IN THE SUPREME COURT OF FLORIDA

JEFFREY LEE ATWATER,

Appellant,

vs. **CASE NO. SC94865**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

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) The instant appeal followed.

STATEMENT OF FACTS

A. 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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> ***
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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).

b. Evidentiary Hearing

At the Rule 3.850 evidentiary hearing on September 11, 1998, Atwater presented the testimony of his trial attorneys, John Thor

White and Michael Schwartzberg. Atwater also testified. (R3: 425)

John White testified that he was Atwater's counsel in 1990. (R3: 431) He testified that prior to filing his motion for continuance where he informed the court that based on the weight of the state's evidence there was a good possibility there would be a penalty phase, he and/or co-counsel Schwartzberg had met with Atwater at least four or five times, spending a number of hours with him each time. Additionally, he had several telephone conferences with Atwater. (R3: 433-36)

Prior to representing Atwater, White had handled five or six death penalty cases, in addition to over a hundred criminal jury trials. (R3: 437, 450) White testified that as the senior attorney with seventeen years experience, he was lead counsel. (R3: 438, 450)

In terms of trial strategy, White did not believe that Atwater had a chance of getting an out-and-out acquittal. (R3: 453-54) There was no credible evidence of an alibi, insanity, or self defense. (R3: 454) White recounted that Atwater had signed in with the night watchman at the high rise where Kenny Smith lived, he was seen with blood all over him after the murder and then made statements [admitting that he had killed Smith.] (R3: 455) It was not a "whodunit case." Accordingly, one of their strategies was to save Atwater's life by getting a second degree verdict. (R3: 455)

White did not recall who made the opening statement, but he believes their theory was that Atwater's mental state about his aunt Adele caused him to snap and go off into a rage killing which would be second degree murder. (R3: 462) White testified that he honestly believed that this is what happened. (R3: 463) He denied that their theory changed during the course of the trial. (R3: 464)

White believes that they discussed the strategy about opening and every other aspect of the case. (R3: 441) He has no reason to believe that it did not come up. (R3: 461) He did not recall a change in theory between opening and close. (R3: 442) They set up the argument so that if they had to they could argue to the jury that Atwater just went crazy over his belief that the victim was hurting his aunt. (R3: 446) White did not remember if Atwater had ever conceded guilt to him. (R3: 447) He agreed that it's the client's decision whether or not to concede guilt. (R3: 468)

They had no problems communicating with Atwater, they had a two-way line of communication. (R3: 451) He does not recall Atwater ever expressing a desire to testify. (R3: 447, 467) They were concerned that if Atwater took the stand he would have denied committing the murder. As this was "grossly contrary" to the evidence, it might have impacted adversely to him during the penalty phase. Nevertheless, he would never force anybody to not

testify when they've expressed a desire to testify. (R3: 458) If Atwater had told him that he wanted to testify despite White's advice to the contrary he would have let him testify. (R3: 458) In his opinion it would not have been in Atwater's best interest to testify. He noted that at the time of Atwater's trial that it was very rare for a judge to make a personal inquiry of a defendant as to whether they wanted to testify. (R3: 459-60) White did not remember what was discussed during the break they took before resting, but he denied ever telling Atwater that if he testified, they would lose first and last closing argument. (R3: 469) He also denied ever receiving a plea offer from the state. The state was adamantly seeking death throughout the course of the prosecution. (R3: 471)

Co-counsel Michael Schwartzberg testified that Atwater was his second capital trial, that he had been practicing law for six years at the time and had done approximately fifty criminal jury trials. (R3: 473, 492) He was not a rookie. (R3: 492) After reading through all the discovery and everything he felt there was a potential that the jury would convict Atwater of first degree murder and recommend the death penalty. (R3: 475-76) He definitely discussed that possibility with Atwater.

Schwartzberg did not recall if Atwater wanted to testify. Although he has no independent recollection of discussing it with

Atwater, it is something he definitely would have done. He knows his client has an absolute constitutional right to testify and, although he may try to persuade him not to, he would not have kept him from doing it. (R3: 477) He denied ignoring his client's wishes. He would tell the client if he was acting contrary to his advice, but as long as the decisions were something supportable by law or capable of being supported, he would defer to his client's decisions. (R3: 480)

Schwartzberg does not recall Atwater passing him notes to follow up on or Atwater conceding guilt. He testified that he would normally would not ask a client about guilt. He would tell the client that the question is not whether you did it, the question is whether the state can prove you did it and that his job was to evaluate and advise the client of his options. (R3: 481)

He does not recall whether their theory of defense changed. His standard practice is to go over closing argument with the client to determine if he disagreed with anything and he believes he did that in this case. (R3: 483) As far as conceding second degree, he has no independent recollection of discussing it, but his standard practice is to discuss all options with the client. He has never had a case where he would not have at least explained his strategy to the client. (R3: 493) If the client objected he would not proceed with a course of action over the client's wishes.

(R3: 485-86) Sometimes the evidence forces them to argue in the alternative. (R3: 488) He did not tell Atwater to plead guilty and go straight to the penalty phase. He did not tell Atwater he would lose first and last closing argument if Atwater testified. (R3: 490) Scwhartzberg admitted to being on probation with the bar for failing to diligently prosecute a civil client's case. (R3: 491)

Atwater never expressed any kind of complaint with the strategy to avoid the death penalty by going for a lesser-included offense. (R3: 497) Schwartzberg had concerns about Atwater's appearance and demeanor on the stand and in the courtroom. (R3: 500) He agreed that the state never offered a plea and that they were consistently pursuing the death penalty. (R3: 501) Scwhartzberg concluded that he was confident that he advised Atwater of his right to testify. (R3: 506)

Jeffrey Atwater testified that although he knew he could testify, his lawyers told him they did not think he should. (R3: 508) He did not know he could overrule their decision. He also testified that Mr. Schwartzberg told him if he testified that they would lose first and last. (R3: 509) Atwater claimed that the attitude of his lawyers was that he was guilty so why should we put forth the effort. Atwater testified that if he had testified at his trial he would have told the jury that he was not guilty. (R3:

510) He said that when they recessed before closing, he went into a back room. Schwartzberg offered him a cigarette and they talked about baseball. He did not know he could object to not testifying. (R3: 511) He said that trial strategy was never discussed with him. Atwater never agreed to concede guilt and it was never discussed with him. (R3: 513) On the eve of trial, he says that White came to him and said why don't you just go ahead and plead guilty. He did not say there was a plea offer. (R3: 514)

On cross-examination, Atwater admitted that they discussed the possibility of him testifying and that his lawyers told him they did not think he should testify. He then reasserted that although he did not present any other witnesses that his lawyer told him if he testified that they would lose first and last. (R3: 516) Atwater testified that he had a tenth grade education, that he could read and write, that he was not having any health problems and that he was more alert than Mr. Schwartzberg. He never had any arguments with counsel, although he told them right before sentencing how dissatisfied he was with their services. (R3: 517) Appellant also admitted that he had previously been in front of a judge and admitted his guilt. (R3: 518) Therefore, he knew he had the right to remain silent. (R3: 519) He also knew he had the right to testify. (R3: 520) He conceded that he had admitted to being in the victim's apartment the night of the murder. He also

acknowledged that his family members were going to testify against him. (R3: 521-22) He was advised that given the evidence against him and the nature of the crime that there was a strong possibility that a death penalty could result. Atwater testified at the hearing that if he had been allowed to testify that he would have told the jury that he did not kill Kenneth Smith.

SUMMARY OF THE ARGUMENT

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.

Issue II: Atwater next contends that the trial court erred in summarily denying his claim that counsel was ineffective in the penalty phase portion of his trial. It is the state's contention that based on the facts of this case that summary denial was appropriate as the claim was conclusively rebutted by the record, which demonstrates no deficiency in performance that prejudiced the defendant.

Issue III: Atwater's next claim is that no reliable transcript of his capital trial exists and that he was denied a proper direct appeal from judgment and sentence due to omissions in the record. He alleges that unspecified pretrial proceedings were made off the record and were missing from the appellate record. This allegation was summarily denied because it should have been raised on direct

appeal to this Court and is not appropriate for collateral review.

Issue IV: Atwater alleges that the state presented false testimony through three F.B.I. agents. This is an issue for direct appeal and is, therefore, procedurally barred. Furthermore, as Atwater has not shown any false or misleading evidence of the F.B.I. experts, summary denial of these claims was proper because the motion, record, and files conclusively demonstrate that this claim does not provide a basis for relief.

Issue V: Atwater's next claim is that the trial court erred in admitting evidence from blood spatter experts. He contends that the experts were not qualified and, therefore, the evidence was inadmissible. This claim is procedurally barred as an issue that could have been and should have been raised on direct appeal. Torres-Arboleda v. Dugger, 636 So.2d 1321, 1323 (Fla. 1994).

Issue VI: This Court has made it clear that claims that the cold, calculated and premeditated jury instruction is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal and that as a direct appeal issue, such claims are not properly raised in a motion for post-conviction relief. This claim should be denied as procedurally barred.

Issue VII: Atwater's next allegation is that State witness Michael Painter received a reduced sentence, after testifying for

the State against Atwater. Accordingly, he maintains that the witness must have been promised lenient treatment. This claim was summarily denied as the motion, record, and files conclusively demonstrate that this claim does not provide a basis for relief.

Issue VIII: Atwater next alleges, without factual support, that the "underlying conviction ... was obtained in violation of Mr. Atwater's rights under the Sixth, Eight, and Fourteenth Amendments." Until overturned in the specific case, a prior judgement and sentence is presume valid and not subject to collateral attack in a different case.

Issue IX: Atwater's claim that he was absent from proceedings is an issue available for appeal and barred from postconviction relief. In addition to being procedurally barred, this claim is also without merit.

Issue X: Atwater's next claim, that the state failed to prove each element of the offenses charged, is a matter that could have been and should have been raised on direct appeal. Post conviction motions do not operate as a second appeal to allow defendants to raise issues that are appropriate for direct review. Accordingly, this claim is procedurally barred.

Issue XI: Challenges to jury instructions are procedurally barred as available for appeal and, therefore, are not issues for postconviction relief

Issue XII: Atwater's next claim based on allegedly "inadmissible victim impact information" and allegedly improper argument of the prosecutor is procedurally barred as available for appeal.

Issue XIII: Atwater's next contention is that counsel was ineffective for failing to question prospective jurors more thoroughly on their views of "major issues" of the case. Atwater has not shown that counsel's omissions on voir dire would have changed the outcome or that it was "a substantial and serious deficiency reasonably below that of competent counsel." Accordingly, it was properly denied.

Issue XIV: The "automatic aggravator" challenge issue was available for appeal, therefore, it is not appropriate for postconviction relief.

Issue XV: Atwater's next challenge is to the sentencing order. Once again appellant is raising a claim that could have been, should have been and, in fact, was raised on direct appeal.

Issue XVI: Atwater's next claim, a challenge to the facial validity of the death penalty statute, should have been raised on direct appeal and is, therefore, procedurally barred.

Issue XVII: This claim is essentially a repetition of Issues III and IX in which Atwater claims he was not present at pretrial hearings and did not meet with defense counsel prior to

depositions. For the foregoing reasons, this claim was correctly denied.

Issue XVIII: Atwater's next claim asserts that the combined effect of all alleged errors in this case warrants a new trial and/or penalty phase. This cumulative error claim is contingent upon Atwater's demonstrating error in at least two of the other claims presented in his motion. For the reasons previously discussed, he has not done so.

Issue XIX: Atwater's next claim is that the court submitted to the jury during deliberations a copy of Judge Schaeffer's death penalty sentencing outline. This claim is similarly procedurally barred as an issue that is appropriate for appellate review.

Issue XX: Atwater next asserts that the trial court erred in admitting of photographic evidence. He contends that the photographs were unduly prejudicial and that legitimate issue existed as to the victim's manner of death. Like many of the foregoing claims, this claim is procedurally barred as a direct appeal issue.

Issue XXI: Atwater next claims that he is innocent of first degree murder and second degree murder. However, he does not explain how he is innocent of first and second degree murder. In light of his own admission of his fulfilling his prior threat to kill the victim, and that he enjoyed doing it and would do it

again, this claim was properly denied.

Issue XXII: Finally, Atwater asserts that counsel was ineffective for failing to discover what he calls credible evidence to impeach Joan Camarato and testimony as to times she had seen Atwater on the days before the murder. As Atwater has not alleged how the pay slip supports his claim or even attached the alleged pay slip, no showing of prejudice or deficient performance has been established. Accordingly, this claim was properly denied.

PRELIMINARY STATEMENT

In the instant appeal, Atwater raises a number of claims which are procedurally barred as claims which could have or should have been raised on direct appeal and are, therefore, not cognizable in a motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.850. Torres-Arboleda v. Dugger, 636 So.2d 1321, 1323 (Fla. 1994); Johnson v. State, 593 So.2d 206 (Fla.), cert. denied, ___ U.S. ___, 113 S. Ct. 119 (1992); Raulerson v. State, 420 So.2d 517 (Fla. 1982); Christopher v. State, 416 So.2d 450 (Fla. 1982); Alvord v. State, 396 So.2d 194 (Fla. 1981); Meeks v. State, 382 So.2d 673 (Fla. 1980). It is also not appropriate to use a different argument to relitigate the same issue. Torres-Arboleda, 636 So.2d at 1323; Medina v. State, 573 So.2d 293, 295 (Fla. 1990). The purpose of Rule 3.850 is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are cognizable on direct appeal. McCrae v. State, 437 So.2d 1388 (Fla. 1983).

The state urges this Court to make an express finding of a procedural bar in denying any such claims so that any federal courts asked to consider these claims in the future will be able to discern the parameters of their federal habeas review. See, Harris v. Reed, 489 U.S. 255, 109 S. Ct. 1083, 103 L. Ed. 2d 308 (1989); Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594

(1977).

Additionally, to counter the procedural bar to some of these issues, Atwater has couched his claims in terms of ineffective assistance of counsel in failing to preserve or raise those claims. This Court has consistently recognized that "[a]llegations of ineffective assistance cannot be used to circumvent the rule that post-conviction proceedings cannot serve as a second appeal." Medina v. State, 573 So.2d 293, 295 (Fla.1990); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995). The state urges this Court to deny Atwater’s attempts to undermine the procedural bar rule with a gratuitous assertion that counsel was ineffective.

ARGUMENT

ISSUE I

WHETHER ATWATER ESTABLISHED THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT PHASE OF THE TRIAL WHEN DEFENSE COUNSEL CONCEDED ATWATER'S GUILT DURING CLOSING ARGUMENTS.

Appellant was indicted for the first degree murder and armed robbery of Ken Smith. In support of this charge the state produced evidence establishing that Atwater, after signing in with the security desk, entered the John Knox Apartments to see Ken Smith, the victim in this case. Twenty minutes later he returned from the apartment and advised the clerk that no one had answered the door. Immediately afterwards, Smith's dead body was discovered in the room. Smith's pockets were turned inside out and his money was missing. Atwater told several people, including family members, that he had killed Smith.

Faced with the weight of this evidence, defense counsel argued in closing arguments that the state had neither proven first degree premeditated murder because there was no plan to commit a murder nor felony murder because there was no proof of a robbery. (TR12:1420-25) The state countered by expounding on the evidence that showed premeditation and the existence of a robbery. (TR12:1425-38) The prosecutor then went through the reasons why the lesser included offenses and possible defenses did not apply. (TR12:1436-38) On rebuttal defense counsel argued:

They have been testifying to you for three days. They have been asking you to speculate for three days, and now he comes up here and he says, well, why didn't I talk to you about murder in my first argument? Because I wasn't about to speculate as to what further testimony the State of Florida was going to bring before you.

Ladies and gentlemen, this is a case about murder. Pure and simple. Nobody is going to stand before you and say that Kenny Smith was not murdered. The evidence before you is overwhelming, but the question is degree. Is this the act of a depraved mind with no regard for human life?

Ladies and gentlemen, the law gives you alternatives. You must decide from the facts the degree of murder. Mr. Ripplinger made light of the fact of Murder in the Second Degree, but by definition, that's what this crime is all about. It is an act of a depraved mind, and it was done out of ill will, hatred, spite or an evil intent.

I told you in opening statements that this was a case about relationships. The State did its best to try to hide those relationships from you until the end when Adele and Janet and Michael Painter had to take the stand, and then finally the State allowed the full story to come before you.

The relationship between Kenny and Adele, ups and downs, rocky. Yeah. Physical and verbal abuse is rocky, and Adele Coderre suffered it at the hands of Kenny Smith. But who witnessed it? Jeffrey Atwater. His mom was being abused by the man that she loved, and it festered in Jeffrey Atwater's mind, and it didn't happen once. He heard about it at least three times, and he finally kicked Kenny Smith out of the apartment, but the abuse didn't stop, and Jeffrey Atwater festered.

Is this the act of a depraved mind? I submit to you that the only answer is yes. Nine stab wounds to the back, nine stab wounds to the chest. One of them four and a half inches deep. It went through the front of the heart and came out the back of the heart. Ill will, hatred, spite, evil intent. Second Degree Murder.

> The legislature has deemed there to be a difference. You must render a verdict that is true and just, that fits not only the facts, but the law. and the law says that this crime is Murder in the Second Degree. Your verdict must reflect the law and the evidence.
>
> There have been a lot of things going on during the course of this trial, back and forth between the State of Florida and the Defense, questions, comments, attacks, but it all boils down to that, pure and simple. We're not hiding anything from you. We're asking you to do your duty, to render the only verdict that is fair and just, and that is as to Count One of the indictment, that Jeffrey Atwater is guilty of Murder in the Second Degree, and as to Count Two of the indictment, that Jeffrey Atwater is not guilty as to robbery.
>
> You cannot find him guilty of Murder in the First Degree, Felony Murder, because there is no evidence before you of a robbery, and the law defines for you Murder in the Second Degree, and there it is. That's what this is all about, not shooting into some house and accidentally killing some people, because Mr. Ripplinger read to you the jury instruction for manslaughter, culpable negligence.
>
> This is an act of a depraved mind regardless of human life, done out of ill will, spite, hatred or an evil intent. It is the only verdict that you can return and do what you swore to do, justice.
>
> Thank you, your Honor.
>
> (TR12:1438-40)

Atwater now 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. As the court below found, this claim is without merit.

At the evidentiary hearing below, both of Atwater's trial

lawyers testified concerning the decision to argue to the jury that they should find a lesser included offense. John White testified that he was Atwater's co-counsel in 1990. (R3: 431) He testified that he and/or co-counsel Schwartzberg had met with Atwater at least four or five times, spending a number of hours with him each time. Additionally, he had several telephone conferences with Atwater. (R3: 433-36) Prior to representing Atwater, White had handled five or six death penalty cases, in addition to over a hundred criminal jury trials. (R3: 437, 450) White testified that as the senior attorney with seventeen years experience, he was lead counsel. (R3: 438, 450) In terms of trial strategy, he did not believe that Atwater had a chance of getting an out-and-out acquittal. (R3: 453-54) There was no credible evidence of an alibi, insanity, or self defense. (R3: 454) White recounted that Atwater had signed in with the night watchman at the high rise where Kenny Smith lived, he was seen with blood all over him after the murder and then made statements admitting that he had killed Smith. (R3: 455) It was not a "whodunit case." Accordingly, one of their strategies was to save Atwater's life by getting a second degree verdict. (R3: 455) White did not recall who made the opening statement, but he believes their theory was that Atwater's mental state about his aunt Adele caused him to snap and go off into a rage killing which would be second degree murder. (R3: 462) White testified that he honestly believed that this is what happened. (R3: 463)

White believes that they discussed the strategy about opening and every other aspect of the case. (R3: 441) He did not recall a change in theory between opening and close, rather they set up the argument so that, if they had to, they could argue to the jury that Atwater just went crazy over his belief that the victim was hurting his aunt. (R3: 446) White did not remember if Atwater had ever conceded guilt to him. (R3: 447) He agreed that it's the client's decision whether or not to concede guilt. (R3: 468) They had no problems communicating with Atwater, they had a two-way line of communication. (R3: 451)

Co-counsel Michael Schwartzberg testified that although Atwater was only his second capital trial, that he had been practicing law for six years at the time and had done approximately fifty criminal jury trials. (R3: 473, 492) He was not a rookie. (R3: 492) After reading through all the discovery and everything he felt there was a potential that the jury would convict Atwater of first degree murder and recommend the death penalty. (R3: 475-76) He definitely discussed that possibility with Atwater. His standard practice is to go over closing argument with the client to determine if he disagreed with anything and he believes he did that in this case. (R3: 483) As far as conceding second degree, he has no independent recollection of discussing it, but his standard practice is to discuss all options with the client. He has never had a case where he would not have at least explained his strategy to the client. (R3: 493) If the client objected he would not

proceed with a course of action over the client's wishes. (R3: 485-86) Sometimes the evidence forces them to argue in the alternative. (R3: 488) Atwater never expressed any kind of complaint with the strategy to avoid the death penalty by going for a lesser-included offense. (R3: 497)

Appellant, Jeffrey Atwater, testified at the evidentiary hearing that trial strategy was never discussed with him; he never agreed to concede guilt and it was never discussed with him. (R3: 513) On the eve of trial, he says that White came to him and said why don't you just go ahead and plead guilty. He did not say there was a plea offer. (R3: 514) Atwater testified that he had a tenth grade education, that he could read and write, that he was not having any health problems and that he was more alert than Mr. Schwartzberg. He never had any arguments with counsel, although he told them right before sentencing how dissatisfied he was with their services. (R3: 517) Appellant also admitted that he had previously been in front of a judge and admitted his guilt. (R3: 518) Therefore, he knew he had the right to remain silent. (R3: 519) He also knew he had the right to testify. (R3: 520) He conceded that he had admitted to being in the victim's apartment the night of the murder. He also acknowledged that he knew his family members were going to testify against him. (R3: 521-22) He admitted that he was advised that given the evidence against him and the nature of the crime that there was a strong possibility that a death penalty could result.

After hearing testimony from both trial lawyers and Atwater, the trial court rejected the claim as follows:

> 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 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).
>
> Therefore, the Court finds that this ground is without merit.

In reviewing a trial court's application of the law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent substantial evidence, this Court will not substitute its judgment for that of the trial court

on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court. Melendez v. State, 718 So.2d 746 (Fla. 1998) The trial court's finding that the decision was a reasonable strategic decision with or without Atwater's consent was supported by the evidence before it and should be affirmed.

Recently, in Nixon v. State, 2000 WL 63415 (Fla. Jan. 27, 2000), this Court reversed for an evidentiary hearing where Nixon's defense counsel conceded that the State had proven beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson. Nixon argued that these comments were the equivalent of a guilty plea by his attorney. The claim had been summarily denied. In light of defense counsel's concession of guilt to the crimes as charged, this Court remanded the case for an evidentiary hearing on the issue of whether Nixon consented to defense counsel's strategy to concede guilt, noting that the defendant had the *burden of establishing that he had not given his consent to the strategy*.

In the instant case, Atwater did not establish that he had not agreed to the strategy to admit that a second degree murder had been established. Although he denied that counsel ever discussed trial strategy with him, he admitted that he was advised by counsel that given the evidence against him and the nature of the crime that there was a strong possibility that a death penalty could result. Both White and Schwartzberg were experienced criminal

trial lawyers. They testified that they always discussed trial strategy with their clients and would never concede guilt without discussing it first with their client. Moreover, unlike counsel in Nixon, Atwater's lawyers did not concede guilt to the crimes as charged but, rather, subjected the State's case to meaningful adversarial testing by arguing that no robbery or premeditated murder had been established.

Even Atwater concedes that under certain circumstances, that the concession of a particular element of the crime does not establish ineffective assistance of counsel. 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). Nevertheless, appellant contends that the way counsel in the instant case presented the argument to the jury distinguishes it from McNeal as relied upon by the trial court. He contends that unlike McNeal, where counsel urged that *at best* the state had proven a lesser offense, counsel in the instant case conceded guilt. However, a review of McNeal, as well as the foundation upon which it rested, belies any assertion that asking the jury to find a lesser offense constitutes ineffective assistance of counsel.

In McNeal, the court noted the argument made by McNeal's counsel was distinguishable from Wiley v. Sowders, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091 (1981). Wiley's attorney repeatedly stated that his clients were guilty of the offenses charged, that the state had proven their guilt, but requested that

the jury show leniency. Id. at 644-45. Conversely, McNeal's counsel, like Atwater's, did not state that McNeal was guilty of first degree murder, but only of a lesser offense. McNeal's counsel argued that "at best" the government had proven only manslaughter because they did not prove premeditation. Noting that an attorney's strategy may bind his client even when made without consultation, the court concluded that in light of the overwhelming evidence against McNeal, it cannot be said that the defense strategy of suggesting manslaughter instead of first degree murder was so beyond reason as to suggest defendant was deprived of constitutionally effective counsel. 722 F.2d at 676-677.

This Court in Brown v. State, Case No. SC90540 (Fla. March 9, 2000) rejected a similar argument concerning the holding in McNeal. Brown, like Atwater, asserted in his collateral appeal that defense counsel, Wayne Chalu, had conceded Brown's guilt without first obtaining his consent. In his guilt-phase closing argument, defense counsel Chalu told the jury: "The fact is Mr. Brown is guilty of homicide, but he is not guilty of murder in the first degree." Brown, like Atwater, had an evidentiary hearing on the claim where defense counsel explained his strategy and denied conceding guilt without first discussing it with his client. After considering the evidence presented at the hearing, this Court in Brown held:

> "Thus, the record reflects that Chalu did not concede first-degree premeditated murder or felony murder, but rather, the record

> supports that Chalu set upon a strategy to do what he reasoned he could do in light of Brown's confession to convince the jury to find Brown guilty of a lesser offense. Faced with the overwhelmingly inculpatory evidence of Brown's confession, Chalu made his informed decision to argue for a lesser conviction in an effort to avoid a death sentence. See McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984). In this case, we find that Chalu provided full representation to Brown and made reasonable, informed tactical decisions as to his defense. Thus, we find that Chalu did act as an advocate for Brown, who has failed to demonstrate that Chalu's tactical decision to argue for a conviction on a lesser charge constitutes ineffective assistance of counsel under either prong of Strickland.
>
> Brown, Slip Op at 28.

The facts presented in the instant case established that Atwater murdered Kenneth Smith, the 64-year-old fiancee of Atwater's aunt, by beating him and stabbing him at least 40 times. Atwater used the ruse of claiming he was the victim's grandson and wanted to surprise him to gain entrance at the victim's apartment building and to his room without alerting the victim. The victim had been trying to avoid Atwater, who had been looking for him for several days because Atwater had said he was going to kill the victim. Atwater v. State, 626 So.2d 1325 (Fla. 1993). Atwater was seen coming out of the victim's room although he told the desk clerk that he had not gained entrance. Atwater admitted the killing to his aunt, her daughter and the daughter's boyfriend immediately afterward, showing them his bloody clothes and telling them it was the victim's blood. (TR12:1337 - 1345). Faced with

the incriminating testimony of family and friends, as well as the testimony of the desk clerk and the physical evidence, the decision to seek a lesser conviction in the attempt to avoid the death penalty was a reasonable strategic decision. Moreover, in light of defense counsels' testimony that they would have discussed the decision with Atwater and Atwater's own admission that they discussed the overwhelming nature of the evidence and the likelihood of him receiving a death sentence, Atwater has not met burden of establishing that he had not given his consent to the strategy. Brown v. State, supra; Nixon v. State, 2000 WL 63415 (Fla. Jan. 27, 2000).

Furthermore, as this Court in Holland v. State, 503 So.2d 1250 (Fla. 1987) acknowledged, the harmless error analysis is applicable. Harmless error analysis for issues of ineffective assistance of counsel are governed by Strickland v. Washington, 466 U.S. 668 (1984). The burden is on a defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland at 691. Given the overwhelming nature of the evidence against Atwater and the failure to establish in this post conviction proceeding that any truly exculpatory evidence existed which was not presented, Atwater has failed to establish prejudice. Notably, although the jury was offered the possibility of convicting of a lesser crime it, nevertheless, found Atwater was guilty of the higher offense and recommended death by a vote of 11

to 1. (TR7:675) The suggestion that without this argument that there is a reasonable probability that the jury would have acquitted Atwater of all charges is not supported by the record.

As 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, the trial court properly denied relief.

ISSUE II

WHETHER 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.

Atwater next contends that the trial court erred in summarily denying his claim that counsel was ineffective in the penalty phase portion of his trial. It is the state's contention that based on the facts of this case that summary denial was appropriate.

This Court has repeatedly recognized that a hearing is warranted on an ineffective assistance of counsel claims only where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrates a deficiency in performance that prejudiced the defendant. Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995); Jackson v. Dugger, 633 So.2d 1051, 1055 (Fla. 1993); Mendyk v. State, 592 So.2d 1076, 1079 (Fla. 1992); Roberts v. State, 568 So.2d 1255, 1259-60 (Fla. 1990); Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). As the instant claim does not render the conviction or sentence vulnerable to collateral attack, the trial court correctly denied the claim without an evidentiary hearing. See Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); Puiatti v. Dugger, 589 So.2d 231 (Fla. 1991).

After reviewing the motion and the record before it, the trial court rejected this claim on the following basis:

Claim 11: Defendant's counsel was ineffective

> because counsel failed to adequately investigate and present mitigation and failed to adequately challenge the State's case. The mitigation witnesses offered by defense counsel did not properly and fully explain the issues surrounding defendant's intoxication. Defendant's counsel was rendered ineffective by actions of the State and the trial court. Defendant includes an account of his early life and family situation.
>
> The State responds with a summary of the defense counsel's mitigation case. The Court has reviewed the record and agrees with the State's contention that defense mitigation witness Dr. Merin, a psychologist, testified to essentially the same information about defendant's early life and family situation as outlined in defendant's claim. Defense counsel also presented testimony from Dr. Merin and from three witnesses regarding defendant's alcohol use. The State points out that the defendant does not suggest what other witnesses should have been called by the defense counsel to testify to mitigation. The Court adopts the State's response as to this claim, and finds that the defendant does not meet the performance component of Strickland v. Washington, 466 U. S. 668 (1984). Therefore, this ground has no merit.

As noted by the lower court, at Atwater's penalty phase hearing, the defense presented four lay witnesses and a psychiatrist who testified on Atwater's behalf. The first witness, Jean Newby testified that she saw a man talking to the clerk at the John Knox apartments. The man was dressed rather scruffily and was telling the clerk that he wanted to see his grandfather. She saw him ten to twenty minutes later, again talking to the clerk. He was acting very concerned about this person in the apartment and asked her to go check on him. (TR14: 1554-58) She testified on cross that he was not tottering or staggering; that he did not seem

to walk any different than the average person. (TR14: 1561) The man did not insist that the clerk go up, so she went up herself and checked on Mr. Smith. The man's signature on the sign in sheet was Jeffrey Atwater. He signed in at 8:04 and signed out at 8:20 to 8:29. (TR14: 1565)

The next witness was Kelly Thomas Bowman, a bartender at the Anchor Bar. Ms. Bowman testified that on the day of the murder she came on duty about 4:45. When she came in the front door of the bar, Atwater was there. She kicked him out at 8:30 because he had a tank top on. He was drinking Chevas Regal whole time. He had at least three and she thought they were doubles. He was buying drinks for several people. He was not acting loud or obnoxious. (TR14: 1566-77)

Harvey Cuyler testified that he lived in John Knox apartments, close to Smith's apartment. He saw Atwater leaving Smith's apartment, wearing a hat and cussing. He could have been a little drunk; he was acting funny. He was not staggering. (TR14: 1582-88) After being declared an adverse witness, Cuyler admitted that Atwater appeared to be drinking and demonstrated how he was walking. (TR14: 1588-95) He couldn't say if he was drunk, but he had his suspicions. (TR14: 1595-1601)

Michael Painter testified that he knew Adele Coderre very well, she was his next door neighbor. (TR14: 1604) Whenever he talked to Atwater about his aunt and Kenny Smith, Atwater would get upset. (TR14: 1609) About a week before the murder he was

drinking and smoking pot with Atwater and Atwater told him that when he drank liquor or wine he sort of blacked out. (TR14: 1612) Atwater told him Kenny pushed Adele down. (TR14: 1614) On cross he admitted that except for one time, the number of times he had seen Atwater drink that Atwater appeared to be in control. That one time he heard that Atwater was running down the street kicking in doors. (TR14: 1615) Atwater told him that he was going to get Smith at least four to six weeks before the murder. Normally, he was a peaceful person. (TR14: 1616-21)

Defense expert, Dr. Sidney Merin, a clinical psychologist and neuropsychologist, testified that he had examined Atwater and determined that he was competent to stand trial and at the time of the offense. (TR14: 1629-34) He also evaluated Atwater for penalty phase purposes. In doing so, he reviewed depositions of witnesses, police reports, investigative reports, autopsy reports and photographs. (TR14: 1634-36) He also conducted a number of psychological tests, including the Bender Gestault Visual Motor test, the Clinical Analysis questionnaire, Human Figure drawing test, an MMPI and the Sentence Completion Test. (TR14: 1637, 1642, 1645-46, 1653) There was no evidence of brain damage. There was some evidence of tremors which are commonly associated with alcoholics. Dr. Merin felt that whatever problems Atwater has, they are probably associated with psychological dynamics rather than dysfunctions of the brain. (TR14: 1641) The tests revealed that Atwater had a personality or behavioral disorder as opposed to

a mental disorder. He has a disdain for social values. (TR14: 1643-45, 1649) He is a very dependant person. This type of person does not hold back, they act on whatever they feel. They tend to be impulsive and have difficulty being sensitive to other people's feelings. He was high on the psychopathic deviate scale. (TR14: 1651) There is more evidence of a behavior disorder without being infected by neurotic or psychotic thinking. (TR14: 1657)

Dr. Merin also recounted what Atwater told him about the crime:[1]

> He stated he had worked a full day on that particular day. Completing his work, he went to his employment company, he got his paycheck for the day, he cashed it next door at a bar. He said he had a few beers and then said it was about 6:00 p.m.. He denies firmly that he was intoxicated. He said it would, quote, "Take a lot more than beer to get me drunk", end of quote.
>
> He said he left the bar between 5:30 and 6:00 p.m.. He proceeded to the Anchor Lounge at 11th Street and Fifth Avenue North in St. Petersburg. He said he had a few more beers then. And again he indicated the number was probably more than six. In addition, he stated he had six to seven shots of Chevis Regal. He spoke with some friends and acquaintances.
>
> He left the lounge at about 8:00 p.m., after he talked with others and he played several games of pool. He said he felt somewhat intoxicated but he was able to walk without staggering or any imbalance.
>
> He said he was going home, as he intended

[1] At the evidentiary hearing, Atwater testified that if he had ben allowed to testify at trial he would have told the jury he had not committed the crime. During closing arguments collateral counsel urged that Atwater would have testified consistent with Dr. Merin's testimony concerning what Atwater told him.

to do. En route home, he observed that he was in front of the John Knox Apartment building, and at that point, in his talking with me, he related some historical information about when he -- why he entered that building.

He said the victim, Ken Smith, he said: “The man I’m accused of hacking up lived in those apartments.” Smith apparently had been going with his Aunt Adele. They had lived together and had been engaged to each other, he said, on two separate -- two different occasions.

After Adele and Smith broke up the second time, he said Smith kept coming over to my aunt’s house and bothering her. He then stated his aunt lamented that Ken would come over and bother her and she wished he would stop doing so. This is all part of his thinking.

Q. This is what he’s telling you?

A. That is correct. And then prior to this, on one Sunday morning, he said, while he was half asleep, he heard his aunt talking to Ken, telling him to stop. That was followed by him hearing a big thud, he said, as though someone were falling. He said that occurred some four to six weeks before Ken’s death.

When he heard his aunt cry out, he said he jumped out of bed and he found his aunt on the kitchen floor with Ken standing over her. He says usually when he awakens, he says he finds himself with a greater tendency toward being irritated and fuzzy about other people.

He asked his aunt what had happened, and she allegedly told him that Ken had pushed her down. Ken indicated to Adele that allegedly that she knew she had actually fallen down, and denied -- he denied that he had pushed her. Mr. Atwater noted that his aunt has cerebral palsy and did indeed have a tendency to fall.

He then stated, quote, “I considered Kenny had abused my aunt in the past”, end of quote. He told Kenny not to bother Adele anymore and to leave the key to her apartment, and to get out. He stated that he threatened Ken, that is Atwater threatened Ken. He told

Ken should he come around to bother his aunt again, he, Mr. Atwater, would, quote, “Knock the taste out of your mouth”, end of quote.

He then related all of the above, using a variety of expletives and swear words, other curse words. He said those threats were said not with the intention of doing so, but expressed figuratively.

He reported since Ken was a 64 year old man, he had not meant those threats in the literal manner. Rather, the threat was meant as a reflection of his displeasure, and to, as he said, knock a point home.

He said Ken left the apartment after those threats, and he said that was the last time I saw -- I saw him alive to talk to him. He indicated he had, in fact, subsequently seen Ken on the street, but had said nothing to him.

Then Mr. Atwater, meanwhile, stated that he had learned his Aunt Adele had been, in fact, lying to him about other relatives, other relatives not wishing to talk to Mr. Atwater or to have anything to do with him. He learned that information through still another aunt and discovered that his Aunt Adele had been manipulating him.

In fact, he said, Adele allegedly had told the subject that the subject lies concerning his own mother, that is, she told him lies about his own mother. He said that put -- that placed, quote, “a strain on trusting my aunt.”

Back to August 11, 1989, while walking past the John Knox Apartments, he continued by indicating that he felt guilty about having mistreated Ken on their prior contact at Adele’s home. He wanted to see Ken, and he said he wanted to find out his side of the story, that is Ken’s side of the story, and then develop an opinion about what had actually gone on himself. He said he had always gotten along with Ken before.

He entered the apartments, he signed the guest register, he said he was a little drunk, but he -- and he talked to the desk clerk, a woman, and the subject had a conversation with her, and he identified Ken as being his grandfather, and he wished to see his

grandfather. And he then noted that while Ken lived with his aunt, he would often refer to his -- to Ken as grandfather.

The woman at the desk asked him if he wished for her to call Ken upstairs and let him know he was on his way up. Mr. Atwater said no, he didn't want that. He explained to her that he had not seen his grandfather for six months, and he wanted to surprise him.

Q. So in effect, Atwater was describing to you a ruse that he was using to get up to see Ken Smith, right?

A. That is correct.

Q. Okay. Please continue.

A. He said he went to the elevator, took the elevator up, but the elevator was super slow. Went to the sixth floor, knocked on the door, no response, knocked harder and the door opened, and he believed apparently that the door was not fully closed and therefore, his increased knock popped it open.

He said when the door opened he observed Ken lying on the living room floor. He walked in, closed the door, saw blood all around him all around Ken, he said mostly around his head and chest. He then squatted down beside the victim and placed his hand on Ken's jugular vein in order to feel for a pulse. He said there was none. He got up, saw some blood on his hand, wiped it on his pants. He said then he tried to decide what to do.

Being somewhat intoxicated, and this being the first dead body he had ever seen of somebody he knew, he left. While going down in the elevator he though of wanting to get the woman at the desk to go up to Ken's apartment with him.

He said that Ken's throat was cut, he observed multiple stab wounds and he said he saw blood all over. Then Mr. Atwater considered should that woman go upstairs with him and discover the body with him, that the police or nobody would believe that he had done it.

Downstairs, then in speaking with the

woman clerk, he told her he had gotten no answer at the door, and he wanted her to come upstairs since Ken had called him several days earlier when Mr. Atwater was ostensibly in Connecticut. And he then said that, quote, “I made up a whole bullshit story”, end of quote.

He wanted her to go upstairs with him because he did not want her -- want to tell her outright that he had entered the room and found the body, and then say, well, let’s call the police now. When asked -- when I asked him why he would not have wanted to tell her the truth, as he had related it to me, he answered, I don’t know why I didn’t want to tell her. I guess it was because I was drunk.

He then stated had he not been drunk, he probably would have told her something different. Mr. Atwater, in his explanation to the desk clerk, said that Kenneth, in his telephone call, false telephone call, to him earlier, had indicated that someone was after him, that is someone was after Ken. Thus, Mr. Atwater told the woman clerk that was the reason he, that is Mr. Atwater, had come down from Connecticut, to find out what was going on.

Mr. Atwater wished to stress to me that this was a drunk man thing. He said, I was drunk and doing all of this. That was his explanation for why he had made up that type of story.

* * *

. . .And then he asked the woman to call Ken to determine if he were in his apartment. The woman called, she got no answer. He asked her pointblank, could you go upstairs with me and, in effect, we’ll both check his apartment. And the woman declined, indicating that Ken could be somewhere else in the building, left his apartment visiting somebody else, and apparently people do that.

However, should a tag not be turned in, someone goes to their apartment and checks up on them, that is, there has to be a tag available in order to determine whether there’s somebody in or out of their room.

(TR13:1660-68)

Dr. Merin testified that Atwater told him he debated with himself about what to do. Dr. Merin felt Atwater was trying to convince him he was too drunk to have concocted a story. Atwater told him he considered calling the police but that his experience with the police was that when he had been beaten up, the cops would put him in cuffs. (TR13:1668-72)

Dr. Merin then recounted Atwater's personal history which included much of the information Atwater now alleges should have been presented through unnamed family members. He said his mother was an alcoholic with a number of illegitimate children. His sister was killed when he was ten and she was eight. He said his mother would beat him and blame him for everything. He told Dr. Merin that he had to quit playing high school football because of a knee injury, so he quit school. (TR13:1674-75) He moved with his mother to Connecticut, went to school five to six months and then quit again. His mother forced him out of the house and he moved to the Salvation Army. He said he got married at 23 or 24 for four months. He admitted to slapping his wife when she would not keep the house clean. (TR13:1675-77) Atwater reported that he frequently suffered from migraines for which he takes codeine and fiorinol. He saw a mental health professional when he was a teenager for several months, but had never been in a detoxification center and had never received a citation for being under the influence. (TR13:1678) He began drinking and doing marijuana at age 15 or 16. He began taking harder drugs at 19 or

20. He reported that the amount of usage varied over the years and that he was never dependent on them. (TR13:1679) Dr. Merin characterized Atwater's use of drugs as self-destructive, but in his opinion it did not contribute to the homicide. It was Atwater's personality, not the alcohol that resulted in the homicide. His personality problems were largely a result of his family background. Atwater has a difficult antisocial, impulsive, hedonistic, borderline type of personality. (TR13:1680-87) Dr. Merin noted that he had received a letter from Atwater's mother that reinforced his opinion of her as an egocentric and depriving kind of mother. (TR13:1705)

Despite this extensive presentation, Atwater now contends that counsel should have done more. He contends that although Atwater's family testified against him concerning his admissions of guilt that instead of presenting evidence of his intoxication and psychological problems, the jury may have been swayed by additional evidence from unspecified sources of Atwater's unremarkable family history. This history as related by collateral counsel included the fact that his parents split up, that he suffered from nosebleeds, he had difficulty grasping concepts, his new stepfather was physically and mentally abusive, his sister died in a car accident, he quit high school to work, his pastor transferred out of state, at age eighteen when he began drinking, he moved out of his mother's home and into the Salvation Army. (See pgs 23-25, Initial Brief of Appellant).

Although, Atwater concedes that much of this evidence was introduced through Dr. Merin, he suggests that the manner in which it was presented precluded any real consideration of the evidence. The record in the instant case belies this assertion. The trial court considered and weighed Atwater's family background and his lack of a close family relationship. The court also found Atwater's antisocial behavior and use of alcohol as nonstatutory mitigation. (TR7: 713-15) Balanced against this alleged mitigation, the court below found three aggravating circumstances; 1) During the course of a robbery with a deadly weapon, 2) heinous, atrocious or cruel and 3) cold, calculated and premeditated. In support of the heinous, atrocious or cruel factor, the court found, and this Court agreed, that Atwater 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, Dr. Corcoran, 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. (TR7: 707-710) Atwater v. State, 626 So.2d 1325, 1327-28 (Fla. 1993). In support of the CCP factor the court found that it was clear that there was preplanning, reflection or calculation as evidenced by his statements days before and after the murder, by evidence that he brought the murder weapon with him, by his use of subterfuge to enter the victim's apartment and by his leaving the apartment in a calm and deliberate manner. (TR7: 707-714)

Based on the record in this case, Atwater has not demonstrated deficient performance by his counsel. Cf. Van Poyck v. State, 694 So.2d 686 (Fla. 1997) Moreover, to merit relief, Atwater 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." Strickland v. Washington, 466 U.S. 668 (1984); Bolender v. Singletary, 16 F.3d 1547, 1556-57 (11th Cir.1994). See also Robinson v. State, 707 So.2d 688, 695 (Fla. 1998); Rose v. State, 675 So.2d 567, 570-71 (Fla.1996); Hildwin v. Dugger, 654 So.2d 107, 109 (Fla.1995). Atwater has established neither prong of Strickland.

Both trial lawyers representing Atwater were experienced in capital criminal trials. Both testified at the hearing concerning their prior trial experience and their representation of Atwater at

the trial below. The trial record shows that Atwater was afforded constitutionally reliable representation. The mere fact that other witnesses might have been available or other testimony might have been elicited is not a sufficient grounds to prove ineffectiveness. See, Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987), cert. denied, 487 U.S. 1241 (1988). As in Spaziano v. Singletary, 36 F. 3d 1028 (11th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 911 (1995), "[t]here is nothing in the record to indicate that [Atwater's] present counsel are either more experienced or wiser than his trial counsel, but even if they were, the fact that they would have pursued a different strategy is not enough." If the best lawyers or even most good lawyers "could have conducted a more thorough investigation that might have borne fruit," it does not mean that this attorney's performance fell outside the wide range of reasonably effective assistance. Id. at 1040, 1041.

Atwater also objects to the notation by the court that the defendant failed to suggest what other witnesses should have been called by the defense counsel to testify to mitigation. He contends that under Gaskin v. State, 737 So.2d 509 (Fla. 1999) that a defendant is not required to plead the names of witnesses in order to survive summary judgement. Noting that there is no requirement under rule 3.850 that a movant must allege the names and identities of witnesses in addition to the nature of their testimony in a postconviction motion, this Court in Gaskin ordered an evidentiary hearing. However, the decision in Gaskin rested on

the fact that, in contrast to the limited mitigating evidence actually presented by Gaskin's trial counsel, Gaskin's motion presented an extensive litany of important facts which painted an entirely different picture of Gaskin's family background and mental condition than the meager picture presented at trial. 737 So.2d 514.

Conversely, in the instant case, the evidence alleged by Atwater in his post conviction motion is virtually identical to the family history recounted by Dr. Merin during the penalty phase. Thus, while collateral counsel faults defense counsel for failing to establish the family history through other witnesses, he does not allege that there are other witnesses who would testify to same. Based on these facts the court could reasonably find that the motion did not sufficiently allege facts that established counsel's performance was deficient or that said deficiency actually prejudiced the defendant.

Based on the foregoing, the trial court properly denied Atwater's claim of ineffective assistance of penalty phase counsel.

ISSUE III

WHETHER THE LOWER COURT CORRECTLY DENIED ATWATER'S CLAIM THAT HE WAS DENIED A PROPER APPELLATE REVIEW BY THIS COURT BECAUSE PORTIONS OF THE TRIAL COURT PROCEEDINGS ARE ALLEGEDLY MISSING FROM THE APPELLATE RECORD BEFORE THIS COURT.

Atwater's next claim is that no reliable transcript of his capital trial exists and that he was denied a proper direct appeal from judgment and sentence due to omissions in the record. He alleges that unspecified pretrial proceedings were made off the record and were missing from the appellate record. He also alleges that the packet of penalty phase jury instructions is missing.

This allegation was summarily denied because it should have been raised on direct appeal to this Court.[2] A Motion to Supplement the record and, if needed, reconstruction of record at the appellate stage is the remedy available to an appellate advocate who claims the necessity of the missing record for appellate review. Johnson v. Singletary, 695 So.2d 263 (Fla. 1996). Claims which could have or should have been raised on direct appeal are not cognizable in a motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.850 and are therefore subject to summary denial in a post-conviction proceeding. Torres-Arboleda v. Dugger, 636 So.2d 1321, 1323 (Fla.

[2] The record shows that Atwater presented this claim to this Court pursuant to 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. The motion was denied on October 16, 1995.

1994). Accordingly, this claim is procedurally barred.

Even absent the procedural bar, Atwater failed to demonstrate any prejudice from the alleged missing records. See Johnson v. State, 442 So.2d 193, 195 (Fla. 1983). Atwater does not point to any specific record which contains claims which he was precluded from raising or that merit any type of relief. For example, Atwater would be hard pressed to show prejudice from the lack of "the packet of jury instructions at the penalty phase" because the instructions are included elsewhere in the record. (TR14: 1811-1818) Accordingly, it was not error for the lower court to summarily deny the instant claim.

ISSUE IV

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

Atwater's next claim is that FBI agents provided false and misleading testimony. He surmises that the State must have presented evidence which was false, unreliable, misleading and biased in favor of the State in that they used F.B.I. agents Allison Simons, David Attenberger and Mark Babyak. Atwater contends since other F.B.I. agents have committed perjury as to training experience and findings, these three agents must have similarly committed perjury. Atwater's illogical syllogism is that some F.B.I. agents have lied; these three witnesses are F.B.I. agents; therefore, these three also lied.

This claim was summarily denied as follows:

> **Claim 3:** Defendant was denied effective assistance of counsel, an adversarial testing, and a fair trial when the State elicited false and misleading evidence and expert testimony from FBI agents. Defendant states that agents of the FBI crime laboratory have committed perjury in other cases; he then states that FBI agents gave unreliable testimony at his trial. He added that he was denied the opportunity to meaningfully cross examine or impeach these FBI witnesses; no adversarial testing occurred, as a result of either the State withholding this evidence or counsel failing to investigate and develop the evidence.

> The State responds that defendant's conclusion that because some FBI agents have committed perjury, the FBI witnesses in his trial also perjured themselves, is illogical. The Court agrees, and adds that this portion of the claim is speculative. As to the defendant's allegation of ineffective assistance of counsel, the State responds that defendant has totally failed to allege an issue showing either withheld evidence or any issue requiring investigation by defense counsel. Mere speculation or conjecture is insufficient to show prejudice for postconviction relief. Rivera v. Dugger, 629 So. 2d 105 (Fla. 1993). The Court finds that this claim is without merit.

As noted above, the State presented three F.B.I. agents as witnesses. Special F.B.I. agent Allison P. Simons, the head of the F.B.I.'s hair and fiber unit, identified a known pubic hair of the victim as matching a pubic hair removed from State's exhibit 6, a towel. On cross-examination she admitted that the match was not as positive as a fingerprint, that she had no way of knowing how long the hair had been on the towel and that no other hairs of the victim were found on Atwater's submitted clothing nor in the victim's fingernail scrapings. (TR11:1154 - 1156, 1161 - 1162, 1164 - 1165)

Special F.B.I. agent David Attenberger, who had conducted a shoe print identification in the case, testified that he had reached no positive findings due to lack of sufficient detail and unique features but that the shoes and prints in blood which he compared corresponded. (TR11:1170 - 1180)

The third witness, special F.B.I. agent Mark Babyak, a

serologist with the F.B.I. for 15 years with a bachelor of science in biology from Princeton University, Princeton, N.J., compared blood on Atwater's pants and shoes with known blood samples from Atwater and from the victim. He excluded Atwater's blood as possibly being that on the pants and shoes. The blood was consistent with that of the victim and of about four and a half percent of the white population. Tests conducted on the towel, Atwater's shirt and socks, and the victim's fingernail scrapings identified human blood but were inconclusive as to any further identification. No blood was found on the hat tested. (TR11:1181 - 1183, 1189 - 1201)

Of course, these are matters available at the time of the appeal and, therefore, issues not available for postconviction relief. Atwater attempts to transform the matter to one for postconviction review by addition of the claim that counsel was ineffective either through a failure to investigate or by withheld evidence. Atwater has, however, totally failed to allege an issue showing either withheld evidence or requiring any investigation by defense counsel. See Correll v. State, 698 So.2d 522 (Fla. 1997). Atwater's burden is to show that there is a reasonable probability that the outcome would have been different but for counsel's mistakes. Strickland v. Washington, 466 U.S. 668 691, (1984). Mere speculation or conjecture is insufficient to show prejudice for postconviction relief. Rivera v. Dugger, 629 So.2d 105, 107 (Fla. 1993). An issue available for appeal cannot be transformed

into one for postconviction review merely by adding language of ineffective assistance. Rivera v. State, 717 So.2d 477, 488 (Fla. 1998); Robinson v. State, 707 So.2d 688 (Fla. 1998); Cherry v. State, 659 So.2d 1069, 1072 (Fla.1995).

This Court has previously affirmed the summary denial of this identical claim. In Buenoano v. State, 708 So.2d 941, 947 (Fla. 1998), this Court stated:

> First, we address Buenoano's contention that the trial court erred in summarily denying her third motion for postconviction relief. Buenoano maintains that, based on the information she has obtained as a result of the OIG investigation into the practices of Special Agent Roger Martz, she is entitled to an evidentiary hearing on the Brady, Giglio, and newly discovered evidence claims she raises in claim II. Summary denial of these claims was proper because, as explained below, the motion, record, and files conclusively demonstrate that these claims do not provide a basis for relief. Roberts v. State, 568 So.2d 1255, 1256 (Fla.1990) (upholding summary denial of rule 3.850 motion where the motion and record conclusively demonstrated that the defendant was not entitled to relief); Fla. R.Crim. P. 3.850(d); Fla. R.App. P. 9.140(I) (providing that unless the record shows conclusively that the appellant is entitled to no relief, appellate court must reverse order summarily denying postconviction relief and remand for evidentiary hearing).

Buenoano v. State, 708 So.2d 941, 947 (Fla. 1998). See, also, Davis v. State, 736 So.2d 1156 (Fla. 1999).

In the instant case, Atwater has not shown any false or misleading evidence of the F.B.I. experts. Accordingly, as in

Buenoano, summary denial of these claims was proper because the motion, record, and files conclusively demonstrate that this claim does not provide a basis for relief.

ISSUE V

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

Atwater's next claim is that the trial court erred in admitting evidence from blood spatter experts. He contends that the experts were not qualified and, therefore, the evidence was inadmissible. This claim is procedurally barred as an issue that could have been and should have been raised on direct appeal. Torres-Arboleda v. Dugger, 636 So.2d 1321, 1323 (Fla. 1994).

The claim is also couched in terms of ineffectiveness of trial counsel in several regards. Atwater alleges that defense counsel stated on the record that they "lacked any knowledge of blood stain pattern analysis and interpretation" and that defense counsel lacked notice that blood stain pattern evidence would be used and failed to hear a defense expert. The record does not support this claim.

The context of the quote relied upon by Atwater from page 1217 of the trial record begins on page 1216 and shows a motion being made by defense counsel to prohibit the State's introduction of the unexpected testimony of F.B.I. agent Mike Babyak as an expert in blood stain pattern evidence. The State explained that not even they had known of this additional expertise until he flew in the night before for his testimony. The Court ruled that this witness

could not testify as to the blood stain pattern evidence. (TR11:1220)

Counsel's statement of lack of expertise in blood spatters was made in the context of arguing lack of notice of the State's expert witness Babyak on blood spatters and lack, therefore, of the opportunity to obtain a defense expert. This argument was successful in excluding the witness's testimony. The State unsuccessfully protested that defense counsel was not prejudiced because they had attempted to question the assistant medical examiner, Dr. Corcoran, about the blood spatters during his deposition a few weeks earlier. (TR11:1216)

Thus, Atwater's claim does not support any ineffectiveness of defense counsel as to F.B.I. witness Babyak since the State was not allowed to introduce the evidence. Moreover, Atwater has not suggested that the evidence would have helped the defense or affected the outcome.

Atwater has not established any factual predicate for his claim that Dallas Holtman and Fred Marini were not qualified, or that defense counsel had any objection to their being qualified that could have been made in good faith. See Nibert v. State, 508 So.2d 1, 3 (Fla. 1987). Dallas Holtman testified, after stipulation by defense counsel as to his qualification as a crime scene technician for the St. Petersburg Police Department for fifteen years, that his training had included blood spatter school. (TR10:1091-1092) He identified one photo as showing a blood

spatter on the wall, “most likely as he fell and splashed on the wall.” (TR10:1100) This is the only record cite provided by Atwater and he fails to allege or show how this testimony was inadmissible or prejudicial.

Detective Fred Mariani testified that he had been a police officer for 17 years, a detective for 16 and assigned to robbery and homicide for the last 6 years, and had been assigned to about 60 homicides for St. Petersburg Police Department. The State did not seek to qualify him as an expert. (TR11:1285-1286) Atwater cites to his testimony at page 1291-1296 as expert testimony regarding blood stain pattern analysis without requisite credentials and qualifications. Detective Mariani testified as to photographs of the body at the scene and his observations at the scene that he believed, from a bloody area on the stomach, and an outline on the floor, that the body had been rolled over. (TR11: 1291-1293) He also testified that the fact that the chest area had no blood downward from the wounds showed that the person was lying down when the wounds occurred. (TR11: 1293) He also noted the spatter on the wall, but the Court sustained defense counsel’s objection for lack of foundation for the prosecutor’s question to him of what would cause the spatter. (TR11: 1294) The prosecutor inquired then as to the homicide detective’s training and experience in blood stains, and the court then allowed the questioning based on the detective’s answers. (TR11:1294) Atwater has not shown that the judge abused his discretion in this ruling.

The detective testified that he thought it could have been from stomping because of the blood being low on the wall and a bloody shoe print nearby. (TR11: 1295-1296) Atwater has not shown how he was prejudiced by this testimony of the homicide detective from the photographs and his own observations at the scene.

Accordingly, the lower court rejected this claim stating:

> **Claim 4:** The State elicited opinion testimony about blood spatter evidence from an unqualified witness and the testimony was erroneously admitted into evidence by the trial court. Defendant adds that trial counsel was rendered ineffective by the State's presentation of the blood spatter evidence, and admitted to ineffectiveness. Defendant states that counsel lacked notice that blood stain pattern evidence would be used during trial and failed to hire a defense expert. Defendant argues that he was denied effective assistance of counsel to the extent that his counsel failed to adequately preserve this issue or failed to raise it.
>
> The State responds that defendant's claim is presented as trial court and prosecutorial error, but is argued as an ineffective assistance of counsel claim. The Court agrees, and notes that questions regarding the admissibility of evidence are reviewable only on direct appeal. Duest v. Dugger, 555 So.2d 849 (Fla.1990). As to counsel's lack of notice of additional blood spatter evidence from an FBI agent, and failure to obtain his own expert, the record shows that defendant's counsel made those arguments to the trial court in a lengthy objection, and the court upheld the objection and excluded the testimony of the witness. The defendant cites defense counsel's statement that he would not be able to conduct an effective cross-examination of the witness and would be denying his counsel [sic] effective assistance as an admission of ineffective assistance. However, the Court finds that this argument has no merit, since the testimony was not

> admitted, and counsel was therefore not effective [sic].

As this claim is both procedurally barred and without merit, the trial court properly denied it.

ISSUE VI

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

This Court has made it clear that claims concerning the constitutionality of the cold, calculated and premeditated jury instruction are procedurally barred unless a specific objection is made at trial and pursued on appeal. Bush v. State, 682 So.2d 85(Fla. 1996) The objection at trial must attack the instruction itself, by submitting a limiting instruction and by making an objection to the instruction as worded. Pope v. State, 702 So.2d 221 (Fla. 1997); Walls v. State, 641 So.2d 381, 387 (Fla.1994), cert. denied, 513 U.S. 1130 (1995). At trial and on direct appeal the only jury instruction challenge in the instant case concerned the heinous, atrocious or cruel instruction. No challenge was raised to the instruction as now presented. Atwater v. State, 626 So.2d 1325,(Fla. 1993)

Moreover, as it is a direct appeal issue, it is not properly raised in a motion for post-conviction relief. Furthermore, allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal. Teffeteller v. Dugger, 1999 WL 395697, 24 Fla. L. Weekly S296 (Fla. 1999)

Finally, even if this claim was properly before the Court it

is without merit. Phillips v. State, 705 So.2d 1320, 1323 (Fla. 1997)(holding that the aggravator was not unconstitutionally vague) Accord, Jackson v. State, 648 So.2d 85 (Fla. 1994). (Earlier cases had described Jackson as finding the aggravator unconstitutionally vague, but denied relief where the evidence of heightened premeditation led the Court to a finding of harmless error and/or procedural bar for lack of contemporaneous objection. See Banks v. State, 700 So.2d 363 (Fla. 1997); Bell v. State, 699 So.2d 674 (Fla. 1997); Larzelere v. State, 676 So.2d 394, 407 (Fla. 1996).)

Although the jury instruction for the aggravating factor for cold, calculated and premeditated which was given in this case at trial in 1990 was later invalidated by this Court in Jackson v. State, 648 So.2d 85 (Fla. 1994), this Court explained in Monlyn v. State, 705 So.2d 1 (Fla.1997), Reese v. State, 694 So.2d 678 (Fla. 1997), and Larzelere v. State, 676 So.2d 394 (Fla.) cert. den. 117 S. Ct. 615 (1996), that the aggravator will stand despite the faulty instruction "where the facts of the case establish that the killing was CCP under any definition." Monlyn. This Court went on to approve the aggravator in Monlyn on evidence establishing a heightened premeditation. In the instant case, this Court on direct appeal specifically approved the trial court's finding that the murder was committed in a cold, calculated, and premeditated manner without pretense of legal or moral justification. Atwater v. State, 626 So.2d 1325, 1329 (Fla. 1993). Accordingly, this claim was properly denied.

ISSUE VII

WHETHER THE STATE FAILED TO REVEAL ANY PROMISES OF LENIENT TREATMENT TO WITNESSES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Atwater's next allegation is that State witness Michael Painter received a reduced sentence, after testifying for the State against Atwater. Atwater contends that Painter was sentenced to two years for sexual battery on a mentally disturbed woman, and that he served only six months. Accordingly, he maintains that the witness must have been promised lenient treatment. This claim was summarily denied as the motion, record, and files conclusively demonstrate that this claim does not provide a basis for relief. Buenoano v. State, 708 So.2d 941, 947 (Fla. 1998).

At trial, Michael Painter testified that he was in custody but that he had made the same statements as his testimony to the police before the date of the offense for which he was in custody. (TR11: 1320-1321) Painter testified that neither the State nor his defense counsel in the pending criminal case had promised him anything in exchange for his testimony. (TR11: 1321-1322)

A bald allegation, contrary to the record, that a promise was made to the witness does not warrant postconviction relief. See Phillips v. State, 608 So.2d 778, 780 (Fla. 1992); Wright v. State, 581 So.2d 882 (Fla. 1991); Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988). Atwater has not shown that "the State was granting special favors to Painter" nor that defense counsel had any

different cross-examination that could possibly have been made of this witness.

Moreover, Atwater failed to establish that even if a deal had been made and not disclosed, that he was prejudiced under Brady v. Maryland, 373 U.S. 83(1963). To demonstrate materiality under Brady, Atwater must establish a reasonable probability exists that the outcome of the case would have been different. See Kyles v. Whitley, 514 U.S. 419 (1995). In analyzing this issue the Court explained that courts must focus on whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Id. at 435. In White v. State, 729 So.2d 909 (Fla. 1999), this Court considered a similar claim and held that materiality had not been established where the record showed that the witness had been thoroughly cross-examined.

At Atwater's trial, Painter testified that he was Atwater's aunt's next door neighbor and that he had known Atwater for four or five months before Atwater murdered Smith. (TR14: 1604) He testified that whenever he talked to Atwater about his aunt and Kenny Smith, Atwater would get upset. (TR14: 1609) About a week before the murder he was drinking and smoking pot with Atwater and Atwater told him that when he drank liquor or wine he sort of blacked out. (TR14: 1612) Atwater told him Kenny pushed Adele down. (TR14: 1614) On cross he admitted that except for one time, the number of times he had seen Atwater drink that Atwater appeared

to be in control. That one time he heard that Atwater was running down the street kicking in doors. (TR14: 1615) Atwater told him that he was going to get Smith at least four to six weeks before the murder. Normally, Atwater was a peaceful person. (TR14: 1616-21)

Beyond testimony that Atwater had threatened to get Smith before the murder, Painter did not implicate Atwater in the crime. Moreover, defense counsel was able to use Painter in support of the contention that Atwater was intoxicated at the time of the offense and that his use of alcohol had previously resulted in blackouts and erratic behavior. Under these circumstances, the record refutes any contention that evidence of Painter's subsequent sentence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Accordingly, because the motion, record, and files conclusively demonstrate that this claim does not provide a basis for relief, summary denial of this claim was proper. Buenoano v. State, 708 So.2d 941, 947 (Fla. 1998).

ISSUE VIII

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

Atwater next alleges, without factual support, that the "underlying conviction ... was obtained in violation of Mr. Atwater's rights under the Sixth, Eight, and Fourteenth Amendments." Until overturned in the specific case, a prior judgement and sentence is presumed valid and not subject to collateral attack in a different case. Mann v. State, 482 So.2d 1360, 1361 (Fla. 1986), sentence reversed on other grounds at 844 F.2d 1446 (11th Cir. 1988); Adams v. State, 449 So.2d 819, 820 (Fla. 1984); cf. Long v. State, 529 So.2d 286 (Fla. 1988).

As Atwater has not demonstrated ineffectiveness of counsel nor shown that counsel had any issue which could have been raised in good faith, this claim was properly denied.

ISSUE IX

WHETHER THE TRIAL COURT FAILED TO ASSURE MR. ATWATER'S PRESENCE DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Atwater alleges that he was involuntarily absent from all pretrial proceedings after his first appearance and from bench conferences. Atwater seems less certain whether he was present during "off the record proceedings" but claims that it would "appear that he was" involuntarily absent. Whether he was absent from proceedings is an issue available for appeal and barred from postconviction relief. Rivera v. Dugger, 629 So.2d 105, 107 (Fla. 1993).

In addition to being procedurally barred, this claim is also without merit as Atwater has not alleged any prejudice from his absence from bench conferences. See Hardwick v. Dugger, 648 So.2d 100, 105 (Fla. 1994). This Court has already held that a defendant's absence from bench conferences is not fundamental error where no objection was made. Cole v. State, 701 So.2d 845 (Fla. 1997); Shiner v. State, 452 So.2d 929 (Fla. 1984). In Cole, this Court held that a defendant has no constitutional right to be present at bench conferences involving purely legal matters. Atwater has not alleged that he was absent from any bench conference involving nonlegal matters.

Bench conferences are not per se critical stages of a criminal proceeding. Wright v. State, 688 So.2d 298, 300 (Fla. 1996).

Hardwick, supra. In Hardwick, this Court affirmed denial of postconviction relief, which included the allegation of ineffective assistance of counsel for failure to object to defendant's absence from bench conferences. This Court noted that Hardwick failed to show prejudice from his absence at the bench conferences. Hardwick also rejected that defendant had suffered any ineffective assistance from his absence from depositions. Under Florida law, a defendant has no absolute right to be present at depositions. Rule. 3.200(h)(7), Fla.R.Crim.Proc., which was 3.220(h)(6) in 1989.

Atwater does not here specify which pretrial proceedings he claims were critical stages. In Rose v. State, 617 So.2d 291, 296 (Fla. 1993), this Court explained that a defendant's right to be present even at critical stages of proceedings depends on whether "his presence would contribute to the fairness of the proceedings." Whether the defendant's absence amounted to a violation of due process "should be considered in light of the whole record." Id.

Pretrial motions are most usually purely legal argument on purely legal matters. See Stano v. State, 473 So.2d 1282, 1287 (Fla. 1985). Atwater does not specify any particular prejudice from his absence from any particular pretrial proceeding. Insofar as Atwater's allegation might be intended to include pretrial motions, the analysis in Cole is instructive. A defendant has no constitutional rights to be present at proceedings which involve purely legal matters. Atwater has not alleged that any pretrial matter was more than a purely legal matter. See Pomeranz v. State,

703 So.2d 465, 470 (Fla. 1997); Corey v. State, 653 So.2d 1009, 1012 (Fla. 1995); Beltran-Lopez v. State, 583 So.2d 1030, 1032 (Fla. 1991); Roberts v. State, 510 So.2d 885, 890 (Fla. 1987); Garcia v. State, 492 So.2d 360, 363-364 (Fla. 1986). Stano v. State, 473 So.2d 1282, 1287 (Fla. 1985); Herzog v. State, 439 So.2d 1372 (Fla. 1983).

The hearing of April 18, 1990, and April 26, 1990, on the defense motions to continue trial are part of the appellate record. (TR16: 1878 - 1912) Neither transcript reflects Atwater's presence. The first was denied without prejudice to see if depositions could be rescheduled to an earlier date. The second was denied without prejudice after defense counsel admitted that no depositions had been concluded but expressed concern for the need for additional preparation for the penalty phase. The court indicated that defense counsel was free to raise the motion to continue trial should anything develop about an insanity defense and that there would be time between the guilt and penalty phase for further preparation by defense. (TR13: 1902 - 1904, 1909) Because these records are available, Atwater has the burden of showing that he was prejudiced by his absence. As this claim is barred and without merit, it was properly summarily denied.

ISSUE X

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

Atwater's next claim, that the state failed to prove each element of the offenses charged, is a matter that could have been and should have been raised on direct appeal. Post conviction motions do not operate as a second appeal to allow defendants to raise issues that are appropriate for direct review. Accordingly, this claim is procedurally barred.

Moreover, this claim is without merit. For example Atwater alleges insufficient evidence to prove premeditation in that the State did not show that he was "not intoxicated or otherwise mentally capable of forming specific intent on the night of the crime. . . . ." The State does not have to disprove voluntary intoxication. Sochor v. State, 619 So.2d 285, 290 (Fla. 1993).

The State's evidence included that Atwater announced that he was going to kill the victim, looked for him for three days, lied both orally and in signing the guest log that he was the victim's grandson to gain entrance to the victim's apartment where he stabbed him over 40 times and robbed him, and then left "in a calm and deliberate manner." Atwater v. State, 626 So.2d 1325, 1329 (Fla. 1993). After the murder Atwater told several family members including his Aunt Adele Coderre that he had done it. Id.

Atwater did not take the stand in his own defense nor present

any witnesses in the guilt phase. He does not suggest what his counsel should have done to investigate a defense of intoxication. In light of Atwater's own actions near the time of the offense, there was no defense of intoxication for defense counsel to investigate. Blaylock v. State, 600 So.2d 1250 (Fla. 3d DCA 1992); Mendyk v. State, 592 So.2d 1076 (Fla. 1992).

Additionally, Atwater has not shown ineffectiveness of counsel in the guilt phase of this claim. Defense counsel made an effort to show appellant's intoxication for the penalty phase as mitigation. However, Atwater's own statement to the appointed confidential psychologist Dr. Merin was that he had a few beers and six to seven shots of Chevas Regal but was not drunk. (TR13:1660) Atwater related to Dr. Merin the ruse he had used to get by the desk clerk at victim's apartment, including asking her not to call the victim to tell him that he was coming so he could surprise the victim. (TR13:1664) Atwater described going into the victim's apartment and finding him already dead, getting the victim's blood on his hand and wiping it on his pants. He described telling the desk clerk he had not gained entrance and she should check on the occupant. Atwater told Dr. Merin he was acting this way, telling the desk clerk this story, because he was drunk. (TR13:1664 - 1666) Dr. Merin said he interpreted Atwater's different stories to him as to whether he was drunk or not as meaning that he would say whatever fit his needs at the minute. (TR13:1666 - 1667) Dr. Merin said Atwater's detailed story to him and its reflected reasoning

was not the thinking of a drunk person. (TR13: 1668) Atwater told Dr. Merin of his actions after finding the victim dead and of telling his Aunt Adele, Cousin Janet and her boyfriend, Daniel, of finding the victim dead. (TR13:1669 - 1671)

Dr. Merin had also discussed with Atwater the facts of his early life and development, including home life, education and health. (TR13:1678) Dr. Merin did not feel that Atwater's admitted history of substance abuse was a contributing factor to the homicide. (TR13: 1680) He felt Atwater was, at most, mildly intoxicated. (TR13: 1680)

Based on the foregoing, Atwater's claim is not only procedurally barred, but, also without merit.

ISSUE XI

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

Atwater adds that he was denied effective assistance of trial counsel for failure of counsel to raise or to preserve the now asserted challenges to certain jury instructions. The challenge appears to be that the armed robbery, felony murder, voluntary intoxication, third degree murder, sufficiency of the evidence, sanity and corpus delicti instructions given were erroneous. Challenges to jury instructions are procedurally barred as available for appeal and, therefore, are not issues for postconviction relief. Clark v. State, 690 So.2d 1280, 1284 (Fla. 1997). Accordingly, this claim was correctly denied by the lower court.

Moreover, Atwater has not explained how the instructions were "materially erroneous" and case law relied on by Atwater is inapplicable to this case. The reasoning in Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989), and disapproved in State v. Smith, 573 So.2d 306 (Fla. 1990), on the issue of jury instructions is instructive. Contrary to the Second District, this Court said that whether the jury instruction on excusable homicide was complete was not an issue of fundamental error that could be reviewed without

preservation of the issue.

Both Franklin v. State, 403 So.2d 975 (Fla. 1981), and Robles v. State, 188 So.2d 789, 793 (Fla. 1966), relied on by Atwater, held that it is error not to instruct on the underlying felony when the instruction for felony murder is given. Unlike the present case, both are cases on appeal from the judgement and sentence rather than from postconviction orders. The underlying felony in the instant case was robbery, and the complete instruction on robbery was given. (TR12:1474 - 1476) Additionally, there was sufficient evidence of premeditation to support the jury verdict of first degree murder, as charged, without regard to the theory of felony murder. In Dobbert v. State, 456 So.2d 424, 430 (Fla. 1984), this Court distinguished Robles where there was sufficient evidence of premeditation to support the jury verdict.

In Anderson v. State, 276 So.2d 17 (Fla. 1973), relied on by Atwater, this Court reversed on direct appeal for failure of the trial court to define or explain premeditation. To the contrary in the instant postconviction proceeding, the instruction on premeditation was complete as given. (TR12: 1469 - 1470)

Atwater additionally claims that the erroneous guilt phase instruction on robbery affected the penalty phase, wherein the jury was instructed that it was an aggravating circumstance if they found that the murder occurred during a robbery. Atwater fails to explain what was erroneous about the robbery instruction as given in the guilt phase. Issue IX of Atwater's brief on direct appeal

argued that: "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." As an issue available for appeal and actually raised on appeal, his claim is barred from postconviction review.

Atwater's postconviction motion adds to this claim that the jury instructions were unsupported by the evidence. Sufficiency of the evidence is an issue for direct appeal rather than postconviction relief. Issue II of Atwater's appeal brief raised sufficiency of the evidence and the jury instruction on felony murder and claimed that: "Because robbery was not proved, Atwater did not receive a trial by jury on premeditated murder, and instructing the jury on felony murder was harmful error." This claim was denied.

Atwater's attempt to elevate this claim to one of ineffective assistance also fails. This Court continues to reject issues that could and should have been raised on direct appeal and are procedurally barred, Maharaj v. State, 684 So.2d 726, 728 (Fla. 1996), "even if couched in ineffective assistance language." Johnson v. Singletary, 695 So.2d 263, 265 (Fla.1996); Robinson v. State, 707 So.2d 688 (Fla. 1998). The trial court's summary denial of these claims should be affirmed.

ISSUE XII

WHETHER 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. WHETHER THE PROSECUTOR'S ALLEGEDLY INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENT, NON-STATUTORY AGGRAVATING FACTORS AND THE SENTENCING COURT'S RELIANCE ON THESE NON-STATUTORY AGGRAVATING FACTORS RENDERED ATWATER'S CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Atwater's next claim is based on allegedly "inadmissible victim impact information as defined by Booth v. Maryland, 482 U.S. 496 (1987)" In Farina v. State, 680 So.2d 392, 399 (Fla. 1996), this Court noted that the U.S. Supreme Court receded from Booth in Payne v. Tenn., 501 U.S. 808, 827 (1991), overturning all except the prohibition on the opinion of family members on the crime. Atwater admits that a portion of Booth was later overturned but wants to rely on its being the law at the time of his trial. However, Atwater may not rely on case law which is later overturned to obtain a new trial. See Farina at 399 (holding that victim impact evidence comporting with Payne could be introduced on remand.) Accord, Lawrence v. State, 691 So.2d 1068, 1072 (Fla. 1997). Additionally, the issue is procedurally barred as available for appeal, Hardwick v. Dugger, 648 So.2d 100, 103 (Fla. 1994), or not preserved for appellate review. Bryan v. Dugger, 641 So.2d 61, 65 (Fla. 1994); Grossman v. State, 525 So.2d 833 (Fla. 1988); cf. Jackson v. Dugger, 547 So.2d 1197, 1198 (Fla. 1989).

Atwater does not cite to the record to support his claim that "[e]vidence and argument was presented to the jury concerning the character of the victim.... [which] amounted to urging the jury to consider a non-statutory aggravating circumstance and was inadmissible victim impact information ...." Initial Brief of Appellant, page 77. The State put on no evidence in the penalty phase; the jury was not instructed as to victim impact evidence; and the State's penalty arguments made no reference to the character of the victim. (TR13/14: 1533 - 1537, 1769 - 1788)

Atwater goes on to allege, without citation to the record, that the judge and jury "were presented with and considered non-statutory aggravating circumstances." Initial Brief of Appellant, page 77. This claim is not supported by the record and, furthermore, such issues are available for appeal and not issues for postconviction relief. Issues about the sentencing phase were raised on appeal, including issues of the propriety of some of the jury instructions.

Atwater also urges error based on allegedly improper argument of the prosecutor and improper eliciting of opinion testimony from witnesses. Again, however, Atwater does not support this contention by reference to the record. Without further specificity Atwater has not established prejudice nor that the alleged error truly exists. Moreover, even if the record did support the claim, such issues are available for appeal and barred for postconviction relief. Cherry v. State, 659 So.2d 1069, 1071 (Fla. 1995).

As Atwater has not established that defense counsel had any good faith issue supporting an objection, Atwater has not shown ineffective assistance on this claim. This claim was correctly denied.

ISSUE XIII

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

Atwater's next contention is that counsel was ineffective for failing to question prospective jurors more thoroughly on their views of "major issues" of the case. Specifically, Atwater claims that the jurors should have been questioned about "mental illness, drugs, child abuse" and more expansively than they were about capital punishment and alcohol abuse. Initial Brief of Appellant, page 80. This claim was summarily denied by the lower court as follows:

> **Claim 14:** The defendant's counsel was ineffective during voir dire; counsel was rendered ineffective by actions of the State and the trial court. Defense counsel failed to question prospective jurors about major issues in defendant's case: mental illness, drugs, and child abuse. Prospective jurors were only superficially questioned about their views on capital punishment and alcohol abuse.
>
> The State responds that mental illness, drugs and child abuse were not major issues in defendant's case, but were explored by defense witness Dr. Merin in the penalty phase, based on what the defendant had told Dr. Merin about his childhood and his substance abuse. The State adds that the prospective jurors were extensively questioned about their views of capital punishment. Defendant does not show that counsel's alleged omissions on voir dire would have changed the outcome or that counsel's voir dire was a substantial and serious deficiency reasonably below that of competent counsel.
>
> The Court has reviewed the record, and

> agrees with the State that mental illness, drugs and child abuse were not major issues in this case. The Court finds that this claim has no merit, and defendant's claim of ineffective assistance of counsel also has no merit.

As the trial court found, mental illness, drugs and child abuse were not major issues in this case. The record shows that they were only brought up by defense witness Dr. Merin in the penalty phase based on what the Atwater had told the doctor about his childhood development and substance abuse. In light of Dr. Merin's conclusions, the record does not support that these were major issues even in the penalty phase.

Between the prosecutor's and defense counsel's questioning, the prospective jurors were extensively questioned about their views of capital punishment. The majority of the defense voir dire was about the jurors' views of capital punishment. Atwater has not shown that counsel's omissions on voir dire would have changed the outcome or that it was "a substantial and serious deficiency reasonably below that of competent counsel." Smith v. State, 445 So.2d 323, 325 (Fla. 1983); Johnston v. Dugger, 583 So.2d 657, 662 (Fla. 1991).

ISSUE XIV

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

This claim is based on Atwater's allegation that two instructions given in the penalty phase are unconstitutionally automatic aggravating factors: (1) that the murder was committed while engaged in the commission or attempt to commit a robbery, and (2) that the murder was committed in a cold, calculated and premeditated manner. Both instructions were raised as error on direct appeal and rejected by the Florida Supreme Court. Case law relied on by Atwater in this claim predates the mandate and could have been raised on the appeal. As issues available for appeal, they are not issues for postconviction relief. Lopez v. Singletary, 634 So.2d 1054, 1056 (Fla. 1993); Bolender v. State, 658 So.2d 82 (Fla. 1995); Jennings v. State, 583 So.2d 316, 323 n. 3 (Fla. 1991); See Kennedy v. Singletary, 599 So.2d 991, 992 (Fla. 1992). Accordingly, this claim should be denied as procedurally barred.

Moreover, this Court has repeatedly rejected the argument that the aggravating factors are automatic. Clark v. State, 443 So.2d 973, 978 (Fla. 1983); Blanco v. State, 706 So.2d 7 (Fla. 1997), concurring opinion of J. Wells compiling the case law; Smith v. Dugger, 565 So.2d 1293, 1297 (Fla. 1998). In Bolender v. Dugger, 564 So.2d 1057, 1059 (Fla. 1990), this Court refused to permit

raising ineffectiveness of counsel when the issue was procedurally barred because the death sentence was "fully considered" on direct appeal.

Atwater's reliance on Stringer v. Black, 112 S. Ct. 1130 (1992), is misplaced. Stringer, which was decided after Atwater's trial in 1990, did not announce a change in law and was consistent with this Court's analysis on direct appeals. Kennedy v. Singletary, 599 So.2d 991, 992 (Fla. 1992). This Court in Kennedy concluded that Stringer required only that the Court conduct harmless error analysis on any sentence for which an invalid aggravating factor was considered. In Mills v. Singletary, 606 So.2d 622, 623 (Fla. 1992), this Court specifically found that Stringer was not to be retroactively applied. In Johnson v. Singletary, 612 So.2d 575 (Fla. 1993), this Court held that the issue of invalidity of an aggravating factor was procedurally barred for postconviction relief for lack of contemporaneous objection. Accord, Sims v. Singletary, 622 So.2d 980 (Fla. 1993).

The issue of whether Atwater's sentencing " 'genuinely narrow[ed] the class of persons eligible for the death penalty, ' Zant v. Stephens, 462 U.S. 862, 876 (1983)," is an issue for appeal and procedurally barred for postconviction relief. Marek v. Singletary, 626 So.2d 160, 162 (Fla. 1993). Similarly, the Maynard v. Cartwright, 486 U.S. 356, 362 (1988), claim urged by Atwater, is barred for postconviction relief. Porter v. State, 653 So.2d 374, 380 (Fla. 1995); Bryan v. Dugger, 641 So.2d 61, 65 (Fla. 1994).

Similarly, this Court has rejected the holding in Engberg v. Meyer, 820 P. 2d 70 (Wyo. 1991). See Blanco v. State, supra.

To the extent this issue is based on case law postdating Atwater's trial, counsel is not ineffective for failing to be clairvoyant, Bottoson v. Singletary, 685 So.2d 1302 (Fla. 1997), and where the issue is based on case law predating Atwater's trial, counsel is not ineffective for failure to make futile objections. Magill v. State, 457 So.2d 1367, 1370 (Fla. 1984); Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). As relief is not warranted on any of the underlying claims, Atwater has failed to establish either deficient performance or prejudice. Accordingly, this claim was properly denied.

ISSUE XV

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

Once again appellant is raising a claim that could have been, should have been and, in fact, was raised on direct appeal. On direct appeal, this Court rejected the claim as follows:

> Finally, we reject Atwater's claim that the sentencing order did not clearly state which nonstatutory mitigating factors the judge found or what weight he gave them. With respect to nonstatutory mitigating factors, the sentencing order states:
>
> In considering any other aspect of Defendant's character or record and any other circumstances in the evidence which was proffered as a mitigating circumstance, the Court has carefully considered the following: whether the Defendant was under the influence of mental or emotional distress (even if not "extreme"); whether the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired (even if not "substantially" impaired) by lack of intelligence, personality disorder, consumption of alcohol or a perception that his aunt was being treated abusively by the victim. The Court additionally considered and weighed the Defendant's family background and his lack of a close family relationship. All of these factors were presented to the jury during the penalty phase of the proceedings in this case, as well as now being fully considered and weighed by the Court.
>
> While the judge did not indicate the extent to which each factor existed, it is evident that he found nonstatutory mitigation

> to exist and that he carefully weighed it in his deliberations.

Atwater v. State, 626 So.2d at 1329-1330.

Accordingly, this claim should be denied as procedurally barred. Hall v. State, 1999 WL 462617, 24 Fla. L. Weekly S350 (Fla. 1999)(The trial court correctly found claim to be procedurally barred in that it was raised and addressed by Court on direct appeal.)

Moreover, Campbell v. State, 571 So.2d 416 (Fla. 1990) did not become final until after Atwater was sentenced.[3] This Court has held that Campbell is not to be applied retroactively. Grossman v. Dugger, 708 So.2d 249, 253 (Fla. 1997); Turner v. Dugger, 614 So.2d 1075, 1079 (Fla. 1992).

Based on the foregoing, the state urges this court to deny the claim as procedurally barred.

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[3] Trial commenced on May 1 - 4, 1990, the sentencing phase was on May 16 - 17, 1990 and sentencing was held on June 25, 1990. This Court's opinion in Campbell issued on June 14, 1990 and rehearing was denied on December 13, 1990. Atwater's sentencing on June 25, 1990, preceded the Campbell opinion becoming final, after rehearing.

ISSUE XVI

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

Atwater's next claim, a challenge to the facial validity of the death penalty statute, clearly could have been raised on direct appeal. It must be denied as procedurally barred. Jennings v. State 583 So.2d 316, 322 (Fla. 1991) In addition, claims relating to jury instructions are consistently rejected in collateral proceedings as they should be raised both at trial and on direct appeal. See, Johnston v. Dugger, 583 So.2d 657, 662-663, n. 2 (Fla. 1991); Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988) ("Because a claim of error regarding the instructions given by the trial court should have been raised on direct appeal, the issue is not cognizable through collateral attack"). No relief is warranted.

Moreover, this claim has consistently been rejected on the merits. Blanco v. State, 706 So.2d 7 (Fla. 1997); Williamson v. State, 681 So.2d 688, 698 (Fla. 1996); Thompson v. State, 619 So.2d 261, 267 (Fla. 1993); Thompson v. State, 553 So.2d 153 (Fla. 1989).

Atwater adds to this issue that electrocution is cruel and unusual punishment. This claim is also barred as a claim that could have been raised on direct appeal. This Court has also disagreed with this contention. Pooler v. State, 704 So.2d 1375

(Fla. 1997); Jones v. State, 701 So.2d 76 (Fla. 1977). Furthermore, this claim is waived because Atwater only gets execution by electrocution, if he elects it over lethal injection. See, Stewart v. LaGrand, 526 U.S. 115 (1999)(Inmate sentenced to death waived claim that execution by lethal gas violated Eighth Amendment's prohibition of cruel and unusual punishment by choosing to be executed by lethal gas rather than lethal injection, where state law provided inmates with choice of execution by lethal gas or lethal injection, and made lethal injection the default form of execution.)

ISSUE XVII

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

This claim is essentially a repetition of Issues III and IX in which Atwater claims he was not present at pretrial hearings and did not meet with defense counsel prior to depositions. For the foregoing reasons, this claim was correctly denied.

Atwater adds to this claim a contention that trial counsel "did not allow for any meaningful relationships to exist between counsel and their client." Initial Brief of Appellant, pgs.91-92. The U.S. Supreme Court has rejected that a defendant is entitled to any "meaningful relationship" with counsel. Morris v. Slappy, 103 S. Ct. 1610 (1983).

As Atwater has not demonstrated any new claim of ineffectiveness of counsel in this claim, it was correctly denied.

ISSUE XVIII

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

Atwater's next claim asserts that the combined effect of all alleged errors in this case warrants a new trial and/or penalty phase. This cumulative error claim is contingent upon Atwater's demonstrating error in at least two of the other claims presented in his motion. For the reasons previously discussed, he has not done so. Thus, the claim must be rejected because none of the allegations demonstrate any error, individually or collectively. Although this may be a legitimate claim on the facts of a particular case, such facts are not present herein. No relief is warranted. Melendez v. State, 718 So.2d 746, 749 (Fla. 1998)(where claims were either meritless or procedurally barred, there was no cumulative effect to consider) and Johnson v. Singletary, 695 So.2d 263, 267 (Fla. 1996)(no cumulative error where all issues which were not barred were meritless.)

ISSUE XIX

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

Atwater's next claim is that the court submitted to the jury during deliberations a copy of Judge Schaeffer's death penalty sentencing outline. This claim is similarly procedurally barred as an issue that is appropriate for appellate review.

Moreover, Atwater admits that there is no evidence to support the claim and cites to no authority for the proposition that it would be reversible error to do so. Speculation is insufficient to warrant postconviction relief. Zeigler v. State, 654 So.2d 1162, 1164 (Fla. 1995); Rivera v. Dugger, 629 So.2d 105, 107 (Fla. 1993); State v. Shearer, 628 So.2d 1102, 1103 (Fla. 1993).

Although this claim is baseless in fact and law, the state urges this Court to deny this claim as procedurally barred.

ISSUE XX

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

Atwater next asserts that the trial court erred in admitting of photographic evidence. He contends that the photographs were unduly prejudicial and that legitimate issue existed as to the victim's manner of death. Like many of the foregoing claims, this claim is procedurally barred as a direct appeal issue. Mendyk v. State, 592 So.2d 1076 (Fla. 1992)(Defendant was procedurally barred in postconviction proceeding from raising claim that trial court should not have admitted color photographs of murder victim; claim should have been raised on direct appeal.)

In order to circumvent this procedural bar, appellant asserts that counsel was ineffective for failing to object to the admission of the photographs below. Allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal. Teffeteller v. Dugger, 1999 WL 395697, 24 Fla. L. Weekly S296, (Fla. 1999)

Finally, even if this claim was properly before the Court it is without merit. Atwater has not shown that an objection to the photographs would have resulted in their being excluded from evidence. Counsel is not ineffective for failure to make a meritless objection. Parker v. State, 611 So.2d 1224 (Fla.

1992)(counsel not ineffective for abandoning objection to photograph; the failure to raise a nonmeritorious issue is not ineffectiveness.)

Subject to relevancy, introduction of photographic evidence is largely discretionary with the trial court. Preston v. State, 607 So.2d 404, 410 (Fla. 1992). Atwater's conclusion that the photographs were "inflammatory, cumulative and prejudicial" and that "there existed no legitimate issue as to the victim's manner of death or identity" is not supported by the record. The photographs taken at the scene were relevant to the victim's manner of death and identity. The photographs taken at the scene were also used as part of the State's proof that a robbery occurred. Additionally, photographs of this victim at the medical examiner's office were used to establish aggravating factor heinous, atrocious and cruel. See Atwater v. State, 626 So.2d 1325, 1329 (Fla. 1993). As the photographs were not cumulative but necessary to show the circumstances of the murder and robbery and the great number of stab wounds and that the victim was beaten prior to the stabbing, appellant has not demonstrated that the court abused its discretion in admitting the photographic evidence, nor that defense counsel had any good faith objection to make on their introduction.

This claim should be denied as procedurally barred.

ISSUE XXI

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

Atwater reraises the issue that defense counsel argued for second degree murder without consulting with him or getting his consent, which is the same claim raised in Issue I and answered therein.

Atwater does not herein explain how he is innocent of first and second degree murder in light of his own admission of his fulfilling his prior threat to kill the victim, and that he enjoyed doing it and would do it again. (TR12: 1341)

The lower court properly denied this claim.

ISSUE XXII

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

Finally, Atwater asserts that counsel was ineffective for failing to discover what he calls credible evidence to impeach Joan Camarato and testimony as to times she had seen Atwater on the days before the murder. Atwater points out that the "police inventory list contained pay slips of Mr. Atwater that would have contradicted the time line stated by Ms. Camarato." Initial Brief of Appellant, pg. 100) Atwater contends that the pay slip shows that he "was on the job site at the times stated by Joan Camarato."

To warrant an evidentiary hearing on a claim for ineffective assistance of counsel, the movant must allege specific facts which are not conclusively rebutted by the record and which demonstrate deficient performance that prejudiced the defendant. See LeCroy v. Dugger, 727 So.2d 236 (Fla.1998); Mendyk v. State, 592 So.2d 1076, 1079 (Fla.), receded from on other grounds by Hoffman v. State, 613 So.2d 405 (Fla.1992); Roberts v. State, 568 So.2d 1255, 1259 (Fla.1990); Kennedy v. State, 547 So.2d 912, 913 (Fla.1989). As Atwater has not alleged how the pay slip supports his claim or even attached the alleged pay slip, no showing of prejudice or deficient performance has been established. Gorham v. State, 494 So.2d 211,

212 (Fla. 1986); Bell v. State, 585 So.2d 1125, 1126 (Fla. 2d DCA 1991). Accordingly, this claim was properly denied.

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's order should be affirmed.

Respectfully submitted,

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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.

COUNSEL FOR APPELLEE