IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,

Petitioner,

v. CASE NO. 70,459

RICHARD DUGGER, ETC., ET AL.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the respondents, by and through the undersigned Assistant Attorney General and files this Response to the allegations contained in the habeas corpus petition filed by petitioner.

I.

The legal authority by which respondents hold petitioner is a judgment for first degree murder and a sentence of death entered on September 3, 1987, in the Circuit Court for the Sixth Judicial Circuit in and for Pinellas County, Florida. Both the judgment and sentence were affirmed by this Court in Waterhouse v. State, 429 So.2d 301 (Fla. 1983). The Honorable Robert Beach denied relief under **Rule 3.850, Fla. R. Crim. P.**, and the appeal from said denial is pending in this Court.

II.

Petitioner now argues his counsel on appeal was ineffective for failing to raise several issues on appeal. The Eleventh Circuit has held that a defendant is entitled to reasonably effective assistance of counsel on appeal. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984) and Mylar v. Alabama, 671 F.2d 1300 (11th Cir. 1982). To be effective an appellate counsel need not brief issues reasonably considered to be without merit. Mendiola v. Estelle, 635 F.2d 487 (5th Cir. 1981). Counsel cannot be held ineffective for failing to raise issues not preserved for appeal and which are not fundamental error. See, McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983).

The Supreme Court has indicated there is no constitutional right to an appeal. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). However, when a state undertakes to provide a system of appellate review, that system must comport with due process requirements. This includes the requirement of effective counsel on the first appeal. Evitts v. Lucey, 469 U.S. __, 105 S.Ct. __, 83 L.Ed.2d 821 (1985). The requirement of effective counsel does not, however, mean counsel must raise every nonfrivolous issue. Jones v. Barnes, supra.

This Court in Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985) held the criteria for proving ineffective assistance of appellate counsel was the same standard as used for ineffectiveness of trial counsel. See, Strickland v. Washington, 466 U.S. 668 (1984). The defendant must show (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. See, Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985).

III.

On direct appeal, appellate counsel raised the following issues:

POINT ONE

THE STATEMENTS OF THE DEFENDANT AND THE TANGIBLE EVIDENCE TAKEN FROM HIS CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THEY WERE OBTAINED AS A RESULT OF AN ILLEGAL ARREST OR DETENTION.

POINT TWO

THE TANGIBLE OBJECTS TAKEN FROM THE DEFENDANTS' CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THE POLICE OFFICERS LACKED PROBABLE CAUSE TO SEIZE THE VEHICLE PRIOR TO THE TIME THEY OBTAINED A WARRANT TO SEARCH ITS CONTENTS.

POINT THREE

THE DEFENDANT'S STATEMENT SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO TERMINATE THEIR QUESTIONING AFTER THE DEFENDANT EXPRESSED HIS INTENTION TO REMAIN SILENT.

POINT FOUR

THE DEFENDANT'S FINAL STATEMENT SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO ADVISE THE DEFENDANT'S COURT APPOINTED ATTORNEY THAT THEY WERE CONDUCTING AN INTERVIEW.

POINT FIVE

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THEY WERE NOT SHOWN TO HAVE BEEN MADE VOLUNTARILY.

POINT SIX

THE EVIDENCE OF THE DEFENDANT'S ALLEGED POSSESSION OF MARIJUANA WAS IMPROPERLY ADMITTED BECAUSE IT DID NOT MEET THE RELEVANCY TEST REQUIRED BY THE FLORIDA EVIDENCE CODE AND THE WILLIAMS RULE.

POINT SEVEN

THE EVIDENCE OF AN ALLEGED HOMOSEXUAL RAPE ATTEMPT WAS IMPROPERLY ADMITTED BECAUSE IT DID NOT MEET THE RELEVANCY TEST REQUIREDD BY THE FLORIDA EVIDENCE CODE AND THE WILLIAMS RULE.

POINT EIGHT

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CAPITAL FELONY WAS COMMITTED BY THE DEFENDANT FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

POINT NINE

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CAPITAL FELONY WAS PARTICULARLY HENIOUS, ATROCIOUS AND CRUEL.

POINT TEN

THE TRIAL JUDGE ERRED IN BASING TWO AGGRAVATING CIRCUMSTANCES ON ONE PRIOR ACT OF THE DEFENDANT.

POINT ELEVEN

THE INVOLUNTARY SEXUAL BATTERY WAS AN ESSENTIAL ELEMENT OF THE HOMICIDE AND AS SUCH, IT COULD NOT CONSTITUTIONALLY BE USED AS AN AGGRAVATING CIRCUMSTANCE.

Petitioner is now saying there were still other issues he should have raised.

The first claim of ineffective counsel is that counsel should have raised on appeal other evidence of bad acts in addition to the ones raised. More particularly, petitioner argues appellate counsel should have argued on appeal certain statements concerning the sexual preferences of the defendant and the victim. It must first be noted that none of the comments during the

prosecutor's opening or closing statements were objected to at trial. As this Court has previously indicated, counsel is not ineffective for failing to assert as error unobjected to comments. See, Harick v. Wainwright, 484 So2.d 1237 (Fla. 1986). As will be seen from the discussion below, this type of evidence was not erroneously admitted; therefore, there is no fundamental error argument to overcome the failure to object.

After petitioner was arrested, he made several statements to the pollice. These statements concerned his personal problems with alcohol, sex and violence. At one point, the conversation proceeded as follows:

> Q. What did he indicate that his problem was during the interview?
>
> A. He stated that he had a problem in that he really liked sex, and he had a problem with violence. He said when he drank a lot he found himself doing things that he knew were bad, but that he couldn't have any control over.
>
> Q. Did he talk about his sex drive?
>
> A. Yes. He stated that he felt he had a large sex drive. He stated that he didn't like anything abnormal, that he wasn't into bestiality or anything strange, but just that he liked sex any way that he could get it, and then stated oral, anal, or vaginal. (emphasis added)
>
> . . .
>
> A. Yes, he stated that sometimes he would be out with a girl and he would be getting worked up and excited, and that he would then find that she was cursed, and he stated that this would make him frustrated.
>
> I then asked him if by cursed he was referring to her being in her monthly period, and he stated that was correct.
>
> Q. Did he indicate this problem about getting worked up and frustrated and then realizing that a girl was cursed, did he relate that to any particular night.
>
> A. When we then asked him about his problem, he related this to the date of Wednesday night. (R 1821 - 1822)

There was evidence indicating sex was involved in this murder; there were wounds to the victim's anus and her bloody tampon had been stuffed in her mouth. More importantly the defendant himself, through his statements, put his sexual motive at issue.

When the sexual testimony was objected to at trial, the prosecutor argued the evidence was relevant to show motive, intent and non-consent of the victim. **Section 90.404, Florida Statutes,** the codification of Williams v. State, 110 So.2d 654 (Fla. 1985), provides for the admission of other crimes, wrongs, or acts when relevant to prove a material fact in issue. Motive, intent and non-consent of the victim were all issues in this case. One of the first degree murder theories was that the murder was committed during the course of a sexual battery. Not only was this argued and the jury so instructed, but this was also found as an aggravating circumstance. Sexual battery, when the victim is over the age of eleven (11), generally involves the question of the consent of the victim.

Under the circumstance of this case, the sexual evidence was relevant to issues in the case, and therefore, admissible. The admission of the testimony was thus not error and certainly not reversible error. Counsel cannot be held ineffective for failing to raise an issue which "does not undermine confidence in the fairness and correctness of the appellate result". Johnson v. Wainwright, supra.

IV.

Petitioner also argues appellate counsel was ineffective for failing to raise on appeal the propriety of the former New York detective testifying concerning the circumstance of the prior murder. Mr. Lawrence Hawes was one of the officers who investigated the New York murder. He was allowed to testify concerning the circumstances of the murder of Ella Mae Carter. Defense counsel objected saying the specifics of the prior conviction could not be introduced.

There is nothing in **§921.141, Florida Statutes,** or the case law which prohibits testimony concerning the specifics for a prior conviction. In fact, it has been allowed in some cases, especially where the nomenclature of the prior felony does not necessarily include violence. See, i.e., Mann v. State, 408 So.2d ___ (Fla. _____). The same type of situation faced here was

recently addressed by this Court in Tompkins v. State, 502 So.2d 415 (Fla. 1986). The state in Tompkins introduced certified copies of the defendant's conviction showing kidnapping and sexual battery. This Court opined the certified copies were sufficient alone to establish the aggravating circumstance and further found no prejudice resulted from having the two officers relate the facts of the cases.

Presentation of this issue on appeal would not have resulted in a new sentencing.

V.

It is also being argued that counsel was ineffective for not having the fact that there was a pamphlet on juror conduct in the jury room. It must be remembered that an appellate counsel is not required to raise on appeal every nonfrivolous issue. Jones v. Barnes, supra. While defense counsel objected once knowledge of the booklet was made known, counsel could have decided to brief issues more likely to succeed, i.e., the search and seizure and Miranda issues.

Respondent further submits this is not an issue which would have resulted in reversal. The defense alleges, that the jury who convicted defendant and sentenced him to death considered improper materials during their deliberations. This allegation is based on the possibliity that jurors read a booklet while on jury duty which had been obtained by one of the jurors by mail. Defendant states that "the tone of the booklet was to urge the jurors not to take their oaths as completely binding upon them." This allegation is refuted by the booklet itself. Defendant cites as prejudicial the following excerpts from the booklet.

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

Id. at 11. The booklet goes on to argue:

> 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 the law.

Id. at 29."

The state contends that a reasonable lay person, when reading such a passage would view it to mean that their verdict must be based upon the facts and the law as the judge instructs it to the jury. The state contends that the tone of the booklet and this passage is not as pointed by defense counsel, but is casting jurors who defy the law into a negative light.

The judge in the instant case instructed the jury that they must follow the law:

> "You are impaneled and sworn only to find a verdict based upon the law and evidence. You are to consider only the testimony which you have heard, along with the other evidence which has been received, and law as given to you by me.
>
> You are to lay aside any personal feeling you may have in favor of or against the State, and in favor of or against the defendant. It is only humman to have personal feelings or sympathy in matters of this kind, but any such personal feelings or sympathy has no place in the consideration of your verdict.

Florida Standard Jury Instruction 2.05, R at 2220.

Defense counsel further asserts that:

> "the booklet encouraged the jury to consider Mr. Waterhouse's lawyers misleading, and ignore any 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. at 21."

To the contrary, however, there is no statement in the booklet that infers that only defense counsel can be misleading. The booklet's use of "lawyers" in the plural clearly indicates that it applies to the attorneys on both sides. The impact of this statement must be viewed in the light of a reasonable lay person and, upon so viewing, it is apparent that the impact of this excerpt is to impress upon the jury that what the lawyers say is not evidence. In fact, the jurors were so instructed in the instant case:

> "What the lawyers say is not evidence, and you are not to consider it as such."

Florida Standard Jury Instruction 1.01, R. at 879.

Defendant further asserts that the booklet encouraged jurors to take notes during the trial. There is no indication, however, that any juror actually took notes.

The record at 2046 - 2050, reveals that the attorneys for both sides were made aware of the booklet. Trial defense counsel objected and opted to allow the appeal court to determine any actual prejudice. The defense attorney admitted that the booklet itself said that the jurors are finders of fact and they are not to use outside sources. (R. at 2049) In his instructions the trial judge stated:

> "You alone, as jurors sworn to try this case, must pass on the issues of fact, and your verdict must be based solely on the evidence or lack of evidence and the law as it is given to you by me.
>
> You are not to consider any matters that have not been presented into this courtroom by way of evidence through the lips of the witnesses or tangible evidence before you. You are not to consider anything that you have read outside the courtroom; that has no bearing on this case. You are only to consider the evidence as it comes from the lips of the witnesses who have testified and the physical evidence within the courtroom. Is that understood by everybody? Good."
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> (Record at 2193 - 2194)

The state submits that there was no prejudice to the defendant from the booklet even if all jurors were aware of it. The entire tone of the booklet would, in actuality, aid rather than hamper the defense. Counsel cannot be considered ineffective thereby since:

> "If counsel could not convincingly argue fundamental unfairness, then not raising these issues cannot be considered a serious and substantial deficiency. See McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983)." Dobbert v. State, 456 So.2d 424, 430 (Fla. 1984).

Defendant's claim is without merit.

VI.

Respondent submits the issue of whether or not prospective jurors Ashcraft and Clark were properly excused was not properly

preserved for appellate review. Therefore, counsel cannot be ineffective for failing to raise the issue. After the final questioning of these two prospective jurors, the court indicated they should be excused. The defense counsel did not object; rather, he questioned his right to object. (R 725) There ensued a discussion, albeit brief, concerning the confusion of two people. Defense counsel never made the objection.

Furthermore, both the two prospective jurors made it clear they could not follow the law. See, Lockhart v. McCrae, 106 S.Ct. 1758 (1986). Venirewoman Ashcraft was asked specifically if she could, under any circumstances, vote to impose a sentence of death. Ashcraft answered, "No. I'm sorry." (R 724) Likewise, venireman Clark made it unmistakably clear that he could not find guilt on circumstantial evidence. (R 725) Under either circumstance excusal was proper.

VII.

As a final claim of ineffective appellate counsel, it is alleged that counsel should have raised the trial court's failure to grant the defendant's motion for a continuance. This Court has continually held the granting or denial of a motion for a continuance lies within the sound discretion of the trial judge. Woods v. State, 490 So.2d 24 (Fla. 1986); Lusk v. State, 446 So.2d 1038 (Fla. 1984) and Jent v. State, 408 So.2d 1024 (Fla. 1981). This discretion remains intact even in a death penalty case. Williams v. State, 465 So.2d 781 (Fla. 1983), cert. denied, 465 U.S. 1109 (1984). The exercise of that discretion will not be disturbed on appeal absent an abuse of discretion. No abuse has been demonstrated here.

The record on the hearing on the motion for a continuance indicates there was no necessity for the continuance since all of the items the defense indicated they did not have was provided for or arranged to be provided. (R 599 - 604) Mr. Vasquez, one of the witnesses the defense had been recently informed of, had indicated to the prosecutor he would make himself available to the defense. (R 604) This individual did, in fact, testify at

trial. (R 1928 - 1994) The prosecutor also indicated the other witness, Mr. Spitzig was local and the state's investigator was in the process of bringing that witness to court. (R 601 - 602) Defense counsel, at the evidentiary hearing, stated he talked with Spitzig, but he could not get the dates straight concerning when he was with the defendant.[1]

There was no indicator that the defense team had deposed all of the state's expert witnesses. Any tests or reports which had not been received would be immediately turned over. (R 603 - 604) Under these circumstances, it was not an abuse of discretion to deny a continuance.

None of the issues petitioner claims his appellate counsel should have raised would have individually or collectively entitled petitioner to a new trial or a new sentencing hearing. The evidence of appellant's guilt in this case was overwhelming. See Waterhouse v. State, 429 So.2d 301 (1983). Even if any of the evidence complained of was erroneously admitted, the error was harmless. United States v. Hastings,

VIII.

Respondent submits the sentencing procedure in this case did not violate Hitchcock v. Dugger, 41 Cr.L. 3071 (1987); Lockett v. Ohio, 438 U.S. 586 (1978) or Eddings v. Oklahoma, 455 U.S. 104 (1982). This case was tried in 1980; any confusion as to whether or not the statute precluded presentation and/or consideration of non-statutory, mitigating evidence was put to rest by this Court's opinion in Songer v. State, 365 So.2d 696 (Fla. 1978). There is no indication in this record that counsel was precluded from presenting anything.

A close reading of defense counsel's argument demonstrates clearly the line of attack for the penalty phase. Counsel made no effort to point out any aspects of the defendant's character or circumstances that was mitigating. Rather, the defense chose

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[1] The record in the companion case #69,557, contains the defense attorney's testimony. This particular statement is at record pages 871 - 872.

to appeal to the jury's possible aversion to sentencing a person to death by pointing out life in prison would serve the same purpose. (R 2289 - 2292)

CONCLUSION

Based on the foregoing arguments, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Stephen Bright, Julie Edelson, Clive A. Stafford Smith, 185 Walton Street, N.W., Atlanta Georgia 30303, this 20th day of May, 1987.

OF COUNSEL FOR RESPONDENT.