IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,103

ROBERT B. WATERHOUSE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Waterhouse's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied all claims and denied an evidentiary hearing on all claims. The following symbols will be used to designate references to the record in the instant case:

"R." -- record on direct appeal to this Court;

"PC-R." -- record on 3.850 appeal to this Court;

"PC-SR." – supplemental record on 3.850 appeal to this Court;

"T." -- transcript of the hearings held.

REQUEST FOR ORAL ARGUMENT

Mr. Waterhouse has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to present the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Waterhouse through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

The Circuit Court of the Sixth Judicial Circuit, Pinellas County, entered the judgments of conviction and sentence under consideration. Mr. Waterhouse was charged by indictment dated January 31, 1980 with first degree murder (R. 16,17). He pled not guilty and was tried by a jury on August 25-31, 1980. The jury rendered a verdict of guilty (R. 389). After a penalty phase held on September 3, 1980, the jury by a vote of 12-0 recommended death (R. 390).

The trial court accepted the recommendation of the Jury and sentenced Mr. Waterhouse to death (R. 2305). Thereafter, on September 15, 1980, the trial court entered written findings of fact in support of the sentence (R. 408, 409). On direct appeal, the Florida Supreme Court affirmed Mr. Waterhouse's conviction and sentence. Waterhouse v. State, 429 So.2d 301 (Fla. 1983), cert. denied, 464 U.S. 977, 104 S. Ct. 415, 78 L. Ed. 2d 352 (1983).

Mr. Waterhouse subsequently filed a motion to vacate judgments of conviction and sentence with the lower court, and a writ of habeas corpus with the Florida Supreme Court.

The lower court denied Mr. Waterhouse's motion to vacate. The Florida Supreme combined the appeal from the denial of the motion to vacate and the writ of habeas corpus. The Florida Supreme Court addressed the ineffective counsel issues as to the guilt phase, but held issues relating to penalty phase as moot since it granted habeas corpus relief and ordered a new sentencing. Waterhouse v. State, 522 So.2d 341 (Fla. 1988).

The re-sentencing proceedings were begun on March 19, 1990 (RS. 188). On March 21, 1990 the jury voted 12-0 and returned an advisory sentence of death (RS. 856). The judge followed the recommendation of the jury and imposed a death sentence on April 11, 1990 (RS. 870-71).

On direct appeal, the Florida Supreme Court affirmed Mr. Waterhouse's sentence. Waterhouse v. State, 596 So.2d 1008 (Fla. 1983), cert. denied, 113 S. Ct. 418 (1992).

By his motion for Fla. R. Crim. P. 3.850 postconviction relief filed on November 1, 1994, Mr. Waterhouse asserted that his conviction and sentence of death were obtained in violation of the Fourth, Fifth, Sixth, Eighth, and

Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution.

The postconviction motion was subsequently denied without an evidentiary hearing on any issues by the Honorable Judge Beach on January 22, 1998. A motion for rehearing was filed on February 2, 1998, and it was denied on February 9, 1999. This is an appeal from the summary denial of that motion for the reasons set forth below.

SUMMARY OF ARGUMENT

1. Mr. Waterhouse was denied due process, effective assistance of counsel, and equal protection under the law by the following failures of both the lower court and counsel. The lower court failed to provide an evidentiary hearing, and counsel failed to investigate and prepare the case, failed to make the closing argument, failed to rebut aggravating factors, failed to object to the use of incriminating statements made by Mr. Waterhouse, failed to object to improper and prejudicial comments by the prosecutor, failed to impeach a key state witness, failed to move to recuse the trial judge, failed to argue mitigation that was established, failed to object to the prosecutor making false statements to the jury, failed to object to comment about Mr. Waterhouse's right to remain silent and failed to object to comments which diminished the jury's sense of responsibility.

2. The trial judge was prejudiced against Mr. Waterhouse and predisposed to sentence him to death.

3. Mr. Waterhouse was denied a competent and

appropriate mental health evaluation and an individualized sentencing.

4. Mr. Waterhouse's jury was given instructions which shifted the burden to Mr. Waterhouse to prove that death was not the proper sentence, and the judge used the same improper standard to sentence him to death.

5. Mr. Waterhouse's penalty phase proceedings were replete with procedural and substantive errors which when considered as a whole deprived him of a fair and impartial resentencing.

6. The capital sentencing statute of Florida is unconstitutional on its face and as applied since it fails to prevent the arbitrary and capricious imposition of the death penalty and violates cruel and unusual punishment prohibitions.

7. The jury and the judge at Mr. Waterhouse's re-sentencing improperly considered non-statutory aggravating factors.

8. At Mr. Waterhouse's re-sentencing the prosecutor erroneously stated that sympathy was an improper

consideration in determining the proper sentence.

9. Mr. Waterhouse’s jury was given jury instructions which unconstitutionally diluted their sense of responsibility for sentencing.

10. During Mr. Waterhouse's penalty phase, the jury was mislead and incorrectly informed about it’s function at capital sentencing.

11. The Florida statutes used in Mr. Waterhouse’s re-sentencing regarding aggravating factors is facially vague, overbroad, and does not provide for adequate narrowing instructions to the jury.

12. Mr. Waterhouse’s sentence rests upon an unconstitutional automatic aggravating circumstance.

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. WATERHOUSE’S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AT PENALTY PHASE WITHOUT AN EVIDENTIARY HEARING.

Mr. Waterhouse was deprived of his right to a reliable individual sentencing proceeding, and denied the effective assistance of counsel during his re-sentencing trial, in violation of his rights to due process and equal protection

under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as his rights under the corresponding provisions of the Florida Constitution.[1]

In its order, the lower court denied these claims without granting an evidentiary hearing. Mr. Waterhouse asserts that the lower court erred in failing to grant an evidentiary hearing and in summarily denying the following ineffective assistance of counsel claims alleged in the 3.850 motion:

A. FAILURE TO INVESTIGATE AND PREPARE THE CASE

Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)(failure

[1]This argument was raised in Claim III of Mr. Waterhouse's motion to vacate.

to conduct pretrial investigation was deficient performance); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc) (failure to interview potential self-defense witness was ineffective assistance); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989)(failure to have obtained transcript witness's testimony at co-defendant's trial was ineffective assistance); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses).

"In a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." Coleman v. Brown, 802 F.2d 1227 (11th Cir. 1986). Mr. Waterhouse's court-appointed counsel failed in this duty. No tactical motive can be ascribed to an attorney whose omissions are based on the failure to properly investigate and prepare. See Kimmelman v. Morrison, Chambers v. Armontrout, Nixon v. Newsome. Mr. Waterhouse's capital conviction and sentence of death are the resulting prejudice. But for counsel's errors, there is a reasonable probability of a different outcome.

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 626 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washington; Kimmelman v. Morrison.

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. Beck v. Alabama, 477 U.S. 625 (1980). The United States Supreme Court noted, in the context of ineffective

assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland v. Washington, 466 U.S. 668, 696 (1984) (emphasis added). The evidence presented in this claim demonstrates that the result of Mr. Waterhouse's trial is unreliable.

A proper review of this ineffective assistance of counsel claim would necessarily require an evidentiary hearing to determine the reasons that counsel failed to call witnesses and completely investigate the case. The failure to conduct an evidentiary hearing was error by the lower court.

In its order denying relief, the lower court held:

> Defendants allegations that defense counsel failed to adequately investigate this case prior to the trials is not supported by any factual allegations in the motion and should be denied. Further, this matter should have been raised in the initial stages of the trial and appeal and therefore is procedurally barred.

(PC-R. 1163).

Each of the lower court's findings is erroneous. First, with regard to the lack of factual allegations, the trial record itself is manifest with indications of ineffectiveness.

As Mr. Hoffman, Mr. Waterhouse's trial attorney stated:

> ... And he refused to put on anything in mitigation. Therefore, I don't know of ... **I don't have anything in mitigation to talk about**.

(PC-R. 927)(emphasis added). This statement clearly shows that Mr. Waterhouse's attorney had not completed his investigation.

Further, the record does not support the lower court's finding that the allegations in the 3.850 Motion to Vacate are not supported by any factual allegations in the motion. The motion makes allegations concerning failure of defense counsel to investigate and prepare (PC-R. 923). A

postconviction movant is entitled to an evidentiary hearing unless the motion and the record conclusively show that he is entitled to no relief. A movant's allegations must be accepted as true except to the extent that they are conclusively rebutted by the record. (*see* Valle v. State, 705 So.2d 1331 (Fla. 1997); LeCroy v. Dugger, 727 So.2d 236 (Fla. 1998); Meeks v. State, 382 So.2d 672 (Fla. 1980); Gaskin v. State, 737 So.2d 509 (Fla. 1999).

Mr. Waterhouse's allegations of ineffective assistance of counsel are not conclusively rebutted by the record. On the contrary, the record supports Mr. Waterhouse's claims and reveal the necessity for an evidentiary hearing on the issue. The relevant portions of the record pertaining to the failure of defense counsel to investigate and prepare are as follows:

(a) Motion to Withdraw Hearing (R. 199).

> **Mr. Waterhouse**: He has an investigator working with him who I gave Mr. Hoffman names of witnesses that are relevant to this case that I would like to have called. The man says he can't find them. I don't believe this.
>
> **Mr. Crow**: That's why I would like the names.

The Court: Has he given you any names?

Mr. Hoffman: We've got people we have been trying to find. My investigator hasn't found anybody relevant. I think the case for whimsical doubt can be made without some of the people we can't find. I don't think there is a problem.

The Court: If you can't find them, you just can't.

Mr. Crow: I don't know.....

Mr. Waterhouse: The State has them under their subpoena.

Mr. Crow: Judge, I don't know whom he is talking about.

The Court: Is that true?

Mr. Crow: I'm not sure judge. If that a witness I'm thinking about, he resides outside the State and is physically unable to travel and I assume his testimony is preserved in the record in some fashion. Did he use to be your employer?

Mr. Crow: I think we probably know where he is, if that's who you are looking for.

Mr. Hoffman: That's a pure guilt issue.

Mr. Crow: Im not trying to decide the issue. I've got an updated address we can supply you, were happy to do that. If there are other witnesses-you mentioned a couple. Is there another witness that.....

Mr. Waterhouse: His brother David. If Robert VanBuren can be found, he knows where his brother

is.

Mr. Crow: We could provide whatever information we have to Mr. Hoffman.

The Court: Do that.

(b) Trial Testimony:

Mr. Waterhouse: We seem to be at odds.

(R. 804).

Mr. Waterhouse: I have not had a chance to sit down and explain to him the things that I want to put forth in mitigation at the closing. He's only been up there once and we never discussed....
(R. 808).

Mr. Waterhouse: Mr. Hoffman has chosen to sell me out. As to what I feel about his representation, he's done little.

(R. 810).

Mr. Waterhouse: Because of the time I've been having with my attorney over here, the man claims he can't find...he's had these witnesses names for months and he claims he can't find them. It goes beyond me why he can't. There were numerous people- David VanBuren himself was cut and rode in my car, cut on the leg. There was Randy Winstead, who was a friend of mine, we were returning from an after hours club one time in Tampa and he got in a fight in a dirt parking lot, cut up all over the place, bleeding pretty good in a couple of other places and, obviously, blood in the car, on the car.

(R. 832).

> **Mr. Waterhouse**: My attorney would rather sell me out to the State, say's he can't find him. He can't go out there and find them. I also gave Mr. Hoffman the name of another, I only know her by her first name, claims he can't find her. She also, was in my car.

(R. 833).

> **Mr. Waterhouse**: Again, because of my incompetent counsel back here, another witness was not called. And that was another man that worked with me, that he would provide me with an alibi that I was not at the ABC Bar at the time Debbie Kammeren left. There was another witness to corroborate this; he wasn't called either.

(R. 839).

The above cited portions of the record establish that Mr. Waterhouse specifically complained about counsel's failure to locate and call witnesses on his behalf.[2] He

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[2]Counsel recognizes that the citations to the record referred to in this argument were not included in the 3.850 motion as required by the F.R.Crim P. However, the lower court's order reflects that the judge had read the entire record, and was therefore aware of the facts pertaining to the claim. For instance, in the first paragraph of the court's order, he states: . . . .and the court having considered the record . . . , Also, regarding Claim III of the Defendant's 3.850 motion, the court specifically cited excerpts from transcripts as well as attaching excerpts from the record to support the denial. It is our understanding that during the period of time that this motion was prepared, CCRC was understaffed and underfunded. In the

(continued...)

lists Robert and David VanBuren and Randy Winstead by name and outlines their testimony for the court. He further describes a female witness who was in his car and a male witness that would provide him with an alibi. It is important to note that these witnesses are not "pure guilt" witnesses as Mr. Hoffman referred to them in the motion to withdraw. These witnesses could have been called to rebut the HAC aggravating factor. One of the State's theories to establish HAC was that the victim in the case was brutally beaten in Mr. Waterhouse's car. (R. 580-85). The State attempted to bolster that theory with expert testimony concerning blood evidence found in Mr. Waterhouse's car. Witnesses that someone else other that the victim was a source of that blood would be immensely valuable in rebutting that aggravating factor. That rebuttal was particularly important because two of the aggravating circumstances in this case, that the murder was committed to eliminate her as a witness, and that the murder was

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[2](...continued)
interest of justice, counsel moves this Court to consider this portion of the record in evaluating this argument.

committed in a cold, calculated and premeditated manner, were found to be insufficient by this Court due to lack of evidence. It was therefore critically important for counsel to use all witnesses at his disposal to attack the remaining aggravating factors.

Also the lower court's finding that this claim should have been raised in the initial stages of trial and appeal is contrary to Florida law. It is not possible for an ineffective assistance of counsel claim to be raised during a trial. Furthermore, claims of ineffective assistance of counsel are generally not reviewable on direct appeal, but are properly raised in a motion for postconviction relief. (*see* Kelly v. State, 486 So.2d 578 (Fla. 1994); Healy v.State, 556 So.2d 488 (Fla. 2d DCA 1990); Cumper v. State, 506 So.2d 89 (Fla. 2nd DCA 1987); Loren v. State, 601 So.2d 271 (Fla. 1st DCA 1992). Since ineffective assistance of counsel claims are generally not reviewable on direct appeal, the claim is not procedurally barred for postconviction review. Mr. Waterhouse is entitled to a hearing on the issues raised.

B. FAILURE TO MAKE A CLOSING ARGUMENT

At Mr. Waterhouse's re-sentencing trial, the judge was under the impression that he had to permit Mr. Waterhouse to take part in his own closing argument:

> THE COURT: Well, I've already made for the record a statement that I think that he would harm himself by doing that [making closing argument] and he now has effective counsel. I think I would create more error by saying that he can get up and intentionally harm himself by making an inadequate closing argument when he has effective assistance of counsel...I don't mind. By the time this case gets back, I'll be retired. So, we'll let him testify. We'll let him make his statement. He can say anything he wants. I won't be here.

(RS. 747).[3]

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[3]However trying a case may become, a duty rests "[u]pon the trial judge . . . [to] see[] that the trial is conducted with solicitude for the essential rights of the accused." Glasser v. United States, 315 U.S. 60, 71, 62 S. Ct. 457, 86 L. Ed. 680 (1942). In determining whether counsel should be provided to the accused, "*a judge must investigate as long and as thoroughly as the circumstances of the case before him demand*." State v. Chavis, 31 Wash. App. 784, 644 P.2d 1202, 1205 (1982) (emphasis in original) (quoting Von Moltke v. Gillies, 332 U.S. 708, 723-24, 68 S. Ct. 316, 92 L. Ed. 309 (1948)). It must be said that the trial court in this case took a slightly cavalier approach to the issue of Mr. Waterhouse's counsel. Judge Beach twice repeated that whether the case got reversed was of little concern to him, since he would have retired, and would not have to retry the case. (See, e.g., Tr. 747, 804). Actually Judge Beach was

(continued...)

Yet, Mr. Hoffman did not participate in making the closing argument as he should have to assist Mr. Waterhouse. Counsel's failure was ineffectiveness. In Waterhouse v. State, 596 So.2d 1008, 1017 (Fla. 1992), Justice Kogan made precisely this point in his dissenting opinion on the direct appeal:

> In my five years on this Court, I have read countless records in which defense counsel had far less to argue than did Hoffman, yet counsel still developed a moving and legally sound closing statement. In many instances, such attorneys have persuaded more than a few jurors to vote for a recommendation of life. I see no reason why Hoffman could not have done the same when his client asked him in open court to make the closing argument. For example, Hoffman could have argued against the existence of all or some of the aggravating factors, two of which this Court today finds inappropriate. The failure even to notice the inapplicability of these two aggravating factors, much less argue against them to judge and jury, reveals Hoffman's claims in court as an unacceptable excuse.

Waterhouse v. State, 596 So.2d 1008, 1020 (Fla. 1992)(emphasis added).

When Judge Beach asked Mr. Waterhouse what, his desires were, it was clear that Mr. Waterhouse wanted the assistance

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[3](...continued)
prejudiced against Mr. Waterhouse (See Claim V).

of counsel. However, at this point, defense counsel simply refused to give a closing argument:

> THE COURT: Is it still your desire to go forward with your own statements?
>
> * * *
>
> MR. WATERHOUSE: I would like Mr. Hoffman to do it [closing argument]; he's more articulate than myself. We seem to be at odds.
>
> THE COURT [to defense counsel]: He says he wants you to do it. Are you refusing?
>
> MR. HOFFMAN: Yes. Aside from for the record, I think that's what I have to do.
>
> What he wants me to do, I feel might be totally unethical, to go into the guilt phase issue.
>
> And he refused to put on anything in mitigation.
>
> Therefore, I don't know of -- I don't have anything in mitigation to talk about.
>
> And I can get up there and speak about things unethical and this happened before he told me what to do.
>
> And I have gone on for what he told me to do, and we may have to do this again, but we may not.
>
> THE COURT: Well, this judge won't. All right, then, he proceeds on his own.

(RS. 803-04)(emphasis added).

Counsel's objection was two-fold: First, that Mr. Waterhouse wanted to argue his innocence which counsel felt to be unethical. However, the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586 (1978), announced that a capital sentencer may not be precluded from considering in mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence less than death..." Counsel was ineffective for failing to argue whimsical or lingering doubt as a mitigating circumstance during the closing argument.

The real objection was that counsel felt there was little to say, since Mr. Waterhouse wanted only to dispute his guilt, and refused to allow the presentation of mitigating evidence. This was a strange posture for counsel to adopt, in effect saying because the evidence is weaker than it might be,

no argument should be given at all.

Judge Beach was correct in relating to counsel that he would have to just make the most of what he had:

MR. HOFFMAN: The posture I've decided to take on this, right or wrong, is that he can't force me to make what I feel is an ineffective representation in closing argument by reneging on his previous statements.

And in light of the fact that he's not allowed me to put on any mitigation case, he's absolutely not allowed any mitigation case.

So, there really isn't much to talk about. And rather than do that and make a half hearted attempt and skirt the issue of ethical bounds with regard to whether or not I can talk about the guilt issue, I would rather leave him to do what he said he wants to do, and if that turns out to be wrong and he turns out to get another trial...

THE COURT: Well, you can always talk about the seriousness of the recommendation and it requires not taking it light. That is certainly a matter that can be argued to the jury. I mean, that's...

MR. HOFFMAN: That's about the only thing; I mean, just get up and ask the jury what I did in opening statement; I can reiterate everything I said in opening.

(RS. 807-08).[4]

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[4]Trial counsel had previously made it clear that he did not want to give closing argument under any circumstances:

THE COURT: ...Are you prepared to go in his place?

MR. HOFFMAN: Judge, I think I would take the

(continued...)

The issue was never resolved: counsel had stated flatly that he refused to give the closing, and despite Judge Beach's encouragement to make the argument, he never backed off from that position. In fact, Justice Kogan in his dissenting opinion, as stated aforesaid, agreed that there was little excuse for Mr. Hoffman's refusal to do the closing argument:

> Moreover, I cannot give credence to Hoffman's assertions that his actions were so constrained by Waterhouse that he was unable to develop a closing argument. The Florida Rules of Professional Conduct give considerable latitude to defense counsel to control the technical and legal tactical issues of the case. R. Regulating Fla. Bar 4-1.2(a) & 4-1.2 (comment on scope of representation) (1991). Hoffman could have exercised this prerogative had he so chosen, thus developing some sort of closing argument of behalf of his client.

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[4](...continued)
posture that even if he would ask me to do it now, based on his previous instructions, that I couldn't do it.

And now we're riding the same horse. He told me not to do things.

And I can't jump, and I would not attempt; I would rather go with the no attempt.

(R.S. 803).

> The very fact that Hoffman sat mute while Waterhouse rambled through an unskilled and confused closing argument could be considered a damning indictment in the eyes of jurors; and for this reason alone, I believe Hoffman did not meet his obligations to his client and assisted in depriving his client of the right to counsel and due process.

Waterhouse, 596 So.2d at 1018, 1019, 1020 (emphasis added).

It is worth noting that there have been other cases when no evidence has been presented by the defense at the penalty phase of a capital trial, yet counsel has always made a closing argument. See, e.g., Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986)(argument given, although counsel's failure to present evidence amounted to ineffective assistance); King v. Strickland, 714 F.2d 1481 (1983), reinstated, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016, 105 S. Ct. 2020, 85 L. Ed. 2nd 301 (1985)(ineffectiveness found where closing argument given, after presentation of no evidence, but it was so bad that it "did more harm than good"); Blake v. Kemp, 513 F. Supp. 772, 779-81 (S.D. Ga. 1981), aff'd, 758 F.2d 523 (11th Cir. 1985), cert. denied, 474 U.S. 998, 106 S. Ct. 374, 88 L. Ed. 2d 367 (1985); United States ex rel. Kubat v. Thieret, 679

F. Supp. 788, 811 (N.D. Ill. 1988)(although argument given after presentation of no evidence, "appeal to the jurors' religious beliefs in closing argument, exhorting the jury to show compassion" insufficient to demonstrate effective assistance); People v. Jackson, 28 Cal. 264, 285, 168 Cal. Rptr. 603, 610, 618 P.2d 149, 162 (1980)(no penalty phase evidence presented, but "trial counsel argued at length . . . [regarding] mitigating factors such as the defendant's age and his cooperation with the police"); Washington v. State, 397 So.2d 285, 287 (Fla. 1981)(despite lack of mitigating evidence, "trial counsel made a respectable argument on appellant's behalf at the sentencing hearing"); see also State v. Myles, 389 So.2d 12, 30 (La. 1980)(finding counsel's performance inadequate, and listing the possible arguments which could have been made by counsel who had presented no penalty phase evidence).

In its order, the lower court denied the ineffective assistance of counsel claim for failure to make a closing argument on the basis that “[t]he Florida Supreme Court previously ruled that counsel bent over backwards to accord

the defendant all rights to which he was entitled and waived his right to have his attorney make the closing argument" (R. 1163).

The lower court's reliance on this Court's ruling is misplaced and legally incorrect. The claim made on direct appeal before the Florida Supreme Court was one of denial of counsel, not ineffective assistance of counsel. The fact that this Court held that Mr. Waterhouse was knowledgeable enough to proceed as his own counsel at closing bears no relationship to whether counsel was ineffective in refusing to make a closing argument.

Furthermore, there are factual discrepancies in the record as to counsel's reasons for failing to make a closing argument. At the pre-trial motion to withdraw counsel stated, "I think the case for whimsical doubt can be made without some of the people we can't find." Later in the trial, counsel informed the court that he would not deliver a closing argument because his client wanted him to argue whimsical/lingering doubt to the jury, and he stated,

> "So there really isn't much to talk about. And rather than do that and make a half hearted

> attempt and skirt the issue of ethical bounds with regard to whether or not I can talk about the guilt issue, I would rather leave him to do what he wants to."

(R. 807).

Obviously, there was a breakdown in the attorney/client relationship from the time of the pre-trial motion to withdraw, where counsel was willing to put forth whimsical doubt evidence, and the time of trial, where counsel refused to do so.

The record is silent as to counsel's reason for his change in position. Any meaningful review as to the viability of this ineffective assistance of counsel claim would necessarily require an evidentiary hearing to determine counsel's reasons for failing to present a closing argument. Testimony from Mr. Hoffman and Mr. Waterhouse would have to be presented for a determination of this claim.

The 3.850 motion also alleges that counsel was ineffective for failing to argue against the aggravating factors against Mr. Waterhouse. By allowing Mr. Waterhouse to deliver the closing argument, counsel deprived the jury of

defense arguments as to the aggravating circumstances alleged by the State. Even if this Court should accept counsel's refusal to make a lingering/whimsical doubt argument, there is nothing on the record to excuse counsel's refusal to argue against the aggravating factors. It was particularly important for counsel to make a closing argument as to aggravators since this Court ultimately struck down the avoiding lawful arrest, and the cold, calculated and premeditated aggravators due to insufficient evidence.

There is a reasonable probability that a skillfully delivered competent closing argument would have changed the jury's recommendation from death to life. The lower court did not address the allegation of ineffective assistance of counsel for failing to argue against the aggravating circumstances. Failure of the court to do so is a violation of Florida law. (*see* F.R.C.P. 3.850(d); ...committee note, "in any order of denial based on the insufficiency of the motion or on the face of the record, trial courts will set forth the basis of the court's ruling with sufficient specificity to delineate the issue for the benefit of

appellate courts.”). The lower court erred in failing to address and in failing to order an evidentiary hearing on this issue.

The 3.850 motion also alleges that counsel was ineffective for failing to present a closing argument concerning mitigation that was present in the record (PC-R. 934). Counsel’s stated reasons for not delivering a closing argument was Mr. Waterhouse’s alleged insistence on a whimsical/lingering doubt argument, and his alleged refusal to allow mitigation witnesses to be called to testify. Those reasons do not explain counsel’s refusal to argue mitigating factors which were developed in the re-sentencing trial such as voluntary intoxication and his extensive history of drug and alcohol abuse (PC-R. 526). The record is silent as to counsel’s reasons for failing to argue these legally recognized mitigating factors. That decision prevented the jury from hearing any defense arguments concerning mitigation. It was particularly harmful in this case since this Court struck down two of the aggravating factors put forth by the state at the re-sentencing. There is a

reasonable probability that a skillfully delivered closing argument by counsel outlining the mitigating factors supported by the record would have changed the jury's recommendation from death to life. Instead, the jury was left to consider only the aggravating circumstances due to counsel's refusal to present a closing argument. Furthermore, the lower court's order does not address the ineffective assistance of counsel claim for failing to argue the mitigating factors. The court merely cites this Court's ruling on the direct appeal denying Mr. Waterhouse's claim of denial of counsel- which is an entirely different legal issue unrelated to ineffectiveness of counsel's refusal to deliver a closing argument on the mitigating factors in the record. Failure of the court to address this issue in the 3.850 sentencing order is a violation of Florida law. (*see* F.R.C.P. 3,850(d); ...committee note, "in any order of denial based on the insufficiency of the motion or on the face of the record, trial courts will set forth specifically the basis of the court's ruling with sufficient specificity to delineate the issue for the benefit of appellate courts."). The lower

court erred in failing to address and in failing to grant an evidentiary hearing on this issue.

The 3.850 motion also alleges that trial counsel was ineffective for failing to argue before the sentencing judge the mitigation that was established during Mr. Waterhouse's initial trial and postconviction proceedings (R. 935). The mitigation included evidence of Mr. Waterhouse's childhood history; evidence of organic brain damage due to an automobile accident; evidence in the form of testimony from Dr. Berline that Mr. Waterhouse suffers from mental disorders related to his alcoholism. The findings from Dr. Berline included that Mr. Waterhouse may well have been under the influence of an extreme emotional disturbance at the time of his commission of the crimes and that Mr. Waterhouse's capacity to conform his conduct to the requirements of the law might have been impaired. Dr. Berline made specific diagnoses of episodic dyscontrol and pathological intoxication (PC-R. 128-29).

Trial counsel was free to argue these mitigating factors at the sentencing hearing before the lower court. The record

is silent as to the reasons he failed to do so. Inexplicably, the lower court based the denial of this claim in the final 3.850 order by denying relief on the basis that Mr. Waterhouse had instructed counsel not to offer any mitigation to the re-sentencing jury. This claim has nothing to do with the presentation of evidence to the re-sentencing jury, but rather it concerns failure to present mitigation existing in the record to the re-sentencing judge.

The lower court's reliance on the record of the jury proceedings in denying this claim is misplaced and contrary to Florida law. The lower court is required to specifically delineate reasons for summarily denying claims in a 3.850 motion. The lower court erred in failing to address and in failing to grant an evidentiary hearing on this issue.

C. FAILURE TO REBUT THE "IN THE COURSE OF A SEXUAL BATTERY" AGGRAVATING FACTOR

The 3.850 motion alleges ineffective assistance of counsel for failing to rebut the "in the course of a sexual battery" aggravating factor. In summarily denying this claim without an evidentiary hearing, the lower court stated:

> With respect to the allegation that defense

> counsel was ineffective because he did not rebut evidence of sexual battery on the victim, the physical evidence of sexual battery was of such graphic and verbal description by the photographs and medical examiner to defy rebuttal of its occurrence. To deny before a jury that a sexual battery had occurred would insult their intelligence. Defense counsel chose the far wiser tact of not attempting to persuade the jury that a sexual battery had not occurred and was not attributable to the defendant.

(PC-R. 1164).

> Further, the Florida Supreme Court had previously ruled on this issue in Waterhouse *v.* State, 596 So.2d at 1015 (Fla. 1992).
>
> The judge appropriately precluded Waterhouse from presenting evidence questioning his guilt. However, Waterhouse was not precluded from challenging the State's evidence that a sexual battery occurred of from presenting evidence that a sexual battery did not occur. Our review of the record indicates that the court afforded Waterhouse and his counsel considerable leeway in cross-examining State witnesses on the evidence of sexual battery.
>
> The jury was instructed on the elements of a sexual battery and informed that each aggravating factor must be established beyond a reasonable doubt. We find no error.

(R. 1163).

In a postconviction proceeding, the movant is entitled to an evidentiary hearing unless the motion and the record

show that he is entitled to no relief. A movant's allegations must be accepted as true except to the extent that they are conclusively rebutted by the record. (*see* Valle v. State, 705 So.2d 1331 (Fla. 1997); LeCroy v. Dugger, 727 So.2d 236 (Fla. 1998); Meeks v. State, 382 So.2d 672 (Fla. 1980); Gaskin v. State, 737 So.2d 509 (Fla. 1999).

In this case, the lower court did not afford Mr. Waterhouse with a proper review of the factual allegations of the claim. Instead, the lower court drew conclusions that are not supported by the record. The record is silent as to counsel's reasons for failing to challenge the sexual battery, yet the lower court reaches the conclusion that it was a strategic decision. Furthermore, the lower court did not weigh the potential witnesses that Mr. Waterhouse informed the court he had given to counsel, but were not used. He gave the names of Robert and David VanBuren as well as Randy Winstead who would have testified as to blood in Mr. Waterhouse's car. This would have rebutted the sexual battery claim. Mr. Waterhouse also informed the

court about another female witness who had knowledge of the blood in the car and a male witness that would provide him with an alibi. To properly evaluate this claim the lower court should have ordered an evidentiary hearing. At that hearing, trial counsel could have testified as to his reasons for not rebutting the State's case as to the sexual battery as well as explain his reasons for not calling the witnesses given to him by Mr. Waterhouse. Likewise, Mr. Waterhouse could have presented his witnesses to rebut the sexual battery claim. The lower court erred in failing to order an evidentiary hearing.

Trial counsel was ineffective for failing to put on evidence challenging the "in the course of a sexual battery" aggravating factor. In this case, Mr. Waterhouse was indicted for murder in the first degree (RS. 1). It was therefore true that a conviction for first degree murder had been affirmed by this Court. However, the State elected to try Mr. Waterhouse at the re-sentencing trial on the totally distinct crime of sexual battery. The prosecution was allowed to seek to prove that Mr. Waterhouse had committed a

sexual battery. The trial court instructed the jury on the elements of sexual battery (RS. 158).[5]

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[5]In the first trial, the jury was instructed (in pertinent part) that:

> Murder in the first degree is a[n] . . . unlawful filling of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any of the following crimes: arson, involuntary sexual battery, robbery, burglary, [or] kidnapping . . . .

(1980 Tr. 2198-99)(emphasis supplied). There is, of course, no way to tell with any certainty on which charge the jury ultimately rested their finding of guilt -- premeditated murder, murder in the course of sexual battery, or murder in the course of kidnapping. However, the jury found Mr. Waterhouse "guilty of murder in the First Degree as charged in the indictment filed herein." (1980 Tr. 389)(emphasis supplied). While not dispositive, it is interesting to note that Mr. Waterhouse had been indicted only for premeditated murder:

> ROBERT BRIAN WATERHOUSE . . . unlawfully and from a premeditated design to effect the death of Deborah Kammerer, a human being, did beat and choke her thereby inflicting upon her wounds and did drag the said Deborah Kammerer into the water where he left her to drown and by the means aforesaid and as a direct result thereof, the said Deborah Kammerer died.

(RS. 1)(emphasis supplied). In any event, it is impossible to say that the jury made any finding at the first phase of

(continued...)

However, the jury was instructed that guilt was not relevant:

> We've previously had a trial on that issue and another jury has determined his guilt beyond and to the exclusion of every reasonable doubt.

(RS. 241; see also RS. 214, 324).[6]

Mr. Waterhouse vehemently denied that he had committed a sexual battery -- just as he denied that he had committed the murder at all. On direct appeal, Mr. Waterhouse complained that trial counsel was not allowed to challenge the "in the course of a sexual battery" aggravating factor. The Florida Supreme Court held:

> The judge appropriately precluded Waterhouse from presenting evidence questioning his guilt. However, Waterhouse was not precluded from challenging the State's evidence that a sexual battery occurred or from presenting evidence that a sexual battery did not occur. Our review of the

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[5](...continued)
the first trial with respect to sexual battery.

[6]In addition to being simply untrue, at least with respect to the sexual battery, this had the rather obvious effect of diminished the jurors' sense of responsibility for their own tasks. For example, venire person Gonzalez candidly said that giving the death penalty would be easier because another jury had made the decision that Mr. Waterhouse was guilty (RS. 368). Mr. Martin basically agreed (RS. 414; see also RS. 379, 421).

> record indicates that the court afforded Waterhouse and his counsel considerable leeway in cross-examining State witnesses on the evidence of sexual battery. The jury was instructed on the elements of a sexual battery and informed that each aggravating factor must be established beyond a reasonable doubt. We find no error.

Waterhouse, 596 So.2d at 1015. Clearly, trial counsel was ineffective for failing to put on evidence that was available to challenge the "sexual battery" allegation.

The lower court's assertion in the 3.850 order that the Florida Supreme Court had already ruled on this issue is legally incorrect. The Florida Supreme Court only ruled that Waterhouse was not precluded from challenging the State's evidence that a sexual battery occurred or from presenting evidence that a sexual battery did not occur. The Court made no ruling or comment concerning the effectiveness of counsel in failing to do so.

The Florida Supreme Court ruled that counsel was free to fully challenge the sexual battery charge. Counsel's failure to do so is the ineffective assistance of counsel claim. The lower court's reliance on this ruling in support of denial of the claim is misplaced and constitutes

reversible error.

D. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AT THE RE- SENTENCING TRIAL TO THE USE OF ILLEGALLY OBTAINED INCRIMINATING STATEMENTS BY MR. WATERHOUSE.

The 3.850 motion contained an allegation that counsel was ineffective for failing to object at the re-sentencing trial to certain damaging statements that Mr. Waterhouse said to police such as, “Well, nobody wants to go to jail. You do what you have to do to protect Bobby Waterhouse.”

In denying this claim the lower court stated:

> With respect to the Defendant’s complaint that defense counsel was ineffective because he failed to suppress certain statements of the defendant, the Florida Supreme Court previously ruled these statements admissible. *Waterhouse v. State* 429 So.2d 307. Furthermore, these statements introduced at the sentencing phase were, if error, harmless and not critical to the jury’s recommendation of death.

(PC-R. 1165).

The lower court’s reliance on this Court’s ruling concerning the statement is misplaced. That fact is established by the following full excerpt from the Court’s ruling:

> Waterhouse challenged the admission of certain

> incriminating statements that he claims were obtained in violation of his right to counsel. While we rejected this same argument in direct appeal, *Waterhouse v. State,* 429 So.2d at 304-06, he now relies on the recent case of *Minnick v. Mississippi*,------U.S. ------, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990). Waterhouse failed to object to the admission of these same statements at re-sentencing and therefore he has waived this claim for purposes of this appeal. The admission of the statements at the re-sentencing hearing was not fundamental error which would excuse the failure to object to their admission. In any event, the statements could have had no significant impact on the jury's sentencing recommendation because Waterhouse's guilt of the murder was not at issue. *See Teffeteller,* 495 So.2d at 747. Thus, at most, the admission of these statements would be harmless error.

(PC-R. 1018).

In this case counsel could have prevented use of this damaging statement with a timely objection. The United States Supreme Court has addressed the issue in the Minnick case. There, Minnick asserted his right to counsel to his interrogators, and he told them to come back over the weekend. The Court held that the only valid confession which could be taken in counsel's absence after a request for legal assistance would arise when the accused has initiated the conversation or discussion with the

authorities.(see Minnick 111 S. Ct. 486, at 488.

In the case at bar, the circumstances of Mr. Waterhouse's statements were as follows:

> Appellant said, "I think I want to talk to an attorney before I say anything else." At this point, the officer ceased questioning him. Then, when appellant was being processed into the jail on the charge of murder, Detective Murray, asked appellant whether he would like her to come to his cell, talk to him, and answer any questions he might have. He seemed interested, so Detective Murray and Hitchkock went to talk to him at 2:00 A.M. At this point, appellant became emotionally upset and made certain statements described previously. The conversation ended when appellant said, "I think I'd like to talk to my attorney. Would you all come back tomorrow?" Then on the following day there was further interrogation eliciting statements entered into evidence.

Waterhouse, 429 So.2d at 305.

As the above record establishes, the finding by this Court that the statement was admissible was superceded by a subsequent ruling from the United States Supreme Court. It is incumbent upon counsel to research the law and make appropriate objections based upon recent Court decisions. In this case counsel was ineffective for failing to discover the United States

Supreme Court decision in Minnick, and to use it for Mr.

Waterhouse's benefit by keeping the damaging statements from the jury. The statement in question was damaging to Mr. Waterhouse because it indicated a lack of remorse and an attempt to evade lawful arrest. There is a reasonable probability that suppression of the statement would have changed the jury's recommendation from death to life. The lower court erred in denying this claim based upon this Court's opinion that has been superceded by an opinion from the United States Supreme Court.

E. FAILURE TO OBJECT TO IMPROPER AND PREJUDICIAL COMMENTS BY THE PROSECUTOR.

Mr. Waterhouse alleged in the 3.850 motion that the prosecutor made the following prejudicial comments to the jury that were not objected to by defense counsel:

> (i) But the evidence you have heard can give you the flavor for the overwhelming evidence of guilt that led to this conviction, but you also know what the jury did not know, some of the facts you know that they didnt know. They didnt know that Mr. Waterhouse had murdered Ella Carter.
>
> (ii) Whether you have the defendants blood or whether you have the victims blood; the victims and the defendants blood are almost the same thing; there is only one enzyme that separates them. Well have you heard any testimony that Robert Waterhouse got beaten with a tire iron in

> his own vehicle? Absolutely not. There is absolutely no way that the blood came from any where except Deborah Kammerers skull.

In summarily denying the allegations that counsel was ineffective for failing to object to the above comments, the lower court stated:

> The defendant's complaint that defense counsels failure to object to comments made by the prosecution during closing argument as evidence of ineffective representation by defense counsel is without merit. Neither are the prosecutor's comments objectionable, or if so, such error to warrant a new trial. Neither are the prosecutor's comments objectionable, or if so, such error to warrant a new trial. Whether or not defense counsel had successfully objected to these statement's would not have made a difference in the outcome of the jury's sentencing recommendation.

(PC-R. 1165).

The lower court's findings that the comments by the prosecutor were not objectionable is error as a matter of law. The first comment by the prosecutor listed above concerning the "overwhelming evidence of guilt" is both untruthful and prejudicial. It is improper for a prosecutor to try and sway a jury based upon what evidence a previous jury did or did not receive. Further, the prosecution should not have been able to argue the <u>degree</u> of the

defendant’s guilt. The lower court had already ruled that the defendant’s guilt had already been established and would not allow counsel to address “guilt issues.” In essence the prosecutor was allowed a “free shot” at arguing the degree of defendant’s guilt without response or rebuttal from the defense. Trial counsel was ineffective for not objecting and moving for an immediate mistrial based upon these improper arguments concerning the degree of Mr. Waterhouse’s guilt.

The second comment by the prosecutor listed above is an improper comment on the defendant’s right to remain to silent. The comments specifically referred to a lack of witnesses and testimony provided by the defense by stating, “Well have you heard any testimony that Robert Waterhouse got beaten with a tire iron in his own vehicle?”

Florida Statutory law is clear that a prosecuting attorney cannot comment on the defendant’s refusal to testify. Florida Rule of Criminal Procedure 3.250 specifically states, “no accused person shall be compelled to testify against himself or herself, nor shall any

prosecuting attorney be permitted to comment on the failure of the accused to testify in his or her own behalf."

Florida case law also establishes that remarks such as the ones made by the prosecutor in this case are fairly susceptible to being interpreted by the jury as a comment on the failure of the accused to testify. In Shelton v. State, 654 So.2d 1295 (Fla. 2nd DCA 1995), the prosecution's case against the defendant was based upon the sale of cocaine to an undercover officer. In closing argument the prosecuting attorney stated, " "Defense counsel will bring up different things about statements that were made at different times. But is there anything showing that he didn't make that sale? He was there." Id. at 1297. The court found the comments to be an impermissible comment on the defendant's right not to testify. Id. at 1297. In State v. Marshall, 476 So.2d 150, 151 (Fla. 1985), this Court found a similar comment to be reversible error-"Ladies and gentleman, the only person you heard from in this courtroom with regards to the events on November 9, 1981, was Brenda Scarrone" (a witness for the prosecution). In Halloman v. State, 573 So.2d 134 (Fla. 2nd

DCA 1991), the case against the defendant was for sale of cocaine and the prosecuting attorney played a tape recording of the transaction. In closing argument, the prosecutor stated, “there was no other female in that house when it was searched”, and “there has been no rebuttal, no evidence from the stand to say other than it was the female on that tape, or to establish that there was someone, some other female, living in that house.” Id. at 137. The Second District Court of Appeals held those comments by the prosecutor were fairly susceptible of being interpreted by the jury as comment on the defendant’s failure to testify Id. at 137.

The above statutory and case law shows that under Florida law the prosecutor’s comments were improper and constituted grounds for a mistrial. It was incumbent upon trial counsel to make a timely objection to the remarks. It is well settled Florida law that counsel’s failure to object to improper comments by the prosecution constitutes ineffective assistance of counsel. In Ross v. State, 726 So.2d 317 (Fla 2nd DCA 1998), the Second District Court of Appeal held that defense counsel was ineffective for failing

to object to comments by the prosecution in closing argument that the defense witnesses were “pathetic”, “ridiculous”, “inappropriate”, “insulting” to the jury’s intelligence, “totally ridiculous” and who had just “flat out lied”. The court held “in light of the egregious arguments made by the prosecutor, we conclude that defense counsel’s failure to object fell below any standard of reasonable assistance.” Id at 318. In Martin v. State, 501 So.2d 1313 (Fla. 1st DCA 1986), the First District Court of Appeal found that counsel was ineffective for failing to object to numerous comments by both state witnesses and by the prosecutor in closing argument directed to the appellant’s silence and her failure to fully explore her actions on the day of her husbands death. In Jackson v. State, 711 So.2d 1371 (Fla. 4th DCA 1998), the Fourth District Court of Appeals held that the trial court had committed error by denying an evidentiary hearing where counsel had failed to object to prosecution comments concerning the defendant’s post arrest silence. In Overton v. State, 531 So.2d 1382 (Fla 1st DCA 1988), the First District Court of Appeals held that the defendant was

entitled to an evidentiary hearing on the issue of ineffective assistance of counsel due to failure to object to comment by the prosecution that were reasonably susceptible of interpretation as a comment upon the defendant's right to remain silent, or which infers that a defendant has the burden of proving his innocence.

Based on the foregoing law the lower court committed error in summarily denying and in failing to conduct an evidentiary hearing on this claim.

F. FAILURE TO IMPEACH ESSENTIAL STATE WITNESS KENNETH YOUNG WITH AVAILABLE INFORMATION.

State witness, Kenneth Young, testified at Mr. Waterhouse's re-sentencing concerning an incident that occurred between Mr. Waterhouse and another inmate at the county jail. He also testified as to statements he attributed to Mr. Waterhouse. Mr. Young provided the following damaging testimony against Mr. Waterhouse.

> He sat on the other side of the kid, making much of the same comments I was, telling him how cute, and asked for.....he asked ,"How bout some of that poop-shoot"? And this went on for about five minutes.
>
> He sat up and put his arm around the boy and

> put a knife made out of a spoon up next to the boy's throat.
>
> He put it up next to the boys throat and said "How bout some of that poop-shoot".
>
> Mr. Waterhouse put his hand down the back of the boys pants and kept making remarks that "It's only a little one, it won't hurt" and such remarks as that.
>
> Yes sir. He started to jump up and down at the top rack where he was, and Mr. Waterhouse reached up and put his hands against the boy's chest and said "not you sweetheart you stay."
>
> I heard the boy say "come on, get off of me, leave me alone,please", just pleading....
>
> Mr. Young then heard Mr. Waterhouse say, " I wonder how he'd like a coke bottle up his ass, like I gave her?"

(RS. 604-617).

The 3.850 motion specifically alleges that counsel was ineffective for failing to impeach Mr. Young's testimony with available evidence. That evidence included that Mr. Young had sought favorable treatment on his pending charges in exchange for his testimony against Mr. Waterhouse. Mr. Young had two pending felony charges for attempted escape and smuggling dynamite into the jail (R. 793). Mr. Young's sentencing on the two pending charges was continued until

after Mr. Waterhouse's trial. The stated purpose of the delay was for the State to "see whether Mr. Young performed at Mr. Waterhouse's trial." (R. 801). Inexplicably, counsel for Mr. Waterhouse did not cross-examine Mr. Young concerning the deal he had made with the State on his pending charges. That was one of the allegations in the 3.850 motion.

In denying the claim, the judge in the final order stated:

> Further, with respect to the defendants claim concerning the defense counsels failure to impeach witness Kenneth Young and failure to advance a voluntary intoxication defense, these have been resolved by prior motions and appeals, or, if not raised at that time should have been and therefore are procedurally barred.

(PC-R. 1165).

The lower court's assertion that the claims had been resolved by prior motions and appeals is factually incorrect. Counsel has reviewed the prior appeals and motions and determined that this issue was not raised. Furthermore, the lower court's finding that the issue "should have been raised" in other appeals is legally incorrect. The

information concerning the “deal” struck by Mr. Young was not discovered until the postconviction process. Therefore, that claim could not have been raised on previous motions and appeals and is not procedurally barred. The lower court erred in failing to address and hold an evidentiary hearing on this claim.

G. FAILURE OF TRIAL COUNSEL TO MOVE TO RECUSE THE TRIAL JUDGE ON THE BASIS THAT HE WAS PREJUDICED AGAINST MR. WATERHOUSE.

The 3.850 Motion also alleges that counsel was ineffective for failing to move for recusal of the trial judge based upon his bias and prejudice toward Mr. Waterhouse. The trial judge had indicated his prejudice in a statement he made to the probation commission on May 28, 1981. The report stated that Judge Beach commented that Mr. Waterhouse is a dangerous and sick man and that many other woman have probably suffered because of him.

In summarily denying this claim the lower court stated:

> At no time does the record reflect that defense counsel, including present counsel, motioned the trial judge to recuse himself for bias and prejudice before this present motion was filed although the information which is the basis of this complaint was a matter of record for sixteen years

> and assumably known by defense counsel. Further, there is no allegation in the complaint to suggest the trial court conducted any motion hearings or trials in a biased or prejudicial manner toward the defendant. In fact, the Florida Supreme Court made this observation about the trial judge in *Waterhouse v. State,* 596 So.2d 1008, 1014. "Clearly, the trial court, the prosecutor, and his own attorney bent over backwards in trying to give Waterhouse the benefit of every legal right to which he was entitled."
>
> Therefore, it is the finding of this court that defendant's Claim V is without merit and should be denied as a matter of law.

(PC-R. 1166).

The lower court's stated reasons for denying this claim are insufficient and incorrect as a matter of law. The basis of the claim is that counsel failed to move for recusal based upon Judge Beach's statement to the probation commission. Yet in denying the claim the court simply states that no counsel for Mr. Waterhouse had requested his recusal. **That is the point of the ineffectiveness claim.** The fact that counsel knew about the statement for a period of years only strengthens the ineffectiveness allegation and is not a legal reason to deny the claim.

Furthermore, the trial court's reliance on this Court's

statement about “bending over backwards” to benefit Mr. Waterhouse is misplaced. This Court was only addressing the issue of Mr. Waterhouse delivering his own closing argument at the re-sentencing. That comment has no relation to the ineffectiveness allegation that counsel failed to move for the recusal of Judge Beach. This Court was not even aware of the comment by Judge Beach concerning his opinion that Mr. Waterhouse was “a dangerous and sick man and that many other woman have probably suffered because of him.” Therefore, the comments by the court are wholly irrelevant to this claim and do not provide a legal basis to issue a summary denial.

The ineffective assistance of counsel claim for failing to move for the judge’s recusal has substantial legal merit. Florida law is clear that due process under capital sentencing procedures requires a trial judge who is not predisposed to a life sentence or a death sentence but rather is committed to impartially weighing aggravating and mitigating circumstances. In Porter v. State, 723 So.2d 191 (Fla. 1998), this Court ruled that the trial judge was not

impartial based upon the following statement that he made at a deposition:

> Q. Did you indicate in the deposition that two days ago, in a reference to your disagreement with the jury's recommendation, that it was because of your inner nature that you disagreed with it?
>
> A. [By Judge Stanley]: Because I felt it should have been something else, yes, if that's what you want.
>
> Q. Well no. I mean the question is, do you recall using the words, the basis–my inner nature was your answer?
>
> A. What your trying to get me to say is–I'll just lay this out for you. I believe that if the same thing had happened, that I would have killed Mr. Porter. Mr. Porter wouldn't have had to be put to death, But if he had done that to my family, I'd have killed him.

The Court stated that "we conclude that the legal effect of this evidence is that Judge Stanley's impartiality did not satisfy the constitutional requirement that the sentencer of appellant for the first degree murder conviction be impartial and not predisposed to a sentence of either life or death." Id. at 193. In Zeigler v. State, 452 So.2d 537 (Fla. 1984), this Court also recognized that a trial judge's lack of impartiality would require a re-

sentencing if it were proven that the trial judge had told the prosecutor, “you get me a first degree murder conviction and I’ll fry the son of a bitch”.[*See also* Gordon v. State, 469 So.2d 795 (Fla 4th DCA 1985); Hayes v. State, 686 So.2d 694 (Fla. 4th DCA 1996)].

Applying the above case law to the present case, it is clear that the comments by Judge Beach are sufficient evidence that his impartiality did not satisfy the constitutional requirement that the sentencer of Mr. Waterhouse be impartial and not predisposed to a sentence of either life or death.

The comments reflect a factual finding by the judge, entirely unsupported by the evidence, that Mr. Waterhouse is a dangerous and sick man and that many other woman have probably suffered because of him. It was incumbent upon trial counsel to be aware of this comment by the judge, since it was contained in the pre-sentencing report, and to act in Mr. Waterhouse’s behalf and move for recusal of the judge. His failure to do so was ineffective assistance of counsel. The lower court erred in failing to address and

order an evidentiary hearing on this claim.

H. TRIAL COUNSEL FAILED TO ARGUE BEFORE THE SENTENCING JUDGE THE MITIGATION THAT WAS ESTABLISHED DURING MR. WATERHOUSE'S INITIAL TRIAL AND POSTCONVICTION PROCEEDINGS.

Mr. Waterhouse was granted a new sentencing proceeding because the trial court and the jury did not consider the non-statutory mitigation in his case as required by Hitchcock v. Dugger, 108 S. Ct. 1821 (1987). The Florida Supreme Court held:

> . . . At the sentencing proceeding, Waterhouse proffered evidence that he suffered from alcoholism and was under the influence of alcohol the night of the murder. He also presented evidence that despite the difficulties of being a severely abused child, he was a well behaved child until he suffered a severe head injury allegedly resulting in organic brain damage. The jurors should have been allowed to consider these factors in mitigation, but were told by both the judge and the prosecutor that it could not. For these reasons a reweighing of the aggravating and mitigating factors is required.
>
> Accordingly, we grant the writ of habeas corpus, vacate the sentence of death imposed upon Waterhouse, and remand this case to the trial court for a new sentencing proceeding before a jury, consistent with this opinion and the requirements of Lockett and Hitchcock.

Waterhouse, 522 So.2d at 344 (emphasis added).

At the sentencing hearing before the trial judge, Mr.

Waterhouse's trial attorney was free to cite the wealth of mitigation that had already been established in Mr. Waterhouse's initial trial and postconviction proceedings.

There is substantial and compelling mitigation in the record that trial counsel could have argued to the trial judge in favor for life. It would have made Mr. Waterhouse more human in the eyes of the judge and presented a background which cries out for compassion.

Mr. Waterhouse was born in Greenport, Long Island, in 1946 to Mabel and Roger Waterhouse. At age six months he went to live with his aunt, Lois, and her husband, Chet. Lois had been unable to have children, and apparently took Robert just for a while to help Mabel out, giving the latter her dining room set when the situation became more permanent so that there would be a room for Robert. However, the rumor became rife that Robert had been exchanged for a dining room set, and this apparently followed him through school (PC-R. 643, 648, 651, 985, 1002).

Mr. Waterhouse has a sense of alienation from his real family and the atypical environment with his aunt. He used

to go to his parents' home often for school lunch, but his father, an illiterate carpenter, allegedly had it in for him. Apparently one birthday his father threw his birthday cake out in the garbage (PC-R. 994, 1004). On other occasions he would be very rough with Robert, and Robert had the sense of being a stranger in his house, not to mention a lasting resentment against his mother for swapping him (PC-R. 643, 644, 993, 1004).

Mr. Waterhouse's life with his surrogate parents, his aunt Lois and his uncle Chet, was also atypical. He was given most of the material things he wanted, but Lois was not at home very much in the early years (PC-R. 1005, 1006). She was a barmaid, and allegedly she had an affair with Ken Norwood, another person working at the bar, when Mr. Waterhouse was about twelve (PC-R. 1006-1008). When this came out, she allegedly tried to commit suicide (PC-R. 1007, 1008). In the aftermath, her husband Chet apparently desired to avoid a repetition and allowed Ken to move into their house, amid some notoriety (PC-R. 1008). Mr. Waterhouse seems to have some hostility against Lois for her

apparent desertion of him and his father. At approximately the age of seven, Mr. Waterhouse was apparently raped by a 17-year-old youth by the name of Dokey Jenner (PC-R. 433, 644).

There is also evidence that Mr. Waterhouse suffers from organic brain damage as a result of a severe automobile accident when he was a teenager. His record reflects that following this accident Mr. Waterhouse suffered behavior problems at school. Each of these are mitigation under Florida law. Cooper v. Dugger, 526 So.2d 900 (Fla. 1988).

Further, nationally renowned psychiatrist, Dr. Berline, opined that two statutory mitigating factors applied in Mr. Waterhouse's case, and that Mr. Waterhouse suffers from mental disorders related to his alcoholism:

> However, based upon my careful review of the foregoing materials, it appears that Mr. Waterhouse may well have been under the influence of an extreme emotional disturbance at the time of his commission of the crimes. Mr. Waterhouse's capacity to conform his conduct to the requirements of the law might have been impaired.
>
> There is evidence which points to the fact that Mr. Waterhouse has been able to function at times in a satisfactory fashion socially though often not when faced with overwhelming frustrations

from a female figure when combined with alcohol. Certain types of tests can be performed on such individuals such as an induced alcohol EEG, and an alpha chloralose activated EEG, to test for an abnormal reaction to alcohol or an explosive form of violent behavior. Under the combination of alcohol and severe emotional stress, some individuals are unable to conform their behavior to the requirements of the law and act out in violent, destructive ways similar to the behavior described in Mr. Waterhouse's past. This dyscontrol syndrome is thought by some to be similar to an epileptic seizure. It has been observed and described by Dr. Karl Menninger in his book "Man against Himself" and in detail by Dr. Russel Monroe in "Episodic Dyscontrol," Harvard Press, 1972. To my knowledge, Mr. Waterhouse has never been given any of the tests which might provide further information regarding whether or not he suffers from this syndrome, which might help to explain his behavior in the two serious crimes with which he has been involved. Episodic Dyscontrol is classified as Intermittent Explosive Disorder (312.34) in the official psychiatric Diagnostic Statistical Manual (DSM III). It is also possible that his behavior could have been a manifestation of a compulsive paraphilic (sexual deviation) disorder. This too might have compromised his capacity to conform his behavior to the law and, in my judgment, should be further evaluated.

There is also another condition of pathologic intoxication in which certain individuals have a totally idiosyncratic reaction to the ingestion of small amounts of alcohol at which time their behavior can be irrational and sometimes include unremembered violent episodes. This diagnosis can sometimes be aided with an alcohol-electro-encephlagram. See Alcohol Idiosyncratic Intoxication (DSM III, 291.40).

(PC-R. 128-29).

As noted above, Mr. Waterhouse was granted a re-sentencing on a Hitchcock error. Clearly, trial counsel was ineffective for failing to argue the wealth of mitigation that was apparent in the record. Strickland v. Washington, 466 U.S. 668, 696 (1984).

I. TRIAL COUNSEL FAILED TO OBJECT TO THE STATE'S FALSE COMMENT THAT THE PREVIOUS JURY DID NOT KNOW ABOUT THE NEW YORK MURDER.

The prosecutor argued to the jury that they should impose death because the first sentencing jury had not known that Mr. Waterhouse had previously committed a homicide:

> But that evidence you have heard can give you the flavor for the overwhelming evidence of guilt that led to his conviction, but you also know what that jury did not know, some of the facts you know that they didn't know.
>
> They didn't know Mr. Waterhouse had murdered Ella Carter.

(RS. 793)(emphasis added).[7] Mr. Waterhouse's defense counsel

[7]Under the most charitable interpretation, this statement could have been an unfortunate effort to tell the jury that the jury which found Mr. Waterhouse guilty had not heard this evidence. If this was what was intended, this was not what was actually said. A juror, unfamiliar with the rules

(continued...)

failed to object to this improper and untrue statement regarding evidence heard by the previous jury.

The prosecutor was apparently attempting to address speculation among the jurors, who might have queried why Mr. Waterhouse was not under a death sentence. This was highly improper under any circumstances. However, the statement made was highly prejudicial for another reason: It was not true; the first jury had heard that Mr. Waterhouse was responsible for the death of Ms. Carter.

It really should go without saying that the "prosecution's duty to correct false testimony . . . arises `when [false testimony] appears." People v. Wiese, 425 Mich. 448, 389 N.W. 2d 866, 871 (1986) (quoting Napue v.

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[7](...continued)
of double jeopardy, could have believed that the first jury gave life, and the prosecution had appealed. The *bona fides* of the prosecution is not here at issue. For example, in People v. Johnson, 61 A.D. 2d 923, 403 N.Y.S. 2d 11 (1978), the prosecutor "inadvertently" implied to the jury that the metal pipe the accused had been carrying had been the weapon used in the murder, although the pipe had been excluded in pre-trial testing. The Court reversed, holding that this misstatement of fact, even though corrected in the presentation of evidence, "seriously impaired the fundamental fairness of the trial." Id. at 12.

Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)). This is true even when the false statement is not solicited. Giglio v. United States, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

How much worse is it, then, when the prosecutor himself implies a "fact" which is not supported by the evidence? See, e.g., United States v. Bigeleisen, 625 F.2d 203, 209-10 (8th Cir. 1980).[8] It is fundamental that a trial be resolved by evidence, and that "counsel should not be permitted to state as fact that which is damaging to the defendant, and of which there is no legal proof." Smith v. State, 210 So.2d 826, 848-49 (Ala. 1968)(citing cases).[9]

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[8]See also United States v. Whitehouse, 480 F.2d 1154, 1158 (D.C. Cir. 1973)(prosecutor's argument implying that he knew that the defendant was selling drugs when the evidence and the charge were limited to possession violated due process); United States v. Gonzalez, 488 F.2d 833 (2nd Cir. 1973)(prosecutor's argument that the accused was a `pusher' when there was no evidence of drug selling violated due process); Hall v. United States, 419 F.2d 582, 583-84 (5th Cir. 1969).

[9]Additionally, with no basis in evidence or fact, the prosecutor personally diagnosed Mr. Waterhouse as a "sexual sadist ".

(continued...)

In United States v. Toney, 599 F.2d 787, 790 (6th Cir. 1979), the court characterized as "foul play" a closing argument that Toney would have called Jimmie King as a witness if he would have testified in support of the defense. The defense had sought to do this and, over objection by the prosecution, the evidence had been excluded. Id. The court roundly condemned an argument to "the jury that it should convict because of the absence of evidence which [the prosecutor] knew existed." Id. at 791; see also Walker v. State, 624 P. 2d 687, 691 (Utah 1981)(retrial required where "prosecution knowingly fostered" a false impression); United States v. Dorr, 636 F.2d 117, 121 (5th Cir. Unit A. 1981)(reversal where argument "inserted a factor . . . which did not exist in the case at all").

Because the jury was left with an impression that they

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[9](...continued)

> I am suggesting . . . that the mechanics and known dynamics of sexual sadism did not suddenly spring out of one's head the night you pick up the victim and take her in your car.

(Tr. 783). The notion that Mr. Waterhouse was a sexual sadist was a figment of the prosecutor's imagination, since no evidence had been introduced to support the argument.

should impose death because they had heard more evidence than any prior sentencer (thus explaining away the possibility that Mr. Waterhouse had previously not received death), the case must be reversed.

J. TRIAL COUNSEL FAILED TO OBJECT TO THE STATE'S COMMENT INFERRING THAT MR. WATERHOUSE HAD FAILED TO TAKE THE STAND IN HIS OWN DEFENSE.

During argument at the re-sentencing trial, the prosecutor made the following comment of the fact that Mr. Waterhouse did not testify or offer proof at the re-sentencing proceedings:

> Whether you have the defendant's blood or whether you have the victim's blood; the victim and the defendant's blood are almost the same thing; there is only one enzyme that separates them.
>
> Well, have you heard any testimony that Robert Waterhouse got beaten with a tire iron in his own vehicle? Absolutely not.
>
> There is absolutely no evidence that that blood came from anywhere expect Deborah Kammerer's skull.

(PC-R. 794-95) (emphasis added). The impropriety of this statement was particularly apparent in light of the reason for there being no evidence on this point: The trial judge had explicitly ruled that Mr. Waterhouse could not offer

proof tending to show that he did not commit the crime. Yet, Mr. Waterhouse failed to object to this comment that inferred Mr. Waterhouse failed to take the stand in his own defense.

The Fifth Amendment means what it says. There can be no penalty exacted upon the assertion of the right to remain silent:

> The Fifth Amendment to the United States Constitution provides in unequivocal terms that no person may "be compelled in any criminal case to be a witness against himself." To protect this right Congress has declared that the failure of a defendant to testify "shall not create any presumption against him." Ordinarily, the effectuation of this protection is a relatively simple matter -- if the defendant chooses not to take the stand, no comment or argument about his failure to testify is permitted.

United States v. Curtiss, 330 F.2d 278, 281 (2d Cir. 1964) (emphasis added) (quoting Stewart v. United States, 366 U. S. 1, 2, 81 S. Ct. 941, 6 L. Ed. 2d 84 (1961)).

The comment on silence is perhaps the most fundamental error a prosecuting attorney may commit. For most of a century the Bar has been on notice that such arguments should be avoided at all costs. See Jackson v. State, 45

Fla. 38, 34 So. 243 (1903); see also Griffin v. California, 380 U. S. 609, 85 S. Ct. 1129, 14 L. Ed. 2d 106 (1965), Doyle v. Ohio, 426 U. S. 610 (1976).[10] In judging the equities of such a violation of Mr. Waterhouse's rights it is, then, perhaps appropriate to borrow from the argument of one prosecutor in this context, his comment on the defendant:

> He's not illiterate in the law. He knows exactly what he's doing.

Porterfield v. State, 522 So.2d 483, 486 (Fla. 1st DCA 1988).[11]

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[10]As other courts have uniformly held, a comment made at the penalty phase in denigration of the right to remain silent clearly also violates the Fifth Amendment. See, e.g., People v. Ramirez, 98 Ill. 2d 439, 75 Ill. Dec. 241, 457 N.E.2d 31, 35-37 (1983) (the defendant "has sat silent before you . . . and offered no explanation for the murder"); State v. Cockerham, 365 S.E. 2d 22, 23 (S. C. 1988); State v. Arthur, 350 S.E. 2d 187, 191 (S. C. 1986); State v. Brown, 347 S.E. 2d 882, 887 (S. C. 1986); People v. Szabo, 94 Ill. 2d 327, 68 Ill., 447 N.E.2d 193, 209 (1983); State v. Sloan, 298 S.E. 2d 92, 95 (S. C. 1982); see also Turner v. State, ___ So.2d ___, Slip Op. at 19 (Miss. Dec. 12, 1990).

[11]Indeed, because the claim is so fundamental, comments on silence have been reviewed under the plain error rule. See, e.g., Fuller v. State, 540 So.2d 182, 184-85 (Fla. 5th DCA

(continued...)

When a comment is made which implicates the right to freedom from self-incrimination, this Court has asked whether the comment is "fairly susceptible of being interpreted by the jury as a comment on silence." State v. Diguilio, 492 So.2d 1129, 1131 (Fla. 1986). Reflecting the fundamental nature of the right infringed, this has been characterized as "`a very liberal rule' for determining what constitutes a comment on silence." Stephens v. State, 559 So.2d 687, 691 (Fla. 1st DCA 1990) (quoting Jackson v. State, 522 So.2d 802, 807 (Fla. 1988)); accord State v. Kinchen, 490 So.2d 21, 22 (Fla. 1985) (because state constitution provides additional protection, rule "offers more protection to defendants than does the federal tests").

Applying this rule in Long v. State, 494 So.2d 213 (Fla. 1986), this Court considered -- and reversed -- a case closely analogous to Mr. Waterhouse's. The prosecutor argued:

> I haven't heard any evidence that he thought

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[11](...continued)
1989); Rosso v. State, 505 So.2d 611, 612 (Fla. 3rd DCA 1987).

this car belonged to one of his friends.

Long v. State, 469 So.2d 1, (Fla. 5th DCA 1985), quashed, 494 So.2d 213 (Fla.), on remand, 498 So.2d 570, 571 (Fla. 5th DCA 1986); see also David v. State, 369 So.2d 943, 944 (Fla. 1979) ("There's no evidence of business failure, you would have head evidence . . . why didn't he say anything"); West v. State, 553 So.2d 254, 257 (Fla. 4th DCA 1989); Bain v. State, 552 So.2d 283, 284 (Fla. 4th DCA 1989); Lowry v. State, 510 So.2d 1196, 1197-98 (Fla. 4th DCA 1987).

It is impossible to tell what effect this comment had on the jury. The state must "show beyond a reasonable doubt that the specific comment(s) did not contribute to the verdict." State v. Digiulio, 491 So.2d at 1136. In State v. Hawkins, 357 S.E. 2d 10 (S. C. 1987), the court rightly found that "[a]rguments of this nature are especially egregious in the context of death penalty [sentencing] proceedings because they violate the Eighth as well as the Fifth Amendment." Id. at 13 (emphasis added). The United States Supreme Court has similarly held that, because of the awesome scope of the jury's prerogative to exercise mercy,

an evaluation of the effect of constitutional error in the sentencing phase of a capital trial must be made with additional care. See Satterwhite v. Texas, 486 U.S. 249, 258, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988). In this case, the error requires re-sentencing.

K. TRIAL COUNSEL FAILED TO OBJECT TO THE STATE'S COMMENTS THAT DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY.

In violation of Caldwell v. Mississippi, 472 U.S. 320, 105, S. Ct. 2633, 86 L. Ed. 2d 231 (1985), the prosecutor told the jury that they were not responsible for the sentence of death:

> . . . you are simply being asked to decide the facts and to apply the law. Don't let anyone make you feel morally culpable or attack your understanding because the responsibility for Mr. Waterhouse's fate rest[s] with him right here for the acts he has, himself, committed, and which have sealed his fate.

(RS. 772).

Additionally, the prosecutors sought to lessen the gravity of the sentence of death by arguing that the "probable anal intercourse" would have been worth life imprisonment itself:

> In it's [sic] own right, sexual battery can lead to a sentence of life imprisonment.
>
> I suggest to you that when a person who commits a sexual battery makes that quantum leap, goes that extra step and not only commits a sexual battery but kills his victim, then doesn't justice ask for, doesn't justice demand, a penalty that's different in kind and different in quality from the punishment he already faces by the commission of the sexual battery alone?

(RS. 779-80). Therefore, Mr. Waterhouse would be getting a "free murder" if he "only" received life. Mr. Waterhouse's trial counsel failed to object to either of these statements.

Long before Caldwell was decided, this Court condemned comments aimed at diminishing the gravity of the jury's function as reflecting not a desire to see justice done, but a "prime ambition of the State . . . [to assure] the electric chair for the accused." Pate v. State, 112 So.2d 380, 385 (Fla. 1959); Blackwell v. State, 79 So. 731, 735 (Fla. 1918); see also Commonwealth v. Baker, 511 A.2d 777, 787-90 (Pa. 1986); Frye v. Commonwealth, 345 S.E. 2d 267, 284-84 (Va. 1986). This Court held that such a remark was so prejudicial that reversal must ensue. Pait v. State, 112

So.2d at 385.

ARGUMENT II

MR. WATERHOUSE WAS DENIED A FAIR AND IMPARTIAL TRIBUNAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. MR. WATERHOUSE'S TRIAL JUDGE , THE HONORABLE ROBERT E. BEACH, WAS PREJUDICED AGAINST MR. WATERHOUSE PRIOR TO, DURING, AND AFTER MR. WATERHOUSE'S RE-SENTENCING TRIAL AND POST-CONVICTION PROCEEDINGS. JUDGE BEACH WAS PREDISPOSED TO SENTENCE MR. WATERHOUSE TO DEATH BEFORE ANY EVIDENCE WAS RECEIVED IN MR. WATERHOUSE'S RE-SENTENCING TRIAL. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING JUDGE BEACH.

Prior to Mr. Waterhouse's re-sentencing trial and post-conviction proceedings, Judge Beach had formed a very biased opinion concerning Mr. Waterhouse, and he maintained that Mr. Waterhouse was guilty of probably committing other uncharged and unknown crimes against women. In Mr. Waterhouse's Pre- Sentence Investigation report, prepared by the Florida Parole and Probation Commission, it was reported that Judge Beach made the following prejudicial statement:

> Sentencing Judge, Robert E. Beach, commented that the subject is a dangerous and sick man and that many other women have probably suffered because of him.

(Florida Parole and Probation Commission, Post Sentence Investigation Report, Robert Brian Waterhouse, May 28, 1981,

at 3)(emphasis added).

Due process guarantees the right to a neutrally detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." Carey v. Piphus, 425 U. S. 247, 262 (1978). The United States Supreme Court has explained that in deciding whether a particular judge cannot preside over a litigant's trial:

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U. S. 575, 588, 84 S. Ct. 841, 849, 11 L.Ed.2d 921 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955).

Taylor v. Hayes, 418 U. S. 488, 501 (1974).

In capital cases, judicial scrutiny must be more stringent than it is in non-capital cases. As the United States Supreme Court indicated in Beck v. Alabama, 447 U. S.

625 (1980), special procedural rules are mandated in death penalty cases in order to insure the reliability of the sentencing determination. "In a capital case, the finality of the sentence imposed warrants protections that may or may not be required in other cases." Ake v. Oklahoma, 470 U. S. 68, 87 (1985)(Burger, C.J., concurring).

Thus, in a capital case such as Mr. Waterhouse's, the Eighth Amendment imposes additional safeguards over those required by the Fourteenth Amendment. In Caldwell v. Mississippi, 472 U. S. 320 (1985), a prosecutor's closing argument in a penalty phase was found to violate the Eighth Amendment's heightened scrutiny requirement even though a successful challenge could not be mounted under the Fourteenth Amendment. See Caldwell, 472 U. S. at 347-52 (Rehnquist, J. dissenting); Adams v. Dugger, 816 F.2d 1493, 1496 n.2 (llth Cir. 1987).

The impartiality of the judiciary is especially important in "this first-degree murder case in which [Mr. Waterhouse's] life is at stake and in which the circuit judge's sentencing decision is so important." Livingston,

441 So.2d at 1087. The court's adverse predisposition would surely prevent Mr. Waterhouse from ever receiving fair treatment before the court.

In Livingston, this Court concluded that the failure of the judge to disqualify himself was error due to apparent prejudgment and bias against counsel, and predetermination of the facts at issue (Livingston at 1088). Consequently, the Court reversed and the matter was remanded for proceedings before a different judge. Id. at 1089.

A fair hearing before an impartial tribunal is a basic requirement of due process. In re Murchison, 349 U. S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing.

Judge Beach should have removed himself from Mr. Waterhouse's trial. To the extent that Mr. Waterhouse's trial counsel was privy to Judge Beach's disposition, trial counsel was ineffective for not seeking to have Judge Beach disqualified from Mr. Waterhouse's case. Mr. Waterhouse is

entitled to relief and should have been granted an evidentiary hearing on this issue.

ARGUMENT III

MR. WATERHOUSE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE DEFENSE COUNSEL FAILED TO OBTAIN A MENTAL HEALTH EXPERT WHO COULD CONDUCT A PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATION OF MR. WATERHOUSE DURING THE TRIAL AND RE-SENTENCING COURT PROCEEDINGS. MR. WATERHOUSE'S RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION WERE DENIED.

A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979).

When mental health is at issue, counsel has a duty to

conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So.2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The mental health expert must also protect the client's rights, and the expert violates these rights when he or she fails to provide adequate assistance. State v. Sireci, 502 So.2d 1221, 1224 (Fla. 1987); Mason v. State. The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So.2d at 736-37. The United States Supreme Court has recognized the pivotal role that the mental health expert plays in criminal cases:

> [W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or

> jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they might believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant.

Ake, 105 S. Ct. at 1095 (citation omitted).

Generally accepted mental health principles require that an accurate medical and social history be obtained "because it is often only from the details in the history" that organic disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient but from sources independent of the patient. Patients are frequently unreliable sources of their own history, particularly when they have suffered from head injury, drug addiction, and/or alcoholism. Consequently, a patient's knowledge may be distorted by knowledge obtained from family and their own

organic or mental disturbance, and a patient's self-report are thus suspect:

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information in the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of Informed Speculation, 66 Va. L. Rev. 727 (1980) (cited in Mason, 489 So.2d at 737).

In Mr. Waterhouse's case, counsel failed to provide his client with "a competent psychiatrist...[to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985). The relationship between Mr. Waterhouse and trial counsel had deteriorated to such degree that Mr. Waterhouse's mental state led him to believe that trial

counsel was not working in his best interest, and the appointed mental health expert was not to be trusted. The breakdown of attorney client relationship was directly caused by trial counsel's abandonment of his duty to effectively represent Mr. Waterhouse. Both the experts and trial counsel have a duty to perform an adequate background investigation. When such an investigation is not conducted, due process is violated. The judge and jury are deprived of the facts which are necessary to make a reasoned finding. Information which was needed in order to render a professionally competent evaluation was not investigated. Mr. Waterhouse's judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake, 105 S. Ct. at 1095.

A wealth of compelling mitigation was never presented to the jury charged with the responsibility of whether Mr. Waterhouse would live or die, and such action constitutes an ineffective counsel. Important, necessary, and truthful information was never presented to the jury, and this

deprivation violated Mr. Waterhouse's constitutional rights. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U. S. 104 (1982); Lockett v. Ohio, 438 U. S. 586 (1978).

In discussing the statutory mental health mitigating factors, the Florida Supreme Court recognized that:

> A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

Perri v. State, 441 So.2d 606, 609 (Fla. 1983).

Because of counsel's failure to properly investigate and prepare for the penalty phase, his "minimal preparation is plainly evident." Cunningham v. Zant, 928 F.2d 1006, 1017 (11th Cir. 1991).

The prejudice to Mr. Waterhouse resulting from the expert's and counsel's deficient performance is clear. Confidence in the outcome is undermined, and the results of the penalty phase are unreliable.

ARGUMENT IV

MR. WATERHOUSE'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. WATERHOUSE TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. WATERHOUSE TO DEATH. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given <u>if the state showed the aggravating circumstances outweighed the mitigating circumstances</u>.

<u>State v. Dixon</u>, 283 So.2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Waterhouse's capital proceedings. To the contrary, the court shifted to Mr. Waterhouse the burden of proving whether he should live or die.

In <u>Hamblen v. Dugger</u>, 546 So.2d 1039 (Fla. 1989), a capital postconviction action, the Florida Supreme Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The <u>Hamblen</u> opinion reflects that these claims should be addressed on a case-by-case

basis in capital postconviction actions. Mr. Waterhouse herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement. Moreover, he asserts that defense counsel rendered prejudicially deficient assistance in failing to object to these errors. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U. S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U. S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Judicial instructions at Mr. Waterhouse's capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Waterhouse, but also unless Mr. Waterhouse proved that the mitigation he provided outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Waterhouse to death. See Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed).

This standard obviously without objection by defense counsel shifted the burden to Mr. Waterhouse to establish that life was the appropriate sentence, and that only limited consideration of mitigating evidence was incorrect to those factors proven sufficient to outweigh the aggravation. The standard given to the jury violated the law. According to this standard, the jury could not "full[y] consider[]" and "give effect to" mitigating evidence. Penry, 109 S. Ct. 2934, 2951 (1989). This burden-shifting standard thus "interfered with the consideration of mitigating evidence." Boyde v. California,

110 S. Ct. 1190, 1196 (1990).

Since "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481 U. S. 279, 306 (1987), the instructions provided to Mr. Waterhouse's sentencing jury without argument or objection by defense counsel, as well as the standard employed by the trial court, was ineffectiveness and violated the eighth amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990). See also Lockett v. Ohio, 438 U. S. 586 (1978); Hitchcock v. Dugger, 481 U. S. 393, 107 S. Ct. 1821 (1987).

The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned. The standard by which the judge instructed Mr. Waterhouse's jury, and upon which the judge relied is distinctly an

egregious abrogation of Florida law and violative of eighth amendment principles. See McKoy v. North Carolina, 110 S. Ct. 1227, 1239 (1990)(Kennedy, J., concurring)(a death sentence arising from erroneous instructions "represents imposition of capital punishment through a system that can be described as arbitrary or capricious").

In this case, Mr. Waterhouse, the capital defendant, was required to establish (prove) that life was the appropriate sentence, and the jury's and judges' consideration of mitigating evidence was limited to mitigation "sufficient to outweigh" aggravation.

In his penalty phase instructions to the jury, the judge instructed the jury that it was their job to determine if the mitigating circumstances outweighed the aggravating circumstances:

> [H]owever it is your duty to follow the law that will be now given to you by the Court and render to the Court an advisory sentence, based on your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(RS. 842)(emphasis added). This erroneous standard was then

repeated to the jury by the judge later in his instructions:

> Should you find sufficient aggravating circumstances to exist, it will then be your duty to determine whether mitigating circumstances exist outweigh the aggravating circumstances.

(RS. 845).

After numerous unconstitutional instructions, there can be no doubt that the jury understood that Mr. Waterhouse had the burden of proving whether he should live or die. The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Waterhouse on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Waterhouse's Due Process and Eighth Amendment rights. See also Sandstrom v. Montana, 442 U. S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The jury was not instructed in conformity with the standard set forth in Dixon.

Second, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told

that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Counsel was ineffective for failure to object to these instructions, and certainly the outcome of the sentence would have been different. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U. S. 393, 107 S. Ct. 1821 (1987). Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. State v. Dixon, 283 So.2d at 10.

According to these instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Therefore, Mr. Waterhouse is entitled to relief due to the fact that his sentencing was tainted by improper instructions.

Counsel's failure to object to the clearly erroneous instructions was deficient performance under the principles

of Harrison v. Jones, 880 F.2d 1277 (11th Cir. 1989) and Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). But for counsel's deficient performance, there is a reasonable probability that the jury would have recommended life. Accordingly, relief is warranted.

ARGUMENT V

MR. WATERHOUSE'S TRIAL COURT PROCEEDINGS WERE REPLETE 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 FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Waterhouse did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Ray v. State, 403 So.2d 956 (Fla. 1981); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991). The process itself failed Mr. Waterhouse. It failed because of the sheer number and types of errors which occurred during his trial, and when considered as a whole, those errors virtually dictated the ultimate sentence that he received.

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U. S. at 287 (Brennan, J., concurring). It differs from lesser sentences

"not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U. S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

The flaws in the system that sentenced Mr. Waterhouse to death are many. They have been pointed out throughout this brief and are incorporated herein. There have been repeated instances of ineffective assistance of counsel and error by the trial court which significantly tainted this process. These errors cannot be harmless. Relief is proper.

ARGUMENT VI

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND FOR VIOLATING THE CONSTITUTIONAL GUARANTEE PROHIBITING CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Florida's capital sentencing scheme denies the right to

due process, and constitutes cruel and unusual punishment on its face and as applied in this case. It did not prevent the arbitrary imposition of the death penalty nor narrow the application of the death penalty to the worst offenders.

Execution by electrocution imposes physical and psychological torture without commensurate justification, and constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U. S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. This leads to the arbitrary and capricious imposition of the death penalty, and violates the Eighth Amendment.

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances envisioned in Proffitt v. Florida, 428 U. S.

242 (1976).

In view of the arbitrary and capricious application of the death penalty under the current statutory scheme, the constitutionality of Florida's death penalty statute is in doubt. Florida's death penalty statute as it exists, and as applied, is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT VII

MR. WATERHOUSE'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY THE JURY'S AND THE JUDGE'S CONSIDERATION OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES.

The State maintained during its closing argument at re-sentencing that Mr. Waterhouse posed a future danger to society:

> MR. CROW: In August of 1966, Detective Laurence Styling was introduced into the world of detectives by one of the most gruesome crimes he had seen in twenty-four years.
>
> Ella Carter, a seventy-seven year old woman, had been brutally beaten, choked and raped and lay in her own bed, surrounded by her own blood, a victim of Robert Waterhouse's sadistic sexual desires.

* * *

> The defendant was arrested, confessed, pled guilty and sentenced to a term of a minimum twenty years to life, which should have kept him away from innocent victims on the street.
>
> But that minimum twenty became nine. And in 1975, he was released by New York authorities and several years later made his way to Pinellas County.
>
> And finally, in 1980, he came in contact with another victim, young Deborah Kammerer, five foot two, ninety pounds.

(RS. 567-69)(emphasis added).

The State continued its improper and inflammatory argument that Mr. Waterhouse was a future danger to society and should receive the electric chair because this is "his second time around:"

> [THE STATE]: The aspect of his record, well, you know, it's his second time around for him.
>
> Recall in voir dire one of the questions that was raised with the jurors was, "Well, gee, don't you think some people can really be rehabilitated in prison?"
>
> Well, we know what Mr. Waterhouse's record is in that regard.
>
> And the suggestion that after ten years in custody from 1980, that there is a twenty-five year mandatory minimum sentence reflects justice in the state's case, I think that's a ludicrous suggestion.

(RS. 800)(emphasis added).

Further, the State's insistence that Mr. Waterhouse poses a future danger to society prompted the following jury question in which the trial court refused to answer:

> 1) If he's sentenced to life when would he be eligible for parole?
>
> Does the time served count towards the parole time?
>
> 2) If paroled from Florida would the defendant than be returned to New York to finish his sentence there?

(RS. 162).

The judge's consideration of improper and unconstitutional non-statutory aggravating factors violated the Eighth Amendment, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S.Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response," a clear violation of Mr. Waterhouse's constitutional rights. Penry v. Lynaugh, 108 S. Ct. 2934 (1989).

Similar prosecutorial arguments have been consistently condemned as improper by the Florida Supreme Court. In Taylor v. State, 583 So.2d 323 (Fla. 1991) the Court maintained the state attorney's argument was improper because it urged consideration of factors outside the scope of the jury's deliberations.

The Florida Supreme Court held the same arguments to be improper in Jackson v. State, 522 So.2d 802 (Fla. 1988) and Hudson v. State, 538 So.2d 829 (Fla. 1989), saying the prosecutor overstepped the bounds of proper argument. Citing to Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985), the Court sent out the parameters of improper argument:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

See, 522 So.2d at 809.

Here, there is no question but that the State's argument

was meant to evoke an emotional response from the jury. Clearly, confidence in the outcome of Mr. Waterhouse's trial has been undermined when jurors are exposed to such emotional oratory.

The cumulative effect of this closing argument and improper evidence was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U. S. 647 (1974); See also, United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991). In Rosso v. State, 505 So.2d 611 (Fla. 3rd DCA 1987) the Court defined a proper closing argument:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may be reasonably drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Rosso, 505 So.2d at 614. The prosecutor's argument went beyond a review of the evidence and permissible inferences. He intended his argument to overshadow any logical analysis of the evidence and to generate an emotional response, and that the jury consider factors outside the scope of the evidence.

The Florida courts have held that "a prosecutor's concern `in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor `may strike hard blows, he is not at liberty to strike foul ones.'" Rosso, 505 So.2d at 614. The Florida Supreme Court has called such improper prosecutorial commentary "troublesome." Bertolotti v. State, 476 So.2d 130, 132 (Fla. 1985).

Arguments such as those made by the State Attorney in Mr. Waterhouse's penalty phase violate due process and the eighth amendment, and render a death sentence fundamentally unfair and unreliable. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985) (en banc); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984); Wilson v. Kemp, 777 F.2d 621

(11th Cir. 1985); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989); Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986). Here, as in Potts, because of the improprieties evidenced by the prosecutor's argument, the jury "failed to give [its] decision the independent and unprejudiced consideration the law requires." Potts, 734 F.2d at 536. In the instant case, as in Wilson, the State's closing argument "tend[ed] to mislead the jury about the proper scope of its deliberations." Wilson, 777 F.2d at 626.

In such circumstances, "[w]hen core Eighth Amendment concerns are substantially impinged upon . . . confidence in the jury's decision will be undermined." Id. at 627. Consideration of such errors in capital cases "must be guided by [a] concern for reliability." Id. The Florida Supreme Court had held that when improper conduct by the prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So.2d 1346 (Fla. 1990).

The jury was also precluded from hearing any mitigation evidence regarding whimsical or residual doubt in violation of Lockett v. Ohio, 438 U. S. 586 (1978) and Eddings v.

Oklahoma, 455 U.S. 104 (1982).

ARGUMENT VIII

AT MR. WATERHOUSE'S RE-SENTENCING TRIAL THE PROSECUTOR ERRONEOUSLY ASSERTED THAT SYMPATHY TOWARDS MR. WATERHOUSE WAS AN IMPROPER CONSIDERATION IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

During the voir dire of Mr. Waterhouse's re-sentencing, the prosecutor asserted that the jury could not consider sympathy in their considerations:

> PROSPECTIVE JUROR MARTIN: It gives me the understanding that even bad criminals have two sides.
>
> MR. BARTLETT [the State]: Well, I point this out to everyone; sympathy is just a quality of human nature.
>
> And we all have sympathy in one form or another, either for or against the victim or for or against Mr. Waterhouse or not.
>
> And the judge will tell you that you just don't let sympathy play a part in your verdict, that you just have to take the coat of sympathy off and hang it outside based on what the evidence and law is; okay?

(RS. 419-20) (emphasis added).

The jury was led to believe that to consider sympathy based upon mitigating evidence was impermissible. However,

consideration of sympathy is applicable in the penalty phase:

> [T]he validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 303, 96 S. Ct. 2978, 2990, 49 L. Ed. 2d 944 (l976)(striking down North Carolina's mandatory death penalty statute for the reason, inter alia, that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death"); Lockett v. Ohio, 438 U. S. 586, 604, 98 S. Ct. 2954, 2964, 57 L. Ed. 2d 973 (l978)(striking down Ohio's death penalty statute, which allowed consideration only of certain mitigating circumstances, on the grounds that the sentencer may not "be precluded from considering as a mitigation factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The [prosecutor's closing] in strongly suggesting otherwise, misrepresents this important legal principle.

Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985).

The sentencer's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate

punishment. Eddings v. Oklahoma, 455 U. S. 104 (1982); Lockett v. Ohio, 438 586 (1978). Sympathy which arises from the evidence is a proper consideration. An admonition to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U. S. 538 (l987)(O'Connor, J., concurring). The sympathy arising from the mitigation, after all, is an aspect of the defendant's character that must be considered.

Counsel's failure to object to the prosecutor's erroneous statement regarding sympathy and his failure to argue to the court that the Eighth Amendment not only permitted but required consideration of such, was deficient performance. Harrison v. Jones, 880 F.2d 1279 (llth Cir. 1989).

In Mr. Waterhouse's case, the sentencer was told that Florida law precluded considerations of sympathy. This was error which creates the unacceptable risk that the jury's recommendation of death was the product of the argument that

feelings of compassion, sympathy, and mercy towards the defendant were not to be considered in determining the sentence to be imposed. The resulting sentence is therefore unreliable and inappropriate in Mr. Waterhouse's case. The Eighth Amendment cannot tolerate the imposition of a sentence of death where there exists a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952.

ARGUMENT IX

MR. WATERHOUSE'S SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Waterhouse's jury was repeatedly instructed by the court and the prosecutor that its role was merely "advisory". (See, e.g. (RS. 801, 842, 843, 847, 848) However, because great weight is given the jury's recommendation, the jury is a sentencer. Espinosa v. Florida, 112 S. Ct. 2926 (1992). In fact, the jury "is a co-sentencer under Florida law." Johnson v. Singletary, 18 Fla. L. Weekly 90 (Fla. 1993).

Here the jury's sense of responsibility would have been diminished by the misleading comments and instructions regarding the jury's role. The jury was not told it was a co-sentencer. This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U. S. 320 (1985). To the extent that defense counsel without a tactic or strategy failed to object to these repeated violations, he rendered prejudicially deficient performance.

ARGUMENT X

MR. WATERHOUSE'S JURY WAS MISLED AND INCORRECTLY INFORMED ABOUT ITS FUNCTION AT CAPITAL SENTENCING, IN VIOLATION OF EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Waterhouse's sixth, eighth, and fourteenth amendment rights were violated by erroneous and misleading instructions at the sentencing phase. These instructions indicated to the jury, that seven or more members must agree on a recommendation of life imprisonment before declining to impose a sentence of death. The effect of these erroneous instructions was to render Mr. Waterhouse's death sentence fundamentally unfair.

The trial judge gave this erroneous instruction during the course of his sentencing instructions:

> In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury.
>
> The fact that the determination of whether a majority of you recommend a death sentence, or sentence of life imprisonment in this case would be reached by a single ballot on each case, should not influence you to act hastily or without due regard to the gravity of these proceedings.

(RS. 847-848).

The Court also gave examples of what would constitute a majority vote in favor of a death recommendation:

> For example, if it's eight to four or seven to five, something of that kind, "advise and recommend to the court that it impose the death penalty upon Robert Brian Waterhouse. So say we all."

(RS. 848).

However, the Court failed to give any type of examples that would constitute a life recommendation.

The second form says:

> The jury advises and recommends to the court that it imposes a sentence of life imprisonment upon Robert Brian Waterhouse without a possibility of parole for twenty-five years.

You can bring in one verdict.

(RS. 848-849). The jury was only given examples of death recommendations and had the erroneous impression that they could not return a valid sentencing verdict if the vote was six to six. The Court failed to instruct the jury that a vote of six for life was sufficient for a life recommendation.

In Rose v. State, 425 So.2d 521 (Fla. 1983), and Harich v. State, 437 So.2d 1082 (Fla. 1983), the Florida Supreme Court ruled that a majority vote was required only for a death recommendation. Accordingly, the court held that a six-to-six vote by the jury is a life recommendation. The jury instructions provided at Mr. Waterhouse's trial were therefore erroneous.

Trial counsel failure to attack these erroneous instructions rendered counsel's performance ineffective. The operation of these erroneous instructions thus violated the Eighth and Fourteenth Amendments, because it created the substantial risk that the death sentence was imposed in spite of factors calling for less severe punishment.

ARGUMENT XI

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. WATERHOUSE'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE NARROWING CONSTRUCTIONS. AS A RESULT, MR. WATERHOUSE'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED NOW IN LIGHT OF NEW FLORIDA LAW, ESPINOSA V. FLORIDA AND RICHMOND V. LEWIS.

At the time of Mr. Waterhouse's trial, sec. 921.141, Fla. Stat., provided the reference to aggravators to be used in sentencing.

The United States Supreme Court's opinions in Richmond v. Lewis, 113 S.Ct. 528 (1992), Espinosa v. Florida, 112 S. Ct. 2926 (1992), and Glock v. Singletary, Case No. 91-3528 (11th Cir., October 7, 1994), establish that the Florida Supreme Court erred in its analysis of Mr. Waterhouse's claim raised on direct appeal that the Florida Statute, setting forth the aggravating circumstance of "cold, calculated and premeditated," was vague and overbroad under the Eighth Amendment.

At issue in Richmond was whether an Arizona aggravating

factor, statutorily defined as "especially heinous, atrocious, cruel or depraved," was constitutional as applied in Mr. Richmond's case. In that case, the trial court had found three (3) aggravating factors, including the "especially heinous, atrocious, cruel or depraved" factor, and determined that these factors outweighed the mitigation which the defendant had presented, and sentenced him to death. On direct appeal, the Supreme Court of Arizona affirmed the defendant's sentence with two (2) justices finding that the "especially heinous, atrocious, cruel or depraved" aggravating factor was properly applied, two (2) justices finding that the factor was not properly applied but concluding that the sentence of death appropriate even absent the factor, and one (1) justice dissenting. The United States District Court for the District of Arizona denied habeas corpus relief, and the United States Court of Appeals for the Ninth Circuit affirmed, finding that the Arizona Supreme Court had applied a valid narrowing construction of the "especially heinous, atrocious, cruel or depraved" factor, or, in the alternative, that the case was

distinguishable from Clemons v. Mississippi, 494 U. S. 738 (1990)(requiring either appellate re-weighing or a valid harmless error analysis after an appellate court strikes an aggravating factor) because under the statute at issue in Clemons the invalidation of an aggravating circumstance necessarily rendered any evidence of mitigation 'weightier' or more substantial in a relative sense, while the same could not be said under the terms of the Arizona statute.

Challenging the latter determination, Mr. Richmond petitioned the United States Supreme Court for certiorari, arguing that the statute in question was unconstitutionally vague, and that the Supreme Court of Arizona failed to cure that invalidity during the appellate process.

In analyzing the issue, the Supreme Court stated:

> The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. See e.g., Maynard v. Cartwright, 486 U. S. 356, 361-364 (1988); Godfrey v. Georgia, 446 U. S. 420, 427-433 (1980). Second, in a "weighing" State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other valid aggravating

> factors obtain. See e.g., Stringer v. Black 503 U. S. ___, ___ (1992) (slip op., at 6-9); Clemons v. Mississippi, supra, at 748-752. Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error. See Lewis v. Jeffers, 497 U. S. 764 (1990); Walton v. Arizona, 497 U. S. 639 (1990). Finally, in federal habeas corpus proceedings, the state court's application of the narrowing construction should be reviewed under the "rational factfinder" standard of Jackson v. Virginia, 443 U. S. 307 (1979). See Lewis v. Jeffers, supra, at 781.

113 S. Ct. at 535.

> 12. Reasoning that a majority of the Arizona Supreme Court had found that the trial Court had applied the "heinous, atrocious, cruel or depraved" aggravating circumstance contrary to that court's narrowing construction, but had thereafter failed to apply that narrowing construction through an appellate reweighing or to conduct any meaningful harmless error analysis, the United States Supreme Court vacated Mr. Richmond's sentence of death and remanded for a new sentencing.

Id.at 534.

The same result is required here. In Mr. Waterhouse's case, the Florida Statute defined the aggravating factors at issue as follows: the capital felony "was committed in a cold, calculated, and premeditated manner." Fla. Stat. §121.141(5)(i). The statute did not further define this aggravating factor. This statutory language is and was

facially vague. Richmond, 113 S. Ct. at 535; Espinosa v. Florida, 112 S. Ct. 2926 (1992).[12]

While the Florida Supreme Court has adopted narrowing constructions of this statutory provision, the United States Supreme Court held in Richmond that, not only must a state adopt "an adequate narrowing construction," but that construction must also be applied either by the sentencer or by the appellate court in a reweighing in order to cure the facial invalidity. Richmond, 113 S. Ct. at 535 ("Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand.").

In Mr. Waterhouse's case, the narrowing construction was not applied by any of the constituent sentencers. His penalty phase jury was not given "an adequate narrowing

[12]The Florida Supreme Court has recognized that the cold, calculated, and premeditated instruction is also subject to attack on grounds of vagueness. See James v. State, 615 So.2d 668 (Fla. 1993).

construction," but instead was simply instructed on the facially vague statutory language. Following the death recommendation, the sentencing judge imposed a death sentence.

In Florida, a sentencing judge in a capital case is required to give the jury's verdict "great weight." As a result, it must be presumed that a sentencing judge in Florida followed the law and gave "great weight" to the jury's recommendation. Certainly nothing in Mr. Waterhouse's case warrants setting aside that presumption. Florida law requires that where evidence exists to support the jury's recommendation, it must be followed. Scott v. State, 603 So.2d 1275 (Fla. 1992). Here the judge considered, relied on, and gave great weight to the tainted jury recommendation. A "new sentencing calculus" free from the taint, as required by Richmond, had not been conducted. The judge was not free to ignore the tainted death recommendation. Scott.

Richmond demonstrates that Mr. Waterhouse was denied his Eighth Amendment rights. The jury was not given the proper narrowing construction so the facial unconstitutionality of

the statute was not cured.

Therefore, even if "the trial court did not directly weigh any invalid aggravating circumstances," it must be "presume[d] that the jury did so." Id. Thus, "the trial court indirectly weighed the invalid aggravating factor[s] that we must presume the jury found. This kind of indirect weighing of . . . invalid aggravating factor[s] creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, . . . and the result, therefore, was error." Id.

Considering invalid aggravating factors adds thumbs to "death's side of the scale," Stringer, 112 S. Ct. at 1137, "creat[ing] the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Id. at 1139. The errors resulting from the unconstitutional instruction regarding the "cold, calculated and premeditated" circumstance provided to Mr. Waterhouse's jury were not harmless beyond a reasonable doubt. "[W]hen the weighing process has been infected with a vague factor

the death sentence must be invalidated." Stringer, 112 S. Ct. at 1139.

In Florida, the sentencer weighs aggravation against mitigation in determining the appropriate sentence. Id. Thus, assessing whether an error occurring during the sentencing process was harmless or not requires assessing the effect of the error on the weighing process.

Unless the Respondent can establish beyond a reasonable doubt that the consideration of the invalid statutory provisions had no effect upon the weighing process, the errors cannot be considered harmless. Espinosa and Richmond require that Mr. Waterhouse receive a new sentencing proceeding in front of a jury that comports with the Eighth Amendment.

ARGUMENT XII

MR. WATERHOUSE'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Under Florida law, capital sentencers may reject or give little weight to any particular aggravating circumstance. A

jury may return a binding life recommendation because the aggravators are insufficient. Hallman v. State, 560 So.2d 233 (Fla. 1990).

The cornerstone of the state's first degree murder case against Mr. Waterhouse was premised on a felony murder theory -- that the murder took place during the course of a rape. The State knew that Mr. Waterhouse suffered from a history of drug and alcohol abuse and that he was intoxicated at the time of the alleged offense which would undermine proof of premeditation at the time of the offense. Therefore, at Mr. Waterhouse's initial trial, the jury was read the felony-murder instruction and the definition of sexual battery, despite the fact, that Mr. Waterhouse was not charged with sexual battery (R. 2197-2203). Subsequently, Mr. Waterhouse was found guilty of first degree murder (R. 389).

At Mr. Waterhouse's re-sentencing trial, the jury was instructed on the "felony-murder" aggravating circumstance and the definition of sexual battery, and the trial court also subsequently found the existence of the "felony murder"

aggravating factor (RS. 168).

The jury's deliberation was tainted by the unconstitutional and vague aggravating circumstance. The use of the underlying felony as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance, and Mr. Waterhouse thus entered the re-sentencing eligible for the death penalty, See Porter v. State, 564 So.2d 1060 (Fla. 1990).

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 112 S. Ct. 1130 (1992). The sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder. Every felony murder would thus involve, by necessity, the finding of a statutory aggravating circumstance, a fact which violates the eighth amendment. This is so because an automatic aggravating circumstance is created that does not "genuinely narrow the class of persons eligible for the death penalty," Zant v.

Stephens, 462 U. S. 862, 876 (1983), and which renders the sentencing process unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U. S. 356, 362 (1988). Because Mr. Waterhouse was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. In fact, the Florida Supreme Court has held that the felony murder aggravating factor alone cannot support the death sentence. Rembert v. State, 445 So.2d 337 (Fla. 1984). Yet, the lower court neither instructed the jury on nor applied this limitation in imposing the death sentence.

The Wyoming Supreme Court recently addressed this issue in Engberg v. Meyer, 820 P. 2d 70 (Wyo. 1991). In Engberg, the Wyoming court found the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance violative of the Eighth Amendment:

> In this case, the enhancing effect of the underlying felony (robbery) provided two of the

aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.

Additionally, we find a further Furman/Gregg problem because both aggravating factors overlap in that they refer to the same aspect of the defendant's crime of robbery. While it is true that the jury's analysis in capital sentencing is to be qualitative rather than a quantitative weighing of aggravating factors merely because the underlying felony was robbery, rather than some other felony. The mere finding of an aggravating circumstance implies a qualitative value as to that circumstance. The qualitative value of an aggravating circumstance is unjustly enhanced when the same underlying fact is used to create multiple aggravating factors.

When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at lest one "aggravating circumstance" be found for a death sentence becomes meaningless. Id. At 767.

Black's Law Dictionary, 60 (5th ed. 1979) defines

aggravation as follows:

> Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself. (emphasis added).

As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the Furman/Gregg weeding-out process fails. Engberg, 820 P. 2d at 89-90.

Wyoming, like Florida, provides that the narrowing occur at the penalty phase. See Stringer v. Black. The use of the "in the course of a felony" aggravating circumstance is unconstitutional. As the Engberg court held:

> [W]here an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the sentencing phase. We acknowledge the jury's finding of other aggravating circumstances in this case. We cannot know, however, what effect the felony murder, robbery, and pecuniary gain aggravating circumstances found

had in the weighing process and in the jury's final determination that death was appropriate.

Engberg,820 P.2d at 92.

In Tennessee v. Middlebrooks, 840 S. W. 2nd 317 (Tenn. 1992), the Tennessee Supreme Court followed the decision in Engberg. In remanding for a new sentencing in a case involving the torture murder of a fourteen year old boy, the Tennessee Supreme Court adopted the rationale expressed by Justice Rose of the Wyoming Supreme Court seven years before the majority of that court granted Mr. Engberg a new sentencing hearing in Engberg v. Meyer:[13]

> Automatically instructing the sentencing body on the underlying felony in a felony murder case does nothing to aid the jury in its task of distinguishing between first-degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since all participants in a felony murder, regardless of varying degrees of culpability, enter the sentencing stage with at least one aggravating factor against them.
>
> . . .
>
> A comparison of the sentencing treatments afforded first-degree-murder defendants further

[13]At that new sentencing hearing Mr. Engberg received a life sentence.

> highlights the impropriety of using the underlying felony to aggravate felony-murder. The felony murderer, in contrast to the premeditated murderer, enters the sentencing stage with one aggravating circumstance automatically against him. The Disparity in sentencing treatment bears no relationship to legitimate distinguishing features upon which the death penalty might constitutionally rest.

Middlebrooks, slip op. at 55 (citing Engberg v. State, 686 P. 2d 541, 560 (Wyo. 1984)(Rose J., dissenting)).

Compounding this error is the fact that the Florida Supreme Court has held that the "in the course of a felony" aggravating circumstance is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert, 445 So.2d at 340 (no way,of distinguishing other felony murder cases, in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty").

In Mr. Waterhouse's case, mitigating circumstances are set forth in the record. There was evidence that Mr.

Waterhouse suffered from a history of alcoholism, and there was evidence that he was intoxicated at the time of the alleged offense. Each of these constitute mitigation under Florida law. Cooper v. Dugger, 526 So.2d 900 (Fla. 1988). To the extent that defense counsel failed to object, he rendered prejudicially deficient performance. Mr. Waterhouse should have been provided an evidentiary hearing, and refusal was error.

CONCLUSION

Mr Waterhouse's re-sentencing was riddled with errors by both his counsel and the lower court judge which make the sentence of death imposed unreliable. Additionally, the Florida Statutes utilized in arriving at this sentence were unconstitutional either facially or as applied and do not meet United States Constitutional standards. The case should be reversed and remanded for a new trial and/or new sentencing.

CERTIFICATE OF FONT AND SERVICE

I HEREBY CERTIFY that a true copy of the Foregoing ***Initial Brief of Appellant***, which has been typed in **Courier New** font size 12, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on December 28, 1999.

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