IN THE SUPREME COURT OF FLORIDA
No. 76,128

ROBERT BRYAN WATERHOUSE
Appellant

v.

THE STATE OF FLORIDA
Appellee

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

COMES NOW, ROBERT BRIAN WATERHOUSE, by counsel, and files the following brief, urging this Court to reverse his death sentence and remand for a resentencing hearing.[1]

STATEMENT OF THE CASE

Mr. Waterhouse was previously convicted and sentenced to death. On direct appeal, this Court affirmed. See Waterhouse v. State, 429 So. 2d 301 (Fla.), cert. denied, 464 U.S. 977, 104 S. Ct. 415, 78 L. Ed. 2d 352 (1983). This Court subsequently granted Mr. Waterhouse's petition for a writ of habeas corpus and ordered a resentencing trial. See Waterhouse v. State, 522 So. 2d 341 (Fla. 1988).

1. Mr. Waterhouse bases each claim on the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and on Article I to the Constitution of this State, in addition to the law separately set forth in the brief.

The resentencing proceedings were begun on March 19, 1990. (Tr. 188)[2] On March 21, 1990, the jury returned an advisory sentence of death. (Tr. 856) The judge followed the recommendation of the jury and imposed a death sentence on April 11, 1990. (Tr. 870-71) From this judgment, Mr. Waterhouse now appeals to this Court.

STATEMENT OF FACTS

Robert Waterhouse conceded to the jury that over twenty years ago, as a teenage alcoholic, he had been involved in a prior second-degree murder in the State of New York. (Tr. 840) He emphatically denied involvement in the crime charged against him in this case.

Indeed, this was a circumstantial evidence case. A confidential informant had directed the police to search Mr. Waterhouse's car. (Tr. 508) A check on his background revealed his prior offense. Fitting the list of usual suspects, Mr. Waterhouse was brought to the police station but he was later released, owing to lack of probable cause to arrest him.

Ultimately Mr. Waterhouse's car was impounded and various tests run on the physical evidence. The blood testing was not very conclusive, in large part because Deborah Kammerer's and Mr. Waterhouse's blood were rather common types, differing only in

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2. The transcript of Mr. Waterhouse's resentencing hearing, around which this appeal primarily revolves, will be cited as "(Tr. ___)". References to the first trial will appear as "(1980 Tr. ___)". References to the *§ 3.850* hearing held in 1985 will appear as "(3.850 Tr. ___)".

one enzyme. (Tr. 665) Then there was Judith Bunker who purported to be able to view blood spatter evidence and pin-point what was happening in the car within centimeters. (Tr. 704) Circumstantial testimony suggested that Mr. Waterhouse's face had been scratched a few days after the crime. (Tr. 716)

Jack Osmond, a former probation officer, testified that Mr. Waterhouse had been on parole in 1980 for the New York offense. (Tr. 618-19) Lawrence Hawes, a former Long Island detective, was then called to testify regarding the 1967 offense. (Tr. 621) Mr. Hawes had been very junior at the time -- indeed, this was the first case which he was permitted to observe, although he was not allowed any actual involvement in the investigation. (Tr. 622) His hearsay testimony went into great detail about the various reports filed in the case.

After hearing closing arguments, the jury recommended the death sentence (Tr. 856), which the trial court accepted. (Tr. 870-71) This appeal follows.

I. WHERE THE PROSECUTION CHARGES THAT MR. WATERHOUSE COMMITTED THE OFFENSE OF SEXUAL BATTERY, AND WHERE THE PROSECUTION PRODUCES QUESTIONABLE EVIDENCE IN AN EFFORT TO SHOW THAT HE DID, THE DEFENSE CANNOT BE PRECLUDED FROM CHALLENGING MR. WATERHOUSE'S INVOLVEMENT IN THE CRIME.

It must be said at the start that this Court has ruled that in Florida evidence of "whimsical doubt" is not admissible at a resentencing trial. See, e.g., King v. State, 514 So. 2d 354, 358 (Fla. 1987); Aldridge v. State, 503 So. 2d 1257 (Fla. 1987);

Burr v. State, 466 So. 2d 1051 (Fla.), cert. denied, 474 U.S. 879, 106 S. Ct. 201, 88 L. Ed. 2d 170 (1985); Buford v. State, 403 So. 2d 943 (Fla. 1981), cert. denied, 454 U.S. 1163, 102 S. Ct. 1037, 71 L. Ed. 2d 319 (1982); but see Tafero v. Wainwright, 681 F.Supp. 1531, 1535 (S.D. Fla. 1984) (noting that this Court "explicitly found that there were no residual doubts"), aff'd, 796 F.2d 1314 (11th Cir. 1986).

This said, it is paradoxical that the question of whether the juror is really and truly convinced that the defendant committed the crime ranks top in any list of matters which the average lay person considers crucial to an equitable death penalty scheme.[3]

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3. For example, in a poll conducted in the State of Florida, the question of the possible innocence of the accused -- even after convicted by a jury beyond a reasonable doubt -- was one of the most important factors in the consideration of the death penalty. *Attitudes in the State of Florida on the Death Penalty: A Public Opinion Survey*, at 63 (Cambridge Survey Research Inc., Washington, D.C., 1986). Lay people apparently believe, with good reason, that doubt may arise "to a sufficient level that, though not enough to defeat conviction, might convince [them] . . . that the ultimate penalty should not be exacted, lest a mistake may have been made." King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), cert. denied, 471 U.S. 1016, 105 S. Ct. 2020, 85 L. Ed. 2d 301 (1985). As one venireperson in this case put it, it is one thing to say that an individual is guilty, and another thing altogether to say that there is no issue as to how guilty he may be:

> PROSPECTIVE JUROR BROWN: * * * The reason I'm hesitating is because not knowing the whole thing, is it necessary if he's already guilty, we just need to know how guilty.

(Tr. 388)

Perhaps this is why so many of our sister courts have disagreed[4] with the position taken by this Court.[5]

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4. See, e.g., State v. Hutton, 53 Ohio St. 3d 36, 559 N.E. 2d 432, 445 (1990) ("the issue of guilt or innocence is relevant to sentencing"); State v. Tyler, 50 Ohio St. 3d 24, 553 N.E. 2d 576, 583 (1990) (defendant properly allowed to argue "[b]ut do you honestly feel that I'm guilty?"); State v. Gillard, 40 Ohio St. 3d 226, 533 N.E.2d 272, 281 (1988) ("'Residual doubts' of a capital defendant's guilt are properly considered in mitigation"); State v. Buell, 22 Ohio St. 3d 124, 489 N.E. 2d 795, 811 (1986) ("[t]he proclamation of innocence is a factor relevant to the issue of whether the sentence of death should be imposed and as such can be asserted by a defendant along with other relevant factors"); State v. Hughes, 106 Wash. 176, 721 P.2d 902, 908 (1986) ("'whimsical doubts' . . . might prevent them from voting for the death penalty"); Cook v. State, 255 Ga. 565, 340 S.E. 2d 843, 860 & n.11 (1986) (approving "sentencing-phase argument on 'whimsical doubt'"); People v. Haskett, 30 Cal. 3d 841, 180 Cal. Rptr. 640, 640 P.2d 776, 792 (1982) (accused permitted "to awaken any residual doubt the jurors might have had about his guilt"); Stout v. State, 693 P.2d 617, 628 (Okla. Cr. 1985) (the penalty phase "is for additional evidence and in no way excludes from consideration on sentence the matters heard on the issue of guilt or innocence"); State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105, 1132 (1983) (approving use of consideration of sodium amythal "truth serum" evidence at the penalty phase to show that defendant was innocent, although such evidence would not have met admissibility standards at the guilt phase); State v. Teague, 680 S.W. 2d 785, 788 (Tenn. 1984) ("parties at capital re-sentencing are entitled to offer evidence relating to circumstances of the crime"); People v. Terry, 37 Cal. Rptr. 605, 390 P.2d 381, 387 (1964).

5. The status of "whimsical doubt" as a matter of federal law is not so apparent. In Lockhart v. McCree, 476 U.S. 162, 106 S. Ct 1758, 90 L. Ed. 2d 137 (1986), Chief Justice Rehnquist wrote for the Court:

> [A]s several courts have observed, jurors who decide both guilt and penalty are likely to form residual doubts or 'whimsical' doubts . . . about the evidence so as to bend them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases.

(continued...)

For the purposes of this case, there is no need to dispute the general rule that a defendant may not contest his or her guilt at a resentencing hearing. However, to every rule there are limits, and to every rule there are exceptions.

We observe at the outset that the death penalty statute must "limit the imposition of the penalty to what is assumed to be the small group for which is it appropriate. . . ." State v. Ramseur, 106 N.J. 123, 183, 524 A.2d 188 (1988) (citing Furman v. Georgia, 408 U.S. 238, 310, 92 S. Ct. 2726, 2763, 33 L. Ed. 2d 346, 390 (1972) (White, J., concurring)). The jury must be

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5. (...continued)
Id. at 181. Indeed, the importance of whimsical doubt has often been stressed in the lower federal courts. Smith v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984), cert. denied, 470 U.S. 1087, 105 S.Ct. 1853, 85 L.Ed. 2d 150 (1985); see also Johnson v. Wainwright, 806 F.2d 1479, 1482-83 (1986), rehearing denied, 810 F.2d 208 (11th Cir. 1987); Aldrich v. Wainwright, 777 F.2d 630, 639 (11th Cir. 1985); Smith v. Balkcom, 660 F.2d 573, 580-81, modified, 677 F.2d 20 (5th Cir. Unit B 1981), cert. denied, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982); Johnson v. Thigpen, 806 F.2d 1243, 1251 (5th Cir. 1986); Brown v. Rice, 693 F.Supp. 381, 397 (W.D.N.C. 1988). In Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed. 2d 155 (1988), a plurality of the Court held that, even assuming the admissibility of evidence on whimsical doubt, the defendant does not have a "constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation." Id. at 172-73 (emphasis supplied); accord Moon v. State, 258 Ga. 748, 375 S.E.2d 442, 452 (1988) (affirming denial of "requested charge on residual doubt, the court observed that the defense could argue residual doubt"); Minnick v. State, 551 So. 2d 77, 94-95 (Miss. 1988), rev'd on other grounds sub nom. Minnick v. Mississippi, ___ U.S. ___, 59 U.S.L.W. 4037 (1990) (Franklin holds that "where a defendant argues residual doubt to the jury, which a defendant is free to do to a relevant extent, the defendant's right to have a jury consider residual doubt is not impaired by the trial court rejecting an instruction on residual doubt"). It should be noted that the thrust of the plurality opinion in Franklin was overruled the next term in Penry v. Lynaugh, 492 U.S. ___, 109 S. Ct. 256, 106 L. Ed. 2d 256 (1989).

allowed to fully evaluate the appropriateness of the ultimate sanction.

In this case, Mr. Waterhouse was indicted for Murder in the First Degree. (Tr. 1) It was therefore true that a conviction for first-degree murder had been affirmed by this Court. However, the State elected to try Mr. Waterhouse at the penalty phase on the totally distinct crime of sexual battery. The prosecution was allowed to seek to prove that Mr. Waterhouse has committed a sexual battery. The trial court instructed the jury on the elements of sexual battery. (Tr. 158)[6]

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6. In the first trial, the jury was instructed (in pertinent part) that:

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

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

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

(continued...)

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

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

(Tr. 241; see also Tr. 214, 324)[7]

Mr. Waterhouse vehemently denied that he had committed a sexual battery -- just as he denied that he had committed the murder at all. Yet he was not allowed to seek to prove that he had not committed a crime.[8]

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6. (...continued)
thereof, the said Deborah Kammerer died.

(Tr. 1) (emphasis supplied) In any event, it is impossible to say that the jury made any finding at the first phase of the first trial with respect to sexual battery.

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

8. The trial court made it rather clear that no evidence pertinent to guilt would be admitted. (See, e.g., Tr. 190, 215, 226, 229, 241, 324, 651) Unfortunately, this had the result of directing a verdict on the issue of whether Mr. Waterhouse was the one who committed a sexual battery, assuming that such a crime had been committed. Indeed, the defense proffered evidence which would have substantially negated the testimony of the serologist, who purported to link Mr. Waterhouse to the crimes charged. (Tr. 97-101) Some of the other evidence proffered by the defense and excluded by the trial court would have gone to the question of whether there actually was a crime of sexual battery at all. (See, e.g., Tr. 88-89; 102-03) Even had the defense been allowed to present this evidence -- and it is difficult to make an argument that this was permissible -- the evidence which would have shown that Mr. Waterhouse was not the perpetrator was clearly excluded. Mr. Hoffman also proffered the (continued...)

If there is one thing clear in the law, it is that no verdict may be directed against the accused in a criminal case. In all criminal cases, the United States Constitution requires that the State bear the burden of proof:

> [T]he due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

State v. Cohen, 545 So. 2d 894, 896 (Fla. DCA 4, 1989) (emphasis supplied) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). The rule of Winship was nothing new in this State. See, e.g., Brooke v. State, 128 So. 814, 817 (Fla. 1930) ("The burden is upon the state to prove every material allegation of the charge"). Indeed, the Constitution of Florida is still more solicitous of the rights of the accused in this respect than is the United States Constitution.[9]

In any criminal case, even a rebuttable presumption violates due process. See, e.g., Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985); Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979); State v. Falcon, 556 So. 2d 762, 763 (Fla. DCA 2, 1990); Rolle v. State,

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8. (...continued)
evidence which he, as counsel, would have presented were he allowed to contest guilt on the murder count. (Tr. 85, 191)

9. See, e.g., Yohn v. State, 476 So. 2d 123, 126-27 (Fla. 1985) (burden of proving sanity on the prosecution); Freund v. State, 520 So. 2d 556, 557 (Fla. 1988) (same); cf. Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (federal constitution would permit imposition of the burden to prove insanity on the defendant).

528 So. 2d 1208, 1209 (Fla. DCA 4, 1988). In this case, it was conclusively and irrebuttably presumed that Robert Waterhouse was the one who committed the sexual battery.

The question emphatically is not whether the trial court believes or disbelieves in the innocence of the defendant for the crime charged.[10] Even if the evidence is absolutely overwhelming the trial court cannot direct a verdict of guilt against the accused. Jones v. State, 440 So. 2d 570, 574 (Fla. 1983) ("credence and weight to be given to such testimony remained with the jury"); Brown v. State, 454 So. 2d 596, 599 (Fla. DCA 5, 1984) ("the weight of legally sufficient evidence is for the jury").

Quite apart from the general prohibition forbidding directed verdicts against criminal defendants, in a capital case constitutional concerns absolutely bar the preclusion of defense evidence offered to rebut the prosecution's case. As the Supreme Court held in Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986):

> it is . . . [an] elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain."

Id. at 5 n.1 (quoting Gardner v. Florida, 430 U.S. 349, 362, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)); accord Skipper v. South

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10. This is true even where the defendant bears the burden of proof, as in the application of affirmative defenses. See, e.g., Gardner v. State, 480 So. 2d 91, 93 (Fla. 1985) ("This evidence did not convince the trial court . . . but we find the evidence sufficient to create a question of fact for the jury to decide") (emphasis supplied).

Carolina, 476 U.S. at 10 (Rehnquist & Powell, JJ, and Burger, C.J., concurring).

A question similar to that presented in this case arose in Blankenship v. State, 251 Ga. 621, 308 S.E. 2d 369 (1983). Blankenship's death sentence had been reversed, and at the re-sentencing trial the trial judge restricted the presentation of evidence:[11]

> During the presentation of evidence, the state was allowed to present evidence tending to prove that the defendant had entered the victim's apartment, alone, and had beaten and raped her. The defendant's cross-examination of the state's witnesses, however, was in several instances curtailed.
>
> * * *
>
> We conclude that the trial court's view of the scope of evidence in mitigation was too narrow.

Id., 308 S.E. 2d at 371.

In this case, a directed verdict on the issue of sexual battery cannot be reconciled with the most fundamental rights of any criminal accused, let alone the special '"need for reliability in the determination that death is the appropriate punishment"' in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988) (quoting, Gardner v. Florida, 430 U.S. 349, 363-64, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (quoting, Woodson v. North Carolina, 428 U.S.

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11. In point of fact, the limitation was not so severe as in Mr. Waterhouse's case, since the defendant was permitted to testify to his innocence. Id. 308 S.E. 2d at 371.

280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (White, J., concurring))). The death sentence must be reversed.

II. MR. WATERHOUSE WAS DENIED THE RIGHT TO COUNSEL WHEN DEFENSE COUNSEL REFUSED TO DELIVER THE CLOSING ARGUMENT, AND THE TRIAL COURT LEFT MR. WATERHOUSE WITH NO OPTION BUT TO DO IT HIMSELF.

The treacherous interaction between the right to counsel, the right to meaningful communication with counsel, and the right to represent oneself has frequently created legal headaches. It takes considerable patience for a trial judge to assure respect for each important constitutional right involved. Unfortunately, in this case the trial judge took rather precipitous action.

The judge was himself placed in a dilemma by trial counsel's rather surprising point-blank refusal to give Mr. Waterhouse's closing argument. The trial judge then placed Mr. Waterhouse in an unconstitutional dilemma: Either accept counsel's argument which, counsel had already announced, would be ineffective; or, do the argument himself.

Mr. Waterhouse strained for a third option. The trial court said there was none. Mr. Waterhouse then asked for a moment to consult with counsel on what to do. The trial court refused. Forced into a corner, totally unprepared, Mr. Waterhouse gave the closing argument himself.

The facts of this tragedy of errors are set forth below.

1. <u>The Facts of the Claim.</u>

The trial court was under the impression that he had to permit Mr. Waterhouse to take part in his own closing argument:

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

(Tr. 747)[12]

When Judge Beach asked Mr. Waterhouse what his desires were, it was clear that Mr. Waterhouse wanted the assistance of counsel. However, at this point, defense counsel simply refused to give closing argument:

> THE COURT: Is it still your desire to go forward with your own statements?
>
> * * *
>
> MR. WATERHOUSE: I would like Mr. Hoffman to do it [closing argument]; he's more articulate than myself. We seem to be at odds.

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

> THE COURT [to defense counsel]: He says he wants you to do it. Are you refusing?
>
> MR. HOFFMAN: Yes. Aside from for the record, I think that's what I have to do.
>
> And he wants me to do, I feel might be totally unethical, to go into the guilt phase issue.
>
> And he refused to put on anything in mitigation.
>
> And I can get up there and speak about things unethical and this happened before he told me what to do.
>
> And I have gone on for what he told me to do, and we may have to do this again, but we may not.
>
> THE COURT: Well, this judge won't. All right, then, he proceeds on his own.

(Tr. 803-04) (emphasis supplied)

Counsel's objection was two-fold: First, that Mr. Waterhouse wanted to argue his innocence which counsel felt to be unethical. This objection was wholly irrelevant, since Judge Beach had ordered that neither counsel nor Mr. Waterhouse make the whimsical doubt argument, so counsel stood in the same shoes as his client.

The real objection was that counsel felt there was little to say, since Mr. Waterhouse wanted only to dispute his guilt, and refused to allow the presentation of various mitigating evidence. This is a strange posture for counsel to adopt: Because the

evidence is weaker than it might be, no argument should be given at all.[13]

Indeed, Judge Beach was correct in pointing out to counsel that he would have to make the most of what he had got:

> MR. HOFFMAN: The posture I've decided to take on this, right or wrong, is that he can't force me to make what I feel is an ineffective representation in closing argument by reneging on his previous statements.
>
> And in light of the fact that he's not allowed me to put on any mitigation case, he's absolutely not allowed any mitigation case.
>
> So, there really isn't much to talk about. And rather than do that and make a half hearted attempt and skirt the issue of

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13. It is worth noting that there have been other occasions when no evidence has been presented by the defense at the penalty phase of a capital trial, yet counsel has always made a closing argument. See, e.g., Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (argument given, although counsel's failure to present evidence amounted to ineffective assistance); King v. Strickland, 714 F.2d 1481 (1983), reinstated, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016, 105 S. Ct. 2020, 85 L. Ed. 2d 301 (1985) (ineffectiveness found where closing argument given, after presentation of no evidence, but it was so bad that it "did more harm than good"); Blake v. Kemp, 513 F. Supp. 772, 779-81 (S.D. Ga. 1981), aff'd, 758 F.2d 523 (11th Cir. 1985), cert. denied, 474 U.S. 998, 106 S. Ct. 374, 88 L. Ed. 2d 367 (1985); United States ex rel. Kubat v. Thieret, 679 F. Supp. 788, 811 (N.D. Ill. 1988) (although argument given after presentation of no evidence, "appeal to the jurors' religious beliefs in closing argument, exhorting the jury to show compassion" insufficient to demonstrate effective assistance); People v. Jackson, 28 Cal. 264, 285, 168 Cal. Rptr. 603, 610, 618 P.2d 149, 162 (1980) (no penalty phase evidence presented, but "trial counsel argued at length . . . [regarding] mitigating factors such as the defendant's age and his cooperation with the police"); Washington v. State, 397 So. 2d 285, 287 (Fla. 1981) (despite lack of mitigating evidence, "trial counsel made a respectable argument on appellant's behalf at the sentencing hearing"); see also State v. Myles, 389 So. 2d 12, 30 (La. 1980) (finding counsel's performance inadequate, and listing the possible arguments which could have been made by counsel who had presented no penalty phase evidence).

ethical bounds with regard to whether or not I can talk about the guilt issue, I would rather leave him to do what he said he wants to do.

And if that turns out to be wrong and he turns out to get another trial --

THE COURT: Well, you can always talk about the seriousness of the recommendation and it requires not taking it light.

That is certainly a matter that can be argued to the jury.

I mean, that's --

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

(Tr. 807-08)[14] The issue was never resolved: counsel had stated flatly that he refused to give the closing and, despite Judge Beach's encouragement to make the argument, he never backed off that statement.

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

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

MR. HOFFMAN: Judge, I think I would take the posture that even if he would ask me to do it now, based on his previous instructions, that I couldn't do it.

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

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

(Tr. 803)

The State seems to have been aware that this was asking for reversal, for the prosecution asked for further inquiry. (Tr. 805) Therefore, the trial court asked Mr. Waterhouse whether he wanted his lawyer to argue, given the parameters laid down by the court. (Tr. 809) Mr. Waterhouse had previously stated that he did not want these limitations on closing argument, since the only issue he felt to be relevant was whether he actually committed the crime or not. However, he did not understand the precise contours of the trial court's definition of "relevant argument." As far as he could see there were a lot of gray areas where innocence might be relevant even under the trial court's ruling. (Tr. 806)

To the contrary, the trial court stated that there were no gray areas. (Tr. 806) Even a legal scholar might be forgiven for disagreeing with the learned trial judge. See *Section I*, supra. Not fully understanding his options, Mr. Waterhouse stated that he had no legal experience, and he needed to consult with counsel to understand the parameters of the fundamental decision he had to make. The trial court refused to allow him any time and demanded a waiver of his right to counsel on the spot:

> THE COURT: Well, I'm going to ask this question one last time.
>
> If I don't get an answer, you're proceeding on your own, Mr. Waterhouse.
>
> Do you want Mr. Hoffman to make the closing argument for you within the confines of the recommendation of either death or life imprisonment or not, and not make an argument

on your guilt or innocence of the homicide; yes or no?

MR. WATERHOUSE: Your Honor, the problem is -- see, I am not an attorney, I do not know the law fully, what you're talking about.

That's why I need to get together --

THE COURT: Yes or no?

MR. WATERHOUSE: -- with Mr. Hoffman in order so we could prepare for this, so he could tell me that this is admissible and this is not.

We haven't go together on it.

THE COURT: Yes or no?

MR. WATERHOUSE: No.

THE COURT: Bring in the jury.

(Tr. 809)

Thus, the mockery of a closing argument began. Before it was a third over, Mr. Waterhouse, who had little time to prepare, ran out of notes. (Tr. 822) From then on, he rambled from one disjointed point to another. Instead of consulting with counsel prior to making the decision to waive his right to counsel, Mr. Waterhouse was forced to consult with counsel in the middle of closing argument:

MR. WATERHOUSE: * * * Your Honor, could I have a minute, please?

THE COURT: You may.

MR. WATERHOUSE: With counsel?

THE COURT: Pardon.

MR. WATERHOUSE: Could I counsel with Mr. Hoffman for a second?

THE COURT: Sure.

(Whereupon, a pause in the proceedings was had.)

(Tr. 824) This was repeated a few moments later. (Tr. 835)

Playing against an amateur, the prosecution objected to material which any lawyer would know was not the subject for proper closing argument. (See, e.g., Tr. 825, 826, 827, 834, 837) Seeing the client out of his depth, defense counsel then interrupted to argue against the objections. (Tr. 825, 827, 828) Quite who was running the case became totally unclear.

It is true that Mr. Waterhouse was allowed to ramble into certain areas which would normally be improper. It is also true that he was allowed to make very damaging arguments which no sane attorney would ever make. For example, he made a comment on his own silence which would result in automatic reversal had it been made by the prosecution. (Tr. 841) Cf. Griffin v. California, 380 U.S. 609, 85 S. Ct. 1129, 14 L. Ed. 2d 106 (1965) (condemning similar argument by prosecutor). He conceded that he was responsible for the prior second-degree homicide in New York. (Tr. 840) Cf. Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987) (ineffective assistance for defense counsel to concede prior convictions at the penalty phase).[15]

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15. "There as compelling poignancy in Brooks' thrashing efforts to defend himself at trial. * * * Predictably, his role before the jury as . . . advocate made it all but impossible for him also to preserve his right as the accused not to testify and rely on the weaknesses of the State's case." Brooks v. State, 336 So. 2d 647, 650 (Fla. DCA 1, 1976).

Mr. Waterhouse was correct: As he had told the judge, it would be better for counsel to make the argument, since Mr. Waterhouse was not "articulate." (Tr. 803) The trial judge was also correct: For Mr. Waterhouse to make his own argument would be the legal equivalent of committing "kamikaze." (Tr. 744) Judge Beach's first instinct -- that counsel should be required to give the argument (id.) -- was the right one.

2. Applying the law to the Facts.

A recent case decided by the Eleventh Circuit Court of Appeals squarely controls the outcome of this case. See Jackson v. James, 839 F.2d 1513 (11th Cir. 1988); see also Stano v. Dugger, 889 F.2d 962 (1989), rehearing en banc ordered, 897 F.2d 1067 (11th Cir. 1990); Daniel v. Thigpen, 742 F. Supp. 1535, 1555 (M.D. Ala. 1990).

In Jackson, defense counsel Hayes sought to be relieved because his client was being "totally uncooperative." Id. at 1515 n.1. The Eleventh Circuit recounted the facts as follows:

> [The] judge . . . gave [appellant] Jackson two options. Jackson could either represent himself or be represented by Hayes. Because Jackson refused Hayes' representation . . . Jackson was left represent himself. The judge instructed Hayes to act as stand-by counsel.

Id. at 1515. The colloquy between the judge and Jackson -- where the judge gave Jackson the two-choice ultimatum -- is a close reflection of the colloquy in this case. Id. at 1515 n.1.

The court found that Jackson,

> did not invoke his right of self-representation in accordance with the requirements of Faretta v. California, 422 U.S. 806, 95 S. Ct.

> 2525, 45 L. Ed. 2d 562 (1975). We also find that Jackson did not waive his right to counsel . . . .

Id. at 1516; see also Harding v. Davis, 878 F.2d 1341, 1343 (11th Cir. 1989).[16]

Applying these principles to the facts of this case, the same conclusion must be reached.

A. Mr. Waterhouse had the right to consult with counsel prior to making the most important decision in the case.

"An accused is entitled to counsel at every critical stage of a criminal prosecution." Carter v. State, 408 So. 2d 766, 767 (Fla. DCA 5, 1982) (waiver of counsel for trial does not result in automatic waiver for sentencing); Tucker v. State, 440 So. 2d 60, 62 (Fla. DCA 1, 1983); James v. State, 428 So. 2d 706, 707 (Fla. DCA 2, 1983); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). In this case, Mr. Waterhouse was forbidden from talking to counsel prior to making perhaps the most important decision in the case.

In Tucker v. State, 440 So. 2d 60 (Fla. DCA 1, 1983), prior to forcing a decision on self-representation, the trial court at least "told appellant to talk with his lawyer for a few minutes. . . ." Id. at 61. Despite this, the court of appeals reversed

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16. Stano v. Dugger has been vacated for reconsideration en banc. However, its rationale is still persuasive. Id., 889 F.2d at 965 ("either (1) Stano in fact proceeded pro se or (2) Stano had a lawyer who, through no fault of his own, could provide no legal advice whatsoever. Under either characterization, the trial judge's acceptance of Stano's plea deprive Stano of his sixth amendment right to assistance of counsel").

for failure to take the time to evaluate the defendant's real wishes concerning counsel. See, infra, § B. In this case, the trial court simply refused to allow Mr. Waterhouse even a few moments to seek counsel's advice on what may have been the most important decision in the case.

Reason and precedent suggest that "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defense with counsel an empty formality." United States ex rel. Martinez v. Thomas, 526 F.2d 750, 755 (2d Cir. 1975). Although the smooth running of the courts is the goal of an ideal judicial system, the trial court may not "elevate[] considerations of economy and expediency above an appropriate regard for the effectuation of the Sixth Amendment counsel guarantee." Farrell v. United States, 391 A.2d 755, 761 (D.C. App. 1978). Especially in a case where life itself is at stake, "a judge must investigate [the facts] as long and as thoroughly as the circumstances before him demand." Brooks v. State, 336 So. 2d 647, 649 (Fla. DCA 1, 1976).

In this case, Mr. Waterhouse was denied the assistance of counsel at the hearing held on whether he should be allowed assistance of counsel for the closing argument. As in United States v. Wadsworth, 830 F.2d 1500 (9th Cir. 1987), this created an independent violation: "We are convinced that the proceeding conducted by the court . . . resulted in the denial of his right to due process and the right to counsel *at that hearing*." Id. at 1510 (emphasis in original). The necessary solicitude for the

right to counsel simply was not present, and the case must be reversed.

B. If Mr. Waterhouse was actually representing himself, then the trial court failed to follow the mandate of Faretta v. California.

The question of Faretta's right to self-representation generally arises where there has been a request to proceed *pro se*. See, e.g., Kimble v. State, 429 So. 2d 1369, 1371 (Fla. DCA 3, 1983); Parker v. State, 423 So. 2d 553, 554-555 (Fla. DCA 1, 1982); Mitchell v. State, 407 So. 2d 1005, 1007 (Fla. DCA 5, 1981); Robinson v. State, 368 So. 2d 674, 675 (Fla. DCA 1, 1979); Ausby v. State, 358 So. 2d 562, 563 (Fla. DCA 1, 1978). This case is obviously different from the run-of-the-mill Faretta case because Mr. Waterhouse did not make an unequivocal Faretta request to give his own closing argument. Indeed, he asked that his "more eloquent" counsel give it.

However, were the State to argue that a Faretta demand had been made, the requirements of the Florida rules prior to allowing self-representation are clear. See *Fla. R. Crim. Pro. § 3.111(d)*. Likewise, Faretta itself mandates a thorough hearing prior to setting a *pro se* litigant adrift on his own. Faretta v. California, 95 S. Ct. at 2541; Tucker v. State, 440 So. 2d at 61; Robinson v. State, 368 So. 2d at 675.

As the court held in Brooks v. State, 336 So. 2d 647 (Fla. DCA 1, 1976), the accused must be:

> ". . . made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he

> is doing and his choice is made with his eyes open.'"
>
> Long before the Sixth Amendment's guaranty of counsel was held applicable to the States . . . the strong presumption against an accused's waiver of counsel in federal prosecutions was held to require a convincing record that the accused was suitably cautioned about the dangers and difficulties of self-representation.

Id. at 649 (quoting Faretta v. California, 422 U.S. at 835).

At the time that Mr. Waterhouse was required to proceed on his own, the trial court did not conduct any kind of Faretta inquiry. See, e.g., Smith v. State, 549 So. 2d 1147 (Fla. DCA 3, 1989); Tucker v. State, 440 So. 2d 60, 61 (Fla. DCA 1, 1983); Kimble v. State, 429 So. 2d 1369, 1371 (Fla. DCA 3, 1983); Bentley v. State, 415 So. 2d 849, 851 (Fla. DCA 4, 1982); Robinson v. State, 368 So. 2d 674, 675 (Fla. DCA 1, 1979); Ausby v. State, 358 So. 2d 562, 563 (Fla. DCA 1, 1978). Indeed, rather than unequivocally asking to proceed *pro se*, Mr. Waterhouse stated that he needed a lawyer, and that Mr. Hoffman would give a better closing argument than he would.

A waiver of counsel must be "knowingly and intelligently" made. Mitchell v. State, 407 So. 2d 1005, 1007 (Fla. DCA 5, 1981) (quoting Faretta v. California, 422 U.S. at 835 (citing Johnson v. Zerbst, 304 U.S. 458, 464-65, 58 S. Ct. 1019, 1023, 82 L. Ed. 2d 1461 (1938))). The "burden was on the [prosecution] to prove the essentials of a waiver of the right to counsel by clear, precise and unequivocal evidence." Lemke v. Commonwealth, 241 S.E. 2d 789, 791 (Va. 1978). The facts of this case cannot

be characterized as a "clear and unequivocal statement sufficient to show that his *waiver* of the services of an attorney was knowingly and intelligently given." Smith v. State, 546 So. 2d 61, 63 (Fla. DCA 1, 1989) (emphasis in original).

Indeed, far from being a voluntary waiver of counsel, this was a violation of the right to counsel. Far from carefully explaining to Mr. Waterhouse the dangers of self-representation, and taking the time necessary to assure that any decision to proceed *pro se* would be voluntarily made, the trial court placed Mr. Waterhouse into an unconstitutional dilemma: Agree (without consultation with counsel) to proceed *pro se*, or agree (without consultation with counsel) to allow Mr. Hoffman to give the argument. It is axiomatic that "the accused's constitutional rights . . . are 'co-equal' and that he cannot be coerced to sacrifice one in order to enjoy the other." State ex rel. Gentry v. Fitzpatrick, 327 So. 2d 46, 47 (Fla. DCA 1, 1976). "In the present case . . . no fair choice was afforded [Appellant] to 'waive' his right to counsel. As we have seen, his self-representation was forced upon him under the circumstances." United States ex rel. Martinez v. Thomas, 526 F.2d 750, 756 n.8 (2d Cir. 1975).

Furthermore, it is not sufficient to say that defense counsel, Mr. Hoffman, did not want to give the closing argument. "[W]ithout the inquiry required . . . the public defender . . . should not have been discharged, even though the defender's ensuing task might have been unpleasant." Mitchell v. State, 407

So. 2d 1005, 1007 (Fla. DCA 5, 1981); Stockton v. State, 544 So. 2d 1006, 1009 (Fla. 1989) (defense has constitutional right to effective closing argument "even when the state's case is strong and the court believes the defense has very little to argue").[17]

While prejudice is presumed under these circumstances, Bittaker v. Enomoto, 587 F.2d 400 (9th Cir. 1978), the prejudice stemming from this strange, eventful history is obvious. Mr. Waterhouse was set loose to represent himself with just moments notice and minutes to prepare. "Preparation for trial is simple only to the lazy or uninformed. It is complex to lawyers . . ." State ex rel. Gentry v. Fitzpatrick, 327 So. 2d 46, 47 (Fla. DCA 1, 1976). How much more complex is it, then, to a lay person such as Mr. Waterhouse.

C. Alternatively, Mr. Waterhouse was denied his Sixth Amendment right to the assistance of counsel.

"There can be no doubt that closing argument for the defense is a basic element of the adversary fact finding process in a criminal trial." Herring v. New York, 422 U.S. 853, 858, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). Mr. Waterhouse had a fundamental, Sixth Amendment right to have counsel effectively present

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17. Indeed, Mr. Hoffman continued to play a peripheral role in the proceedings to the extent that, were this Court to rule that the requirements of Faretta had been met, Mr. Waterhouse's right to proceed *pro se* was violated. "The defendant has no right . . . to partially represent himself and, at the same time, be partially represented by counsel." Sheppard v. State, 391 So. 2d 346, 347 (Fla. DCA 5, 1980) (citing Goode v. State, 365 So. 2d 381 (Fla.), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979)).

his closing argument. See, e.g., Herring v. New York, 422 U.S. at 860; Hall v. State, 119 Fla. 38, 160 So. 511 (1935); Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983), cert. denied, 470 U.S. 1059, 105 S. Ct. 1776, 84 L. Ed. 2d 835 (1985); see also Stockton v. State, 544 So. 2d 1006, 1008-09 (Fla. 1989) (thirty-minute limit on counsel's closing argument unconstitutional); Hickey v. State, 484 So. 2d 1271, 1274 (Fla. DCA 5, 1986) (same); Cain v. State, 481 So. 2d 546 (Fla. 1986) (15 minutes); Rodriguez v. State, 472 So. 2d 1294, 1295 (Fla. DCA 5, 1985) (same); Foster v. State, 464 So. 2d 1214, 1215 (Fla. DCA 3, 1984) (same); Stanley v. State, 453 So. 2d 530, 531 (Fla. DCA 5, 1984) (10 minutes); Neal v. State, 451 So. 2d 1058, 1059-60 (Fla. DCA 5, 1984) (25 minutes).

It is one thing to say that the trial court failed to follow the procedures laid down in Faretta prior to respecting an accused's constitutional right to proceed *pro se*. A distinct yet related issue is presented by the denial of the right to counsel where, as here, the accused specifically states that he wants counsel to present an effective closing argument.

When reviewing this claim, this Court must indulge in a "strong presumption against waiver of the constitutional right to counsel." Von Moltke v. Gillies, 332 U.S. 708, 723-24, 68 S. Ct. 316, 92 L. Ed. 309 (1948). It is emphatically not sufficient for the State to hypothesize that a valid waiver could result from "a paranoid mistrust of the judicial system . . . [or a belief] that his appointed lawyer was against him . . . ." State v. Hahn, 41

Wash. App. 876, 707 P.2d 699, 704 (1986) (citing State v. Bauer, 310 Minn. 103, 245 N.W. 2d 848 (1976)). Just as the defendant's explanation for a purported waiver in Hahn was not rational, the trial court's acceptance of an alleged waiver here also fails the test: Mr. Waterhouse acknowledged that he was not experienced, and that Mr. Hoffman would be more eloquent. He asked for Mr. Hoffman to do the closing argument. The trial court ruled that the same parameters would guide either Mr. Hoffman or Mr. Waterhouse: i.e., no argument on whimsical doubt. Mr. Waterhouse therefore stood to gain nothing by arguing himself. However, he was not able to discuss this with counsel and maturely and deliberately come to a decision.

III. DUE TO TRIAL COUNSEL'S CONFLICT OF INTEREST, MR. WATERHOUSE WAS EFFECTIVELY DEPRIVED OF HIS RIGHT TO COUNSEL AS HIS SENTENCING HEARING.

Sad to say, Mr. Waterhouse's and counsel's inability to see eye-to-eye degenerated to such an extent that counsel ultimately was placed in a position of conflict, from which there was no escape.[18]

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18. It is true that Mr. Waterhouse has not had a happy history with attorneys. However much the prosecution would like to blame him, it is clear that coincidences beyond his control have been responsible for whatever suspicion he might now reasonably harbor against the legal profession. For example, his lawyer at his trial in New York was disbarred during his suppression hearing, for failing to properly represent clients after accepting a fee. See Suffolk County Bar Association v. LaFreniere, 26 A.D. 2d 946, 374 N.Y.S. 2d 656 (2d Dept. 1966), appeal dismissed, 19 N.Y. 2d 809, 279 N.Y.S. 2d 967, 226 N.E. 2d 700, motion denied, 19 N.Y. 2d 920, 201 N.Y.S. 2d 105, 227 N.E. 2d 899 (1967). When Mr. Waterhouse was allowed a belated appeal from this conviction, his appellate counsel was disbarred. When he (continued...)

Mr. Waterhouse moved to dismiss counsel. (Tr. 66, 70, 80, 146) Mr. Hoffman moved to withdraw. (Tr. 188) These motions were all overruled. (Tr. 138, 151) Counsel conceded (Tr. 222) that after his motion to withdraw was denied, the

> defendant thus being stuck with Mr. Hoffman as counsel, [Mr. Waterhouse] asked Mr. Hoffman to come to see him, to which Mr. Hoffman replied, "Why should I? You don't want me."

(Tr. 221)

As things wore on, the defense team were not on speaking terms. Mr. Waterhouse thought that Mr. Hoffman was just going through the motions, refusing to put his case as he would have it done. (Tr. 309) He objected to everything which Mr. Hoffman was doing in the case. (Tr. 312) After counsel had refused to talk with him, Mr. Waterhouse refused to talk to counsel. (Tr. 309, 348, 370)[19]

"[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an

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18. (...continued)
was first arrested in Florida, his public defender withdrew. (Tr. 193) His next lawyer was an ex-judge, and was also allowed to withdraw. (Tr. 193)

19. At one point, Mr. Waterhouse asked permission to make a statement to the jury concerning his counsel's failure to bring out factual matters which he wanted developed. Counsel's response was to request an instruction to the jury which was rather different:

> In any event, what I think we can do is give the jury <u>an instruction that I'm doing the best I can do</u> and I'm charged with not bringing out things that are not allowed by this court.

(Tr. 543) (emphasis supplied).

advocate.'" United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (quoting Anders v. California, 386 U.S. 738, 743, 87 S. Ct. 1396, 1399, 18 L. Ed. 2d 493 (1967)). The advocacy must be on behalf of the client, and in the client's best interests: "It is well-settled that the Sixth Amendment right to counsel is normally satisfied only when an attorney's loyalty lies solely with his client." Commonwealth v. Duffy, 394 A.2d 965, 967 (Pa. 1978) (citing cases).

If goes without saying that if defense counsel does harbor a conflict of interest, prejudice is presumed. See, e.g., Baker v. State, 202 So. 2d 563, 566 (Fla. 1967); Turner v. State, 340 So. 2d 132, 133 (Fla. DCA 2, 1976); Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). While this normally arises in the context of a conflict in counsel's representation of a co-defendant or a witness, "[c]ompetition between the client's interests and counsel's own interests plainly threatens [the caliber of defense services], and we have no doubt that the conflict corrupts the relationship . . . ." United States v. Hurt, 543 F.2d 162, 166 (D.C. Cir. 1976); United States v. Ellison, 798 F.2d 1102, 1106-07 (7th Cir. 1986). This kind of conflict is present when the "interests of counsel . . . [are] 'inconsistent, diverse or otherwise discordant' with those of his client. . . ." Government of the Virgin Islands v. Zepp, 748 F.2d 125, 135 (3d Cir. 1984).[20]

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20. Where counsel's performance is itself under attack, it occasionally becomes impossible for counsel to adequately repre- (continued...)

Counsel's flat refusal to deliver the closing illustrated sufficient conflict of interest to require reversal of this case. For example, in Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985), counsel refused to cross-examine a witness on his client's behalf. Id. at 286. The appellate court ruled that this illustrated a break-down between the client's and the lawyer's interests which required reversal.

Similarly, in United States v. Williams, 594 F.2d 1258 (9th Cir. 1979), the Court held:

> We think . . . that to compel on charged with [a] grievous crime to undergo trial with the assistance of a [court-appointed] attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.

Id. at 1260 (quoting Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970)); accord State v. Hegge, 54 Wash. App. 345, 766 P.2d 1127, 1130 (1989); People v. Stankewitz, 32 Cal. 3d 80, 184 Cal. Rptr. 611, 648 P.2d 578, 585-86 (1982); People v. Marsden, 84 Cal. Rptr. 156, 465 P.2d 44 (1970); see also Freeman v. Parham, 475 F.2d 183, 185 (6th Cir. 1973); Farrell v. United States, 391 A.2d 755, 761 (D.C. App. 1978).

In this case, the degeneration of the attorney-client relationship was such that counsel refused point blank to give a closing argument. This came on top of counsel's prior refusal to

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20. (...continued)
sent his own and his client's interest. See, e.g., United States v. Barnes, 662 F.2d 777, 781 (D.C. Cir. 1980) (counsel unable to provide conflict-free representation "because he performance as . . . counsel was being challenged").

come to consult with Mr. Waterhouse at the jail. Without casting aspersions on any person regarding the development of these irreconcilable differences, a divorce of the attorney-client relationship was the only possible solution to the devolving discontent.

IV. WHEN THE JURY ASKED FOR ACCURATE INFORMATION ON MR. WATERHOUSE'S ELIGIBILITY FOR PAROLE, THE TRIAL COURT WAS NOT AT LIBERTY TO REFUSE TO ANSWER THE QUESTION.

If the guilt or innocence of the accused is the most important issue for most jurors, the second most important issue is generally whether the jury can rest assured that the defendant will not get out of jail until he is old and grey enough to get up to no more misdeeds. Mr. Waterhouse's case presents a "truth in sentencing" issue -- whether the jury should be accurately informed of the limitations on his eligibility for parole -- which is difficult to distinguish from this Court's recent opinion in Jones v. State, ___ So. 2d ___, No. 72,461 (Fla. 1990).

From the beginning, it was clear that parole eligibility would be an important question for the jury. As one person put it during jury selection:

> PROSPECTIVE JUROR REID: The only think that bothers me is the early out we keep hearing about with prisons. Prisoners being forced to be turned loose early.

(Tr. 301)[21]

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21. Venirepersons Meyer (Tr. 302), Raisch (Tr. 302), Shepard (Tr. 303) agreed. Raisch was on the final jury, and Shepard became the foreman. (Tr. 168) Despite the jurors' honest admissions concerning these preconceptions, it was never (continued...)

In closing argument, the prosecution stressed that the jury could not trust the parole board even to follow the minimum sentences applied by law:

> The defendant was arrested, confessed, pled guilty and sentenced to a term of a minimum twenty years to life [in New York], which should have kept him away from innocent victims on the street.
>
> But that minimum twenty became nine. And in 1975, he was released by New York authorities, and several years later made his way to Pinellas County.

(Tr. 762-63) (emphasis supplied)

Thus, according to the assistant state's attorney, it all came down to what punishment he might receive in Florida. The prosecution stressed that fifteen years of punishment -- computed by the deduction of the ten years already served from the minimum of 25 years prior to parole -- was not sufficient for this crime:

> And the suggestion that after ten years in custody from 1980, that there is a twenty-five year mandatory minimum sentence reflects justice in the state's case, I think is a ludicrous suggestion.

(Tr. 800) Under this argument, Mr. Waterhouse would allegedly be back on the streets at the age of 58, ready to commit murder again.

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21. (...continued)
established that the jurors would even have been able to follow the law (i.e. accept accurate information concerning Mr. Waterhouse's ineligibility for parole) had the law been accurately charged. Cf. Singer v. State, 109 So. 2d 7, 24-25 (Fla. 1959) (capital case reversed for failure to excuse juror who was not shown to be capable of putting preconceptions out of his mind).

This was error in itself. In Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S. Ct. 1430, 79 L. Ed. 2d 754 (1984), this Court considered a similar argument, where the prosecution encouraged the jury to execute the defendant to avoid his possible release at the age of 52. This Court reversed the death sentence, holding that "there is no place in our system of jurisprudence for this argument." Id. at 845, cited with approval in Mann v. Dugger, 844 F.2d 1446, 1452 (11th Cir. 1988) (en banc); accord Grant v. State, 194 So. 2d 612, 615 (Fla. 1967).

While entirely improper, at least the argument in Teffeteller had the virtue of not being misleading. In contrast, the jury in this case was faced with conflicting information, and naturally came back with questions for the trial court.[22] First, when would Mr. Waterhouse really be eligible for parole -- would it be 25 years, or would it actually be less, as implied by the prosecution argument? Second, would the ten years Mr. Waterhouse had already served on Death Row be counted towards the purported minimum of 25 years? Third, if paroled, would he be sent back to New York rather than simply be released?

The trial court read out the precise questions submitted by the jurors, and then refused to answer them:

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22. Normally, a sentence must be reversed if this Court "cannot tell how this improper evidence and argument may have affected the jury." Dougan v. State, 470 So. 2d 697, 701 (Fla. 1985). While the improper argument would have met this standard in this case, the jury's questioning makes it very clear that parole considerations became a central factor in the decision to impose death.

> THE COURT: Thank you. Ladies and Gentlemen of the jury, I've been handed a note from the bailiff that contains three questions on it that I understand came from you.
>
> I'm going to read them.
>
> 1. If he's sentenced to life, when would he be eligible for parole?
>
> The next one, "Does the time serve[d] count towards the parole time?"
>
> And the next one is "If paroled from Florida, would the defendant then be returned to New York to finish his sentence there?"
>
> I'm sorry, but by law I'm not really permitted to answer those questions.
>
> You're going to have to depend on the evidence and the instructions that you have with you because I'm not permitted to go beyond that and answer your questions.

(Tr. 854-55) The defense objected to this instruction on the ground that the jury should be told the truth: That Mr. Waterhouse was still under life parole in New York, and that he would be sent back there should be ever be paroled from Florida. (Tr. 851, 852) The Court denied this request. (Tr. 853)

Again, even without the prosecutor's improper argument, this was error. It is now clear beyond peradventure that the jury must be instructed to consider "any relevant mitigating evidence." Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987) (quoting Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 1671, 90 L. Ed. 2d 1 (1986); accord Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S. Ct. 869, 71 L. Ed. 2d 1

(1982); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987).

This Court recently faced a question which was almost indistinguishable from the issue presented in this case. In Jones v. State, ___ So. 2d ___, No. 72,461 (Fla. 1990), the trial court had precluded the defense from arguing that two consecutive life sentences on the two murder charges could result in "two consecutive minimum twenty-five year prison terms. . . ." Id. at ___. This Court reversed, holding that the jury should be allowed to hear that the defendant could "be removed from society for at least fifty years should he receive life sentences on each of the murders." Id. at ___.

On one level, the jury has no business speculating about parole. If the Parole Board is going to let the defendant out, it is hardly his fault -- and the determination by the Parole Board that he has sufficient redeeming virtues to merit parole is hardly a reason for him to be executed. See Zant v. Stephens, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) (unconstitutional to predicate a sentence of death on matters which should rather be considered mitigating).[23] As the Supreme Court of New Jersey noted many years ago:

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23. For an extensive discussion of this issue, see Paduano & Stafford Smith, *Juror Misperceptions Concerning Parole & the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211 (1987). Without wishing to belabor the point, all the constitutional arguments set forth in that article which militate against imposition of the death penalty on the basis of speculation regarding parole are incorporated into this brief by reference.

> That death should be inflicted when a life sentence is appropriate is an abhorrent thought. * * * The Legislature could not have intended that juries weigh the death penalty against something less than a life sentence and by that process arrive at a punishment which does not fit the facts.

State v. White, 27 N.J. 158, 178, 142 A.2d 65, 76-77 (1958).

However, to the extent that jurors do consider parole, their considerations should at least not be based on misinformation. It has been the law for over four decades that a sentence predicated even in part upon inaccurate information violates due process. See Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 2d 1690 (1948); accord Hicks v. State, 336 So. 2d 1244, 1246 (Fla. DCA 4, 1976).

This Court should reaffirm this principle. Since "we are 'not at liberty to assume that the items . . . did not influence the sentence,' it befalls the State . . . to convince us that these items played no part in the sentence imposed in the present case." Epprecht v. State, 488 So. 2d 129, 131 (Fla. DCA 3, 1986) (quoting Townsend v. Burke, 334 U.S. at 740). The State cannot carry this burden, and the death sentence must be reversed.

V. THE INTRODUCTION OF HIGHLY PREJUDICIAL, INADMISSIBLE HEARSAY EVIDENCE REGARDING THE PURPORTED FACTS OF MR. WATERHOUSE'S PRIOR CONVICTION VIOLATED HIS RIGHT TO A FAIR SENTENCING PROCEEDING.

This complex issue raises several fundamental violations of Mr. Waterhouse's right to confront the evidence against him. Additionally, the prosecution flouted several other important rules of law.

Factual Introduction.

Mr. Waterhouse objected to all reference being made to his prior conviction for second degree murder. (Tr. 488) This objection was overruled. The prosecution then called a retired policeman from New York -- Lawrence Hawes -- to testify about the case. Mr. Waterhouse now objected to live, hearsay evidence being adduced in support of the aggravating circumstance. (Tr. 621) This objection was also overruled.

Mr. Hawes had been a neophyte detective on his very first assignment. (Tr. 622) Indeed, Mr. Hawes had been told to "[o]bserve [and] [k]eep out of the way" during the investigation. (Tr. 622) Mr. Hawes had not been responsible for any of the case himself. Therefore, Mr. Waterhouse next objected to Mr. Hawes regurgitating the results of written -- autopsy and fingerprint -- reports concerning the case. (Tr. 623-24)

Mr. Hawes' testimony was a focal point of the prosecution's closing argument:

> MR. CROW: In August of 1966, Detective Laurence Styling [sic] was introduced into the world of detectives by one of the most gruesome crimes he had seen in twenty-four years.
>
> Ella Carter, a seventy-seven year old woman, had been brutally beaten, choked and raped and lay in her own bed, surrounded by her own blood, a victim of Robert Waterhouse's sadistic sexual desires.
>
> * * *
>
> And having committed this dastardly crime, the defendant, blood on his hands, goes to the refrigerator, opening it up and takes out a beer and contemplates the act he just

> committed; sips a few ounces of alcohol before he leaves.
>
> The defendant was arrested, confessed, pled guilty and sentenced to a term of a minimum twenty years to life, which should have kept him away from innocent victims on the street.
>
> But that minimum twenty became nine. And in 1975, he was released by New York authorities, and several years later made his way to Pinellas County.

(Tr. 762-63) Cf. Johnson v. Mississippi, 486 U.S. 584, 590 & n.8, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988) ("because the district attorney argued this particular . . . circumstance as a reason to impose the death penalty," rejection of harmless error "plainly justified").[24]

This issue was previously presented to this Court in Mr. Waterhouse's petition for a writ of habeas corpus. This Court held that the issue was moot, because relief was granted on another ground. Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988).[25] It seems that a wink was as good as a nod to a blind horse, for the prosecution plowed on and committed the same error again, despite the benefit of exhaustive briefing. The controlling law remains the same.[26]

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24. The centrality of this evidence had also been emphasized by the prosecution in opening statement. (Tr. 486)

25. Since the claim was raised in a habeas corpus challenge, the claim was raised under rubric of ineffective assistance of counsel on appeal.

26. It is worth remembering what the prosecution was charged with proving in aggravation: First, that Mr. Waterhouse was under sentence of imprisonment (i.e. parole) for a crime at

(continued...)

This time, however, another improper twist was added to the case. Joan Wood was the prosecution's medical examiner. She first testified to the autopsy she conducted herself on Deborah Kammerer. (Tr. 544 *et seq.*) This was perfectly legitimate. However, at the end of the case, as the last witness the prosecution placed before the jury, she was recalled and asked to testify concerning the autopsy of the victim in the New York case. (Tr. 724 *et seq.*)[27]

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26. (...continued)
the time of the offense, *Fla. Code Ann. § 921.141 (5)(a)*, and second, that he had previously been convicted of a violent felony. *Id. § (5)(b)*. For the former, obviously all the prosecution needed to show was that Mr. Waterhouse was on parole. This was competently achieved by calling his parole officer. (Tr. 618-19) For the latter, all the prosecution needed was a certified copy of the conviction for second degree murder. This was competently proven by merely submitting the documentation. (Tr. 904) As this Court held in Tomkins v. State, 502 So. 2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S. Ct. 3277, 97 L. Ed. 2d 781 (1987), certified copies of a conviction, without more, "is sufficient to establish the aggravating circumstance. . . ." Id. at 420. While competent evidence concerning the facts of prior offenses may be admissible under certain circumstances, the practice is fraught with constitutional danger. With all due respect, the prosecution simply engaged in overkill.

27. There were other confrontation violations in the proceedings. For example, an officer recited the contents of the confidential tip without any effort being made to establish its reliability: "In essence it said, 'Reference to the bay murder, I have a license tag for you, GMU603. All the information is right there.'" (Tr. 508) An objection was overruled, and an implication was left with the jury that the defendant's close relative had made the statement. The State also introduced testimony that one officer had been told by another that there were stains in the car.

> Q. Was an inspection made of his vehicle, which I guess had been parked outside during the course of your interview; is that correct?

(continued...)

She admitted that she had never talked to Dr. Hugh Ashmore, the doctor who performed the autopsy. Indeed, the prosecution apparently had not checked to see whether he was alive or dead. (Tr. 730) The defense objection was again overruled. (Tr. 725)

Several issues arise from the admission of this series of highly unreliable hearsay testimony. First, the accused at the penalty phase of a capital trial retains the fundamental right to confront the witnesses against him. Second, the failure on the part of the prosecution to even make an effort to secure witnesses who could testify from personal knowledge violated our rules of evidence.

A. A retired New York policeman should not have been permitted to parrot the results of various tests of which he had no first-hand knowledge.

It is unfortunate that the prosecution took the course of least preparation in this case: A witness who had some relation to the prior New York case was retired in Florida, so call him.

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27. (...continued)
A. That's correct. It was parked out on the street during the time that we were talking to him.

And another detective in our unit had gone down and looked in the vehicle parked out on the street. At that time, he observed what appeared to be darkish stains located along -- inside the car, along with said inside the floor mats of the vehicle.

(Tr. 515) (emphasis supplied).

As has been repeated for over two millennia,[28] the easy way out is often not the best. The fact that life is made less complicated for the prosecutor does not cause the evaporation of the Sixth Amendment.

In point of fact, Officer Hawes was probably the least qualified of all the New York personnel to testify. He was never the officer on the case. Indeed, at the time he had not been the investigating officer on any case. He had just become a detective, and he was along for the ride to watch his first investigation:

> A. A lieutenant met me and said, "You're a new detective. Observe. Keep out of the way. One of these days you're going to have to do this by yourself."

(Tr. 622)

Because what little he did see must have been fading into the dimmest, north-east distance[29] after twenty-five years, Hawes had read various reports on the case, and regurgitated the results to the jury:

> * * * There as blood on the window, and there was a pain of glass which was later -- this was at the scene which had the defendant's blood on it along with his fingerprints.
>
> Q. Okay. Was that ultimately a piece of evidence that was utilized to prove that Mr. Waterhouse was the perpetrator of the offense?
>
> A. Yes, it was.

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28. "The road to Hades is easy to travel." Bion (c. 300 B.C.) quoted in, *Diogenes Laertius, Lives of the Eminent Philosophers, bk. IV, § 49.*

29. Robert Browning, *Home Thoughts from the Sea* (1845).

Q. Was there other evidence appearing on the victim showing signs of a struggle?

A. Her teeth had been broken off where she had been hit somehow and there was teeth marks, human teeth marks, a bite, on one of her breasts.

Q. How about her rib cage?

A. The rib cage, according to the autopsy report, just about every rib in the body was broken, along with the neck, the throat, which had been crushed.

Q. And the ultimate cause of death being strangulation?

A. That's what the autopsy report says.

Q. Speaking of the autopsy report, let me show you what's been marked as State's Exhibit No. 9 and ask you if you can identify that, sir.

A. This is a copy of the findings of the Suffolk County medical officer who did the autopsy on Mrs. Carter.

Q. Did you utilize that report and did it become a part of your file during the course of the investigates [sic]?

A. Yes it did.

[Objection overruled.]

Q. * * * Mr. Hawes, getting back to the actual investigation itself, you indicated that fingerprints were found on the bloody pane of glass at the scene, is that right?

A. That is correct.

Q. Did you determine what, in fact, had happened with reference to that pane of glass? In other words, how the blood got there?

Q. [sic] At some point in time did you make that determination?

A. Right.

Q. How was that?

A. The defendant, Waterhouse, when he broke the window, the piece of glass penetrated his leg and he reached down with his hand and pulled the piece of glass out and the glass was found right next to the broken window. I believe it was on the floor next to the bed between the bed and the window.

Q. Was that as he was coming into the scene or as he was leaving?

A. It was when he was exiting the scene.

Q. After he had already committed --

A. After the crime was committed.

Q. All right. Now, ultimately, I believe there was another piece of evidence on a fingerprint on a can?

A. On top of the refrigerator. It was a small house, a little apartment type thing, and the bedroom was here, the hallway, and the kitchen, and the refrigerator which was smeared with blood. I'm pretty sure it was a beer can which contained his fingerprint on it.

(Tr. 623-26) (emphasis supplied)

This is just a sampling of the inadmissible and prejudicial testimony which the jury heard, none of which would have been before them had the prosecution relied on admissible evidence. Retired Officer Hawes testified to conclusions from other crime scene personnel which radically colored the jury's picture of the crime in New York. Yet it is clear that Hawes -- then merely an

observer on his first case -- had no personal knowledge of the underlying facts.[30]

For example, whose conclusion was it that the defendant's bite marks appeared on the victim's breast? Certainly, this was not reflected in the fact that Mr. Waterhouse had entered a plea to second-degree murder.

The prejudice of all this is self-evident. The prosecutor used this testimony to argue to the jury that the New York homicide was a particularly cold-blooded crime. He argued that after brutally killing Ms. Carter, Mr. Waterhouse "goes to the refrigerator, opening it up and takes out a beer and contemplates the act he just committed; sips a few ounces of alcohol before he leaves." (Tr. 762-63)

One key to assessing the prejudice of such hearsay is to probe the validity of the prosecution's theory. In this case, the prosecution sought to convince the jury that the prior homicide was of a quality which set it apart from all other homicides. The prosecution implied that Mr. Waterhouse should have been executed for that crime, let alone the second.

Obviously, no homicide deserves anything less than societal condemnation. However, when one analyzes the <u>real</u> facts of the crime, it is clear that in their zeal the prosecution over-stated their case. Hawes left the impression that the beer was consumed

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30. At the first trial, Officer Hawes admitted that "there's some medical words that I cannot pronounce" (1980 Tr. 2261), yet both times the trial court allowed him to plough on with testimony on various expertises with which he was entirely unfamiliar.

after the crime, casting Mr. Waterhouse in the light of the ghoul, sipping beer in contemplation of his act. In point of fact there was no evidence -- such as blood on the beer can -- that would support the prosecution theory. Had Mr. Waterhouse, a teenager at the time, been drinking prior to the crime, this would have been mitigating (justifying New York's decision to reduce the charge to murder in the second-degree) rather than supporting the emotive theory argued by the prosecution.[31]

On a most basic level, the prosecution could not call an individual with no personal knowledge to prove the contents of writings -- fingerprint and serology reports, for example -- which were never introduced into evidence. The rules of evidence explicitly provide:

> Except as otherwise provided by statute, an original writing . . . is required to prove the contents of the writing. . . .

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31. It is not sufficient to argue that the defense should have rebutted the hearsay evidence adduced by the prosecution. A quarter century after a crime committed over a thousand miles away, refutation of the speculation of a retired, former rookie, officer was no simple matter. A review of the record of the New York case reveals at least the following persons who had greater knowledge of the case than Officer Hawes: Det. Albert T. DeCanio, Det. John R. Guinaw, Det. Lt. Robert Forbes, Det. Sgt. Arnold Dihrberg, Det. Sgt. Frederick Fernez, Det. Robert J. Hickey, Jr., Dr. Bernard Newman, and Dr. Hugh Ashmore. No effort was made by the prosecution to show that these individuals were unavailable. However, there is also no showing that any of them were available. It is therefore impossible to say that Mr. Waterhouse could have effectively rebutted the unreliable evidence which was adduced against him. The rule cannot be that the prosecution may introduce whatever illegitimate evidence they see fit, and then place the defense under a burden to refute it if they can, or somehow prove a negative: that they cannot refute it. Rather, the burden of producing competent evidence is, and must be, on the party proponent.

Fla. Ev. Code § 90.952.[32] This rule is clearly applicable to a criminal prosecution. See G.E.G. v. State, 417 So. 2d 975, 977 (Fla. 1982) (best evidence rule applied in criminal cases because otherwise there would be a "potential for abuse"); Justus v. State, 438 So. 2d 358, 365 (Fla. 1983); Duggan v. State 189 So. 2d 890, 891 (Fla. 1966). Under this rule, a witness "should not have been allowed to testify as to the contents of [a writing] absent the introduction of the [writing] itself into evidence." J.H. v. State, 480 So. 2d 680, 682 (Fla. DCA 1, 1985); see also Waddy v. State, 355 So. 2d 477, 478 (Fla. DCA 1, 1978); Angel v. State, 305 So. 2d 283, 284 (Fla. DCA 1, 1974).

Existing parallel to the rules of evidence in this case are constitutional confrontation considerations. Even in a non-capital sentencing proceeding, this Court has held that "all due process guarantees attach . . . ." Griffin v. State, 517 So. 2d 669, 670 (Fla. 1987). In Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), the United States Supreme Court applied the confrontation clause of the Sixth Amendment to capital sentencing proceedings in Florida. The Court held that the need to assure the proper result is elevated, not diminished, where life is at stake:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives

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32. The exceptions to this rule, none of which is applicable to this case, are set forth in *Fla. Ev. Code § 90.954.* As discussed below, it should be noted that no statutory exception may override the constitutional requirements of reliability and confrontation.

> rise to a special "'need for reliability in the determination that death is the appropriate punishment'" in any capital case.

Johnson v. Mississippi, 486 U.S. 578, 584, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988) (quoting, Gardner v. Florida, 430 U.S. at 363-64) (quoting, Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (White, J., concurring))).

Following Gardner, the Eleventh Circuit has ordered a retrial because the prosecution had relied on an officer's assertion that a co-defendant had inculpated the accused. See Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987). The court described the admission of the hearsay declarations to be

> a violation of the confrontation clause because: (1) the record failed to demonstrate that the prosecution made the required good faith effort to secure the presence of [the declarant] at trial; (2) even if the declarant was unavailable, the state never demonstrated the declarant's reliability . . . .

Id. at 1551 (citations omitted).

The same flaws permeate the presentation of the evidence in this case. Indeed, the admonition in Brown is particularly appropriate. Officer Hawes' testimony was predicated on the opinions, theories and conclusions of persons whose names were totally unknown to the defense, and no effort was made to show that the mystery witnesses were not available. Equally, no showing was made as to the reliability of the declarants, whoever they were.

The issue here is identical to Proffitt v. Wainwright, 685 F.2d 1227 (1982), modified on rehearing, 706 F.2d 311 (11th Cir.), cert. denied, 464 U.S. 1002, 104 S. Ct. 508, 78 L. Ed. 2d 678 (1983). In Proffitt, the state introduced a psychiatric report at the sentencing phase without calling its author. As a result, the conclusions of the person actually conducting the evaluation were not subject to cross-examination. The Eleventh Circuit held that this violation of the Confrontation Clause required a new sentencing trial.

After explaining the importance of meaningful cross-examination to the fairness of any trial, the court discussed the application of this fundamental principle 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.

Id., 685 F.2d at 1254; accord Lanier v. State, 533 So. 2d 473, 487 (Miss. 1988) (error, at penalty phase, to allow prosecution to question witness concerning psychiatric report by witness not called to testify).

This Court has likewise reversed death sentences where the source of the hearsay is unavailable for cross-examination. For example, in Engle v. State, 438 So. 2d 803 (Fla. 1983), this Court condemned the consideration of a statement made by a non-

testifying co-defendant, correctly admonishing that this violated Engle's right to confrontation and cross-examination. See also Tomkins v. State, 502 So. 2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S. Ct. 3277, 97 L. Ed. 2d 781 (1987) (constitutional violation, but harmless error).

The facts of Gardner v. State, 480 So. 2d 91 (Fla. 1985), are similar to this case. A police officer testified to incriminating statements made by a co-defendant. Although the defense obviously got to cross-examine the officer, this is not the focus of the Confrontation Clause: The defendant must be allowed to confront the first-hand proponent of the evidence. This Court held that "Engle applies with equal force here, where the jury considered similar inadmissible and prejudicial evidence before recommending the death penalty." Id. at 94.[33]

B. The law of this State does not permit the admission of reports without any effort being made to produce the testimony of the author.

Just because the prosecution prefers not to call a witness, the State is not allowed to simply submit expert reports for the jury's consideration. Neither may the State call another pathologist to merely repeat the contents of a written report, when that report was prepared by another potential witness who has not been shown to be unavailable.

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33. In a non-capital case, the District Court of Appeal reversed where an assistant state attorney recounted his phone conversations with doctors at the hospital where the defendant had been a patient, and where the hospitalization summary and a telegram from the hospital director were admitted into evidence. Cross v. State, 378 So. 2d 114 (Fla. DCA 5, 1980).

In Lanier v. State, 533 So. 2d 473 (Miss. 1988), the court considered the prosecution's cross-examination of a witness with a psychiatric report prepared by the State Hospital. The prosecutor had demanded of the witness why he believed the defendant to be mentally ill when State doctors -- who were never called as witnesses -- had found Lanier sane and competent. Id. at 487-88. Certainly the court held, the report would have been admissible had the doctors been called. Id. at 489. Absent either that, or a showing both that the doctors were unavailable, and that the report exhibited strong indicia of reliability, no rote incantation of a purported hearsay exception would suffice to overcome the Sixth Amendment:

> ". . . the crucial question under the confrontation clause is not compliance with common law hearsay rules. . . ." The right of a criminal defendant . . . to cross-examine the witnesses against him is at the heart of the confrontation clause, in that cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested."

Id. at 488 (quoting Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)); accord Barnette v. State, 481 So. 2d 788 (Miss. 1985) (reversal because certificate of lab analyst used to prove contents of bag were cocaine); State v. Henderson, 554 S.W. 2d 117 (Tenn. 1977); Gregory v. State, 40 Md. App. 297, 391 A.2d 437, 440-56 (1978) (report of six doctors); see also United States v. Oates, 560 F.2d 45 (2d Cir. 1977); United States v. Beasley, 438 F.2d 1279 (6th Cir.), cert.

denied, 404 U.S. 866 (1971); Phillips v. Neil, 452 F.2d 337 (6th Cir.), cert. denied, 409 U.S. 884 (1972).

In Commonwealth v. McCloud, 457 Pa. 310, 322 A. 2d 653 (1974), the court rejected the use of an autopsy report in evidence, stating that any opinion as to cause of death is "at best a conclusion based on interpretation of often conflicting medical opinion." Id. at 312, 322 A. 2d at 655.[34]

Similarly, in Pickett v. Bowen, 798 F.2d 1385 (11th Cir. 1986), the Eleventh Circuit considered the use of a medical report where the prosecution had failed to demonstrate the unavailability of the author. The court held that reversal was required by "the very logic of the Sixth Amendment's provision of the right of a defendant to confront and cross-examine the witnesses against him." Id. at 1387; see also Porter v. State, 578 S.W. 2d 742, 746 (Tex. Crim. App. 1979) (confrontation violation

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34. An indigent defendant is entitled to funds for independent expert assistance where a factor is important to the case, and "subject to varying expert opinion." Barnard v. Henderson, 514 F.2d 744, 746 (5th Cir. 1975); see also Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). Pathology is such an expertise. See, e.g., Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980) (error to deny funds for defense pathologist). Similarly, all the other specialties to which Officer Hawes and testified have been held to be subject to such varying opinion. See, e.g., Bowen v. Eyman, 324 F. Supp. 339 (D. Ariz. 1970) (serology); United States v. Patterson, 724 F.2d 1128, 1131 (5th Cir. 1984) (fingerprints); United States v. Durant, 545 F.2d 823 (2d Cir. 1976) (same); State v. Bridges, 385 S.E. 2d 337, 339 (N.C. 1989) (same). The fact that expert opinion varies on a subject illustrates the need for effective confrontation of that evidence.

where parole file admitted at penalty phase); Beltran v. State, 728 S.W. 2d 382, 386-87 (Tex. Crim. App. 1987) (rap sheet).[35]

VI. THE TRIAL COURT SHOULD HAVE EXCLUDED A PROSPECTIVE JUROR WHO WOULD APPARENTLY IMPOSE THE DEATH PENALTY IN ALL CASES OF FIRST DEGREE MURDER.

Venireperson Martin was the only juror who classified himself as a "ten" in favor of the death penalty, on a scale of one to ten. (Tr. 399) Cf. Pruitt v. State, 373 So. 2d 192, 198 (Ga. 1988) ("I would be 98% in favor of the death penalty"). He would not reserve the death penalty for murderers but would vote to execute "dope pushers." (Tr. 401) With respect to homicides, he said that he would not vote automatically to impose death on everyone responsible for a killing. (Tr. 399) This satisfied the trial court, and the defense motion for cause was denied. (Tr. 409)

However, analysis of Mr. Martin's response makes it clear that when he said that he would not impose the death penalty on those who killed "in the heat of passion" (Tr. 399), he was actually saying that he would not vote to execute someone convicted of manslaughter. In contrast, it seems that he would automatically vote to execute anyone convicted of first degree murder, as our law narrows that class of homicides.

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35. Neither could Joan Wood take the stand merely to reiterate what was written in the report. For example, in Spradley v. State, 442 So. 2d 1039 (Fla. DCA2, 1983), the court held that the medical examiner should not have been allowed to testify as to the nature of the homicide, when it had not been shown that he had sufficient knowledge of the circumstances of the crime to make a meaningful determination. Id. at 1043.

Mr. Martin must be excused for failing to distinguish first degree from lesser degrees of murder. One cannot expect a lay person to understand the ramifications of voir dire in capital cases when "few attorneys have 'even a surface familiarity with the seemingly innumerable refinements [of capital law].'" Irving v. State, 441 So. 2d 846, 854 (Miss. 1983) (emphasis supplied). When a juror comes into the courtroom for voir dire, it may be his or her first real contact with the criminal justice system. When, a little while later, the person is are asked minute details about attitudes towards the death penalty, it is often a little much to expect instantaneous answers.

The law is clear that if jurors must be excluded for their opposition to the death penalty, they must also be excluded where they favor it so strongly that they would impose it in every case. See, e.g., O'Connell v. State, 480 So. 2d 1284, 1287 (Fla. 1986); Thomas v. State, 403 So. 2d 371 (Fla. 1981); Skipper v. State, 364 S.E. 2d 835, 839 (Ga. 1988); Pope v. State, 256 Ga. 189, 345 S.E. 2d 831 (1986); Bracewell v. State, 506 So. 2d 354, 358 (Ala. Cr. App. 1986); Patterson v. Commonwealth, 283 So.2d 212 (Va. 1981); see also Stroud v. United States, 251 U.S. 15, 40 S. Ct. 50, 64 L. Ed. 103 (1919); Crawford v. Bounds, 395 F.2d 297, 304 (4th Cir., 1968), cert. denied, 397 U.S. 936, 90 S. Ct. 941, 25 L. Ed. 2d 117 (1970).

In Thomas v. State, 403 So. 2d 371 (Fla. 1981), this Court reviewed a fairly extensive voir dire of one Juror Roberts. Mr. Roberts stated that "he could not 'recommend any mercy'" once the

accused was convicted of murder. Id. at 375. This illustrated a bias against the accused which was incompatible with the Sixth Amendment's guarantee of an impartial jury. Id.

In this case, the trial court acted under the misapprehension that Juror Martin would only be excludable if he could not consider life imprisonment for any homicide. However, Mr. Waterhouse stood convicted of murder in the first degree, and the appropriate question is whether the prospective juror "had formed an opinion as to the penalty to be imposed in this case." Hill v. State, 477 So. 2d 553, 555 (Fla. 1985) (emphasis supplied).

Similarly, in O'Connell, this Court held that the proper question is whether the juror could vote for life "in any required sentencing phase. . . ." Id., 480 So. 2d at 1287 (emphasis supplied). Obviously, the death penalty can only be an option in a first degree murder case. The fact that a venireperson might not vote for death in a manslaughter case is thus not a justification for retaining that person on the jury.

The State cannot bear their burden of proving the potential juror's impartiality in this case. In any prosecution,

> [i]t is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for a defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

Hill v. State, 477 So. 2d at 556 (emphasis supplied); accord Leon v. State, 396 So. 2d 203, 205 (Fla. DCA 3, 1981).

Since the trial court asked the wrong question in this case, the wrong conclusion was reached. Mr. Waterhouse was entitled to the exclusion of Venireperson Martin for cause, and he is now entitled to a new sentencing hearing.

VII. THE ADMISSION OF THE STATEMENTS ALLEGEDLY MADE BY MR. WATERHOUSE VIOLATED MINNICK v. MISSISSIPPI.

Blame should not be cast upon the lower court for admitting the statements attributed to Mr. Waterhouse into evidence.[36] This Court had previously approved their use at the first trial. Waterhouse v. State, 429 So. 2d at 304-06.[37] However, since that time the sands of the legal shore have shifted -- most importantly, just days ago in Minnick v. Mississippi, ___ U.S. ___, 59 U.S.L.W. 4037, 48 Cr. L. Rptr. 2053 (Dec. 3, 1990); see also Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986).

This Court previously held as follows:

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36. These highly damaging statements included a purported statement which, according to the State's argument, supported an inference that Mr. Waterhouse sought to avoid lawful arrest: "Well, nobody wants to go to jail. You do what you have to do to protect Bobby Waterhouse." (Tr. 723); but see *Section X (b)*. The State also attributed to Mr. Waterhouse an admission that he "might" have committed the crime. (Tr. 518) This, in part, formed the basis for an argument that he showed no remorse for the crime. See *Section X (a)*.

37. Indeed, over Mr. Waterhouse's objection, the State took the position that the statements issue was *res judicata*, and therefore could not be reviewed by the trial court. (Tr. 233)

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

Waterhouse v. State, 429 So. 2d at 305 (emphasis supplied). Despite these facts -- where Mr. Waterhouse twice asserted his right to counsel, yet questioning continued without the presence of an attorney -- this Court rejected the claim.

With all due respect, the reading of Edwards in Waterhouse v. State, 429 So. 2d 301 (Fla. 1983), was incorrect at the time.[38] It has been explicitly superseded by Justice Kennedy's

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38. Many courts had already rejected this Court's interpretation of Edwards before Minnick. Some had done it explicitly. See, e.g., United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir.), cert. denied sub nom. Fairman v. Espinoza, 483 U.S. 1010, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987); Roper v. State, 375 S.E. 2d 600 (Ga. 1989); State v. Preston, 555 A.2d 360 (Vt. 1988); Bussard v. State, 747 S.W. 2d 71 (Ark. 1988); State v. Perkins, 753 S.W. 2d 567 (Mo. App. 1988); State v. Hartley, 511 A.2d 80, 93 (N.J. 1986); State v. Warndahl, 436 N.W.2d 770, 775 (Minn. 1989); People v. Trujillo, 773 P.2d 1086, 1092-93 (Colo. 1989). Some had done so in *dicta*. See, e.g., United States v. Colon, 835 F.2d 27, 30 (2d Cir. 1987) (citing Arizona v. Mauro, 481 U.S. 520, 107 S. Ct. 1931, 1934, 95 L. Ed. 2d 458 (1987) (quoting Edwards v. Arizona, 451 U.S. at 484-85)). See also Terry v. LeFevre, 862 F.2d 409, 412 (2d Cir. 1988) ("once counsel is requested, all interrogation must cease until an attorney is present"); Neuschafer v. Whitley, 816 F.2d 1390, 1391 (9th Cir. 1987) (*per* Kennedy, J.); Smith v. Endell, 860 (continued...)

recent opinion in Minnick v. Mississippi. After Minnick asserted the right to counsel to his interrogators, he told them to come back after the weekend.[39] The Court held that the only valid confession which could be taken in counsel's absence after a request for legal assistance would arise when "the accused has initiated the conversation or discussions with the authorities. . . ." Minnick v. Mississippi, 59 U.S.L.W. at 4039.

In this case, as the emphasized language demonstrates, Detective Murray asked whether Mr. Waterhouse would talk to her, not *vice versa*. Again after the second request for counsel, which -- just as in Minnick -- left open the possibility of talking with the police after consultation with counsel, the detectives came to question Mr. Waterhouse.

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38. (...continued)
F.2d 1528, 1529 (9th Cir. 1988); Owen v. State of Alabama, 849 F.2d 536, 538 (11th Cir. 1988) ("when a person requests an attorney during custodial interrogation, **all** questioning must cease until an attorney is present.") (emphasis supplied); Acquin v. Manson, 643 F. Supp. 914, 920 (D. Conn. 1986); United States v. Hill, 701 F. Supp. 1522, 1524 (D. Kan. 1988); United States v. Rafferty, 710 F. Supp. 1293, 1295 (D. Hawaii 1989); State v. Mathieu, 449 So. 2d 1087, 1019 (La. 1984); People v. Christomos, 172 Ill. App. 3d 585, 122 Ill. Dec. 669, 527 N.E. 2d 41, 47 (1988); State v. Benner, 533 N.E. 2d 701, 711-12 (Ohio 1988); State v. Grieb, 761 P.2d 970, 972 (Wash. App. 1988); Stanford v. Commonwealth, 734 S.W. 2d 781, 788 (Ky 1987), aff'd on other grounds sub nom. Stanford v. Kentucky, 492 U.S. ___, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989).

39. Minnick actually said "'Come back Monday when I have a lawyer' and stated that he would make a more complete statement then with his lawyer present." 59 U.S.L.W. at 4037. The request for the presence of an attorney was not relevant to the Supreme Court's opinion, since the Court held that all requests for the assistance of counsel would henceforth be read as requiring "counsel's *presence* in interrogation. . . ." Id. at 4038 (emphasis in original).

The statements are thus twice tainted, and should have been excluded.

VIII. THE PROSECUTION SHOULD NOT HAVE BEEN ALLOWED TO MAKE IMPROPER COMMENTS, INCLUDING A STATEMENT REGARDING MR. WATERHOUSE'S FAILURE TO TAKE THE STAND OR PRESENT EVIDENCE AT HIS SENTENCING HEARING.

Various statements by the prosecutors in the sentencing trial tainted Mr. Waterhouse's right to a fair hearing.

(a) The Comment on Silence.

During argument at the penalty phase, the prosecutor made the following comment of the fact that Mr. Waterhouse did not testify or offer proof at the penalty phase:

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

(Tr. 794-95) (emphasis supplied) The impropriety of this statement was particularly apparent in light of the reason for there being no evidence on this point: The trial judge had explicitly ruled that Mr. Waterhouse could not offer proof tending to show that he did not commit the crime. See, supra, *Section I.*

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

> The Fifth Amendment to the United States Constitution provides in unequivocal terms

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

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

The comment on silence is perhaps the most fundamental error a prosecuting attorney may commit. For most of a century the Bar has been on notice that such arguments should be avoided at all costs. See Jackson v. State, 45 Fla. 38, 34 So. 243 (1903); see also Griffin v. California, 380 U.S. 609, 85 S. Ct. 1129, 14 L. Ed. 2d 106 (1965).[40] In judging the equities of such a violation of Mr. Waterhouse's rights it is, then, perhaps appropriate to borrow from the argument of one prosecutor in this context, commenting on the defendant:

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

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40. As other courts have uniformly held, a comment made at the penalty phase in denigration of the right to remain silent clearly also violates the Fifth Amendment. See, e.g., People v. Ramirez, 98 Ill. 2d 439, 75 Ill. Dec. 241, 457 N.E.2d 31, 35-37 (1983) (the defendant "has sat silent before you . . . and offered no explanation for the murder"); State v. Cockerham, 365 S.E. 2d 22, 23 (S.C. 1988); State v. Arthur, 350 S.E. 2d 187, 191 (S.C. 1986); State v. Brown, 347 S.E. 2d 882, 887 (S.C. 1986); People v. Szabo, 94 Ill. 2d 327, 68 Ill. Dec. 935, 447 N.E.2d 193, 209 (1983); State v. Sloan, 298 S.E. 2d 92, 95 (S.C. 1982); see also Turner v. State, ___ So. 2d ___, Slip Op. at 19 (Miss. Dec. 12, 1990).

Porterfield v. State, 522 So. 2d 483, 486 (Fla. App. 1 1988).[41]

When a comment is made which implicates the right to freedom from self-incrimination, this Court has asked whether the comment is "fairly susceptible of being interpreted by the jury as a comment on silence." State v. DiGuilio, 491 So. 2d 1129, 1131 (Fla. 1986). Reflecting the fundamental nature of the right infringed, this has been characterized as "'a very liberal rule' for determining what constitutes a comment on silence." Stephens v. State, 559 So. 2d 687, 691 (Fla. DCA1 1990) (quoting Jackson v. State, 522 So. 2d 802, 807 (Fla. 1988)); accord State v. Kinchen, 490 So. 2d 21, 22 (Fla. 1985) (because state constitution provides additional protection, rule "offers more protection to defendants than does the federal test").

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

> I haven't heard any evidence that he thought this car belonged to one of his friends.

Long v. State, 469 So. 2d 1, 1 (Fla. DCA5 1985), quashed, 494 So. 2d 213 (Fla.), on remand, 498 So. 2d 570, 571 (Fla. DCA 5, 1986); see also David v. State, 369 So. 2d 943, 944 (Fla. 1979) ("There's no evidence of business failure, you would have heard evidence . . . why didn't he say anything"); West v. State, 553 So. 2d 254, 257 (Fla. DCA4 1989); Bain v. State, 552 So. 2d 283,

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41. Indeed, because the claim is so fundamental, comments on silence have been reviewed under the plain error rule. See, e.g., Fuller v. State, 540 So. 2d 182, 184-85 (Fla. DCA5 1989); Rosso v. State, 505 So. 2d 611, 612 (Fla. DCA3 1987).

284 (Fla. DCA4 1989); Lowry v. State, 510 So. 2d 1196, 1197-98 (Fla. DCA4 1987).

It is impossible to tell what effect this comment had on the jury. The state must "show beyond a reasonable doubt that the specific comment(s) did not contribute to the verdict." State v. Digiulio, 491 So. 2d at 1136. In State v. Hawkins, 357 S.E. 2d 10 (S.C. 1987), the court rightly found that "[a]rguments of this nature are especially egregious in the context of death penalty [sentencing] proceedings because they violate the Eighth as well as the Fifth Amendment." Id. at 13 (emphasis supplied). The United States Supreme Court has similarly held that, because of the awesome scope of the jury's prerogative to exercise mercy, an evaluation of the effect of constitutional error in the sentencing phase of a capital trial must be made with additional care. See Satterwhite v. Texas, 486 U.S. 249, 258, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988). In this case, the error requires resentencing.

(b) Improper and untrue statement regarding the evidence heard by the previous jury.

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

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

(Tr. 793)[42]

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

It really should go without saying that the "prosecution's duty to correct false testimony . . . arises 'when [false testimony] appears." People v. Wiese, 425 Mich. 448, 389 N.W. 2d 866, 871 (1986) (quoting Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)). This is true even when the false statement is not solicited. Giglio v. United States, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

How much worse is it, then, when the prosecutor himself implies a "fact" which is not supported by the evidence? See,

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42. Under the most charitable interpretation, this statement could have been an unfortunate effort to tell the jury that the jury which found Mr. Waterhouse guilty had not heard this evidence. If this was what was intended, this was not what was actually said. A juror, unfamiliar with the rules of double jeopardy, could have believed that the first jury gave life, and the prosecution had appealed. The *bona fides* of the prosecution is not here at issue. For example, in People v. Johnson, 61 A.D. 2d 923, 403 N.Y.S. 2d 11 (1978), the prosecutor "inadvertantly" implied to the jury that the metal pipe the accused had been carrying had been the weapon used in the murder, although the pipe had been excluded in pre-trial testing. The Court reversed, holding that this misstatement of fact, even though corrected in the presentation of evidence, "seriously impaired the fundamental fairness of the trial." Id. at 12.

e.g., United States v. Bigeleisen, 625 F.2d 203, 209-10 (8th Cir. 1980).[43] It is fundamental that a trial be resolved by evidence, and that "counsel should not be permitted to state as fact that which is damaging to the defendant, and of which there is no legal proof." Smith v. State, 210 So. 2d 826, 848-49 (Ala. 1968) (citing cases).[44]

In United States v. Toney, 599 F.2d 787, 790 (6th Cir. 1979), the court characterized as "foul play" a closing argument that the Toney would have called Jimmie King as a witness if he would have testified in support of the defense. The defense had sought to do this and, over objection by the prosecution, the evidence had been excluded. Id. The court roundly condemned an argument to "the jury that it should convict because of the absence of evidence which [the prosecutor] knew existed." Id. at 791; see also Walker v. State, 624 P.2d 687, 691 (Utah 1981)

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

44. Additionally, with no basis in evidence or fact, the assistant prosecutor personally diagnosed Mr. Waterhouse as a "sexual sadist":

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

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

(retrial required where "prosecution knowingly fostered" a false impression); United States v. Dorr, 636 F.2d 117, 121 (5th Cir. Unit A, 1981) (reversal where argument "inserted a factor . . . which did not exist in the case at all").

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

(c) The Caldwell Violation.

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

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

(Tr. 772)

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

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

already faces by the commission of the sexual battery alone?

(Tr. 779-80) Therefore, Mr. Waterhouse would be getting a "free murder" if he "only" received life.

Long before Caldwell was decided, this Court condemned comments aimed at diminishing the gravity of the jury's function as reflecting not a desire to see justice done, but a "prime ambition of the State . . . [to assure] the electric chair for the accused." Pait v. State, 112 So. 2d 380, 385 (Fla. 1959); Blackwell v. State, 79 So. 731, 735 (Fla. 1918); see also Commonwealth v. Baker, 511 A.2d 777, 787-90 (Pa. 1986); Frye v. Commonwealth, 345 S.E. 2d 267, 284-87 (Va. 1986). This Court held that such a remark was so prejudicial that reversal must ensue. Pait v. State, 112 So. 2d at 385.

IX. THE INSTRUCTIONS FAILED TO SPECIFY THAT EACH JUROR SHOULD MAKE AN INDIVIDUAL DETERMINATION AS TO THE EXISTENCE OF ANY MITIGATING CIRCUMSTANCE.

There can be few matters on which the case law of the past decade has been clearer than the defendant's right to have the jury fully consider evidence in mitigation. See, e.g., Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); Penry v. Lynaugh, 492 U.S. ___, 109 S. Ct. 256, 106 L. Ed. 2d 256 (1989). Indeed, it was on

this basis that Mr. Waterhouse's initial penalty was reversed. See Waterhouse v. State, 522 So. 2d 341 (Fla. 1988).

It is therefore unfortunate that the jury once again was not apprised of the manner in which each individual member was to consider mitigating circumstances. The Supreme Court has recently emphasized that jurors cannot be said to have individually considered mitigating circumstances unless they understand that they may find a mitigating circumstance, even if the other eleven jurors do not find it. See Mills v. Maryland, 486 U.S. ___, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988); McKoy v. North Carolina, 494 U.S. ___, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990); see also McNeil v. North Carolina, 494 U.S. ___, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990); Petary v. Missouri, 494 U.S. ___, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990).[45]

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45. The jury was doubtless further confused by the prosecution's discussion during voir dire (Tr. 376), and the subsequent assertion that sympathy -- or, in other words, mercy -- should not be an issue:

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

(Tr. 419)

A reasonable interpretation of the instructions given in this case would also allow one juror to veto consideration of mitigating circumstances (statutory or non-statutory) by the other eleven. See also McNeil v. State, 395 S.E. 2d 106 (N.C. 1990). Under these circumstances, resentencing is required.

X. THE JURY AND THE TRIAL JUDGE CONSIDERED ELEMENTS IN AGGRAVATION IN VIOLATION OF THE LAW.

Several of the aggravating circumstances submitted in this case were invalid. For the reasons set forth below, the faults in the various circumstances requires resentencing.

(a) Cold, calculated and premeditated.

Over defense objection (Tr. 755, 762, 864), the jury and the trial court improperly find that the crime was "committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification. . . ." *Fla. Code § 921.141(5)(i)* (emphasis supplied).[46] This Court has explicitly held that not every "killing, although premeditated, rises to the level needed to support such a finding." Lucas v. State, 568 So. 2d 18, 23 n.7 (Fla. 1990); see also Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987) ("substantial period of reflection and though by the perpetrator"); Floyd v. State, 497 So. 2d 1211, 1214 (Fla. 1986); Caruthers v. State, 465 So. 2d 496, 498 (Fla. 1985); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985); Thompson v. State, 456

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46. This instruction suffers from problems of duplicity, as discussed below. See *Subsection (c)*; see also Shell v. Mississippi, 498 U.S. ___, 111 S. Ct. ___, 112 L. Ed. 2d 1, 4-5 (1990) (Marshall, J., concurring).

So. 2d 444, 446-47 (Fla. 1984); Mann v. State, 420 So. 2d 578, 581 (Fla. 1982).

For example, in Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988), this Court ruled as follows:

> There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation." * * * [W]e conclude that "calculation" consists of a careful plan or prearranged design. . . .

Id. at 533; accord Thompson v. State, 565 So. 2d 1311, 1317-18 (Fla. 1990).

This case is indistinguishable from Rogers. There is absolutely no evidence that there was any pre-formed intent to kill or pre-arranged design. See Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984) ("This is a classic example of a felony murder and very little, if any, evidence of premeditation exists"); Schafer v. State, 537 So. 2d 988, 991 (Fla. 1989).

(b) Elimination of Witnesses.

"Proof of the requisite intent to avoid arrest must be very strong in these cases." Floyd v. State, 497 So. 2d at 1214 (quoting Riley v. State, 366 So. 2d 19, 22 (Fla. 1978)); Cook v. State, 542 So. 2d 964, 970 (Fla. 1989); Schafer v. State, 537 So. 2d 988, 991 (Fla. 1989); Caruthers v. State, 465 So. 2d 496, 499 (Fla. 1985). Initially, the trial recognized this rule,

seeming to be rather certain that this circumstance should not be charged to the jury, saying:

> "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." Arguably, he was trying to limit witnesses, but we're not giving that one; right?

(Tr. 759) (emphasis supplied)[47] However, then the trial court switched tack on this circumstance:

> THE COURT: Well, I think it applies; I think it applies in almost every case.

(Tr. 761) (emphasis supplied). The defense objected to the use of this circumstance. (Tr. 762, 865)

To the contrary, the circumstance may only be applied where "the dominant or only motive for the murder was the elimination of a witness." Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986) (emphasis supplied); see also Bates v. State, 465 So. 2d 490, 492 (Fla. 1985). In this case, the only evidence even arguably relevant to the circumstance was a statement attributed to Mr. Waterhouse and repeated to the jury by Detective Allison:

> Well, nobody wants to go to jail. You do what you have to do to protect Bobby Waterhouse.

(Tr. 723) This was subject to various possible interpretations. The State speculated that the statement referred to the reason Mr. Waterhouse allegedly committed the murder. While perhaps plausible, this interpretation is cast in doubt by Mr. Water-

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47. Again, this instruction suffers from problems of duplicity, as discussed below. See *Subsection (c)*; see also Shell v. Mississippi, 498 U.S. ___, 111 S. Ct. ___, 112 L. Ed. 2d 1, 4-5 (1990) (Marshall, J., concurring).

house's general resistance to making a statement of any kind -- after refusing to admit that he had committed the crime, why would he suddenly come out with such an admission as to why he committed the crime?

On the other hand, the statement might well have been Mr. Waterhouse's explanation of his failure to speak openly with the police. "We cannot assume [appellant's] motive; the burden was on the state to prove it." Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979) (emphasis supplied). In this case the State indubitably did not prove the aggravating circumstance. Certainly, the motivation for the crime was not proven beyond a reasonable doubt.

(c) Heinous, atrocious or cruel.

The trial court also erred in finding that the crime was especially heinous, atrocious or cruel. (Tr. 871)[48] Again, the defense objected to this finding. (Tr. 864) It is impermissible

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48. It is not sufficient to say that this Court has previously considered this issue. First, this Court did find that "the murder was especially heinous, atrocious and cruel." Waterhouse v. State, 429 So. 2d at 306 (emphasis supplied); cf. id. at 307. This Court did not address the duplicity problem in the statute. Second, however, considerable constitutional water has passed under the bridge in the seven years since this Court first reviewed Mr. Waterhouse's case. It is true that the United States Supreme Court had disapproved of certain applications of this, or similar, aggravating circumstances. See, e.g., Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 100 L. Ed. 2d 398 (1980); Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). However, recently the Court decided Shell v. Mississippi, ___ U.S. ___, ___ S. Ct. ___, 112 L. Ed. 2d 1 (1990), which considerably expanded upon Godfrey. This Court should therefore revisit the issue now.

for this circumstance to be applied so broadly as to cover any attribute of a crime, and a murder cannot be considered:

> especially heinous because the victim is too young, too old, or because the defendant chose his victims so that they were not too young or too old . . . [or if] the defendant killed for no reason . . . [as well as] a murder committed for a reason the appellate court does not like . . . [or] if the victim is aware of the impending death, and also if the killing is done without warning.

Rosen, *The Especially Heinous Aggravating Circumstance in Capital Cases -- the "Standardless" Standard*, 64 N. C. L. Rev. 941, 989 (1986).

For this reason, this Court has limited the "aggravating circumstance generally . . . [to] when the victim is tortured . . . by the killer." Cook v. State, 542 So. 2d 964, 970 (Fla. 1989); see also Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988); Clark v. State, 443 So. 2d 973, 977 (Fla. 1983); Odom v. State, 403 So. 2d 936, 942 (Fla. 1981).

In this case, the trial court obviously considered what happened to the victim after she had lost consciousness. To the contrary, once the victim is no longer able to suffer, "mutilation of the body . . . was not primarily the kind of misconduct contemplated by the legislature in providing for the consideration of aggravating circumstances." Blair v. State, 406 So. 2d 1103, 1109 (Fla. 1981); accord Simmons v. State, 419 So. 2d 316, 319 (Fla. 1982) ("no evidence that the victim was subjected to repeated blows while living").

Furthermore, because the circumstance demands a finding as to whether the crime is especially heinous, atrocious or cruel, submission of the circumstance to the jury was unacceptably duplicitous. Indeed, it may well be that four jurors could think that the crime was heinous, four that it was atrocious, and four that it was cruel. Cf. Shell v. Mississippi, 498 U.S. ___, 111 S. Ct. ___, 112 L. Ed. 2d 1, 4-5 (1990) (Marshall, J., concurring).

As one commentator has written:

> the *Gipson* rule is essential to insure that the prosecution has met its full burden of establishing guilt beyond a reasonable doubt and inducing in the jury "a subjective state of certitude on the facts in issue." *Gipson* rights are "fundamental to the essentials of jury trial. . . ."

Note, *Right to Jury Unanimity on Material Fact Issues: United States v. Gipson*, 91 Harv. L. Rev. 499, 505 (1977) (citing United States v. Gipson, 553 F.2d 453 (5th Cir. 1977)) (quoting Johnson v. Louisiana, 406 U.S. 356, 373 (1972) (Powell, J., concurring)).

In Florida as under federal law, "[u]nanimity is an indispensable element of a . . . jury trial." United States v. Ryan, 828 F.2d 1010, 1020 (3d Cir. 1987) (quoting United States v. Scalzitti, 578 F.2d 507, 512 (3d Cir. 1978)).

A charge which permits the jury to each a unanimous conclusion that the death penalty should be imposed, without agreeing on the facts which support that conclusion, derogates from the fundamental requirement that the government prove its case beyond a reasonable doubt to the satisfaction of all the members of the jury:

> Because it is impossible to determine whether all the jurors agreed that [the accused] committed one of the acts which could properly support the convictions . . . he was deprived of a unanimous jury verdict . . . .

United States v. Ballard, 663 F.2d 534, 554 (5th Cir. Unit B, 1981) (citing United States v. Gipson, 553 F.2d 453 (5th Cir. 1977)); see also United States v. Starks, 515 F.2d 112, 115-19 (3d Cir. 1975); United States v. Payseno, 782 F.2d 832, 834 (9th Cir. 1986).

(d) Double counting of Aggravating Circumstances.

Concededly, the fact that Mr. Waterhouse had been sentenced to life imprisonment for second degree murder, and was on parole, made him eligible for application of *§ 5(a)* (under sentence of imprisonment). See, e.g., Lewis v. State, 398 So. 2d 432 (Fla. 1981). Similarly, his second degree murder conviction fit the definition of a prior conviction for a felony involving violence. See *§ 5(b)*. However, the New York conviction, which involved a life sentence, made it inevitable that he would also be on parole. (Tr. 904)

This Court has long adhered to the principle that the prosecution may not make two aggravating circumstances out of the same evidentiary facts. See, e.g., Maggard v. State, 399 So. 2d 973 (Fla. 1981) (burglary and pecuniary gain); Provence v. State, 337 So. 2d 783 (Fla. 1976) (robbery and pecuniary gain). As the defense argued (Tr. 865), the same principle must bar the abuse of both circumstances in this case.

(e) Sexual Battery Aggravating Circumstance.

The finding that the crime was committed in the course of a sexual battery was tainted by the refusal to permit evidence on the point. This essentially resulted in a directed verdict on elements of the crime charged. See, supra, *Section I.*

For these errors in the sentencing equation, Mr. Waterhouse's penalty of death must be reversed.

XI. THERE MUST BE A MEANINGFUL LIMITATION ON THE NUMBER AND SHOCKING QUALITY OF GRUESOME AND INFLAMMATORY PHOTOGRAPHS SHOWN TO THE JURY AT THE PENALTY PHASE OF A CAPITAL CASE.

One of the prosecutors warned the jurors that they were "going to see some photographs that are rather gruesome. . . ." (Tr. 392; see also, Tr. 263) Indeed, this was the truth. Additionally, some of the photographs introduced in this case were cumulative, as was illustrated by the following exchange:

> A. This photograph was taken from the top of the head prior to the shaving of the scalp.
>
> There are eight separate injuries through this front quarter of the head (indicating), the largest injury is this injury (indicating). That was five point three inches long.
>
> We see it better in this picture (indicating), these injuries to the lower part of the face.

(Tr. 562) (emphasis supplied).

The defense objected repeatedly to the admission of these gruesome photographs. (See, e.g., Tr. 500, 501, 502) These objections were overruled, and the issue therefore comes to this Court.

The issue of gruesome photographs is one of the most troubling in capital cases today. Too often, without meaningful standards to apply, trial courts admit horrible photographs which shock the jury. Too often, appellate courts are asked to rubber stamp the admission of these truly revolting pictures, even though "[i]t is unrealistic to believe, even after a limited view, that the horror engendered by these slides could ever be erased from the minds of the jurors. . . ." Commonwealth v. Garrison, 331 A.2d 186, 188 (Pa. 1975).

It should be remembered that photographs, by themselves, tell very little. Pictures have been taken by pathologists in this State which are horrific, yet were the product of an automobile or motorcycle wreck, not murder. Thus, the photographs must be important to illustrate some question relevant to the jury's decision.[49]

Certainly, as in State v. Beers, 8 Ariz.App. 534, 448 P.2d 104, 108 (1969), a court must reverse where gruesome photographs are totally irrelevant. Accord Bunting v. Commonwealth, 208 Va. 309, 157 S.E.2d 204, 208 (1967) (photograph "which has no tendency to prove [relevant facts], but only serves to prejudice an accused . . . excluded on the ground of lack of relevancy").

However, when dealing with such highly prejudicial evidence as this, admissibility should not be assessed by simply asking

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49. Frequently, as one Court has said, if the purpose of the photograph was to "illustrate the testimony of the pathologist . . . it is quite apparent that it sheds little light . . . ." Garrison, 331 A.2d at 188.

the witness whether the photograph would be vaguely relevant, or whether it might assist in some way. Rather, the trial court must determine whether the picture was necessary for the testimony. See, e.g., Commonwealth v. Rogers, 401 A.2d 329, 330 (Pa. 1979) ("But the officer did not need the photograph to . . . testify"); Garrison, 331 A.2d at 188 ("it is quite apparent that it sheds little light" on testimony); Commonwealth v. Chacko, 391 A.2d 999, 1001 (Pa. 1978) (invoking "essential evidentiary value" test for inflammatory photographs); Commonwealth v. Liddick, 370 A.2d 729, 731 (Pa. 1977).

Thus Mr. Waterhouse respectfully suggests that this Court should promulgate meaningful standards whereby the trial court shall evaluate the admissibility of photographs *in limine*, much as when, for example, this Court promulgated the Williams rule. The standards might include such considerations as:

(1) The Court must also ask whether the wounds depicted were actually caused by the crime. In general, pictures taken during or after autopsy should be excluded since they mostly show what the surgeon did, and for this reason "Courts have been almost universal in their condemnation of admitting photographs depicting the victim's body after it has been subject to autopsy procedures." State v. Clawson, 270 S.E. 2d at 671 (citing cases).

(2) The trial court should ask whether the photographs are duplicative. President v. State, 602 P.2d 222, 226 (Okla. Ct. Crim. App. 1979).

(3) As a matter of fairness, the Court should also ask whether the jury could be equally enlightened by a diagram, or black and white photographs, instead of pictures in vivid and inflammatory technicolor. While pictures in black and white may themselves be too gruesome for use on rare occasions, see Commonwealth v. Liddick, 370 A.2d 729, 731 (Pa. 1977), as a general matter this Court should "suggest the photograph be reproduced in black and white in order to reduce its potential for prejudice." State v. Polk, 164 N.J. Super. 457, 397 A.2d 330, 334 (1977).

The lower court followed no such guidelines prior to admitting the pictures in this case. Mr. Waterhouse was therefore

> denied a fair trial when the court allowed a gruesome, color photograph of the deceased's massive head wound to go to the jury. * * * In this case, the photograph which was admitted could serve no purpose other than to inflame and prejudice the jury in the grossest manner.

People v. Garlick, 46 Ill.App.3d 216, 4 Ill.Dec. 746, 360 N.E.2d 1121, 1126-27 (1977); accord Commonwealth v. Scaramuzzino, 317 A.2d 225, 226 (Pa. 1974) ("photograph of a wound at the back of the ear with the hair pulled away" too prejudicial).

CONCLUSION

For these reasons, and such others as may be noted by the Court in its independent review of the evidence, Mr. Waterhouse's death sentence should be reversed and a new sentencing hearing ordered.

Respectfully Submitted,
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Certificate of Service

I hereby certify that I have this day mailed a copy of the aforegoing document, first class postage pre-paid, to the following addresses:

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This the 18th day of December, 1990.