In the

SUPREME COURT OF FLORIDA

No. 70459

ROBERT BRIAN WATERHOUSE,

Petitioner,

vs.

RICHARD DUGGER, Secretary, Department of Corrections, State of Florida, and TOM BARTON, Superintendent, Florida State Prison at Starke, Florida,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, ROBERT BRIAN WATERHOUSE, who has appealed from a denial of a motion for post conviction relief in the Sixth Judicial Circuit, moves as an alternate ground for relief that this Court issue a writ of habeas corpus on the ground that he was denied effective assistance of counsel on his direct appeal of his conviction and death sentence. Appellate counsel rendered ineffective assistance by failing to present to this Court several clear violations of petitioner's rights under the Constitutions of the United States and of the State of Florida. Had those violations been brought to this Court's attention, Mr. Waterhouse's conviction and/or sentence would have been reversed by this Court.

JURISDICTION

Petitioner seeks a writ of habeus corpus pursuant to Article V, Section 3(b)(1), (7) and (9) of the Constitution of the State of Florida and Rule 9.030 (a)(3) of the Florida Rules of Appellate Procedure. Petitioner seeks relief in this Court because the issues raised herein involve this Court's appellate review of the trial proceedings. See Knight v. State, 394 So.2d 997 (Fla. 1981).

PROCEDURAL HISTORY

Petitioner was convicted by a jury of first degree murder on September 2, 1980, in the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Pinellas County, St. Petersburg, Florida. After a sentencing hearing, the jury re-

turned a recommendation for the death penalty on September 3, and the court entered its judgement sentencing Mr. Waterhouse to death on that date. The court entered its written order setting out its findings in support of the sentence imposed on September 15, 1980.

This Court affirmed the conviction and sentence on February 17, 1983. Waterhouse v. State, 429 So.2d 301 (Fla. 1983). The United States Supreme Court denied Mr. Waterhouse's petition for a writ of certiorari on November 7, 1983. Waterhouse v. State, 464 U.S. 977 (1983).

Mr. Waterhouse was considered for clemency under the procedures established by the governor of Florida upon a presentation made by attorney Henry Andringa of St. Petersburg on November 26, 1984. Thereafter, the governor denied clemency and signed a warrant ordering Mr. Waterhouse's execution. An execution date was set for March 19, 1985. On March 15, the trial court granted Mr. Waterhouse's motion for a stay of execution pending consideration of his motion for post conviction relief. The State appealed the stay order, which was upheld by this Court on March 18. State v. Beach, No. 66, 725 (March 18, 1985).

Subsequently, Mr. Waterhouse filed a motion for post conviction relief. The trial court held an evidentiary hearing and thereafter denied relief. Mr. Waterhouse filed a timely notice of appeal, and filed his brief on April 24, 1987. Waterhouse v. State, No. 68, 557.

STATEMENT OF FACTS

On January 3, 1980, the body of Deborah Kammerer was found on the shore of Tampa Bay in St. Petersburg. R. 903, 906. [Numbers preceded by "R." refer to the pages in the record on automatic appeal to this Court.] She had suffered severe lacerations on the head, probably made with a hard instrument. Acid phosphotase was found in her rectum in sufficient amount to indicate to the medical examiner the presence of seminal fluid. The cause of death was determined to be drowning.

Robert Waterhouse was arrested for the crime on January 9, and ultimately brought to trial on August 25. Prior to trail, the trial court had suppressed a statement obtained from Mr. Waterhouse by the police, but on the morning of trial, the court reversed itself and announced that the statement would be admitted. On the Friday before trial, the prosecutor, Robert Merkle, provided defense counsel for the first time with the names of two witnesses who had been identified by the police back in January. Both witnesses would testify favorably to Waterhouse on a key point, that he did not leave a bar with the decedent on the night of the murder. The State contended that Waterhouse did leave with the victim.

Defense counsel sought a continuance because of the new ruling on the suppression motion, the last minute information about the witnesses, and the need to review various reports and physical evidence in the possession of the State. R. 597-614. Nevertheless, the court denied the motion. R. 614.

During jury selection, Merkle questions jurors about whether they could vote to impose the death penalty in a case involving circumstantial evidence. After some confused questions and answers, the trial court excused two jurors because they were "baffled." R. 725-26.

The prosecution's case against Mr. Waterhouse consisted in part of testimony of witnesses -- over the objection of defense counsel -- that Mr. Waterhouse liked to have anal sex and the decedent disliked anal intercourse. R. 1159-60; 1270-71, 1320, 1788-95. The propensity evidence was a central theme of the prosecutor Merkle's closing argument. R. 2066-67; 2090; 2106-07; 2184-85.

The prosecution also sought to link Mr. Waterhouse to the crime through testimony of experts regarding various scientific tests, the testimony of officers and a jail inmate about statements allegedly made by Mr. Waterhouse; the testimony of a bartender that Mr. Waterhouse left the bar with the decedent, and testimony of witnesses as to his activities around the time of

the crime.

Just before closing arguments at the guilt-innocence phase the bailiff reported that all of the jurors had read a booklet which defined various terms and described legal procedures. R. 2074.

The prosecution's sole witness at the penalty phase was a retired New York police officer who testified as to what a number of people in New York had found in investigating a homicide for which Mr. Waterhouse had been convicted fourteen years earlier. Over numerous objections from defense counsel, the officer testified about the findings of the police laboratory, the medical examiner, and officers who had obtained a statement from Mr. Waterhouse. R. 2259-2265.

Mr. Waterhouse was convicted and sentenced to death.

RELIEF REQUESTED

Petitioner Robert Brian Waterhouse asks this Court to grant him a new appeal, or, alternatively, to vacate his prior conviction and/or sentence of death because of the fundamental errors described herein.

REASONS THE WRIT SHOULD ISSUE

This Court should issue a writ of habeas corpus because of fundamental constitutional errors which occurred at Robert Waterhouse's trial which were not raised by appellate counsel or by this Court in its review of the case. These errors are so substantial, so pervasive and go so directly to the truthfinding function of the jury, that they require that Robert Waterhouse's conviction and death sentence be set aside.

I. ROBERT WATERHOUSE WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN HIS PREVIOUS APPEAL TO THIS COURT.

The Constitutions of the United States and of Florida guarantee the right of one sentenced to death to a direct appeal. Proffitt v. Florida, 428 U.S. 242, 253 (1976); State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); Fla. Stat. §921.141. Both further interpret that right to include the effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. 387 (1985); Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

In reviewing claims of ineffective assistance of counsel on appeal, this Court must determine whether there were "specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance," and "that the failure or deficiency caused by the prejudicial impace on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the oucome under the governing standards of decision." Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985), citing Strickland v. Washington, 466 U.S. 688 (1984); see also Smith v. State, 457 So.2d 1380 (Fla. 1984).

Petitioner Robert Waterhouse submits that previous counsel was ineffective in failing to raise on previous appeal to this Court the following issues:

1. The highly prejudicial evidence of the sexual preferences of Mr. Waterhouse and the decedent to prove that Mr. Waterhouse had the propensity to commit the crime.

2. Admission of an abundance of prejudicial hearsay testimony of a retired police officer in violation of the confrontation clause at the sentencing phase.

3. The unconstitutional consideration of extraneous materials by the jury.

4. The unconstitutional excusal of two jurors who were "baffled" by prosecutor Merkle's questioning.

5. The denial of a two week continuance when defense counsel had been ambushed by the prosecution's last-minute notification of two key exculpatory witnesses, was caught by surprise by the trial court's reversal of its previous ruling on the admissiblity of statements, and still had not obtained all reports from the State's experts.

The decision, if indeed there was one, not to raise the issues herein on direct appeal "cannot be excused as mere strategy or allocation of appellate resources." Wilson v. Wainwright, 474 So.2d 1192, 1163 (Fla. 1985). Each issue raises concerns of constitutional proportions, where the integrity of the trial is put into question. Further, these issues were not so obscure that they can be likened to the proverbial "needles in a haystack." For example, the Williams rule violation raised herein refers to the most inflammatory evidence introduced at trial. Instead of raising this issue, appellate counsel raised the harmless admission of testimony regarding marijuana found in Mr. Waterhouse's car. Waterhouse v. State, 429 So.2d at 306. Raising the least damaging evidence while ignoring the most damaging and most clearly inadmissible falls below Sixth Amendment standards.

Likewise, the confrontation claim raised herein involves a violation of a right which goes to the very heart of our criminal justice system -- the right guaranteed by the Sixth Amendment to confront and cross examine the witnesses against an accused. This right is considered one of the "fundamental requirements of a fair trial . . . " Proffitt v. Wainwright, 685 F.2d 1227, 1251, (11th Cir. 1982), modified on rehearing, 706 F.2d 311 (1983) cert. denied, 464 U.S. 1002 (1983). The violation of this fundamental right was patently "obvious upon even a casual reading of the trial transcript," Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir., March 7, 1987), and the failure to raise it on direct appeal was inexcusable.

Further, the jury's consideration of improper materials could not be missed upon even a cursory review of the record. A claim based on such a due process violation is hardly a novel one; the law has been well settled for many years that the jury may consider only properly admitted evidence. If nothing else, trial counsel's objection and the several pages worth of discussion concerning the issue (R. 2046 et. seq.) should have signalled to appellate counsel its importance.

The two remaining issues, that of the denial of the continuance, and of the improper removal for cause of two jurors were likewise issues going to central aspects of the trial, which again were "obvious upon even a casual reading of the trial transcript." Matire, 811 F.2d at 1438.

As explained more fully below, the serious omissions by appellate counsel constituted a performance which fell below that which is professionally acceptable, and undermines confidence in the appellate review in this case. Because these issues, if properly raised on direct appeal, would have resulted in reversal, this Court should grant Mr. Waterhouse a new trial. Johnson v. Wainwright, 498 So.2d 938, 939 (Fla. 1986). See also Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986).

A. APPELLATE COUNSEL'S FAILURE TO CHALLENGE HIGHLY PREJUDICIAL EVIDENCE OF UNRELATED BAD ACTS DENIED MR. WATERHOUSE THE EFFECTIVE ASSISTANCE OF COUNSEL.

Several times throughout the trial, the state introduced evidence, over objection, regarding sexual preferences of both Mr. Waterhouse and the victim, and Mr. Waterhouse's propensity toward violent behavior. The sole relevancy of this evidence was to show that Mr. Waterhouse's demonstrated a general preference for certain sexual practices, that the victim may not normally have engaged in such practices, and that since the evidence indicated that she had engaged in such practices the night of her death, it must have been through the use of force by Mr. Waterhouse.

Both Florida law and federal law prohibit the introduction of character and other crimes evidence for the purposes described above. See, e.g., F.S.A. § 90.404 (2)(a); Williams v. State, 110 So.2d 654, cert. denied, 361 U.S. 847 (Fla. 1959); Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. Unit B, 1981). The trial court committed reversible error by admitting it. By failing to raise this error on direct appeal, Mr. Waterhouse's appellate counsel rendered a deficient performance which substantially affected the outcome of the direct appeal. Strickland v. Washington, 466 U.S. at 694.

1. A Central Theme of the State's Case Was to Establish Waterhouse's Propensity to Commit the Crime Through Evidence of Extraneous Acts.

According to the medical evidence, near the time of her death, the deceased had anal sex and suffered lacerations of the rectum resulting from the insertion of a foreign object.[1]

Through argument and testimony, the state introduced prejudicial material concerning Mr. Waterhouse's general propensity towards violence and anal sex, his attempted anal rape of a fellow inmate while awaiting trial, and the deceased's aversion to anal sex.

In his opening statement, the prosecutor introduced the jury to his theory of the case by advising them that "Robert Waterhouse and his sexual preferences" and his "having a problem with sex, having a problem with violence" would be a significant aspect of his case. (R. 895-96)

When examining Robert Van Vuren, Mr. Waterhouse's construction foreman, Mr. Merkle questioned him extensively about petitioner's sexual propensities, including the following:

> Q: Did he say--Did Mr. Waterhouse state that he liked to ask his sexual partners a particular favor?
>
> A: Anal sex.
>
> Q: And?
>
> A: And he also liked the girls that liked him to hit them.
>
> Q: He liked to hit the girls.
>
> A: Well, slap them, you know.
>
> Q: Now, sir, did you have a discussion with Mr. Waterhouse with regard to this within the two weeks--with a--two weeks prior to the murder of Debbie Kammerer?
>
> A: It might have been within that time period.
>
> Q: All right, and so I understand your testimony correctly, Mr. Waterhouse told you that he liked to ask the girls if he could hit them when he had anal sex, is that correct, that he wouldn't do it against their will, that he asked if he could hit them.

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1. The prosecutor argued at trial that a coke bottle was likely the object, but there was no proof that such was the case.

A: He liked girls that liked that.

(R. 1159-60) This questioning took place over defense counsel's objection to this and any evidence concerning petitioner's sexual propensities, citing the Williams rule. (R. 1156) Mr. Van Vuren testified further as to Mr. Waterhouse's sexual disposition during cross examination and redirect examination.[2]

The prosecutor called the decedent's boyfriend to the stand to testify about her attitude toward anal sex. Defense counsel's motion in limine to preclude this testimony was denied. (R. 1270-71) Colvin testified that he and Ms. Kammerer had tried anal sex once, but stated that "it didn't work" and it was "intolerable" for her. (R. 1271-72)

The prosecutor returned to Mr. Waterhouse's sexual disposition, again over objection (R. 1320), through the testimony of Mr. Waterhouse's girlfriend, Sherry Rivers. She testified that she and Mr. Waterhouse had had anal sex more than once, and that Mr. Waterhouse had once asked her if he could hit her during sex.

This evidence of Mr. Waterhouse's bad character and his propensity toward sex and violence was a central theme of Robert Merkle's closing argument in the guilt-innocence phase.

> Now at this time what do we know about the defendant Robert Waterhouse? . . . We know that he brags to his boss all the time that he particularly likes anal sex. He also brags of the fact that he likes to hit women when he does it. He likes violence. We also know that just a couple weeks prior to this he had been drinking, he wasn't intoxicated, his girl friend, Sherry Rivers, told you that, and they were having sex in her apartment, and he asked her if he could hit her, and she said no, she had more respect for herself than that, but he went ahead and hit her anyway. Okay. So we know that this man at this time is a man who enjoys anal sex and who likes to hit women, okay . . .

(R. 2066-67)

Among the several times Merkle returned to this theme in his closing argument, he stated:

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2. Although defense counsel broached the subject on cross examination, (R. 1161, 1167-68), he did so solely to undermine Mr. Van Vuren's credibility regarding Mr. Waterhouse's sexuality. Defense counsel would not have delved into this area but for the erroneous ruling admitting Van Vuren's testimony on direct.

> . . . if you are looking for a motive in this case, apart from the depravity that he's admitted to the police that he had a problem with sex and violence, apart from the fact that he said he frequently gets frustrated when he encounters a woman who's cursed, and his use of that term, I think, tells you a lot about how Mr. Waterhouse looks at women. He hates women. He hits them.

(R. 2090). In clear violation of Williams, Merkle went on to argue to the jury that they could and should convict Mr. Waterhouse on the basis of his disposition to commit the crime:

> Now let's go finally to the statements of the defendant. He told Van Vuren he liked anal sex, he liked to beat women, and he was worried about the police having his car. Here you have a man who was disposed to commit the acts that were committed in this case. To [redacted] He enjoyed anal sex, he once asked to hit her, and he in fact hit her after she gave him permission . . .

(R. 2106) [emphasis added]. Not content with this, Merkle returned to this emphasis on Mr. Waterhouse's propensity toward violence and sex.

> [He] likes sex a lot, and he likes it so much he'd get it any way he could. He said his sex drive was not normal; he liked anal sex, oral sex, any way he could get it.

(R. 2106-07)

Yet one more time, the prosecutor hammered away at this improper and prejudicial theme.

> Counsel suggests that the photographs and the testimony with regard to the sexual preference of the defendant are purely inflammatory . . . Well, if it wasn't relevant, the Court would not have permitted you to hear it, okay, and it's not purely inflammatory. The testimony that's cold (sic) in--with regard to this man, the fact that he liked to have anal sex while hitting a woman, and that he, in fact just a week or two before this crime hit a woman after she had refused her consent, is directly relevant to his state of mind.

(R. 2184-85)

Thus, the prosecutor introduced and argued an extensive line of extraordinarily prejudicial evidence, the sole relevance of which was to show Mr. Waterhouse's bad character and his propensity toward the behavior involved in the crime charged.

2. The Evidence and Arguments Regarding the Extranaous Acts Violated Waterhouse's Constitutional and Statutory Rights.

F.S.A. 90.404 (2)(a) (1979) provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissble when the evidence is relevant solely to prove bad character or propensity.

[Emphasis added.] This rule is the codification of this Court's decision in Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

The basis of the rule is the recognition that "[i]t is improper for the jury to base a verdict of guilt upon a conclusion that because the defendant is of bad character or has a propensity to commit crime, he therefore probably committed the crime charged." Straight, 397 So.2d 903, 908 (Fla. 1981), citing, Winstead v. State, 91 So.2d 809 (Fla. 1956); Nickels v. State, 90 Fla. 659, 106 So. 479 (1925). "Character as used in this rule refers to a person's nature, disposition, inclination or propensity." Hodges v. State, 403 So.2d 1375, 1377 (Fla. DCA 5, 1981).

Embodied in this rule and similar rules in other jurisdictions and the due process protections of the United States Constitution is the "long-held reservation about the use of wrongdoing not then being tried . . . [expressing] our acceptance that a jury suffers the human weakness of blending wrongs--a result inconsistent with our fundamental commitment to charge specificity, jeopardy and due process." Milton v. Procunier, 744 F.2d 1091, 1097 (5th Cir. 1984). See also Bryson v. Alabama, 634 F.2d 862, 865 (5th Cir. Unit B 1981); Panzavecchia v. Wainwright, 658 F.2d 337, 341 (5th Cir. Unit B 1981).

Despite the very clear pronouncement in both state and federal law against the use of this type of evidence, the prosecutor introduced an extensive line of testimony and argument solely to demonstrate bad character and propensity. Mr. Waterhouse submits that the trial court's rulings allowing the intro-

duction of such evidence were erroneous.

Following defense counsel's objection to Mr. Van Vuren's testimony regarding discussions he had with Mr. Waterhouse concerning his sexual preferences, the court stated:

> if a person indicates a sexual preference which might be out of the ordinary and not normally engaged in by people, and the victim has been the subject of that kind of sexual experience, might not that be relevant to the case?

(R. 1155). Defense counsel correctly argued that such evidence is not permitted under the Williams Rule. (R. 1156). The prosecutor countered:

> It's not Williams Rule because, Judge, number one, [anal sex] is not a crime. It's not an attempt to show identity. It shows the guy's motive for doing this. It also is relevant to her consent in the case, . . .

(R. 1156) Previously, Merkle had argued:

> That he loved anal sex with women and he loved to ask them if could beat on them when he did it, and that goes directly to motive in this case as well as intent.

(R. 1154).

The trial court accepted this erroneous contention that the "other crimes, wrongs, or acts" language of F.S.A. § 90.404 (2)(a) applies only to crimes,[3] and that general preferences or past behavior is admissible to show that the defendant engaged in such behavior in committing the crime.[4] The court ruled:

> That's exactly the evidence, whatever the issue is, not only proving sodomy, but sexually molested. It is clear from the doctor's testimony that this all happened at the same time, and if he has said that's what he likes, and they put him in their presence shortly prior to this happening, I think that's certainly material for the jury to consider, so your objection is noted and overruled.

(R. 1157).

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3. Though irrelevant to a correct Williams Rule analysis, petitioner points out that sodomy is in fact a crime in Florida, and was at the time of Mr. Waterhouse's trial. F.S.A. § 800.02 (1975).

4. At another point the trial court remarked that it "let in the proclivities of the defendant towards like -- this type of sex, since [the deceased] was anally penetrated . . ." (R. 1270)

Thus, the prosecution sought to admit the evidence to show motive, intent and the lack of consent by the decedent. However, because Mr. Waterhouse's defense was that he was not the perpetrator of the crime, neither motive, intent or consent was an issue in the case. See, e.g. Coler v. State, 418 So.2d 238, 239 (Fla. 1982) (similar act evidence inadmissible to show state of mind in sexual battery case where state of mind was not a material issue); Duncan v. State, 291 So.2d 241, 243 (Fla. 1974) ("Evidence relating to similar offenses is admissible only when they, or any of them, are relevant in a given case to one of the essential or material issues"); Oats v. State, 446 So.2d 90, 94 (Fla. 1984)(evidence of other crimes admissible to show intent where defendant claimed murder was an accident).

There was no doubt from the evidence that the decedent did not consent to what happened to her. In addition, evidence tending to show Mr. Waterhouse's behavior in other situations was completely irrelevant to the issue of decedent's consent.

"The issue of consent is unique to an individual, and the lack of consent of one person is not proof of the lack of consent of another." Helton v. State, 365 So.2d 1101 (DCA 1, 1979). In Helton, the court held that in a sexual battery case, the introduction of testimony regarding another attempted sexual battery committed by the defendant upon another woman as evidence of consent was error. See also Hodges v. State, 403 So.2d 1375, 1378 (Fla. DCA 5, 1981) (since sexual battery necessarily implies lack of consent, "the one fact which characterizes the accused's acts as being, or not being, criminal, is not an act or intent of the accused, but the mental assent of the 'victim'")

It was equally beyond dispute that the perpetrator of the crime intended to kill the decedent. The motive of the person who committed the crime was not an element of the crime and was not put in issue by either side. The issue in the case was who did it? The prosecution introduced the evidence of sexual preference to show that Mr. Waterhouse had the propensity to do it and, bad character and, therefore, was the culprit.

This use of the evidence is prohibited by the Williams rule. That Mr. Waterhouse engaged in certain activities goes to his propensity toward certain behavior, and cannot be introduced to show that he intended or was motivated to engage in such behavior on one particular evening. See, e.g. Harris v. State, 183 So.2d 291 (Fla. 1966) (evidence of defendant's homosexuality and that he had slept with other men inadmissible in prosecution for having committed crime against nature on one particular man on one particular day).

Thus, this Court's cases establish that a prosecutor cannot introduce evidence of a defendant's past armed robberies to show that he intended the robbery for which he is on trial, or was motivated to commit the robbery because he had committed others. Yet that is precisely what the prosecutor did in this case. It demonstrated that Mr. Waterhouse had engaged in a particular sexual practice so that the jury would infer that he was the perpetrator of a crime involving that type of sexual practice.

Not only was this an improper way to show motive or intent -- neither of which was an issue -- but it was also an impermissible way to show identity.

> . . . If the identity of the defendant in a given case is a material fact in issue . . . and the offense charged was committed in a particularly unusual or unique manner (modus operandi), evidence of another offense committed in the same unique or unusual manner, and to which the defendant can be positively connected, is admissible to establish or corroborate the identity in the case being tried . .

Duncan v. State, 291 So.2d 241, 243 (Fla.App. 1974) [emphasis added].

> A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.

Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981). Thus, a high degree of similarity is required before allowing the use of similar act evidence. See, e.g., Peek v. State, 488

So.2d (52 (Fla. 1986); Thompson v. State, 494 So.2d 203 (Fla. 1986); Green v. State, 427 So.2d 1036 (Fla. DCA 3 1983).

No such similarity was established in the trial court. The decedent in this case was viciously beaten with a hard instrument such as a tire changing tool and put in the bay where she drowned. There were over thirty lacerations and thirty-six bruises. Acid phosphotase was found in the victim's rectum in sufficient amount to strongly indicate the presence of semen there.

By contrast, the propensity evidence was that Mr. Waterhouse liked anal sex and had told his employer that he liked to slap his partner during sex. His girlfriend testified that on the one occasion he slapped her during sex, he immediately apologized. (R. 1319-20) This is hardly the type of past behavior that constitutes a "signature crime." Nor does such evidence tend to establish any pattern of behavior from which one could infer motive or intent.

However, evidence of such sexual propensities could not have been more prejudicial. The evidence printed Robert Waterhouse as a bad person, someone who engaged in deviant practices. As Merkle argued so eloquently and often, a person of this character is just the type of person who would commit this crime. Even assuming the evidence had any legitimate probative value, it was far outweighed by the prejudicial impact.

The jury's role was difficult enough in attempting to dispassionately judge a case involving much extensive injuries to the decedent and such grotesque aspects as a tampon being in the mouth of the decedent. In these circumstances, every safeguard was essential to ensure a verdict and sentence that was not based upon the passions and prejudices of the moment. Instead, Mr. Merkle injected prejudicial and irrelevant evidence and argument into the case at every opportunity, thereby eliminating the prospect of a fair and reasoned verdict based upon evidence the law regards as material, competent and relevant.

The prejudicial impact of this evidence was described by

this Court in Peek v. State, 488 So.2d 52 (Fla. 1986):

> There is no doubt that this admission of prior unrelated crimes would to far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded . . .

488 So.2d at 55-56, quoting Jackson v. State, 451 So.2d 458, 461 (Fla. 1984), and Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), cert. denied, 348 So.2d 953 (Fla. 1977). This Court continued:

> Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense. The admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt if the crime charged." Straight v. State, 397 So.2d 903, 908 (Fla. 1981).

488 So.2d at 56. See also, Keen v. State, ___ So.2d ___ (Fla.S.Ct. No. 667,384, March 19, 1987) Slip op. at 9-10.

The evidence offered against Mr. Waterhouse was so prejudicial and went so far beyond the pale that is admission denied him a fundamentally fair trial. See Shaw v. Boney, 695 F.2d 528 (11th Cir. 1983); Bryson v. Alabama, 634 F.2d at 864; Panzavecchia v. Wainwright, 658 F.2d at 340; Barnard v. Henderson, 514 F.2d 744, 746 (5th Cir. 1975). Appellate counsel had a duty to raise this violation of Mr. Waterhouse's rights on direct appeal; his failure to do so constitutes ineffective assistance of counsel.

B. APPELLATE COUNSEL FAILED TO RAISE ON APPEAL THE VIOLATION OF WATERHOUSE'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AT THE SENTENCING PHASE OF THE TRIAL.

In the penalty phase of the trial, the state introduced the testimony of a retired police officer, Lawrence L. Hawes, who had some very minor involvement in the investigation of the homicide for which Mr. Waterhouse had been convicted fourteen years earlier. (R. 2255-2267) Over numerous objections from defense counsel, the witness was permitted to testify not only about his own limited observations and involvement in the homicide investigation, (R. 2258), but about the findings and conclusions of others, such as the scientific findings of the police laboratory (R. 2262, 2263), the autopsy report (R. 2259), and a confession allegedly given by Mr. Waterhouse. (R. 2265)

Cross-examination of this testimony was of course impossible; nor was it possible for the jury to observe the demeanor of those whose statements were related by the officer. The witness had no first hand knowledge. He simply testified about various reports of doctors, experts, and fellow police officers, none of whom were called to the stand or available for cross-examination by defense counsel. Over further objection to the hearsay nature of the testimony and evidence, the court admitted the autopsy report (R. 2259).

The defense lawyers pointed out throughout the testimony that it was hearsay and they could not confront those who prepared the reports. (R. 2260, 2262) The prosecution asserted that hearsay is admissible at the penalty phase. The trial court agreed with the prosecution and allowed the evidence without ever analyzing it as a hearsay or confrontation clause issue. (R. 2262-63)

The introduction of such unreliable hearsay in a capital sentencing proceeding violated Mr. Waterhouse's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Section 921.141, Florida Statutes. The failure of Mr. Waterhouse's appellate counsel to raise this claim on direct appeal requires a finding that they rendered ineffective

assistance of counsel.

The most basic protection in the American criminal justice system is the right of confrontation, containing the right to cross examine the adverse witnesses, secured under the Sixth Amendment, made applicable to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 405 (1965). Professor Wigmore described cross-examination as "the greatest legal engine ever invented for the discovery of truth . . . [c]ross examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure." 5 Wigmore Evidence §1367 at 32 (Chadborne Rev. 1974). There is no time when it is more crucial to employ that engine that at the penalty phase of a capital trial.

Because "death is a different kind of punishment which may be imposed in this country", Gardner v. Florida, 430 U.S. 349, 357 (1977), "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). This right to cross examine, being "one of the safeguards essential to a fair trial", Alvord v. United States, 282 U.S. 687, 692 (1931), must be jealously protected at critical proceedings against a criminal accused, of which the sentencing phase of a capital trial is one. Proffitt v. Wainwright, 685 F.2d at 1252. See also Gardner v. Florida, 430 U.S. at 358; Green v. Georgia 422 U.S. 95 (1979) (due process protections apply with equal force to capital sentencing proceedings).

The testimony of the retired police officer, Hawes, violated these well-established constitutional standards as well as the rules regarding hearsay. The proponent of the questioned testimony must first establish the declarant's unavailability, through a showing of a good faith effort to produce the witness. Ohio v. Roberts, 448 U.S. 56, 65 (1980); Barber v. Page, 390 U.S. 719, 724-5 (1968). Only after such a showing has been made may the testimony be introduced, if such testimony bears sufficient "indicia of reliability" to justify its use without being subject to

the rigors of cross examination. Ohio v. Roberts, 448 U.S. at 68.

In the case at bar, there was no showing by the state that the sources of the hearsay it sought to introduce were unavailable. Neither did the hearsay testimony of Officer Hawes bear the "indicia of reliability" necessary to comport with due process. None of the testimony fell within any of the "firmly rooted hearsay exceptions", from which reliability can be inferred. Ohio v. Roberts, 448 U.S. at 67. Nor did it display the "particularized guarantees of trustworthiness" sufficient to overcome the dangers inherent in hearsay. Id.

For example, most of Officer Hawes' description of the condition of the body came directly from the autopsy report. (R. 186-191; 2259-62) The trial court allowed this testimony and admitted the autopsy report itself over objection of defense counsel. Officer Hawes' testimony regarding the report suffered from many of the problems which the hearsay rules intended to prevent. He had no personal knowledge about the autopsy or the report. (R. 186) He identified it only by reading the caption. He had simply no understanding of the terminology used in the report -- indeed, he could not even pronounce many of the words. (R. 2261) The autopsy report, like all such reports, consisted of a doctor's conclusions based on his observations during the autopsy. Officer Hawes could not be cross-examined as to those conclusions.

Similarly, Officer Hawes was permitted to testify regarding the fingerprint and serology findings of the police laboratory, again, having no first hand knowledge. In these instances, the reports upon which this testimony was likely based were not even offered by the state. As with the autopsy report, Officer Hawes' could not be cross-examined as to the conclusions of the crime

laboratory technicians.[5]

Finally, Officer Hawes testified that Mr. Waterhouse confessed, and relayed the substance of that confession, yet again, he had no personal knowledge of the taking of that confession. By introducing evidence of the confession through a witness who had no familiarity with the circumstances surrounding the confession, defense counsel had no opportunity to test its reliability.

In the post-conviction proceedings below, counsel for Mr. Waterhouse introduced Defense Exhibit 3, "Minutes of Huntley Hearing," November 14 and 15, 1966,[6] which reveals that there was in fact substantial reason to doubt the reliability of the confession.[7] Not having been present during the interrogation nor the signing of the statement, Officer Hawes was unaware of significant facts surrounding the confession which would have been important to the jury in determining its reliability.

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5. Officer Hawes' testimony that "the blood type was his type" undoubtedly impressed the jury as an important piece of evidence against Mr. Waterhouse. However, such a bald conclusion cries out for cross-examination. If he was referring to the international blood groupings, the jury should have known that "ABO typing by itself has little evidentiary value in criminal cases." Jonakait, R., Will Blood Tell?, 31 Emory Law Journal 833 (1982). This is due to the number of people who fall into each of the blood types -- ". . . such testing does not sufficiently narrow the class of persons who could be suspects." Id., note 30. See also People v. Robinson, 265 N.E.2d 543 (N.Y. 1970).

If, on the other hand, Officer Hawes was referring to a match between the many other genetic markers found in blood, the statement may also have been unreliable, but for different reasons. While the presence of genetic markers may narrow the class of eligible persons to a number small enough to have probative value, there are serious questions about the reliability of the methods used for identifying such markers. See generally, Jonakait, R., Will Blood Tell?, supra. See also People v. Young, 391 N.W.2d 270 (Mich. 1986) (electrophoresis rejected as reliable method for evidentiary testing of dried blood stains); People v. Brown, 709 F.2d 440 (9th Cir. 1985) (en banc). However, there was no opportunity for cross examination, since the source of the serological findings was not present. The State was able to put before the jury conclusions which could not be tested.

6. Reference from the transcript of this hearing will be cited "(N.Y.R.__)."

7. A statement prepared by police officers (N.Y.R.30) was signed by Mr. Waterhouse only after he, (N.Y.R. 31) 19 years old and obviously intoxicated,(N.Y.R. 145) was interrogated from 2 A.M. to 6 A.M. (N.Y.R. 157). During this time, he was threatened with bodily harm (N.Y.R. 113, 115, 121, 148), denied access to a lawyer (N.Y.R. 145, 151) and to his family (N.Y.R. 110-112), including the family friend who had accompanied him to the police station (N.Y.R. 112), and was forced to strip naked and sit on a metal chair during hours of interrogation (N.Y.R. 118-119).

Because the substance of Officer Hawes' testimony did not bear any "indicia of reliability," nor could it be "effectively cross-examined by [defense counsel], [it] carries no assurance of reliability whatever." Smith v. Estelle, 602 F.2d 694, 701 (5th Cir. 1979), affirmed, 451 U.S. 454 (1981).

The issue here is identical to Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified on rehearing, 706 F.2d 311, cert. denied, 464 U.S. 1002 (1983). In Proffitt, the state introduced a psychiatric report at the sentencing phase without calling its author. As a result, the opinions and conclusions were not subject to cross-examination. The Court of Appeals for the Eleventh Circuit held that this constituted constitutional error requiring a new sentencing trial.

After explaining the importance of cross examination to the fairness and integrity of the trial procedure, the court related it to the area of expert testimony:

> Where expert witnesses are employed, cross-examination is even more crucial to ensuring accurate fact-finding. Since, as in this case . . . information submitted by an expert witness generally consists of opinions, cross examination is necessary not only to test the witness's knowledge and competence in the field to which his testimony relates but also to elicit facts on which he relied in forming his opinions.

685 F.2d at 1254.

This Court has likewise reversed death sentences where the source of the hearsay has been unavailable for cross examination. For example, in Engle v. State, 438 So.2d 803 (Fla. 1983), this Court granted relief to the defendant because the sentencing judge considered a statement made by a non-testifying co-defendant, violating the defendant's right to confrontation and cross examination.

A similar result obtained in Gardner v. State, 480 So.2d 91 (Fla. 1985), where a police officer testified to incriminating statements made by the co-defendant. "Engle applies with equal force here, where the jury considered similar inadmissible and

prejudicial evidence before recommending the death penalty." Id., at 94.[8]

The prosecution chose to retry Mr. Waterhouse's prior homicide case at the sentencing phase of his trial in order to put as many prejudicial details before the jury as possible. Of course, the prosecution is allowed to do this under Florida law. But when it elects to do this, the State's evidence must be subject to the same testing and scrutiny as any other evidence the State seeks to offer in support of imposing the death penalty. Here the State simply did not even attempt to follow the rules of evidence or comply with the requirement of the confrontation clause and the Eighth Amendment.

Instead, it convinced the trial court that those rules did not apply to its efforts to sentence Robert Waterhouse to death. It then put before the jury bald conclusions which were extremely prejudicial, but could not be cross-examined or tested in any way. The jury could not judge the demeanor of the absent witnesses or hear the facts underlying the conclusions. Thus, the state was able to provide the jury with a completely one-sided version of events.

As demonstrated herein, there is no support for the suspension of the laws and constitution obtained by the prosecution at the sentencing phase of Mr. Waterhouse's trial. If the State is going into the details of other crimes, it must do it fairly within the constitution and laws of this country and state. It did not do that at Mr. Waterhouse's trial.

This issue leaps out at the reader upon even the most casual review of the transcript of the sentencing hearing. Just as the evidence about Mr. Waterhouse's sexual propensities dominated the guilt-innocence phase, the testimony of Officer Hawes -- the only

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8. In a non-capital setting, similar facts required reversal in the case of Cross v. State, 378 So.2d 114 (DCA 5, 1980), where testimony from an assistant state attorney regarding his phone conversations with doctors at the hosital where defendant had been a patient as well as a telegram from the director and a hospitalization summary were admitted at the sentencing hearing. The District Court of Appeal held that the admission of such hearsay evidence was error.

prosecution witness at the penalty phase -- completely dominated the sentencing hearing. Defense counsel were obviously astounded that the prosecution would seek to elicit and the court agree to allow the abundance of hearsay testimony that came in.

The failure of appellate counsel to raise this claim of reversible error for consideration by this Court on direct appeal constituted ineffective assistance of appellate counsel and undermines confidence in the outcome of the appellate process. Johnson v. Wainwright, 463 So.2d 207, 211 (Fla. 1985); Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985). Accordingly, the writ should issue.

C. MR. WATERHOUSE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHEN HIS APPELLATE COUNSEL FAILED TO RAISE THE ISSUE OF JURY MISCONDUCT.

The United States Constitution and Florida law both require that the jury base its deliberations solely on the evidence properly admitted at trial and the law as charged by the trial court. When, as in this case, the jury considers materials which originated from outside these two sources, without the knowledge and consent of counsel, the Sixth, Eighth and Fourteenth Amendments and the law of this State are violated.

By failing to raise an issue of jury misconduct on direct appeal to this Court, Mr. Waterhouse's appellate lawyer rendered substandard performance. Since the jury misconduct, if raised to this Court in a timely fashion, would likely have resulted in reversal, Mr. Waterhouse's appellate counsel rendered ineffective assistance of counsel on appeal.

In this case, just before closing arguments in the guilt-innocence phase, the trial court advised all trial counsel that a bailiff had reported that the jurors had each read a pamphlet brought by one of them to the courthouse. The bailiff stated to the court and counsel:

> Some juror found out that he was going to be a juror and he sent away for it . . . I guess it was No. 9 juror . . . he handed me this book and asked me why this county didn't give out pamphlets like that little book, how interesting it was and how it had helped them

> and he let all the jurors in the room read it, and they all enjoyed reading it . . .

R. 2047. Mr. Waterhouse's trial counsel objected. R. 2048.

The booklet defined terms and legal procedures, which should have come solely from the judge. See, e.g., Grissinger v. Griffin, 186 So.2d 58, 59 (Fla. 1966), citing Smith v. State, 95 So.2d 525 (Fla.1957).

In cases where extraneous materials have found their way into the jury deliberation room, appellate courts have discussed several concerns relevant here. One is the obvious Sixth Amendment issue raised where the jury deliberates upon evidence which the defendant was given no opportunity to confront, thus denying his rights to effective assistance of counsel and to confront and cross examine the evidence against him. See, e.g., Parker v. Gladden, 385 U.S. 363 (1966). Another is the Sixth Amendment requirement that the defendant be present for all proceedings in the cause against him once the indictment issues. See, e.g., Rogers v. United States, 422 U.S. 35 (1975); Diaz v. United States, 223 U.S. 442, 455 (1912); Proffit v. Wainwright, 685 F.2d at 1257. Finally, it is well settled that the jury is to consider only the law as given to them by the trial judge in open court. As noted by this Court,

> [The jury] must get their instructions as to the law of the case from the court and not from their own perusal of the books.

Johnson v. State, 9 So. 208, 213 (1891). See also Yanes v. State, 418 So.2d 1247 (Fla.App. 1982). Slinsky v. State, 232 So.2d 451 (Fla. 1970); Florida Rules of Criminal Procedure, § 3.400,[9] § 914.01; Marino v. Vasquez, 812 F.2d 499 (9th Cir. 1987).

The jury's consideration of the booklet in the instant case raises all of these concerns. One of the jurors apparently obtained the booklet on his own and shared it with the others.

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9. Rule 3.400 of the Florida Rules of Criminal Procedure states that the jury may take with them into the jury room: "(a) a copy of the charges against the defendant; (b) form of verdict approved by the court, after first being submitted to counsel; (c) any instructions given; . . . (d) all things received into evidence . . . ."

There was no opportunity for Mr. Waterhouse or his counsel to be heard on whether the jury should be permitted to consider its contents.[10] Even had the information in the booklet been completely accurate, that the jurors considered it at all constituted error. See, e.g., Holzapfel v. State, 120 So.2d 195 (Fla.App. 1960). In this case, however, the information in the booklet misled the jurors with respect to several critical principles of criminal process, jeopardizing Mr. Waterhouse's right to a fair trial by an impartial jury.

The booklet, which was made a part of the record by the trial court and is appended to this petition, informed the jury that the existence of the indictment indicated that here was a fifty-fifty chance of Mr. Waterhouse's guilt.

> All that [the indictment] does mean is that some persons in the government feel they have good reason to think that it is possible he has committed a crime, and perhaps they are right. But equally perhaps they might be wrong . . .

JURY DUTY, at 19. This, of course, was erroneous. It is error of constitutional proportions for anyone to intimate that the indictment is an indication of guilt, and in that event, a court is under an obligation to immediately correct such an intimation, even absent an objection. United States v. Cummings, 468 F.2d 274 (9th Cir. 1972); See also Kerr v. City of Chicago, 424 F.2d 1134 (7th Cir.) cert. denied, 400 U.S. 833 (1970) (error to refuse instruction that indictment is no evidence of guilt); United States v. Baker, 418 F.2d 851 (6th Cir. 1970) (instruction that indictment is no indication of guilt must be given if requested); United States v. Stoble, 431 F.2d 1273 (6th Cir. 1970) (proper caution on meaning of indictment should be given).

Even worse, perhaps, was the clear shifting of the burden of proof of reasonable doubt to the defense:

> The defense does not have to prove innocence. The defense only has to create a reasonable doubt of guilt in your mind.

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10. Upon learning of the booklet and that the jurors had all read it, defense counsel immediately objected. R. 2048

JURY DUTY, at 19. Such a statement to the jury violates the due process clause by relieving the state of its duty of proving guilt beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 514 (1979); Francis v. Franklin, 471 U.S. ___, 105 S.Ct. ___, 85 L.Ed.2d 344 (1985).

The booklet informed the jury of peremptory and cause challenges, about which the jury should not be instructed. JURY DUTY, at 20. The booklet mis-instructed the jury by encouraging them to suspect Mr. Waterhouse's lawyers of misleading them, and ignore the defense offered:

> The lawyers are appealing for their respective causes. They are not sworn to tell the truth, which means they are free to say anything they wish, to introduce any misleading argument they choose.

Id. This statement is fallacious, since any lawyer who did not tell the truth in the courtroom would be subject to disciplinary proceedings. FLA. CODE OF PROFESSIONAL RESPONSIBILITY, D.R. § 7-102(A)(5).

Further, contrary to the law, the jury booklet told the jury that they had untrammelled power to convict or sentence to death regardless of the judge's instructions:

> The power of the jury to determine its verdict free and untrammeled is supreme . . . [n]o court can dictate a verdict.

Jury Book, at 11.

> The court will instruct you that no matter how you feel about the law you must obey it as written. Officially the judge interprets the law to you, and the jury passes only on the facts. This is what judges have been doing for centuries, but for as many centuries the jury has stepped beyond its official boundaries. Jurors have understood the evidence, but bring in verdicts contrary to the evidence; they have been told what the law is and they have defied that law.

Id. at 29.

While jurors have a "prerogative of mercy," especially in a capital case, Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981) (option to recommend against death" must be clearly explained to the jury); Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1982); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), it is

clearly unconstitutional for the jury to ignore the law when deliberating.

The situation faced here is analogous to those described in the so-called "dictionary" cases. The issue in those cases is not the accuracy of the extraneous information; obviously, the definitions found in dictionaries are accurate for everyday use. When used in the context of a criminal trial, however, the same words take on a very precise meaning. Similarly, variations in state law may render the same statement accurate in one jurisdiction, while being erroneous in another. For this reason, jurors are bound to accept and apply the definitions imparted by the trial court, and not those found in extrajudicial sources. See, e.g. Alvarez v. People, 653 P.2d 1127, 1131 (Colo. 1982); Grissinger v. State, 186 So.2d 58 (Fla. 1966); Smith v. State, 95 So.2d 525 (Fla. 1957).

As stated by a Texas court, and quoted with approval by this Court,

> No maker of dictionaries should ever be allowed to define legal terms to a jury unless such definitions go through the medium of the trial judge, the only one authorized by law to give definitions and explantations to a jury.

Smith, 95 So.2d at 529, quoting Corpus Christi St. & Inter-Urban Ry. Co. v. Kjellberg, 185 S.W. 430, 432 (Tex.Civ.App. 19). This same rule should apply with equal force to the instant case -- the author of a generic booklet on jury duty should not define terms and legal procedure or offer advice to jurors as to their function in the course of a particular trial without being approved by the trial judge after hearing from both parties.

In Moore v. State, 172 Ga.App. 844, 324 S.E.2d 760 (1984), the Court of Appeals of Georgia reversed a conviction due to one juror's consultation of "extrajudicial law" in the form of a booklet called You and the Law. After finding that the whole jury was subjected to pertinent contents of the book, the court reasoned that the defendant could not be required to prove that the contents of the book changed the vote of any jurors. Id., at 844. Instead, the court looked at the contents of the book to

see if they contained explanations which differed from the law given by the court. Upon finding that application of the explanations offered in the book could have caused a juror to come to a different conclusion than he would have by applying the law as described by the judge, the court reversed. Id., at 847.

There can be little doubt that the jurors considered the contents of the booklet in their deliberations. The statement made by the bailiff is clear: The jurors all had read it, and found it "helpful". Surely they would not have found it "helpful" had they not been applying the reasoning contained in the booklet. This issue should have been briefed to this Court on direct appeal. Had it been, Mr. Waterhouse's conviction and sentence would have been reversed. Because it was not raised, the writ of habaes corpus should issue in this case.

D. APPELLATE COUNSEL'S FAILURE TO CHALLENGE THE EXCUSAL FOR CAUSE OF TWO JURORS DENIED MR. WATERHOUSE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

During voir dire, the trial court excused for cause two jurors after they had been questioned by both parties regarding their views on capital punishment. The court's ruling to "[k]nock them both out" (R. 725), was not based on any known legal standard for death-qualifying a jury. Rather, the court determined that because the prosecutor had "baffled" the two jurors, they could not be considered for the jury in this case. This failure to apply the appropriate standard in determining whether a juror should be excused for cause denied Mr. Waterhouse his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. By omitting this claim, which constituted reversible error, from the appeal of a capital case, Mr. Waterhouse's appellate counsel rendered ineffective assistance of counsel, entitling him to a new appeal.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court held that

> a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply

> because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

391 U.S. at 522. In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed. 2d 841 (1985), the Court clarified the standard for death-qualification of the jury by adopting the test set forth in Adams v. Texas, 448 U.S. 38, 45 (1980): whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Witt, 469 U.S. at 420, 424.

During the selection of jurors for Mr. Waterhouse's trial, prosecutor Merkle, instead of asking jurors their attitude on capital punishment, told the prospective jurors that he had "no living witnesses to the crime," (R. 660, 669), described circumstantial evidence ("if you saw the footprints in the snow, that's circumstantial evidence that the dog was there." R. 659), and asked:

> Does anybody feel that -- You have indicated that you may feel this way, that, well, while circumstantial evidence may be good in any other case, but when we are talking about the possibility of executing a man, it's not good enough for me; does anybody feel that way?

R. 660. Not surprisingly, some jurors indicated they would have some difficulty condemning someone to death based upon footprints in the snow, including venireperson Clark. (R. 660, 667) However, after being instructed by the court that the questions was whether he could "accepting your responsibility as a juror, follow the law that I fell you is the law," Clark answered that it changed his answer regarding circumstantial evidence. (R. 705-06)

Merkle had the last opportunity to question Clark:

> Q. . . . What is your understanding of circumstantial evidence?
>
> A. That's a piece of clothing brought in that somebody claims belongs to the person that was killed --
>
> Q. Mm, hmm.
>
> A. -- something along that line.
>
> Q. But you told me earlier, unless I

misunderstood you, that you did not believe you could vote to convict in a capital case on circumstantial evidence, is that correct?

A. No fully, yes.

R. 724-25. Thereafter, the court considered the State's challenge for cause of Mr. Clark and another prospective juror, Ashcraft:

THE COURT: They are both confused on that. Knock them both out.

MR. SCHERER: Well, can we object?

THE COURT: You want some people that can understand what we are talking about, don't you?

MR. SCHERER: Well, I agree, yes, I think -- I think the prosecutor is confusing them.

THE COURT: Huh?

MR. SCHERER: I think the prosecutor is confusing them.

THE COURT: I think that may be true. That's why I gave you both a shot at them, hoping to clarify it, but they are both baffled, and therefore -- so I'm going to let them both go.

(R. 725-726)

Thus, the prosecutor improperly grafted circumstantial evidence on to its question about death qualificatiion, thereby totally obliterating the constitutional standard for excluding jurors with scruples about capital punishment. The court erred in granting the challenges for cause.

The Supreme Court has repeatedly held that its cases involving death qualification are "a limitation on the State's power to exclude . . ." Wainwright v. Witt, 469 U.S. at 423, quoting Adams v. Texas, 448 U.S. at 47-48. The State cannot eliminate these constitutional limitations by adding additional qualifications to its questions. Nor can jurors be excluded because they do not know the definition of legal terms.

Here, prosecutor Merkle did not even elicit answers to matters of legitimate state interest; he confused the jurors by questioning them about circumstantial evidence in the absense of any instruction from the court defining the concept and even asked one juror to tell him what was meant by circumstantial

evidence. This unconstitutionally undermines the defendant's right not to be tried by a "jury uncommonly willing to condemn a man to die." Witherspoon, 391 U.S. at 521. See Adams, 448 U.S. at 49 (improper to ask jurors if they would be "affected" by possibility of death sentence); Alderman v. Austin, 663 F.2d 558 (5th Cir. 1981), modified en banc, 695 F.2d 124 (1983)(improper to ask jurors if they could sign the verdict of death).

This is not a case where this Court must decide whether the trial court correctly applied the standards for death qualification. Here, the trial court never applied these standards. This omission was reversible error.

The failure to raise this issue cannot be excused. Fundamental constitutional rights of an accused to a fair and impartial jury and to be free from cruel and unusual punishment were at stake. The omission of such a critical issue on appeal constituted deficient performance from which the cause was prejudiced, Johnson v. Wainwright, 463 So.2d at 209, which undermines one's "confidence in the correctness and fairness of the result." Wilson v. Wainwright, 474 So.2d at 1165.

E. MR. WATERHOUSE WAS DENIED EFFECTIVE ASSISTANCE WHEN HIS APPELLATE COUNSEL FAILED ON DIRECT APPEAL TO RAISE THE TRIAL COURT'S DENIAL OF A CONTINUANCE PRIOR TO TRIAL.

On the facts presented to the trial court, Mr. Waterhouse was entitled to a continuance prior to trial. The denial of the continuance violated his rights to a fair trial, to effective assistance of counsel, to confront the witnesses against him, to be free from cruel and unusual punishment and to due process under the Sixth, Eighth and Fourteenth Amendments. The failure on the part of appellate counsel to raise this issue as a ground for relief denied Mr. Waterhouse to his right to effective assistance of appellate counsel.

On the morning of trial, defense counsel requested a two week continuance due to the state's failure to respond to a Brady motion filed several months previously until the eve of trial, the court's reversal of its decision on Mr. Waterhouse's motion

to suppress statements, and counsel's need to review laboratory reports and physical evidence which had not been provided to the defense. R. 597-99. Specifically, the state had first given the defense the names of two witnesses with exculpatory evidence on the Friday prior to trial, which was to begin the following Monday. The State had known of the witnesses since the evening of the crime eight months before. R. 598, 611, 1947, 2002. However, prosecutor Merkle had unilaterally decided to withhold the names: "[i]t was determined by the State that neither one of these witnesses [had] any Brady evidence or exculpatory evidence." R. 600.

Apart from whatever merit there was to this statement, two issues arise. First, it was not up to the prosecutor to "cast [himself] in the role of an architect of a proceedings" by himself determining whether the witnesses in question had information which would tend to exculpate the accused. Brady v. Maryland, 373 U.S. 83, 88 (1963). Second, whether these witnesses had exculpatory evidence was not the issue. Florida law requires disclosure of names of all persons "known to the prosecutor to have information which may be relevant to the offense charged . . . " Fla.R.Cr.P. § 3.220 (a)(1)(i) (emphasis supplied).[11]

However, both of these witnesses could have provided testimony which tended to show that Mr. Waterhouse was not the perpetrator of the homicide. Both would have testified that Mr. Waterhouse did not leave the bar with the victim. (Tr. 975-977)[12] The State contended that he had left with the victim.

In addition to having been given the names of these two witnesses at the eve of trial, the trial court on the morning of trial reversed its earlier ruling suppressing the most incriminating of the pretrial statements made by Mr. Waterhouse. The late disclosure of witnesses and the last minute reversal both

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11. Courts of this State have held that late disclosure, as well as nondisclosure, can constitute reversible error under §3.220. See Griffis v. State, 472 So.2d 834, 835 (Fla. DCA 1, 1985); Neimeyer v. State, 378 So.2d 818 (Fla. DCA 2, 1979).

12. One witness, Vasquez, was brought to St. Petersburg from Florida during trial and placed on the witness stand with virtually no preparation. (Tr. 870-872, 930-31)

required substantial alteration of defense counsels' trial strategy.

Finally, as grounds for their request for continuance, defense counsel stated that they had not received the written reports of some of the laboratory technicians, indeed, some of the tests were still being run. R. 598-599. Further, despite diligent effort, defense counsel had been unable to track down the physical evidence in order to examine it. R. 599. The state's case rested almost exclusively on circumstantial physical evidence.

The denial of a continuance under such circumstances violated Mr. Waterhouse's constitutional rights. See Dickerson v. Alabama, 667 F.2d 1364 (11th Cir. 1982) (right of compulsory process violated where court denied continuance to allow time necessary to procure witness who would give favorable testimony); Hicks v. Wainwright, 633 F. 2d 1146 (5th Cir. Unit B, 1981).

As stated by the United States Supreme Court,

> . . . a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality . . . .

Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

The courts of this State have likewise recognized that such a "myopic insistence on expeditiousness" can work a denial of constitutional rights to the accused. In Cross v. State, 378 So.2d 114 (DCA 5, 1980), defense counsel was given access to an critical piece of evidence shortly before trial, and had only one-half hour in which to confer with his client concerning its contents. The court found that the trial judge's refusal to grant a continuance denied Mr. Cross of the effective assistance of counsel, and denied him any "realistic opportunity to present witnesses in his own behalf." Id., at 115.

Similarly, in Thomas v. State, 243 So.2d 200 (DCA 2, 1971), the District Court of Appeal reversed a conviction upon finding that a denial of a continuance violated the defendant's rights. In that case, an informer in state custody had been subpoenaed by

the defendant, since he was the key witness in his entrapment defense. At the time of trial, the witness had been taken out of the jurisdiction, without the knowledge of the defense, and was not available to testify. The court refused the motion for a continuance, and the defendant was thus denied the right to present his defense.

By denying a continuance to give defense counsel an opportunity to talk with these two witnesses and investigate any leads they had to offer, Mr. Waterhouse was similarly denied his constitutional right to present a defense. The failure to raise this constitutional violation on appeal constituted ineffective assistance on the part of appellate counsel.

II. THIS COURT FAILED TO CORRECT FUNDAMENTAL ERROR IN ITS PREVIOUS REVIEW OF MR. WATERHOUSE'S SENTENCE OF DEATH.

The death sentence imposed in this case is invalid because the advisory jury and sentencing judge were precluded from considering non-statutory mitigating circumstances in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Hitchcock v. Wainwright, ___ U.S. ___, 55 U.S.L.W. 4567 (1987); Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Because this fundamental violation was not corrected in this Court's sentence review on direct appeal, it should be corrected at this time.

The trial court instructed Mr. Waterhouse's jury that it was to consider as mitigating factors only those set out in Fa. Stat. 921.141 (6). R. 2296. The prosecutor emphasized in his closing argument that mitigating circumstances were limited to the statutory list. With regard to evidence which had been presented about Mr. Waterhouse's alcohol problems, the prosecutor argued: "Is that a mitigating factor? I didn't see anything about alcohol [on the statutory list]."

Thus, "it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances, and

that the proceedings, therefore, did not comport with Skipper . . . Eddings . . . and Lockett . . . . " Hitchcock, 55 U.S.L.W. at 4569 [citations omitted]. Because this error goes to the most basic principles of the Eighth Amendment, the writ of habeas coprus should issue to correct this error.

CONCLUSION

For the foregoing reasons, the previous appeal in this matter failed to correct fundamental error. Because Robert Waterhouse was denied his Sixth Amendment right to effective assistance of counsel on appeal, this Court should grant the writ of habeas corpus, grant Mr. Waterhouse a new appeal, or, alternatively, vacate his conviction and/or sentence of death.

Respectfully submitted,

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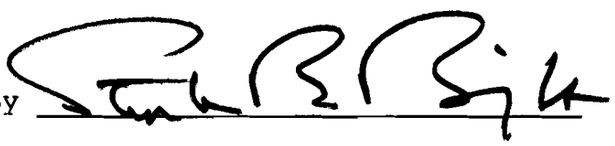
By 

VERFICATION

STATE OF GEORGIA)
)
)
COUNTY OF FULTON)

STEPHEN B. BRIGHT, being duly sworn, deposes and says that the facts in the foregoing petition for a writ of habeas corpus are true and correct to the best of his knowledge and belief and that he signs this verification on behalf of the petitioner because it deals with matters of law and legal inferences, and is otherwise based on the record in the case.

Stephen B. Bright

Sworn to before me this
28th day of April, 1987.

Notary Public, Fulton County, Georgia
My Commission Expires May 5, 1990

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served this 28th day of April 1987, by mail upon Assistant Attorney General Peggy Quince, 1313 Tampa Street, Suite 804, Tampa, Florida, 33602, and Assistant State Attorney Bernard J. McCabe, P. O. Box 5028, Clearwater, Florida, 33518.