusion that she did

not want to serve on the jury, and other jurors with responses similar to hers were allowed to serve. Issue IV: Fundamental error occurred when the trial judge told the jury that he could not answer any jury questions about the law or provide any additional instructions. Issue V: The trial court erred by allowing evidence of the defendant's lack of remorse and by referring to it repeatedly in the sentencing order. Issue VI: The court improperly limited the defense presentation of evidence in the penalty phase by not allowing defense counsel to question the witness about his deposition statement that pressure was building up. Issue VII: The court erred by failing to give a defense instruction which would have clarified for the jury the nature of the heinous, atrocious, or cruel aggravating circumstance. Issue VIII: The finding that the killing was heinous, atrocious, or cruel was not supported by the evidence that [the victim] could have died within a minute and become unconscious quickly. Issue IX: The trial court (1) erroneously instructed the jury on the aggravating circumstance that the murder was committed during a robbery and (2) erroneously found this circumstance to exist. Issue X: The killing was done in anger and passion in response to [the victim's] treatment of Atwater's aunt and therefore done with a pretense of justification and was not cold and calculated. Issue XI: The sentencing order did not clearly say which nonstatutory mitigating factors the judge found or what weight he gave them. Issue XII: The death sentence was a disproportionate penalty.

After discussion, this Court found no error with regard to Issues I, II, III, and IV. With regard to Issue V, evidence of lack of remorse, this Court found error but deemed it harmless. Issue VI, dealing with the trial court's failure to call a witness as a court witness, along with Issues IX and XII were found to be without merit. Issues VII and VIII dealt with the HAC aggravator. This Court found that the jury instruction actually given was inadequate and that the error had been properly preserved, but that the error **was** harmless. In response to Issue x, this Court found that the record was sufficient to sustain the CCP aggravator and that appellate counsel's additional argument that the murder was done with at least a pretense of moral justification was without merit. The argument advanced in Issue XI was rejected because the lower court had found nonstatutory mitigation to exist although the sentencing order did not indicate to what extent each factor existed.

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 6 and claim 7. (R. 226 to 242). The lower court denied a number of these claims finding that they were procedurally barred because they should have been raised on direct appeal. Where claims asserted in the motion for postconviction relief are presented in this petition, they are clearly identified and referenced as such. After an

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

evidentiary hearing on Claims 6 and 7 conducted September 11, 1998, the lower court denied them as well. (R. 364 to 367, order dated January 5, 1999). A timely notice of appeal was filed on January 21, 1999, and that matter is presently before this Court.

**JURISDICTION TO ENTERTAIN PETITION
AND GRANT HABEAS CORPUS RELIEF**

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a) (3) and Article V, sec. 3(b) (9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Atwater's conviction and sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involve the appellate review process. See Wilson v. Wainwright, 474 So.2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Atwater to raise the claims presented herein. See, e.g., Wav v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So.2d at 1165, and has not hesitated in

exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Way; Wilson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Atwater's conviction and sentence of death, and of this Court's appellate review. Mr. Atwater's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmer v. Wainwright, 460 So.2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental and retroactive changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So.2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So.2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So.2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So.2d 613 (Fla. 1981); cf. Witt v. State, 387 So.2d 922 (Fla. 1980). These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Atwater's claims.

This Court therefore has jurisdiction to entertain Mr. Atwater's claims to grant habeas corpus relief. This and other Florida courts have consistently recognized that the writ must issue where fundamental error occurs on crucial and dispositive points, or where a defendant received ineffective assistance of appellate counsel. See, e.g., Wilson v. Wainwright, 474 So.2d 1163; McCrae v. Wainwright, 439 So.2d 768 (Fla. 1983); State v. Wooden, 246 So.2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); Ross v. State, 287 So.2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So.2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So.2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Bassett, 287 So.2d 374-75; Powell v. State, 216 So.2d 446, 448 (Fla. 1968).

Mr. Atwater's claims are presented below. They demonstrate that habeas corpus relief is proper in this case. In light of these circumstances, Mr. Atwater respectfully urges that the Court grant habeas corpus relief.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Atwater asserts that his conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Atwater's case,

substantial and fundamental errors occurred in his capital trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

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.

The trial court gave the following penalty phase instruction:

In order to recommend a sentence of death, you must find that: One, the defendant killed or attempted to kill or intended that the killing take place, or that lethal force be employed; or two, the defendant's participation was major and that his state of mind was one of reckless indifference to the value of human life.

(Dir. 1820). There were no findings made by either the judge or jury about the defendant's "relative culpability." (See sentencing order, Dir. 707 et seq).

The placement of this instruction is also important. The instruction occurs in the midst of general instructions about the death penalty. Immediately before it is the standard instruction that the verdict should be based on the facts and the law, and immediately after it is the instruction that the verdict need not be unanimous. Because of its placement, the instruction therefore appears to apply to the jury's ultimate decision as a whole, not just to an accomplice situation.

The only mention of the word "accomplice" in the penalty phase instructions appears in the instruction on felony murder as

one of a number of alternative possible circumstances (" . . . was engaged in or an accomplice in . . ."). Given that there was never any hint of the existence of an accomplice in this case, it is reasonable to assume that the jury properly disregarded this brief mention of the word. For the purposes of this petition, it does not matter whether the jury connected this mention of the word 'accomplice' with the instruction cited above or not; in either scenario the jury would have been fundamentally misled by the instructions.

The first part of this instruction comports with this Court's ruling in Jackson v. State, 502 So.2d 409 (Fla. 1986):

In Cabana² the Supreme Court recognized that instances may arise in which an appellate court's fact finding on the Enmund issue would be "inadequate." 106 S.Ct. at 698, n. 5. In order to ensure a defendant's right to an Enmund factual finding and to facilitate appellate review of this issue, we direct the trial courts of this state in appropriate cases to utilize the following procedure. The jury must be instructed before its penalty phase deliberations that in order to recommend a sentence of death, the jury must first find that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed. No special interrogatory jury forms are required. However, trial court judges are directed when sentencing such a defendant to death to make an explicit written finding that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed, including the factual basis for the finding, in its sentencing order. Our holding here mandating this procedure will only be prospectively applied. Past failures of

²Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986),

trial courts to follow this procedure will not be considered reversible error.

Id at 412, 413.³ Of note is that this Court did not include the language, ". . . the defendant's participation was major and that his state of mind was one of reckless indifference to the value of human life."

Of course, the problem here is that this is not an accomplice case. Atwater's position is that he came upon the scene of the crime after it took place. His attorney chose to argue that Atwater was guilty of second, rather than first, degree murder. The prosecution argued that Atwater alone was responsible for the murder. Nowhere in the record of this case is there any hint that this was an accomplice situation.

Defense counsel did not object to the instruction at trial, and appellate counsel did not challenge it on direct appeal. The trial court did not make any Enmund-Tison findings in its sentencing order -- it would have been difficult to do so. If anything, it appears that the instructions somehow slipped into the package that the court referred to and read from by mistake. As argued below, the record on appeal is incomplete in part because it does not contain the package of written penalty phase instructions supplied to the jury. In any event, the record is clear that the jury was given this instruction.

Generally, in the absence of an objection an appellate court

³The undersigned has not been able to find any indication that this "Jackson instruction" has ever been published or promulgated as a standard instruction.

cannot review the propriety of jury instructions unless the instructions constitute fundamental error. See Jordan v. State, 707 So.2d 816 (Fla. 5th DCA), *aff'd*, 720 So.2d 1077 (Fla. 1998). Fundamental error has been described as error "so severe as to have undermined the validity of the trial 'to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Larman v. State, 724 So.2d 1230, 1231 (Fla. 5th DCA 1999) (quoting State v. Delva, 575 So.2d 643, 645 (Fla. 1991)). Nevertheless:

[W]here a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant. Failure to give a complete and accurate instruction is fundamental error, reviewable in the complete absence of a request or objection. Rodriguez v. State, 396 So.2d 798 (Fla. 3d DCA 1981); Bagley v. State, 119 So.2d 400 (Fla. 1st DCA 1960); Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945).

Carter v. State, 469 So.2d 194 (Fla. 2d DCA 1985). The standard of review in a case alleging ineffective assistance of appellate counsel is as follows:

A person convicted of a crime, whose conviction has been affirmed on appeal and who seeks relief from the conviction . . . on the ground of ineffectiveness of counsel on appeal must show, first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine

confidence in the fairness and correctness of the outcome.

Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Smith v. State, 457 So.2d 1380 (Fla. 1984). 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, 427 So.2d 713 (Fla. 1983).

Meyer v. Singletary, 610 So.2d 1329 (Fla. 4th DCA 1992). The United States Supreme Court has held that a jury cannot be "affirmatively misled regarding its role in the sentencing process." Romano v. Oklahoma, 512 U.S. 1, 9, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). Under the federal "plain error" standard of review, objections to jury instructions which were not raised in the trial court warrant relief where there has been (1) error, (2) that is plain, and which (3) affects substantial rights. Jones v. United States, 144 L.Ed.2d 370, 119 S.Ct. 2090, 67 USLW 3682 (1999).

The Eleventh Circuit has said:

[A] defendant has a right to counsel to aid in the direct appeal of his or her

criminal conviction. This right to counsel is violated when appellate counsel is ineffective. This circuit has applied the Supreme Court's test for ineffective assistance at trial, see Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to guide its analysis of ineffective assistance of appellate counsel claims. Therefore, [Petitioner] must show that his appellate counsel's performance was deficient and that this performance prejudiced the defense.

Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

Both the deficiency and the prejudice arising from the erroneous reading of this instruction are manifest. This Court in Jackson directed the trial courts to use this instruction "in appropriate cases," which this case is not. The instruction itself does not make any reference to accomplices or in itself say that it is only to be applied in accomplice situations, nor is there any language in the instructions as a whole indicating that the jury had any choice other than to apply this instruction. There is no way the jury could have known that it did not apply to the case, and therefore it must be presumed that the jury did apply it to the case. Sutton v. State, (Fla. 1DCA 1998) 718 So.2d 215; United States v. Wilson, 149 F.3d 1298 (11th Cir. 1998); United States v. Calderon, 127 F.3d 1314, 1334 (11th Cir. 1997).

The United States Supreme Court has stated that a jury is unlikely to disregard a theory flawed in law, but it is likely to disregard an option simply unsupported by the evidence. See Sochor v. Florida, 504 U.S. 527, 538, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992). In Johnson v. Sinsletary, 612 So.2d 575, 577

(Fla.), cert. denied, 508 U.S. 901, 113 S.Ct. 2049, 123 L.Ed.2d 667 (1993), this Court stated that it is not error for a trial court to provide the jury with a proper instruction on the heinous, atrocious, **or** cruel aggravator even though that factor could not have existed as a matter of law. Foster v. State, 679 So.2d 747 (Fla. 1996). The key word in these cases is the word "option." The instruction given the jury in this case did not provide an option. It defined a death eligible defendant as one who either intended that a killing take place or that lethal force be used - in other words one who premeditated - or as one whose state of mind was one of reckless indifference to the value of human life.

This language is almost identical to that of the second degree murder instruction given during the guilt phase ("... is of such a nature that the act itself indicates an indifference to human life." (Dir. 1472)). Whatever narrowing function the instruction on CCP may have had was completely negated by this instruction. In fact, if anything, the instruction as misapplied to this case had the effect of broadening the class of death eligible defendants to include those deemed guilty of second degree murder. It thus 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).

If that is not bad enough: as argued elsewhere in these

proceedings, defense counsel at trial not only conceded his client's guilt of second degree murder, he actively promoted the idea - he insisted that his client was, in fact, guilty of second degree murder. 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 . . .

(Dir. 1402). The net effect of that argument coupled with this instruction is that this is a case where defense counsel, albeit unintentionally, forcefully argued to the jury that his client was an appropriate candidate for the death sentence. Thus, this is not an isolated error, but rather one that permeated the entire proceedings. The instruction was an incorrect statement of the law, it was necessarily misleading to the jury, and the effect of that instruction was to transform defense counsel's main argument in the guilt phase into a reason for sentencing his client to death. It was fundamental error and highly prejudicial to the defendant. Appellate counsel therefore failed to raise a meritorious claim that was reviewable as a matter of constitutional and fundamental error, and pursuant to this Court's decision in Harsrave v. State, susra, habeas relief should be granted.

CLAIM II

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

This claim was raised in Claim XV of the postconviction motion. In that Claim, collateral counsel challenged the CCP, in the commission of, and HAC aggravators. The lower court cited and incorporated the state's argument that the propriety of the instructions on CCP and in the commission of a robbery were raised on direct appeal and therefore were not cognizable in a motion for postconviction relief. (R. 236). In fact, appellate counsel challenged all three instructions and the trial court's findings in Issues IX and X of the initial brief on appeal, but not for the reasons set out here. Instead, he argued that the evidence was insufficient to sustain a guilty verdict on the charge of robbery so that instructing the jury on robbery and CCP in the penalty phase was error. Likewise, he argued that HAC did not apply because the evidence did not exclude the theory that the victim died within a short period of time. In short, appellate counsel challenged the sufficiency of the evidence to sustain these aggravators, but did not address the procedural issue created by the indictment and the general verdict discussed below. Thus, the precise issue presented here was not raised or considered in the direct appeal.

Atwater was indicted for first degree premeditated murder, but the jury was instructed on both the premeditation and felony

murder theories. The jury returned a general verdict finding the defendant guilty of first degree murder and later returned an advisory verdict of death without making findings about any specific aggravators.

The death penalty in this case was predicated upon the application of an automatic aggravator, a fact which was reflected in the judge's sentencing order:

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). This Court has held that a charge of premeditated murder is sufficient to support a conviction for felony murder. Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986); Knight v. State, 338 So.2d 201 (Fla. 1976). In Larry v. State, 104 So.2d 352 (Fla. 1958), this Court explained:

Furthermore, we think there was ample evidence to sustain a verdict for murder in the first degree committed in the perpetration of a robbery. The trial judge instructed the jury on this phrase of the law. His instruction was warranted by the

evidence and in such a case premeditation is presumed as a matter of law. Leiby v. State, Fla., 50 So.2d 529. Proof of a homicide committed in the perpetration of the felonies set forth in s 782.04, Florida Statutes, F.S.A., may be shown under an indictment charging the unlawful killing of a human being from a premeditated design. Killen v. State, Fla., 92 So.2d 825; Everett v. State, Fla., 97 So.2d 241.

The jury was given a packet containing the jury instructions, but it was not given a copy of the indictment. (Dir. 1488). The result in this case is that, because the jury was instructed on felony murder, because the jury returned a general verdict of guilt as to first degree murder, and because the jury did not make findings as to the existence of aggravating circumstances, it may well be true that the jury disregarded the element of premeditation altogether and proceeded only on the theory of a murder committed in the course of a robbery. There is no way to tell otherwise.

In Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), the U.S. Supreme Court held that a conviction under a general verdict is improper when it rests on multiple bases, one of which is legally inadequate. A reviewing court cannot then be certain which of the grounds was relied upon by the jury in reaching the verdict. In Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), the Court clarified that the Yates rule did not apply when the alternative ground was legally proper but failed because of insufficient evidence. Nevertheless, the issue here is not whether the verdict must be vacated, but rather merely one of

interpretation of the verdict. It is utterly clear that in this case the state vigorously sought a conviction on both theories, including felony murder.

In Spencer v. State, 693 So.2d 1001 (Fla. 4th DCA), rev. denied, 698 So.2d 1225 (Fla. 1997), this Court reversed a murder conviction on a general verdict because the jury was instructed on both attempted first degree felony murder, a nonexistent crime, and attempted premeditated murder, and both theories were argued to the jury, explaining:

The state maintains that any error was harmless because the evidence supported a conviction for attempted first-degree premeditated murder. However, because the jury was instructed on both attempted **first-degree** felony murder and attempted first-degree premeditated murder and both theories were argued to the jury, it is not possible to determine with any certainty upon which of the two theories the jury relied in convicting appellant of attempted first-degree murder. Accordingly, the fact that the jury was instructed on attempted first-degree felony murder cannot be considered harmless error.

693 So.2d at 1002. In a sentence enhancement situation involving the use of a firearm during the commission of a **felony, this** Court has held that a finding adverse to the defendant must be based on a specific jury finding:

The district court held, and we agree, "**that** before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So.2d at 948. See also

Hough v. State, 448 So.2d 628 (Fla, 5th DCA 1984); Smith v. State, 445 So.2d 1050 (Fla. 1st DCA 1984); Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982); Bell v. State, 394 So.2d 570 (Fla. 5th DCA 1981). But see Tindall v. State, 443 So.2d 362 (Fla. 5th DCA 1983). The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

State v. Overfelt, 457 So.2d 1385, 1387 (Fla. 1984). In Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), the United States Supreme Court reversed the general verdict against Stromberg as it was impossible to tell if her conviction rested on one of three theories of prosecution, one of which was unconstitutional. 283 U.S. at 370, 51 S.Ct. at 536. Stromberg stands at least for the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground. Griffin v. United States, 502 U.S. 46, 53, 112 S.Ct. 466, 471, 116 L.Ed.2d 371 (1991).

In Allison v. Mayo, 158 Fla. 700, 29 So.2d 750 (1947), the defendant was convicted by general verdict for simultaneously (1)

breaking and entering, and (2) entering without breaking. These verdicts were inconsistent and repugnant. This Court upheld the defendant's argument, presented by habeas corpus petition, that under these circumstances only the sentence (and presumably the conviction) for the lesser crime could stand.

In Mills v. State, 476 So.2d 172, 178 (1985), this Court concluded that the legislature had reasonably determined that a first-degree murder committed in the course of another dangerous felony was an aggravated capital felony. On the other hand, this Court has vacated the death penalty in cases involving a "robbery gone bad." Terry v. State, 668 So.2d 954 (Fla. 1996). Sinclair v. State, 657 So.2d 1138 (Fla. 1995), Thompson v. State, 647 So.2d 824 (Fla. 1994). While the facts adduced by the state in the trial of this case construed in a light unfavorable to the defendant admittedly indicate more than that, the fact that the conviction was based only on a general verdict and that there is nothing in the record indicating that the jury made any finding with regard to premeditation does not support a conclusion that the jury found anything more than a felony murder. See generally Tricarico v. State, 711 So.2d 624 (Fla. 4th DCA 1998):

"Overwhelming evidence of premeditated murder does not, as we have suggested, eliminate the doubt as to which of the two theories the jury rested its decision."

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).

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.

As noted above, appellate counsel failed to raise this issue and collateral counsel was prohibited from raising this issue because it should have been raised in direct appeal. Appellate counsel failed to meet the standards set out in Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985), and Atwater should be

granted relief.

CLAIM III

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. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO RAISE THIS CLAIM.

This issue was raised in Claim XIII of the post conviction motion. The lower court summarily denied it for the following reasons:

The State responds that the defendant does not offer record support for his claim that evidence and argument about the character of the victim were presented to the jury. In addition, the claim is procedurally barred because it was available for appeal. Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994).

The Court finds that this claim is insufficiently alleged. Defendant offers only general allegations, and does not reference the record to support his allegations that non-statutory aggravators were considered and that there was prosecutorial misconduct. This Court finds that this claim is without merit, as is the allegation of ineffective assistance of counsel for failing to object.

(R. 235). Appellate counsel did argue on appeal that the trial court erred by allowing evidence of the defendant's lack of remorse and by referring to lack of remorse in its sentencing

order in Issue V of his brief on direct appeal, and this Court found on this point alone that there was error, albeit harmless. Nevertheless, appellate counsel should have, but did not, raise the overall use of nonstatutory aggravation and an overall pattern of improper argument and overreaching by the prosecution at the penalty phase.

At the penalty phase the defense offered testimony relating to Atwater's intoxication at the time of the offense and expert testimony from Dr. Merin relating to a variety of mental health issues.

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 defense had presented testimony about the

defendant/s background during the evidentiary portion of the penalty phase, but 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 and 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). He went on to say:

[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 diagnosis and explication of antisocial personality disorder was reemphasized 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.

In essence, 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). 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).

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).

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, appellate counsel's failure to raise all aspects of the prosecutor's argument and the trial court's consideration of nonstatutory aggravation prevented this Court from considering the fundamental unreliability of the death sentence in this case on direct appeal.

In Teffeteller v. State, 439 So.2d 840 (Fla. 1983), the Florida Supreme Court remanded the case for a new sentencing hearing where the prosecutor's closing remarks "were patently and obviously made for the express purpose of influencing the jury to recommend the death penalty" on the basis of an improper argument. 439 So.2d at 845. In such cases, the court noted, "the only safe rule appears to be that unless [it] can be determine[d] from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused, the . . . , [sentence] must be reversed." Id. The cumulative effect of the improper prosecutorial arguments was to deprive Mr. Atwater of his fundamental right to a fair sentencing hearing, in violation of due process and the prohibition against cruel or unusual punishments. See DeFreitas v. State, 701 So.2d 593, 596 (Fla. 4th DCA 1997), quoting Peterson v. State, 376 So.2d 1230, 1234 (Fla. 4th DCA 1979) ("When the prosecutorial argument taken as a whole is 'of such a character that neither rebuke nor retraction may entirely destroy their sinister influence . . . a new trial should be granted, regardless of the lack of objection or exception"). Here, such improper conduct constitutes fundamental error that requires reversal of the death sentence,

even in the absence of proper objections by Mr. Atwater's trial counsel. See Pate v. State, 112 So.2d 380, 385 (Fla. 1959). However, in the instant case, appellant counsel inexplicably failed to raise these issues, thereby prejudicing Mr. Atwater. Habeas relief is warranted.

The sentencer's consideration of improper and unconstitutional non-statutory aggravating factors 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 argued nonstatutory aggravating circumstances which were not relevant to

any statutory aggravating factors as a basis for imposing death. Appellate counsel rendered ineffective assistance by failing to argue the cumulative effect of the prosecutor's misconduct.

CLAIM IV

ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT

This issue was pled as part of a part of Claim XVIII in the postconviction. The State responded and the lower court agreed that this Court has ruled otherwise. As of this writing the matter is before the United States Supreme Court. Neither defense counsel nor appellate counsel raised this issue. Both should have done so.

CLAIM V

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.

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. Moreover, the written penalty phase jury instructions which were provided to the jury were not made a part of the record. (Dir. 1816).

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 Entsminser v. Iowa, 386 U.S. 748 (1967), held that appellants are entitled to a complete and accurate record. Lower courts rely upon Entsminser. The concurring opinion in Commonwealth v. Bricker, 487 A.2d 346 (Pa. 1985), citing Entsminser, 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.

Entsminser 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.

The Florida Supreme 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 the Florida Supreme 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, the Florida Supreme 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.

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 SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 22 day of December, 1999.



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