

IN THE SUPREME COURT OF FLORIDA

ROBERT WATERHOUSE ,

Appellant ,

v.

Case No. SC05-1404

Lower Tribunal No. CRC80-00192CFASO-A

STATE OF FLORIDA ,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the record on appeal in the instant case, which consists of two volumes, will be referred to by the Roman numeral designating the volume number and the appropriate page numbers, i.e. (RI/1-10).

STATEMENT OF THE CASE AND FACTS

In January of 1980, while on life parole for the rape-murder of 77 year-old Ella Carter, Robert Waterhouse picked up victim Deborah Kammerer at a local bar. In a savage and merciless attack, he repeatedly beat the victim with a tire iron or similar object, penetrated her anally, stuffed a bloody tampon down her throat and drug her still breathing body onto the mud flats of Tampa bay, leaving her to drown with the incoming tide. Waterhouse was indicted for Kammerer's murder in January of 1980, convicted as charged after trial in August of 1980 and sentenced to death pursuant to the jury's recommendation in September of that year. This Court affirmed the conviction and sentence on direct appeal. Waterhouse v. State, 429 So. 2d 301 (Fla.), cert. denied, 464 U.S. 977 (1983), setting forth the following facts:

The facts surrounding the crime were fully detailed in Waterhouse v. State, 429 So. 2d 301 (Fla. 1983), as follows:

On the morning of January 3, 1980, the St. Petersburg police responded to the call of a citizen who had discovered the dead body of a woman lying face down in the mud flats at low tide on the shore of Tampa Bay. An examination of the body revealed severe lacerations on the head and bruises around the throat. Examination of the body also revealed -- and this fact is recited not for its sensationalism but because it became relevant in the course of the police investigation -- that a blood-soaked tampon had been stuffed in the victim's mouth. The victim's wounds were such that they were probably made with a hard

instrument such as a steel tire changing tool. Examination of the body also revealed lacerations of the rectum. The cause of death was determined to have been drowning, and there was evidence to indicate that the body had been dragged from a grassy area on the shore into the water at high tide. The body when discovered was completely unclothed. Several items of clothing were gathered from along the shore at the scene.

The body showed evidence of thirty lacerations and thirty-six bruises. Hemorrhaging indicated the victim was alive, and defense wounds indicated she was conscious, at the time these lacerations and bruises were inflicted. Acid phosphatase was found in the victim's rectum in sufficient amount to strongly indicate the presence of semen there. Also, the lacerations in this area indicated that the victim had been battered by the insertion of a large object. The medical examiner was also able to determine that at the time of the murder the victim was having her menstrual period.

After several days of investigation the police were unable to identify the victim, so they announced the situation to the public. They then received an anonymous telephone call simply informing them of appellant's automobile tag number and advising them to investigate it.

The police also learned the identity of the victim from two of her neighbors. These two acquaintances, Yohan Wenz and Carol Byers, testified at trial that they went to the ABC lounge with the victim on Wednesday night, January 2, 1980. They testified that they later left the lounge and that Ms. Kammerer remained there at that time. Kyoe Ginn, who was working there as a bartender that night, testified that the victim came into the bar with a man and a woman, that they later left, that Ms. Kammerer then began talking with appellant (who was known to the witness) and that at about 1:00 a.m. appellant and Kammerer left the bar together.

On the evening of January 7, 1980, police officers asked appellant to voluntarily go with them

to police headquarters for an interview. At this time he said that he did not know any girl named Debbie and that he went to the ABC lounge on January 2 but did not leave with a woman. After this interview appellant was allowed to leave but his car was impounded for searching pursuant to warrant. The automobile was searched on January 8 and appellant was arrested on January 9.

Detective Murry and Hitchcox arrested appellant. In the car on the way to the police station, after advising appellant of his rights, Hitchcox asked him, "We were right the other night, weren't we, when we talked to you about being involved in this case?" Appellant responded simply, "Might." Shown a picture of Deborah Kammerer, appellant this time admitted that he did in fact know her.

On the afternoon of January 9, the detectives again interviewed appellant. Detective Murry testified concerning this interview. She said that appellant became emotionally upset and said repeatedly that his life was over, that he was going to the electric chair. He said that he wanted to talk to his interviewers as people and not as police officers. He then said that he had some personal problems with alcohol, sex, and violence.

The two detectives interrogated appellant again on January 10. Again appellant said he wanted to talk to them as people rather than as police officers. Detective Murry testified that appellant again indicated that he experienced a problem involving sexual activity. He said that when he drinks a lot, it is like something snaps and he then finds himself doing things that he knows are terrible and bad, and that he cannot control his behavior on such occasions. Appellant also told the officers that when he wanted to engage in sexual activity with a woman but learned that she was having her menstrual period, he would become frustrated and angry and that this is what had happened the previous Wednesday night. He also said that he had had a lot to drink on Wednesday night.

Inspection of the interior of appellant's car revealed the presence of visible blood stains, and a

luminol test revealed that a large quantity of blood had been in the car but had been wiped up. Analysis of the blood in the car and comparison with known blood samples of appellant and the victim revealed that the blood in appellant's car could have come from the victim but was not appellant's blood.

A forensic blood analyst testified that it is possible through analysis of blood stains on certain surfaces to make estimates concerning the direction and velocity of motion of the blood making the stains. This witness concluded from her analysis that the blood in appellant's car was deposited in the course of a violent attack.

A forensic hair analyst testified that hairs found in appellant's car were consistent in their characteristics with known hair samples from the victim.

A forensic fiber analyst testified that fibers found in the debris adhering to the victim's coat were similar to fibers from the fabric of the seat cover in appellant's car. Also, fibers were found in the car that had the same characteristics as fibers from the victim's coat and pants.

Appellant was employed as a plaster and drywall worker. His foreman testified at trial that on the morning of January 3, appellant arrived at work asking for the day off. He appeared to have a hangover and said he was feeling rough. The witness said that at this time appellant had scratches on his face. The witness also said that appellant had told him that he liked anal intercourse and liked being with women who allowed themselves to be hit and slapped.

Id. at 302-04

In 1985 Waterhouse filed a Motion to Vacate in the trial court attacking his conviction for first degree murder and death sentence and concurrently sought similar relief by filing a Petition for Habeas Corpus in this Court. This Court denied

relief as to the guilt phase but granted a new sentencing phase based upon the belief that Waterhouse had not been given the opportunity to present evidence of nonstatutory mitigation. Waterhouse v. State, 522 So. 2d 341 (Fla. 1988).

At the 1990 resentencing, the state presented evidence of the instant conviction. Additionally, the state established that the defendant had been previously convicted of a violent felony - the 1966 murder of 77 year old Ella Mae Carter and that he was on parole for that crime at the time he murdered Deborah Kammerer. Detective Halle vividly recalled the scene when on February 11, 1966 he arrived at Carter's residence in Greenport, Long Island. He found the elderly victim lying on her bed severely beaten and covered in blood. She had bruises over her face, neck, shoulder, elbows and abdomen and had defensive wounds on her hands. Her dentures were broken. An autopsy revealed she had been strangled; there was bruising of the strap muscles of the neck and her hyoid bone and larynx were fractured. She had six broken ribs on her right side and four on her left. Waterhouse's bloody fingerprints were found on a pane of glass he had broken in exiting the residence after the crime and on a beer can left on top of the refrigerator. He pled guilty to second degree murder and was sentenced to life in prison.

At the insistence of Waterhouse, no mitigating evidence was presented although his attorney was prepared to do so. Waterhouse also insisted on making a closing argument, waiving his right to have argument by counsel. At his 1990 resentencing, a new jury recommended a sentence of death which the judge again imposed. The sentence was affirmed by this Court. Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992). After certiorari review was denied in the United States Supreme Court, Waterhouse once again sought collateral review of his conviction and sentence in circuit court. On January 22, 1998, the Honorable Judge Beach summarily denied the motion. This Court subsequently affirmed the denial of the collateral motion, as well as the state habeas filed by Waterhouse. Waterhouse v. State, 792 So. 2d 1176 (Fla. 2001) and Waterhouse v. Moore, 838 So. 2d 480 (Fla. 2002).

The Rule 3.853 Motion

On September 29, 2003, Waterhouse filed a Motion for Postconviction DNA Testing seeking testing of blood found in Waterhouse's vehicle, blood found on Waterhouse's clothing, serology evidence from the victim at the autopsy, the victim's clothing and hair evidence. (RI/1-9, Motion for Postconviction DNA Testing) The state responded that even though the state may not agree that the defense has met all of the requirements of

Rule 3.853 and F.S. 925.121 it had no opposition to voluntarily submitting additional evidence to FDLE for DNA testing if relevant, available evidence can be identified, but that no evidence remained for testing, in the instant case. (RI/10-28, Response to Defendant's Motion for Postconviction DNA Testing) A hearing was held on the motion on April 15, 2005 before the Honorable R. Timothy Peters. (RII/126-188)

At the hearing, defense counsel conceded that the evidence in question had been destroyed and that there was no evidence to be submitted for DNA analysis. (RII/141) Nevertheless, counsel requested an evidentiary hearing as to the circumstances surrounding the destruction of the evidence to determine if there was bad faith in the evidence being destroyed. (RII/133, 140) The state objected asserting that such an inquiry was beyond the scope of Rule 3.853. (RII/135, 138) On May 5, 2004, Judge Peters issued an Order finding Waterhouse's motion to be facially sufficient, ordering an evidentiary hearing into the circumstances surrounding the destruction of the evidence. (RI/29-30)

The state took an interlocutory appeal seeking reversal of the Circuit Court's Order alleging that the lower court departed from essential requirements of the law by ordering an evidentiary hearing to determine the circumstances surrounding

the destruction of physical evidence where all of the parties agree that no evidence exists to be tested as the hearing is not authorized by Rule 3.853 and appears focused on resolving an unmade allegation of bad faith. This Court dismissed the petition without prejudice on November 3, 2004. Waterhouse v. State, 888 So. 2d 623 (Fla. 2004) The case proceeded to an evidentiary hearing.

Evidentiary Hearing

On April 15, 2005, an evidentiary hearing was conducted on the destruction of evidence. At this hearing, defense counsel Norgard conceded that the destruction of evidence was discovered in 1989¹ and that he was not alleging bad faith. (RII/134) He nevertheless, asserted that even where the destruction is inadvertent there can be a due process violation. The state objected that due process/bad faith issues were not properly before the court in a Rule 3.853 proceeding. (RII/135) Defense counsel stipulated to the exhibits attached to the state's response and presented the following witnesses. (RII/133)

Teressa Craft testified that she is a court evidence specialist in the Clerk of the Circuit Court. (RII/143) She

¹ This discovery was made during preparation for the resentencing proceedings resulting from this Court's 1988 opinion reversing and remanding for a new penalty phase. Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988).

started working in the clerk's office in 1979. In 1983, 1988, and 1989 she was in the appellate section. (RII/144) She was not familiar at all with the procedures used for preserving evidence in the 1980's. (RII/147) Ms. Craft testified that during her tenure at the Clerk's office neither she nor anyone else to her knowledge ever attempted to destroy evidence in bad faith that was believed to be useful in a case. (RII/149)

She did a historical search for the limited records they were able to find. She did not find a certificate of concurrence from the State Attorney. (RII/150) Craft explained the significance of a certificate of concurrence, as follows:

...when the list is originally drawn up, cases that are to be destroyed or that are being put forth for destruction, that list is submitted to the State Attorney so that they can scratch off or scratch out any case that they don't want destroyed for some reason that they may know or have reason to know that we know nothing about. And so when they do that, when they go through and scratch off certain cases, those ones are eliminated from our list. And, when they're done doing that, they sign a little sheet of paper that just says that they now concur with the list that they have edited. (RII/151-152)

Craft testified that the events of the destruction of the evidence in this case coincided time-wise with the relocation of the criminal courts from the Clearwater and Saint Pete courthouses to the criminal complex. When the clerk's office moved in April of 1982, they did not bring all of the evidence

that was downtown at that time. They were going to bring it out only as needed. Therefore about a year later they started a clean-up, destruction process and that's when that list was made and submitted to Judge Beach for an order. It took them a few more years to get everything done and cleaned up and destroyed. (RII/152-54)

Linda Kaye Thompson, manager of the circuit court records department, explained that when Criminal moved from the Clearwater courthouse to a different facility, the old evidence remained in Clearwater until it could be determined if it could be destroyed. The idea was if they were going to destroy some of the evidence that was no longer needed there was no point in moving it to a different facility. (RII/163)

The director of the court services division over the court area encompassing civil, criminal, probate, etc, Sandra Kumby, told her that some of the evidence for the Waterhouse case was in criminal, but it appeared that other evidence had been destroyed. The Waterhouse case number was on the certificate of compliance for the destruction, but Kumby asked her to look into it to see if the evidence actually had been destroyed. (RII/163-65)

She went to the evidence area and spoke with some of the clerks who had assisted with the destruction. At that time,

they did a search trying to locate the working list and discovered that the recorded order included information different from the order we worked from and that Case Number 80-192CFASO has been deleted from the recorded order. (RII/166)

The destruction of the evidence in Mr. Waterhouse's case took place on September 27, 1988. She knew because she signed the certificate of compliance. They had a staging area where the evidence that was being destroyed was kept. They went through the list, case by case, to be sure that they had every case that was on that list before they turned it over for destruction. State's Exhibit Number 2 (RII/123) is the certificate of compliance with the list they used attached. The title of the list is "List of Evidence Destroyed, September 27, 1988." On page three of that list is a reference to Case Number 80-192, Robert B. Waterhouse. (RII/170-72)

In response to defense counsel's question about the possible motive of the destruction, whether it be intentional or whether it be in bad faith or whether it be inadvertent or whether it be a mistake, Thompson believed it to be a mistake. (RII/176)

On cross, Thompson explained that the list which includes the Waterhouse case was attached to her memo in State's Exhibit 3. She indicated that it was provided to her by the clerks

working in the evidence area. (RII/177) She also explained that the people in 1988 that were actually destroying the evidence weren't necessarily the same people in 1983 that had compiled the list. The name Waterhouse meant nothing to her or the people assisting her and to her knowledge, no one was even aware that this was a capital case. She could think of no motive that any of the people working under her would have to destroy evidence in a capital case. (RII/179-80)

The lower court issued an order on April 19, 2005 denying the motion. The court made extensive factual findings based on the evidence and exhibits presented at the evidentiary hearing. The court concluded that the destruction of the physical evidence in this case which may have contained DNA was inadvertent and that there was nothing to infer bad faith in that destruction. (RI/47-49)

Waterhouse then, *for the first time*, requested a new trial in an Amended Motion for DNA testing filed on May 12, 2005. (RI/53-57) The lower court denied the amended motion on June 2, 2005, finding that the evidence had been inadvertently destroyed and reversing the prior determination that the motion made sufficient allegations under Rule 3.853. After reviewing the motion, the record and the law, the court concluded that the motion was *insufficient* on its face. (RI/61) A subsequent

rehearing was denied in part and granted in part. A corrected order denying the rule 3.853 motion was filed on July 6, 2005.

(RI/85)

This appeal ensued.

SUMMARY OF THE ARGUMENT

The lower court properly denied Waterhouse's Rule 3.853 motion after Waterhouse conceded no evidence existed to be tested. Further, as Waterhouse concedes that the destruction of evidence was inadvertent and he has failed to establish that the evidence had apparent exculpatory value, his due process claim was properly denied.

ARGUMENT

ISSUE

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S
RULE 3.853 MOTION AND REQUEST FOR A NEW
TRIAL BASED ON A VIOLATION OF DUE PROCESS
UNDER ARIZONA V. YOUNGBLOOD.

Waterhouse challenges the lower court's denial of his Rule 3.853 motion based on a finding that the motion was legally insufficient. Waterhouse also disputes the court's finding that there was no due process violation. He contends that even though there was no evidence of bad faith, this case presents an exception to the rule requiring a showing of bad faith to find a due process violation in a destruction of evidence case.

The state maintains that the lower court did not abuse its discretion in denying Waterhouse's request for a new trial based on the destruction of evidence in this case.² In fact, the *only* error that occurred below was the decision to go forward with an evidentiary hearing to determine the circumstances surrounding

² The standard of review for a motion for new trial is an abuse of discretion. Gonzalez v. State, 745 So. 2d 542, 543 (Fla. 4th DCA 1999) (stating that a motion for new trial is directed to the sound discretion of the trial court and that its rulings will not be disturbed absent a clear showing of abuse); Chatmon v. State, 738 So. 2d 970, 971 (Fla. 2d DCA 1999) (recognizing that the trial court is vested with broad discretion in deciding whether to grant a motion for new trial); United States v. Riley, 211 F.3d 1207, 1208 (11th Cir. 2000) (noting that appellate court reviews the trial court's denial of this motion for abuse of discretion).

the destruction of the evidence and the question of bad faith. Rule 3.853 clearly requires a threshold showing that evidence exists to be tested. A motion cannot be facially sufficient if it concedes no evidence exists and should be denied without further inquiry.³ Rule 3.853 does not provide a vehicle for an evidentiary hearing into a bad faith destruction of evidence claim.

Nevertheless, the state is asking this Court to affirm the lower court as no purpose would be served in requiring further proceedings on this issue. The state also requests that this Court make it clear in the instant case and for all of those cases that are to follow, that Rule 3.853 is limited to considering claims where a defendant actually has evidence to be tested and can assert that it would lead to his exoneration. If such testing leads to a claim that can be reviewed in a motion to vacate, then it should proceed under the proper rule. See Moore v. State, 903 So. 2d 238, 239-240 (Fla. Dist. Ct. App. 2005) (finding that Rule 3.853 presents no occasion to rule on a Youngblood claim and that a Rule 3.853 proceeding ends in one of two ways: Either the court denies the request for DNA testing or the court orders DNA testing. If the court orders DNA testing

³ Notably, the lower court ultimately revisited the determination that the motion was legally sufficient and reversed the earlier finding of sufficiency. (RI/85-92)

and the results are favorable to the convicted person, he or she may file a motion to vacate pursuant to rule 3.850 (or rule 3.851 in death penalty cases.) A properly filed Rule 3.851 motion will provide the state an opportunity to assert and develop any factual, legal or procedural defenses to the claim. For example, any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence. Glock v. Moore, 776 So. 2d 243, 251 (Fla. 2001). Thus, if Waterhouse had presented a Rule 3.851 motion asserting a newly discovered evidence claim based on the destruction of the physical evidence obtained in this case, the state could and would have asserted that the claim does not qualify as newly discovered evidence. Information that the evidence was destroyed has been available since 1989. Thus, with due diligence counsel could, and probably did, discover that the physical evidence no longer existed. Accordingly, this claim would be procedurally barred in a motion for postconviction relief.

This Court has gone to considerable lengths to fashion procedures for review of these claims. These procedures provide the proper framework to consider the complex issues at hand and

capital defendants, as well as others, should be directed to properly present their claims.

Notwithstanding the foregoing, the trial court's ultimate denial of Waterhouse's request for a new trial after making the findings required by Rule 3.853 (c)(5) was not an abuse of discretion and, as the following will show, Waterhouse is not entitled to relief.

As previously noted, Waterhouse concedes that there is no evidence of bad faith. He contends, however, that even though there was no evidence of bad faith, this case presents an exception to the Arizona v. Youngblood, 488 U.S. 51 (1988), requirement of a bad faith showing. The "exception" argument is based solely upon the concurring opinion of Justice Stevens in Arizona v. Youngblood and Illinois v. Fisher, 540 U.S. 544, 547-48 (2004). Notably, Youngblood addresses only the destruction of evidence *pretrial* and Justice Stevens' sole concern was for those cases where a defendant may lose the right to a fair trial when exculpatory evidence may be lost. A number of courts have recognized that the United States Supreme Court has not extended Youngblood to collateral proceedings. See Lovitt v. True, 403 F.3d 171, 187 (4th Cir. 2005) (noting that evidence discarded *after trial* had concluded and the Supreme Court of Virginia had affirmed conviction, departs significantly from the Youngblood

line of cases which instead involved *pre-trial* destruction of evidence); Ferguson v. Roper, 400 F.3d 635, 638 (8th Cir. 2005) (distinguishing Youngblood as concerning pretrial destruction versus destruction of evidence which existed until long after the trial and finding it to be "evidence undiscovered by the defense, not evidence unavailable to the defense.")

Obviously, at the time of the evidence destruction, Waterhouse had already been convicted and his conviction affirmed. Waterhouse cannot cite to any case where a due process violation has been found based on the inadvertent destruction of evidence *after* there has been a fair trial and conviction. Accordingly, there is no legal support for his contention and the argument was properly rejected.

Further, to obtain relief under Youngblood, Waterhouse must also establish that the clerks who ordered the *concededly inadvertent* destruction of evidence believed the evidence to be material and that it would exonerate the defendant. King v. State, 808 So. 2d 1237, 1242 (Fla. 2002).

As this Court in Guzman v. State, 868 So. 2d 498, 509-510 (Fla. 2003), explained:

Under Youngblood, bad faith exists only when police intentionally destroy evidence they believe would exonerate a defendant. Youngblood explained that the "presence or absence of bad faith . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was

lost or destroyed." Id. at 57 n.*. Evidence that has not been examined or tested by government agents does not have "apparent exculpatory value" and thus cannot form the basis of a claim of bad faith destruction of evidence. See id. at 57 (rejecting a due process claim based on the government's failure to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant"); see also King v. State, 808 So. 2d 1237, 1242 (Fla. 2002) (holding that a defendant failed to show bad faith on the part of the State in destroying hair and tissue evidence, in part because the defendant failed to show the police made a "conscious effort to prevent the defense from securing the evidence"); Merck v. State, 664 So. 2d 939, 942 (Fla. 1995) (holding that the defendant failed to show bad faith in a police detective's failure to preserve a pair of pants found at a crime scene, because the detective believed they did not have evidentiary value).

Guzman argues that bad faith exists because the police destroyed the hair evidence in violation of established practices and procedures. However, under Youngblood and this Court's precedent, *the determination of bad faith does not turn on whether law enforcement officers followed established procedures. Instead, bad faith exists only when law enforcement officers intentionally destroy evidence they believe would exonerate a defendant. See Youngblood*, 488 U.S. at 57. *Guzman has not shown that the hair sample from the murder scene would exonerate him, or that police officers ever believed it might.* To the contrary, the evidence shows that police officers believed the hair evidence was irrelevant to solving the case. The lead detective testified at the rule 3.850 hearing that she believed the clump of hair was the victim's since the victim's skull had been cut multiple times, the clump of hair appeared to have been cut, the hair was bloody, and the clump of hair matched the victim's hair color. The detective stated that she believed the hair sample was not significant to the case.

Thus, as in Merck, the police officers in this case believed that the destroyed evidence had no

evidentiary value. *Guzman has not shown that any State actor intentionally deprived him of evidence which the State actor believed to be exculpatory.* Guzman asserts that if the hair sample had been tested, the result of the test might have exonerated him; however, the destruction of evidence that, if tested, might have exonerated Guzman is not sufficient under Youngblood to establish a due process violation. Guzman's claim of bad faith destruction of evidence must fail.

Guzman, at 509-510 (emphasis added)

Waterhouse not only failed to establish that the clerks knew of the exculpatory nature of the evidence, he failed to establish that they were even aware of the type of case or evidence being destroyed. Thus, as in Guzman, the bare assertion that if the evidence had been tested, the result of the test might have exonerated him, is not sufficient under Youngblood to establish a due process violation.

The only argument that Waterhouse puts forward in support of his contention that the evidence could exonerate him refers to the possibility that *if* he could establish that the hair and blood belonged to someone other than the victim, it might have produced an acquittal. The lower court addressed this argument, stating:

13. While the Defendant's motions for DNA testing fail to sufficiently specify exactly which items will yield what results if tested, or how those results would tend to "exonerate" the Defendant, another of Defendant's prior appeals lends its facts to this question. In Waterhouse v. State, 792 So.2d 1176, (Fla.,2001) the following may be found:

Waterhouse specifically asserts that David Van Buren and Randy Winstead would have testified that on two separate and unrelated occasions they entered the defendant's vehicle while bleeding due to cuts and being involved in fights, thereby providing an undiscriminating reason for the blood that was found in Waterhouse's vehicle. Evidence that the blood found in the defendant's car came from another source is clearly a matter relating to the defendant's guilt. Moreover, David Van Buren was actually presented as a witness for the State, and was cross-examined by defense counsel regarding the cut on his leg which caused him to bleed inside the defendant's car. Therefore, as the claim pertains to Van Buren, it is clearly refuted by the record.

Waterhouse v. State, 792 So.2d 1176, 1183 (Fla.,2001).

14. Thus, it appears that the main thrust of Defendant's motion would be to prove the blood splattered around the inside of his car, while human, was not that of the victim. Again, being familiar with the facts of this case, and in light of the other evidence, even if DNA testing proved the blood splattered throughout Defendant's car was to be other than that of the victim, this would not exonerate Defendant. See, Cole v. State, 895 So.2d 398 (Fla. 2004) (allegations of motion did not rise to a reasonable probability of acquittal or lesser sentence).

(RII/64-65)

The record clearly supports this finding and, as Waterhouse has failed to meet any of his burdens with regard to the due process claim, the lower court properly denied the motion.

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's denial of Waterhouse's Rule 3.853 motion 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 the Honorable R. Timothy Peters, Circuit Judge, 14250 49th Street North, Chamber 5, Clearwater, Florida 33762; to Robert A. Norgard, Esq., P.O. Box 811, Bartow, Florida 33831-0811; and to Douglas E. Crow, Assistant State Attorney, P.O. Box 5028, Clearwater, Florida 33758-5028, this 24th day of February, 2006.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR APPELLEE