IN THE SUPREME COURT OF FLORIDA

**ROBERT BRIAN WATERHOUSE,**

Appellant,

v. **CASE NO. SC12-107**

**STATE OF FLORIDA,** **Death Warrant Signed**
**Execution Scheduled**

Appellee. **February 15, 2012**

_____/

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

# INITIAL BRIEF OF APPELLANT


ANDREA M. NORGARD
For the Firm
P.O. Box 811
Bartow, FL 33831
863-533-8556
Fax 863-533-1334
Norgardlaw@verizon.net
Fla. Bar No. 0661066

Attorney for Appellant

ROBERT A. NORGARD
For the Firm
P.O. Box 811
Bartow FL 33831
863-533-8556
Fax 863-533-1334
Norgardlaw@verizon.net
Fla. Bar No. 322059

Attorney for Appellant

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## PRELIMINARY STATEMENT

The instant appeal arises from the denial of the Appellant's successor Motion for Postconviction Relief filed on January 9, 2012, following the issuance of a death warrant by the Governor on January 4, 2012.

The record on appeal will be designated by "R" followed by the page number. The page number utilized in this brief will be the number appearing in the upper right hand corner of each transcript. The trial transcripts will be designated "TT" followed by the page number. The page number utilized is the largest numerical designation on each page of the trial transcripts.

The Appendix contains those portions of the original trial transcript referenced in this brief as well as the orders of the trial court.

The Appellant, Mr. Waterhouse, will be referred to as Mr. Waterhouse. The Appellee will be referenced as the State.

## STATEMENT OF THE CASE

On January 31, 1980, the Grand Jury for the Sixth Judicial Circuit indicted the Appellant, Robert Brian Waterhouse, for the first-degree murder of Deborah Kammerer on January 2, 1980.

Mr. Waterhouse was tried by jury, convicted as charged, and sentenced to death. The judgment and sentence were upheld in Waterhouse v. State, 429 So.2d 301 (Fla. 1983) *cert. denied*, 464 U.S. 977 (1983).

After the issuance of a death warrant in 1985, Mr. Waterhouse filed a Motion to Vacate in the trial court and a habeas petition in this Court. This Court affirmed the guilt issues, but remanded for a new sentencing proceeding. Waterhouse v. State, 522 So.2d 341 (Fla. 1988).

After a new penalty phase, Mr. Waterhouse was again sentenced to death. This Court affirmed at Waterhouse v. State, 596 So.2d 1008 (Fla. 1992), *cert. denied*, 506 U.S. 957 (1992).

Through the Office of Capital Collateral Regional Counsel, Mr. Waterhouse filed a Motion for Postconviction Relief on February 23, 1992, with two amended motions being filed on November 1, 1994 and July 25, 1997. On January 22, 1998, the motion was summarily denied by the trial court. This Court upheld the denial in Waterhouse v. State, 792 So.2d 1176 (Fla. 2001). Mr. Waterhouse then filed a state habeas petition, which was also denied. Waterhouse v. Moore, 838 So.2d 480 (Fla. 2002).

On September 29, 2003, Mr. Waterhouse filed a Motion

for Postconviction DNA Testing seeking testing of the evidence in his case. A hearing was conducted into the circumstances surrounding the destruction of the evidence after the State responded that all evidence in this case was destroyed by the Clerk for the Sixth Judicial Circuit in 1989. The trial court found the destruction to be inadvertent and denied the relief, a new trial, that Mr. Waterhouse requested. This Court affirmed the action of the trial court in Waterhouse v. State, 942 So.2d 414 (Fla. 2006).

A death warrant was signed by the Governor on January 4, 2012. This Court entered an order on January 5, 2012, establishing a schedule for the proceedings.

Mr. Waterhouse filed a Successor Motion for Postconviction Relief on January 9, 2012, raising two claims for relief: Claim 1, that the destruction of evidence should serve as a bar to execution under constitutional due process standards and under the ban on cruel and usual punishment; and Claim 2, that newly discovered evidence as attested to by the affidavits of Leglio Sotolongo and trial counsel established a *Brady* or *Giglio* violation which required a new trial or the existence of newly discovered evidence requiring a new

trial.

At a *Huff* hearing held on January 13, 2012, the trial court denied Claim 1 and set an evidentiary hearing on Claim 2. A written order denying Claim I was entered on January 17, 2012.

On January 17, 2012, an evidentiary hearing was conducted in the trial court. The trial court entered an order denying relief on January 20, 2012. The trial court found that the evidence met the first prong for newly discovered evidence, but that the second prong was not met. The trial court further found that the evidence did not fall under *Brady.*

A timely Notice of Appeal was filed on January 20, 2012.

## STATEMENT OF THE FACTS

The opinion of this Court in Waterhouse v. State, 429 So.2d 301 (Fla. 1983) summarizes the State's evidence at trial. The summary follows:

> On the morning of January, 3, 1980, the St. Petersburg police responded to the call of a citizen who had discovered the dead body of a woman lying face down in the mud flats at low tide on the shore of Tampa Bay. An examination of the body revealed severe lacerations on the head and bruises around the throat. Examination of the body also revealed- and this fact is recited not for its sensationalism but because it became

relevant in the course of the police investigation- that a blood-soaked tampon had been stuffed in the victim's mouth. The victim's wounds were such that they were probably made with a hard instrument such as a steel tire changing tool. Examination of the body also revealed lacerations to the rectum. The cause of death was determined to have been drowning and there was evidence to indicate that the body had been dragged from a grassy area on the shore into the water at high tide. The body when discovered was completely unclothed. Several items of clothing were gathered along the shore at the scene.

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

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

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

witness) and that at about 1:00 a.m. appellant and Kammerer left the bar together.

On the evening of January 7, 1980, police officers asked appellant to voluntarily go with them to police headquarters for an interview. At this time he said that he did not know any girl named Debbie and that he went to the ABC lounge on January 2, but did not leave with a woman. After this interview appellant was allowed to leave but his car was impounded for searching pursuant to warrant. The automobile was searched on January 8 and appellant was arrested on January 9.

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

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

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

become frustrated and angry and that this is what had happened the previous Wednesday night. He also said that he had had a lot to drink on Wednesday night.

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

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

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

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

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

In addition to the evidence summary above, the State

also presented the testimony of Kevin Norwood, who testified that Mr. Waterhouse cleaned out his car on January 3, 1980.[TT653-56] Kenneth Young, a jailhouse snitch, testified that after an alleged attempted sexual battery at the jail, that Mr. Waterhouse made a statement to the effect of "how he'd like a Coke bottle up his ass like I gave her" and that Mr. Waterhouse made a statement when reviewing discovery that he didn't go to work because he was so scratched up.[TT1176-1182]

In addition to the evidence presented by the State, the following evidence was presented by the defense:

Mr. Leon Vasquez testified that he was employed as a bouncer/id checker at the ABC lounge on January 2, 1980.[Appendix Exhibit A: TT3791] He saw the victim sitting at the center bar with two friends.[Exhibit A:TT3793] During the course of the evening, one of the friends sought his help due to problems with another patron bothering them at the center bar.[Exhibit A: TT3793-3798] At around midnight, Mr. Vasquez saw the victim sitting alone at the center bar.[Exhibit A: TT3799]

Mr. Vasquez also saw Mr. Waterhouse in the bar that evening.[Exhibit A:TT3799] Mr. Waterhouse came in the bar accompanied by a male friend around 11:15 p.m. or

so.[Exhibit A: TT3799] Mr. Waterhouse asked Vasquez if he knew where he could find some marijuana.[Exhibit A: TT3800] Mr. Vasquez set Mr. Waterhouse up with a dealer named Steve Spitzig.[Exhibit A: TT3801-3803] Mr. Vasquez watched Mr. Waterhouse leave the bar with Spitzig and his friend shortly after midnight.[Exhibit A: TT3803]

Around 12:45 a.m. Spitzig re-entered the bar alone. [Exhibit A: TT3804] Mr. Waterhouse remained in his car and left with the other guy.[Exhibit A: TT3805] As Spitzig came in he asked if he had time for a drink before last call at 1:20 a.m.[Exhibit A: TT3805] The doors were locked from the outside at 1:30 a.m.[Exhibit A: TT3805] Mr. Vasquez maintained that Mr. Waterhouse did not come back into the bar that night.[Exhibit A: TT3834]

Mr. Vasquez saw the victim in the bar shortly before last call.[Exhibit A: TT3806] He did not see her leave.[Exhibit A: TT3808]

Mr. Vasquez testified that the bar has two entry/exits. One is the main door and the second is located down a long hallway.[Exhibit A: TT3807] Someone in the center bar could not see the hallway exit.[Exhibit A: TT3807]

Mr. Vasquez was contacted by the police shortly after

this happened.[Exhibit A: TT3809] He went to the police station and was interviewed by Det. Hitchcox.[Exhibit A: TT3809] Mr. Vasquez told Hithcox about Mr. Waterhouse leaving with the two men.[Exhibit A: TT3810] Hitchcox responded that he didn't want to hear that, his job was to make a case and not listen to a defense.[Exhibit A: TT3811]

The testimony from the evidentiary hearing held on January 17, 2012 is summarized as follows:

Mr. Leglio Emilio Sotolongo was employed by ABC as a bouncer/id checker on January 2, 1980.[R13;57] He would stand at the entry/exit doors, usually right inside the door.[R58] His shift was from 7-8 p.m. until around 2:00 a.m.; he worked as many hours as he could get, sometimes 7 days a week.[R58-9] He was moonlighting at the bar to make extra money to buy a house.[R57] He worked there for over a year.[R57] At that time he also owned a candle shop in Tampa.[R13]

Mr. Sotolongo is from the St. Pete area. His family, including his brother who is a police officer with the St. Pete police, live there.[R13] He has owned several businesses over the years and currently owns a cigar shop.[R13-4]

Mr. Sotolongo believed that he was working on the

night of January 2, 1980. The only think that led him to doubt whether he was working was the statement made in Det. Hitchcox's report to the contrary.[R32;35;54-5] Mr. Sotolongo did not hang out in the bar unless he was getting paid, as he had many other things to do, that is why he really believed he was working that night.[R37]

The ABC had two entry/exit points.[R19] The main exit was visible from the center bar.[R20;38] The door that Mr. Sotolongo was working at on January 2, was located at the end of a 30 foot hallway.[R20-22;] There were other doors along the hallway that led to an ice closet, bathrooms, and the entrance to the package store.[R20] This exit door at the end of the hallway was not visible from the center bar or the interior of the bar.[R20-1;39]

He did not know the victim, but may have recognized her in 1980.[R15] He knew Mr. Waterhouse as a patron of ABC and thought he lived next door to a friend.[R16] He did not socialize with Mr. Waterhouse.[R60]

Mr. Sotolongo recalled seeing Mr. Waterhouse at the ABC on January 2, 1980.[R16] He believed that Mr. Waterhouse gave him $10 as he came in to repay a loan from the prior week.[R17] Mr. Waterhouse came into the bar with another man.[R17] Mr. Sotolongo believed that Mr.

Waterhouse entered the bar at the beginning of his shift, but it could have been as late as ten.[R17]

Mr. Sotolongo did not see Mr. Waterhouse while he was in the bar, but he saw him leave with two white men towards the end of his shift.[R17-19;35] Mr. Sotolongo would not have left early, he was in the bar the whole evening.[R34-5;37] Mr. Waterhouse left between midnight and 2 a.m.[R54] Mr. Waterhouse did not leave with a female.[R18] Mr. Waterhouse left from the hallway exit where Mr. Sotolongo was working.[R39]

After the murder was in the papers, Mr. Sotolongo was contacted by Det. Hitchcox.[R21] He told Hitchcox that Mr. Waterhouse left with two men.[R23] Hitchcox did not seem to believe him.[R22] Mr. Sotolongo felt he gave Hitchcox more precise times in 1980.[R22]

Several months later, Mr. Sotolongo was with Mr. Vasquez at a bar called Murphy's.[R22;43] Hitchcox came in and got into an altercation with Mr. Vasquez over his statements trying to defend Mr. Waterhouse.[R22-3] It ended when Vasquez and he left.[R22] Mr. Sotolongo was disturbed enough to call Internal Affairs and report the incident.[R28]

Mr. Sotolongo was friends with Mr. Vasquez then.[R46]

He knew Mr. Vasquez testified at the trial.[R47] At that time he knew that Mr. Vasquez testified that Mr. Waterhouse left with two men towards the end of the evening.[R50-1;64]

Mr. Sotolongo wondered why he wasn't called as a witness, but he assumed that the system worked like it was supposed to.[R64] He gave his statement to a detective and assumed that he wasn't needed.[R65]

A story in the newspaper after the warrant was signed caught Mr. Sotolongo's attention.[R24] The article said that Mr. Waterhouse left the bar with the victim and this was not correct; Mr. Sotolongo saw him leave with two men.[R25-6] Mr. Sotolongo talked about this with a private investigator and a lawyer that patronize his cigar shop.[R26] This led to him coming into contact with undersigned counsel.[R26]

For the first time Mr. Sotolongo was provided with what Hitchcox put in his report after it was read to him over the phone by undersigned counsel.[R27-8] Mr. Sotolongo did not say what is contained in the report.[R28] Mr. Sotolongo then executed the affidavit attesting to the events.[R29]

Mr. Sotolongo came forward not because he was questioning the system, he still didn't know if it had

worked or not.[R66] He came forward because he needed to tell what he knew in case it was important, so he could sleep at night.[R67-68]

The affidavits of trial counsel, Paul Scherer and John T. White were admitted into evidence.[R70-71] The trial court took judicial notice of the prior proceedings.[R71]

The State called retired detective Gary Hitchcox.[R74] Hitchcox testified that he was assigned to investigate this case in 1980.[R75] At that time his practice when conducting an interview was to get basic information first, then the interview. He would record the responses on notes, writing down anything he felt was pertinent, then write a report from his notes.[R80-1]

During the course of the investigation, Hitchcox called Mr. Sotolongo and Mr. Sotolongo agreed to “round up as many people as he could and bring them to the station”.[R76] On January 7, 1980, Mr. Sotolongo came to the police station and was interviewed.[R76] The contents of the January 7 report are accurate as to what Mr. Sotolongo said.[R77]

Hitchcox reviewed Mr. Sotolongo’s affidavit and stated it and his claims were false.[R78-9] If he had been told what was contained in the affidavit, he would have made

note of it in his report.[R79-80] He would have written a statement about seeing Waterhouse leave with two men on his note pad.[R81] However, all his notes on this case have been destroyed.[R85] There would be no way to know exactly what questions he asked a witness.[R92]

On cross Hitchcox was adamant that "two men laving with the suspect would be very important. We would want to pursue that. I would—that would be something that I would get excited about as an investigator. The man told me he didn't see him leave, and there was nothing said about leaving with two men. That would have been in the report."[R86].

When next asked why he didn't do a report on Mr. Vasquez, Hitchcox first claimed he didn't know what was being referred to.[R86] Hitchcox then demanded to see proof that he didn't do a report on Vasquez.[R87] He then claimed he didn't have the Vasquez report with him.[R87]

Hitchcox then thought maybe he only heard about Mr. Vasquez in depositions.[R95] He admitted he did not have a report of any interview or conversation with Mr. Vasquez, but it could be in another report.[R95;100] He did not recall his trial testimony about talking with Mr. Vasquez.[R96] Hitchcox then claimed that Vasquez was

interviewed by another officer name “San Marco”, who probably did a report because Vasquez told San Marco about some guy that was with the victim that they investigated.[R101-2]

Hitchcox conceded that Vasquez was not mentioned in the January 7 report that documented the interviews with the ABC witnesses.[R87]

Hitchcox admitted that he had the ability to record interviews, but didn’t do so.[R91] The only person asked to give a written statement was Kyoe Ginn, the barmaid who claimed that Mr. Waterhouse left with the victim.[R91] According to Hitchcox she was important because she said something that was important about the key suspect, Mr. Waterhouse.[R91-2]

The prior proceedings contradict much of Hitchcox’s claims. Defense counsel was given the names of Mr. Vasquez and Spitzig by the State on the Friday before trial.[Appendix Exhibit B:TT5833-45] ASA Merkle told the court that he had only gotten the names the week before.[ Exhibit B: R5857] Merkle claimed that it was determined by the State that neither had any Brady evidence or exculpatory evidence, but in an abundance of caution, he gave the names.[Exhibit B: TT5847-49;5857] ASA Merkle told

that court that ASA Helinger was looking at police reports when he saw the two names.[Exhibit B: TT5857] They called the detective who investigated the case, who gave them "facts and circumstances which indicated that these individuals had no relevant information to this case."[Exhibit B:TT5858] ASA Merkle repeated that there was no Brady material and this did not have to be given to the defense.[Exhibit B:TT5858] Mr. Vasquez was not deposed until after trial began.

During his redirect examination during the trial Hitchcox testified that Vasquez told him about the problem guy at the bar and he turned it over to others to investigate.[Exhibit C: TT2726-8] He admitted he talked to Mr. Vasquez alone at the police station.[Exhibit C: TT2728]

Mr. Hitchcox was asked in deposition if he talked to anyone other than the defendant and those named in his report and he denied doing so.[Exhibit D- Deposition of Gary Hitchcox]

## SUMMARY OF THE ARGUMENT

Issue I: The trial court erred in denying relief where the heightened due process considerations and the bar to cruel and usual punishment should constitute as a bar to execution where a defendant is precluded from pursuing

exoneration due to the grossly reckless, grossly negligent and/or negligent action of a state agency in destroying the evidence in his case in violation of state statute.

Issue II: The trial court erred in denying relief where the evidence was determined to be newly discovered evidence and where the evidence was such that it would probably produce an acquittal upon retrial. The trial court erred in finding that a *Brady* violation was not established. The evidence does not support the trial court's finding that there was no suppression of evidence by the State. Further, the evidence established prejudice sufficient to warrant a new trial.

## ARGUMENT

### ISSUE I

THE RIGHTS GUARANTEED UNDER THE FLORIDA AND UNITED STATES COUNSTITION SHOULD BAR THE EXECUTION OF AN DEFENDANT WHERE POTENTIALLY EXONERATING EVIDENCE WAS DESTROYED BY A GOVERNMENT AGENCY IN VIOLATION OF STATE STATUTE FORCLOSING THE DEFENDANT'S OPPORTUNITY TO ESTABLISH HIS INNOCENCE.

The judicial system has long recognized that the constitutional imposition of a death sentence requires that those subjected to the ultimate punishment are entitled to enhanced constitutional protections. See, Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231

(1985). The constitutionality of Florida's capital sentencing structure hinges on the recognition that death is different. Because "death is different", Mr. Waterhouse argues that under the circumstances in this case, the destruction of evidence by a government agency in violation of state statute should bar his execution and otherwise entitle him to relief.

The Florida Constitution's provisions as set froth in Article I, Sec. 1; Article I, Sec. 2; Article I, Sec. 17; and Article I, Sec. 21 support this position. Article I, Sec. 2 guarantees the citizens for Florida the "inalienable right to …defend life and liberty…". The actions of the government in this case prohibit Mr. Waterhouse from exercising these constitutional rights. He cannot defend his life due to the destruction of potentially exonerating evidences. Further, an execution or denial of other relief under these circumstances will violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. The courts must use evolving standards of decency that mark the progress of a maturing society when determining which punishments are so disproportionate as to be cruel and unusual under the Eighth Amendment. Roper v. Simmons, 543 U.S. 551, 1215 S.Ct. 1183 (2005). The

execution of a defendant under circumstances where he is prevented from pursuing potentially exculpatory testing because a government agency has destroyed all the evidence in his case in violation of state law is disproportionate and unconstitutional under the Eighth Amendment.

In 2003 Mr. Waterhouse, pursuant to section 921.11 and section 925.12 (Fla. Stat. 2003) and utilizing the procedures of Fla. R. Crim. P. 3.853 tried to establish his innocence by using DNA testing of the evidence in his case. Under oath Mr. Waterhouse affirmed that the testing of this evidence using DNA testing methods that were not in existence at the time of his trial in 1980 would lead to exoneration. During proceedings on his motion, it was learned that all the potentially exonerating evidence was destroyed in 1989 by the Clerk of the Sixth Judicial Circuit contrary to state law. The order of the trial court from this proceeding is appended to the January 17, 2012 order of the trial court.

Mr. Waterhouse at that time appealed the issue of the destruction of the evidence, seeking a retrial in state court since he was precluded from retesting the evidence. This Court denied relief on that ground.

At this juncture, Mr. Waterhouse is under an active

death warrant. At the time of the prior proceedings, execution was a possibility, not a certainty. Mr. Waterhouse is not precluded from challenging the warrant on the grounds that execution would be unconstitutional at this time, when the certainty of execution has never previously been before this Court. Mr. Waterhouse asks this Court to reverse the January 17, 2012 ruling of the trial court and recognize that a not previously recognized constitutional right is at stake- the right that a state should not be permitted to execute one of its citizens when the state, through its actions that are no fault of the defendant, has through gross recklessness, gross negligence and/or negligence, destroyed evidence in a capital case that precludes the defendant from establishing his innocence. An execution under these circumstances will violate the Eighth Amendment, as well as to other Federal and Florida constitutional provisions cited in this Initial Brief.

Mr. Waterhouse recognizes that in Arizona v. Youngblood, 488 U.S. 51(1988), the United States Supreme Court held that a defendant's due process rights are violated when the state in bad faith, fails to preserve useful, or "potentially valuable," evidence and that

Florida has adopted Youngblood. The trial court found in this case that the destruction was not done in bad faith under Youngblood, hence a new trial level proceeding would not be required, although Mr. Waterhouse himself stated at the hearing on January 17, 2012, that where the Clerk broke the law by destroying the evidence that this is bad faith, *per se*. Mr. Waterhouse also contends that the requirement of "bad faith" should be modified in the context of an actual execution because the heightened due process provisions that apply to capital cases were not considered in Youngblood. Moreover, Mr. Waterhouse can find no Florida case in which this question has come before the Court.

Youngblood was not a capital case, therefore the heightened due process standards that apply to capital cases were not considered by the Court. The standard in Youngblood is extremely high, and Mr. Waterhouse suggests that the standard announced by Justice Stevens in his concurrence to Youngblood (and which he affirmed in Illinois v. Fisher, 540 U.S. 544, 549 (2004), should apply and serve as a bar to execution. As Justice Stevens stated in Youngblood "…there may well be cases in which the defendant is unable to prove that the State acted in bad

faith but in which the loss or destruction of evidence in nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." 488 U.S. at 61. This statement can and should be extended to the punishment resulting from such a trial situation as well. It certainly flows that under this type of situation that the destruction of evidence makes the sentence fundamentally unfair.

For this Court to adopt such an approach would not be out of line with other states, which have chosen on state law grounds to apply a less harsh standard than either the Youngblood concurrence or dissent, rather than the next-to-impossible "bad faith" standard. "The majority of states that have considered Youngblood in relation to their state constitutions have rejected the majority opinion." State v. Krantz, 1998 WL 3621 n.2 (Ct. Cr. App. Tenn. 1999)*citing to* State v. Morales, 322 Conn. 707, 726 (1995). As of 1995 those state included Connecticut, Massachusetts, Vermont, Delaware, Alabama, Hawaii, and Alaska. In two states, North Carolina and Virginia, disagreement with the Youngblood standard led to executive commutations of death sentences just hours before scheduled executions. See, Exhibits 2 and 3 of the Defendant's Successor Motion For

Post-Conviction Relief.

As Justice Stevens state in his concurrence in Illinois v. Fisher, "'[f]airness dictates that when a person's liberty is at stake, the sole fact of whether the police or another state official acted in good or bad faith in ailing to preserve evidence cannot be determinative of whether the criminal defendant received due process of law.'" 540 U.S. at 549 (*quoting* State v. Morales, 322 Conn. 707, 723 (Conn. 1995). In this case, due to the signing of the death warrant, the stakes are no longer just the possibility of death and depravation of liberty, but actual death.

To recognize the heightened due process standards that apply in capital cases should be afforded in the manner that Mr. Waterhouse seeks in this case would ensure the integrity of the capital sentencing procedure in Florida. This Court should not let the grossly reckless, grossly negligent, and/or negligent actions of the clerk in this case obscure the duty of the court to give careful and serious consideration to actions of government agencies which breach the public trust in the system. The primary function of due process is to ensure that the ends of justice are met. For these reasons "the methods we employ

in the enforcement of our criminal laws have aptly been called the measures by which the quality of our civilization may be judged." Coppedge v. United States, 369 U.S. 438, 449, 82 S.Ct. 917,923, 8 L.Ed 2d 21 (1962). As Justice Marshall pointed out is his dissent in McClesky v. Kemp, 481 U.S. 320, 107 S.Ct. 1756, 1793-94 (1987) "Those whom we would banish from society or the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of the court's to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of "sober second thought",[*quoting*, Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 25 (1936). To permit execution where the state has destroyed the evidence which may have exonerated the defendant precludes the ends of justice from being met and erodes confidence in the judicial system. This case exemplifies the concerns expressed in *Confronting the New Challenges of Scientific Evidence*, 108 Har. L. Rev. 1557 (May 1995) that

"prosecutors and state officials under political pressure to reduce crime, as well as those with a firm belief in finality, may feel induced to destroy evidence as soon as the appeals process is initially exhausted. The supposed incentives that generally provide the state with a reason to preserve opaque evidence, if they exist prior to conviction, would virtually disappear after conviction. Cost and finality considerations may well push aside concerns about the convicted innocent, absent constitutional and legislative directions to the contrary." A remedy is necessary in order to deter such conduct as happened in this case from recurrence. The reduction to a life sentence or other such relief would accomplish deterrence and still meet society's goal of punishment.

## ISSUE II

THE TRIAL COURT ERRED IN DENYING RELIEF AFTER DETERMINING THAT THE EVIDENCE PRESENTED WAS NEWLY DISCOVERED, BUT THAT NO PREJUDICE COULD BE ESTABLISHED. THE TRIAL COURT FURTHUR ERRED IN DETERMING THAT NO *BRADY* VIOLATION HAD OCCURRED.

In Claim 2 of his motion, Mr. Waterhouse presented the affidavits of Leglio Sotolongo and Mr. Waterhouse's trial attorneys Paul Scherer and John T. White in support of his

claim that in 1980 the State committed a violation of Brady v. Maryland, 373 U.S. 83 (1963) when then Detective Hitchcox failed to accurately record the statements made by Mr. Sotolongo during a police interview. Mr. Waterhouse further argued that the critical portions of Mr. Sotolongo's statement, which were prompted by news coverage of the death warrant, were first disclosed to counsel in January 2012. Both trial attorneys affirmed that had Mr. Sotolongo's exculpatory statement as set forth in his affidavit been available to them at the time of trial, he would have been called as a witness to both impeach the testimony of state witness Kyoe Ginn and to corroborate the testimony of defense witness Leon Vasquez.[Affidavits of Paul Scherer and John T. White]

After an evidentiary hearing, the trial court determined that Mr. Sotolongo's testimony constituted newly discovered evidence.[Order of January 20, 2012 p.10-11] The trial court, however, determined that the testimony "…is not of such a nature that it would probably produce an acquittal on retrial in that it would not give rise to a reasonable doubt as to Waterhouse's culpability."[Order of January 20, 2012, p.11] In reaching this conclusion, the trial court reviewed some of the evidence as presented at

the trial.[Order dated January 20, p.11-16] It is important to note that in reaching this conclusion the trial court did not consider other evidence that would significantly affect the weight of the evidence considered by the trial court. The trial court also did not consider other developments regarding the evidence which would affect the evidence at a retrial.

The trial court then determined that no *Brady* violation occurred.[Order dated January 20, p.18] The trial court based this conclusion on Det. Hitchcox's testimony that he always takes notes of pertinent information and reduces those notes to a report and that any statements about Waterhouse leaving with two men would have been "exciting" to him and he would have written it in his notes and report.[Order dated January 20, 2012, p. 19] This conclusion ignored the fact that similar information was conveyed to Det. Hitchcox by another witness, Leon Vasquez, but Hitchcox did not reduce this information to writing.

The trial court's rejection of the second prong of the newly discovered evidence claim and the rejection of the *Brady* claim should be reversed.

A. THE NEWLY DISCOVERED EVIDENCE CLAIM

In order to establish a claim of newly discovered evidence a defendant must meet two criteria. First, in order to qualify as newly discovered evidence, the evidence must have existed, but have been unknown by the trial court, party, or counsel at the time of trial and must not have been discoverable thorough the use of due diligence. Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial or a different sentencing result. Jones v. State, 709 So.2d 512 (Fla. 1988). The second prong is satisfied when it 'weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." Diaz v. State, 945 So.2d 1136, 1145 (Fla. 2006), quoting, Jones v. State, 709 So.2d at 526. In order for the evidence to constitute newly discovered evidence, it must be evidence that would be admissible at trial. The trial court must then consider whether or not the newly discovered evidence goes to the merits of the case or is impeachment evidence, whether it is cumulative to other evidence, and whether it is material and relevant. The trial court should also consider inconsistencies between the newly discovered evidence and other evidence at trial. Jones v. State, 709 So.2d at 521. A cumulative analysis

must be made so the trial court has a "total picture" of the case. Lightbourne v. State, 742 So.2d 238, 248 (Fla. 1999).

The trial court determined that the evidence adduced at the evidentiary hearing from Mr. Sotolongo, in conjunction with the affidavits of trial counsel and the representations of undersigned counsel, established the first prong of for newly discovered evidence. This finding by the trial court was correct and should be upheld.

However, the trial court incorrectly determined that the second prong, that of prejudice, had not been met. Under Jones, 709 So.2d at 521, the newly discovered evidence must be such that it would probably produce an acquittal at **retrial**.[emphasis added] When the evidence introduced at trial is analyzed from the position of retrying this case, Sotolongo's testimony coupled with the posture of the evidence at retrial establishes that it is probable that a retrial would result in an acquittal. This Court should reverse that finding of the trial court and remand for a new trial.

To support the conclusion that an acquittal would not likely occur at retrial, the trial court's order lists evidence that was adduced at trial in 1980. However, the

order fails to consider other evidence presented at the trail that significantly affects the weight of the evidence considered by the trial court. Also, the order fails to consider the subsequent proceedings which identified evidence which was not admitted at trial and the evidence that would necessarily be excluded at a retrial that was considered by the jury in 1980.

It should be noted that evidence of bags of marijuana found in Mr. Waterhouse's car was admitted in 1980; however this Court held that this admission was improper, although harmless. See, Waterhouse v. State, 429 So.2d at 306. A retrial jury would not be permitted to consider the evidence of this other crime.

It should also be noted that in 1980 the jury reviewed a pamphlet that was left in the jury room that delineated various aspects of trial procedure and juror duties. A retrial jury would not be permitted to view this inappropriate and improper information.

The trial court analysis looked at the statements that Mr. Waterhouse made to Detectives Murry and Hitchcox.[Order dated January 20, 2012, p.11-12] It should be noted, however, that Mr. Waterhouse's statements were equivocal in nature- at no time did he admit to the murder of Ms.

Kammerer. The statements are not a confession and are subject to numerous interpretations.

Next, the trial court relied upon the prior testimony of Mr. Van Vuren, Mr. Waterhouse's boss in 1980. Van Vuren claimed to have seen scratches on Mr. Waterhouse's face on the morning of January 3, 1980.[Order dated January 20, 2012,p.13] However, the trial court fails to consider that a jury at retrial would also hear testimony which would impeach Van Vuren. Other witnesses, including law enforcement, testified that they did not see scratches on Mr. Waterhouse's face. The various witnesses saw Mr. Waterhouse within 1—5 days after the night of January 2, 1980.

The trial court also references testimony that Mr. Waterhouse liked to engage in rough sex.[Order dated January 20, p.13] This evidence does not establish that Mr. Waterhouse killed the victim. He certainly did not kill Ms. Rivers, with whom he engaged in rough sex. Mr. Van Vuren testified that although Mr. Waterhouse engaged in rough sex, it was consensual. Van Vuren testified that Mr. Waterhouse liked to engage in rough sex with women who permitted such activity. There was no evidence that the consensual rough sex that Mr. Waterhouse engaged in led to

any injuries to the women.

The testimony of Kenneth Young, the jailhouse snitch, would be significantly impeached at a retrial. During his initial testimony, he was not impeached with his hopes of favorable treatment or the actual positive treatment he received because it was not developed at the 1980 trial. In this Court's opinion at Waterhouse v. State, 522 So. 2d 341, 343 (Fla. 1988), it was acknowledged that information that would impeach Young was not used at trial, however found that the failure to do so was a tactical decision by trial counsel or that it was not sufficiently prejudicial in and of itself. At a retrial, Young would be impeached about his negotiations with the State and motivations to testify. At a retrial Young could also be impeached by other witnesses that were present, but did not hear what Young claimed to have heard.

The substance of Young's testimony was that (1) he claimed he heard Mr. Waterhouse make a statement after an attempted assault in the jail where he stated "I wonder how he'd like a Coke bottle up his ass like I gave her."[Order dated January 20, 2012, p.13] and that when Mr. Waterhouse was reviewing his discovery he made the comment that the witness who would be called to say that he showed up at

work with scratches on his face was wrong- that he was so scratched up he didn't go into work at all that day.[Order dated January 20, 2012, p.13] Neither of these statements is a confession. The first statement about the Coke bottle does not reference any particular person, and since Mr. Waterhouse allegedly preferred rough sexual activity, it could equally apply to any woman. Mr. Young had no idea who Mr. Waterhouse meant. As to the second statement regarding the scratches, this statement is subject to misinterpretation and is equivocal and hinges on the credibility of Mr. Young. No evidence was detected on a Coke bottle found in Mr. Waterhouse's vehicle linking it to the victim.

The trial court considered the evidence from the medical examiner, Dr. Joan Wood, that acid phosphotase was found in the rectum, which was indicative of sexual activity.[Order of January 20, 2012, p.14] There was no testimony in the original trial which linked Mr. Waterhouse to the acid phosphotase.

The trial court also relied upon the serology testimony that came from Mr. Yeshion and Mr. Baer.[Order of January 20, 2012, p.14] The evidence related to serology has been destroyed, prohibiting this testimony from a

retrial. Further, a retrial jury would necessarily have to told that at best, this evidence was only class characteristics and that millions of persons have the same blood type and marker as Ms. Kammerer.

The testimony of the blood spatter expert, Judith Bunker [Order dated January 20, 2012, p.14), would likely be excluded due to the fact that Ms. Bunker has been discredited after falsifying her credentials. See, Hannon v. State, 941 So.2d 1109 (Fla. 2006). Once again, this evidence would not be admissible even with the use of another expert since the evidence has been destroyed.

The hair and fiber evidence that was admitted at the 1980 trial and referenced by the trial court [Order of January 20, 2012, p.14-15] is also only class characteristic evidence, it could not be determined when the evidence could have been deposited, and testimony would establish that Ms. Kammerer was in Mr. Waterhouse's vehicle on prior occasions. Further, no statistical evidence could be used to conclusively establish that either the hair or fibers were actually from the victim or her belongings.

Lastly, the trial court referenced the testimony of Kyoe Ginn.[Order of January 20, 2012, p.15] A retrial jury would hear the testimony of Mr. Sotolongo, as well as Mr.

Vasquez contradict Ms. Ginn's testimony that Mr. Waterhouse was with the victim in the bar and that he left with her. The State would no longer be able to argue that Mr. Vasquez's testimony was uncorroborated, which Ginn was unchallenged.

In making the determination of whether or not the newly discovered evidence is of such a nature that it would probably produce at acquittal at retrial, the trial court must "consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial." Jones, 709 So. 2d at 521. The trial court failed to consider the relative weight that would be accorded to the prior evidence at retrial in assessing the issue of prejudice. If, as outlined above, the considerations of weight are analyzed, Mr. Waterhouse has established that at a retrial, an acquittal is likely.

B. THE *BRADY* CLAIM

Most recently in Mungin v. State, 36 Fla. L. Weekly S610, 2011 WL 5082454 (Fla. 2011), this Court addressed the requirements of a *Brady* claim. "In order to establish a *Brady* violation, the defendant must demonstrate that (1) favorable evidence, either exculpatory or impeaching (2)

was willfully suppressed by the State and (3) because the evidence was material, the defendant was prejudiced. *Strickler v. Greene,* 527 U.S. 263, 281-2 (1999); *Way v. State,* 760 So.2d 903, 910 (Fla. 2000). To meet the materiality prong, the defendant must demonstrate a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Way*, 760 So. 2d at 913 (quoting *Bagley*, 473 U.S. at 682) A reasonable probability is a probability sufficient to undermine this court's confidence in the outcome. *Id*; *see also Strickler*, 527 U.S. at 290 However, making this determination, a court cannot "simply discount[]the inculpatory evidence in light of the undisclosed evidence and determine[e] if the remaining evidence is sufficient." *Franqui v. State*¸ 59 So.3d 82, 102 (Fla. 2011). "It is the net effect of the evidence that must be assessed." *Jones v. State,* 709 So.2d 512, 521 (Fla. 1998)." Mungin, 2011 WL 5082454, at p. 6.

The trial court found that Mr. Waterhouse had satisfied the first prong of *Brady*, but that had not shown that the State suppressed information under the second prong [Order dated January 20, 2012, p.19] or a showing of prejudice under the third prong.[Order dated January 20,

2012, p.20]

A *Brady* claim presents a mixed question of law and fact. The appellate court will defer to the lower court's factual findings provided they are supported by competent, substantial evidence and the application of the law to the facts under a *de novo* standard. *See*, Franqui v. State, 59 So.3d 82 (Fla. 2011). The trial court's findings as to the second should be reversed where the trial court's factual findings related to Det. Hitchcox are not supported by competent substantial evidence when the entire record is considered. The trial court's finding as to the third prong should be reversed as well.

The trial court found that Hitchcox did not falsify his report because he testified that "he always followed the same procedures when conducting interviews and that he noted and included in his report pertinent information about the subject matter. Hitchcox further testified that had Sotolongo told him this information, it would have been "exciting" to him as a detective and that he would have written it in his notes and the report."[Order dated January 20, 2012, p. 19] Hitchcox's testimony in this regard is completely contradicted by other portions of the record. The trial court failed to acknowledge or otherwise

address Hitchcox's prior documented behavior in this case, hence the findings of the trial court cannot be said to be supported by competent, substantial evidence.

Hitchcox's claim that he most certainly would have noted something as important as Sotolongo's claim that Waterhouse left the bar with two men because he would have been excited about such a thing and that would be something he would pursue as a detective is conclusively contradicted by his actions in this case with the witness Leon Vasquez. While Hitchcox admitted during the trial that he talked in person with Vasquez at the police headquarters and that Vasquez told him about seeing Mr. Waterhouse leave with two men, Hitchcox **never reduced this to writing; Hitchcox did not put Vasquez's statements in any report**. In Exhibit C, the State advised the trial court in 1980 that only the name of Vasquez appeared in a report, but in order to find out what he had told police, they had to go to the "detective investigating the case" and talk to him. Only then did the State learn what Vasquez had to say, which they discounted. Although Hitchcox in the evidentiary hearing tried to claim that detectives other than he would have interviewed and made reports on Vasquez, at trial in 1980 Hitchcox testified that **he was the one who interviewed**

**Vasquez** and he failed to mention any other detective. Further, in the evidentiary hearing Hitchcox claimed that he disclosed Vasquez in deposition, however that is false. Hitchcox's deposition, Exhibit D, makes no mention of Vasquez whatsoever. If we are to rely upon the suggestion that it is the memory closer in time which controls, then we should also consider the actions closer in time to the event. In this case, Hitchcox's actions in 1980 are in complete contradiction to his self serving testimony that he would be so "excited" about information that Mr. Vasquez and Mr. Sotolongo had that not only would it absolutely be in a report, but that it would have warranted follow up investigation. Hitchcox did nothing with Mr. Vasquez- he did no report, he did no follow up investigation, and he told the State Attorney's that Vasquez was of no value. There is no reason to believe that in 1980 he evaluated Mr. Sotolongo any differently. It is entirely reasonable to believe that Hitchcox's attempts to hide Vasquez by failing to memorialize his statements in writing also extended to falsifying Sotolongo's statements or, at a minimum, failing to include evidence from Sotolongo that would be crucial for the defense. Contrary to the trial court's belief that the evidence militated in favor of Hitchcox's reliability

because he wrote a report, the evidence does not militate in favor of Hitchcox's credibility that he truthfully reported what Mr. Sotolongo told him. Unlike Sotolongo, Hitchcox had a strong interest in the case in 1980 and his interest is no less today. The trial court's failure to consider the record evidence which impeaches Hitchcox and severely impugns his credibility allows this Court to conclude that there is a lack of competent, substantial evidence in entire record does not support the trial court's conclusions as to the second prong of *Brady*.

The third prong of *Brady* requires a showing of prejudice. When the net effect of the evidence is analyzed, the trial court's conclusion, reviewed under a *de novo* standard, is incorrect.

A critical component of the State's case in 1980 was to place the victim with Mr. Waterhouse and to establish that she was last seen alive with Mr. Waterhouse. The State placed great emphasis on the testimony of Kyoe Ginn, who was the only state witness who testified that Mr. Waterhouse and the victim were drinking together in the bar for at least a half hour and that they departed together. During closing arguments the prosecutor referred to Ginn a disinterested, truthful, credible, corroborated by other

evidence and uncontradicted. [TT 2067-68;2092;2182] The State argued closing that the testimony of Ginn was one of the three main sources of evidence in the case that established Mr. Waterhouse as the perpetrator.[TT2092-4] The trial court correctly recognized that Mr. Sotolongo would have impeached Kyoe Ginn. However, the trial court failed to recognize even though Mr. Vasquez testified similarly to what Mr. Sotolongo would have testified to, Mr. Vasquez was subject to derision and impeachment by the State.

During cross-examination the prosecutor mercilessly questioned Vasquez about his brokering a drug deal for Mr. Waterhouse and his respect for the law. In rebuttal closing the prosecutor called Vasquez a liar and told the jury that if they believed Vasquez, they would have to then conclude that Det. Murry, Det. Hitchcox, Judith Bunker[at trial a purported blood spatter expert] and Kyoe Ginn were liars.[TT2178-80] The prosecutor portrayed Vasquez as someone who had no respect for the law and whose testimony was uncorroborated.[TT2179-80]

Had Mr. Sotolongo testified consistent with his testimony at the evidentiary hearing, much of the prosecution’s attack on Vasquez would have been undermined.

The State would have had to explain how two witnesses, who were consistent in their testimony, were wrong and only Ginn was correct. Further, Mr. Sotolongo would not have been subject to the same impeachment as Vasquez. Mr. Sotolongo did not broker a drug deal, he already owned a business and was working at ABC to earn extra money to buy a house. He did not socialize with Mr. Waterhouse and did not hang out at the ABC. Mr. Sotolongo was a credible witness without the baggage carried by Vasquez.

The trial court incorporated into its prejudice analysis of the *Brady* claim the same evidence summary that it relied upon in discussing the newly discovered evidence portion of the claim. Mr. Waterhouse would incorporate here the analysis of that evidence contained on pages 31 to 36 of this brief. That analysis demonstrates that the evidence the trial court used was not a complete summary as it did not consider other evidence which affected weight. When the evidence is properly considered, and not just the inculpatory evidence, the proper result is a finding that Mr. Waterhouse established sufficient prejudice to prevail on his claim that *Brady* was violated and he is entitled to a new trial.

## CONCLUSION

Based upon the forgoing citations of law, argument, and other authorities, the Appellant respectfully requests the following relief: As to Issue I, that a stay of execution be ordered with a remand for appropriate proceedings; and as to Issue II, a stay of execution be ordered with a remand for a new trial.

Respectfully submitted,

Andrea M. Norgard
Attorney for Appellant

Robert A. Norgard
Attorney for Appellant

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing Initial Brief has been furnished by U.S. mail and electronic mail to warrant@flcourts.org; Office of the State Attorney, Assistant State Attorney Bruce Bartlett, Office of the State Attorney, Pinellas County Judicial Center, 14250-49th Street North, Clearwater, FL 337;62-2800 [bbartlet@co.pinellas.fl.us]; Office of the Attorney General, Assistant Attorney General Candance M. Sabella, Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607 [candance.sabella@myfloridalegal.com], this ___ day of January, 2012.

## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style font used in the preparation of this Initial Brief is Courier New 12 point in compliance with Fl. R. App. Pro. 9.210(a)(2).


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ANDREA M. NORGARD
For the Firm
P.O. Box 811
Bartow, FL 33831
863-533-8556
Fax 863-533-1334
Norgardlaw@verizon.net
Fla. Bar No. 0661066

Attorney for Appellant

_____

ROBERT A. NORGARD
For the Firm
P.O. Box 811
Bartow FL 33831
863-533-8556
Fax 863-533-1334
Norgardlaw@verizon.net
Fla. Bar No. 322059

Attorney for Appellant

# APPENDIX

# INDEX TO APPENDIX