

SUPREME COURT OF FLORIDA

JEFFREY LEE ATWATER

Petitioner,

v.

CASE NO.SC99-179

MICHAEL W. MOORE

Secretary,  
Florida Department of Corrections  
Respondent.

**RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS**

COMES NOW the Respondent, Michael W. Moore, by and through the undersigned counsel and hereby files its response in opposition to the Petition for Writ of Habeas Corpus. Respondent would show unto the Court as follows:

**STATEMENT OF THE CASE**

On September 7, 1989, Jeffrey Atwater was indicted by a grand jury in Pinellas County, Florida for the first degree murder and armed robbery of Ken Smith. After a trial by jury, Atwater was convicted as charged and sentenced to death on June 25,

1990.

Atwater then filed an appeal in this Court. The appeal was denied and the judgement and sentence were affirmed by this Court on September 16, 1993. Atwater v. State, 626 So.2d 1325 (Fla. 1993). Certiorari review was denied by the United States Supreme Court on April 18, 1994. Atwater v. Florida, 114 S.Ct. 1578 (1994).

After being granted an extension of time to file his initial Rule 3.850 motion for post conviction relief, Atwater filed the motion on or about August 17, 1995. An amended motion was filed on October 13, 1995. The amended motion raised twenty four claims.

After conducting a Huff hearing, the trial court summarily denied twenty two of the claims and ordered an evidentiary hearing on the remaining two claims. The evidentiary hearing was held on September 11, 1998. On January 5, 1999, the lower court issued an order denying the final two claims. (TR3: 364-367)

Atwater then sought review in this Court with an appeal from the denial of the Rule 3.850 motion and a Petition for Writ of Habeas Corpus.

## **STATEMENT OF FACTS**

### **Trial**

In the opinion affirming Atwater's original conviction and sentence, this Court set forth the salient facts as follows:

On August 11, 1989, Atwater entered the John Knox Apartments in St. Petersburg, Florida, to see Ken Smith, the victim in this case. Upon entering the apartment building, Atwater proceeded to Smith's room where he remained for about twenty minutes. After Atwater left, Smith's body was discovered in the room. Smith was dead and his money was missing. Atwater told several people that he had killed Smith. Atwater was arrested the same day for killing Smith. At trial, he was convicted of first-degree murder and robbery. The jury recommended death by a vote of eleven to one. The trial judge found three aggravating factors and no statutory mitigating factors. The judge held that the aggravators outweighed the mitigators and sentenced Atwater to death. This appeal ensued.

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In the instant case, the State presented testimony showing that Atwater had obtained money from Smith on previous occasions, that Smith feared Atwater, and that, on the day of the murder, Smith told a friend that he was not going to give Atwater any more money. Further, there was evidence that Smith had cash in his trousers pocket shortly before the killing. When the body was found, the pockets were turned out and the only money found in the room was a few pennies on the floor. We conclude that the judge properly denied the motion for judgment of acquittal and that there was sufficient evidence to convict of robbery.

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The victim in this case was stabbed at least forty times. The sentencing order recites:

The Court has carefully reviewed the evidence and finds, in fact, that [the heinous, atrocious, or cruel aggravating] factor does exist beyond a reasonable doubt. In reaching this conclusion, the Court has considered evidence that the Defendant killed his sixty-four (64) year old victim by inflicting nine (9) stab wounds to the back, eleven (11) incised wounds to the face, six (6) incised wounds to the neck, one (1) incised wound to the left ear, one (1) incised wound to the right shoulder, one (1) incised wound to the right thumb, nine (9) stab wounds to the chest area including heart and lungs, two (2) superficial puncture wounds to the abdomen, a scalp laceration on the back of the head as a result of blunt trauma, multiple abrasions and contusions about the body, blunt trauma resulting from fractured thyroid cartilage, and blunt trauma to the chest causing multiple rib fractures. The medical examiner ... testified that these injuries occurred while Kenneth Smith was alive, and that death or unconsciousness would not have occurred until one to two minutes after the most serious, life threatening wounds to the heart were inflicted.

Our examination of the record reflects that the evidence presented at trial supports these findings. The evidence also shows that the stab wounds were more likely inflicted in the order of increasing severity and that the fatal wounds to the heart were probably inflicted last. Additionally, Atwater beat his victim prior to or during the stabbing.

Atwater v. State, 626 So.2d 1325, 1327-28 (Fla. 1993).

### **ARGUMENT**

Petitioner raises six claims in the instant petition under the umbrella of an

ineffective assistance of appellate counsel claim. The issues raised in the instant petition are:

Claim One: Failure to raise unpreserved challenge to penalty phase jury instructions.

Claim Two: Failure to challenge aggravators on basis that they constituted automatic aggravators.

Claim Three: Failure to argue that the judge and jury considered nonstatutory aggravating factors.

Claim Four: Failure to raise challenge that electrocution is cruel and unusual punishment.

Claim Five: Failure to argue that the appellate record was incomplete.

A review of the foregoing claims makes it clear that the instant petition for writ of habeas corpus is, as was the petition filed in Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987), "almost entirely a repetition of the issues raised in the Rule 3.850 proceeding." By including these types of claims within his petition for writ of habeas corpus, "collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." Blanco v. Wainwright, 507 So.2d at 1384. Accord, Demps v. Dugger, 714 So.2d 365, 368 (Fla. 1998). As these identical claims were considered and rejected upon review of the denial of the 3.850, this Honorable Court need not and should not "replough this ground once again." Ibid.

With respect to each of the issues raised in this habeas petition, petitioner

gratuitously asserts that appellate counsel was ineffective for failing to raise the issues on direct appeal. In McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983), this Court held that "[h]abeas corpus should not be used as a vehicle for presenting issues which should have been raised at trial and on appeal", citing Hargrave v. Wainwright, 388 So.2d 1021 (Fla. 1980), and State ex rel. Copeland v. Mayo, 87 So.2d 501 (Fla. 1956).

In McCrae, this Court specifically opined that:

. . . Allegations of ineffective appellate counsel therefore should not be allowed to serve as a means as circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal.

Id. at 870.

This type of admonition has been consistently followed by this Honorable Court and this Court has specifically admonished the office of the capital collateral counsel "that habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been raised in Rule 3.850 proceedings." White v. Dugger, 511 So.2d 554 (Fla. 1987), citing Blanco, *supra*, and Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987). Thus, to the extent that petitioner is again asking this Court to exercise its jurisdiction over issues not legally cognizable on

habeas review, this Court should decline to do so.

Respondent urges this Court to continue to enforce its procedural default policy; otherwise, appeal will follow appeal and there will be no finality in capital litigation. cf. Johnson v. State, 536 So.2d 1009 (Fla. 1988) (the credibility of the criminal justice system depends upon both fairness and finality). In Harris v. Reed, 489 U.S. \_\_\_, 109 S.Ct. 1083, 103 L.Ed.2d 308 (1989), the Supreme Court held that where a state court was ambiguous in its ruling denying relief on both procedural and substantive grounds, the federal habeas courts should reach the merits:

Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar.

The court added in footnote 12:

. . . Additionally, the dissent's fear, post, p.11-12 and n.6, that our holding will submerge courts in a flood of improper prisoner petitions is unrealistic: a state court that wishes to rely on a procedural bar rule in a one-line pro forma order can easily write that "relief is denied for reasons of procedural default."

Nevertheless, as the following establishes no relief is warranted on any of the claims raised.

**Claim One: Failure to raise unpreserved challenge to penalty phase jury instructions.**

No relief is warranted on this claim as this Court has consistently held that appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal as unpreserved in the court below. Lambrix v. Singletary, 641 So.2d 847, 848-49 (Fla. 1994) Although, Atwater alleges fundamental error, he has failed to establish that either fundamental error or that counsel's failure to raise an unpreserved claim constitutes deficient performance. Teffeteller v. Dugger, 1999 WL 106810, 24 Fla. L. Weekly S110 (Fla. 1999).

**Claim Two: Failure to challenge aggravators on basis that they constituted automatic aggravators.**

Atwater concedes that appellate counsel challenged the "HAC," "CCP" and "during the course of" instructions on appeal. However, he now asserts as he did in his motion for post conviction relief that counsel was ineffective for failing to argue that the factors constituted automatic aggravators although this argument was not raised at trial. Habeas corpus petitions are not to be used for additional appeals on questions which could have been or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial." Parker v. Dugger, 550 So.2d 459,

460 (Fla.1989); Teffeteller v. Dugger, 1999 WL 106810, 24 Fla. L. Weekly S110 (Fla. 1999). Moreover, Atwater has failed to establish that counsel was ineffective for failing to raise an unpreserved claim that has been repeatedly rejected by this Court on the merits. Hudson v. State, 708 So.2d 256, 262 (Fla. 1998); Blanco v. State, 706 So.2d 7 (Fla. 1997); Orme v. State, 677 So.2d 258 (Fla.1996); Johnson v. State, 660 So.2d 648, 664 (Fla. 1995).

No relief is warranted.

**Claim Three: Failure to argue that the judge and jury considered nonstatutory aggravating factors.**

Again Atwater is urging a claim that was not preserved for appeal, was raised in the Rule 3.850 motion and is meritless. Under these circumstances, the claim should be denied. Teffeteller v. Dugger, 1999 WL 106810, 24 Fla. L. Weekly S110 (Fla. 1999).

**Claim Four: Failure to raise challenge that electrocution is cruel and unusual punishment.**

Again Atwater is urging a claim that was not preserved for appeal and should, therefore, be denied as procedurally barred. Moreover, the merits of this claim have been repeatedly rejected by this Court. Provenzano v. Moore, 199 WL 756012 (Fla.

1999).

Finally, in light of the fact that the state now affords inmates a choice of execution by electrocution or lethal injection, Atwater cannot establish that he is prejudiced in anyway by the failure to raise this claim. Stewart v. LaGrand, 526 U.S. 115 (1999). Accordingly, this claim should be denied.

**Claim Five: Failure to argue that the appellate record was incomplete.**

This claim was also raised in the Rule 3.850 motion and by way of a Motion to Recall Mandate and/or Reopen the Direct Appeal filed by Atwater in October of 1995, over two years after the judgment and sentence was affirmed. Atwater argues that counsel was ineffective for failing to have bench conferences and certain pretrial conferences transcribed and failing for failing to include the jury instruction packet. As this Court noted in Ferguson, “Had appellate counsel asserted error which went uncorrected because of the missing record, or had Ferguson pointed to errors in this petition, this claim may have had merit. However, Ferguson has now obtained a transcript of the voir dire and does not point to any portions of those transcripts which reveal error.” Ferguson v. Singletary, 632 So.2d 53, 58 (Fla. 1993). Atwater also fails to allege an error for which review was denied because of allegedly missing

records. Accordingly, he has failed to show that counsel was either deficient or that he was prejudiced by counsel's actions.

**CONCLUSION**

Based on the foregoing reasons, this Honorable Court should deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Mark S. Gruber, Assistant CCRC, Capital Collateral Regional Counsel-Middle, 3801 Corporex Park Drive, Suite 210, Tampa,

Florida 33619-1136, this \_\_\_\_\_ day of March, 2000.

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OF COUNSEL RESPONDENT