IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,

Appellant,

v. Case No. 76,128

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

As to Issue I - The trial court properly precluded Waterhouse from presenting evidence regarding his guilt for the murder. The trial court at no time, however, precluded Waterhouse from presenting evidence that a sexual battery had not occurred.

As to Issue II - With regard to the claim that Mr. Waterhouse was forced into doing closing arguments against his wishes by trial counsel's refusal to deliver the closing argument, the record shows that this result was entirely at the hands of Mr. Waterhouse. Mr. Waterhouse was not concerned with his representation, but was merely concerned with disrupting the proceedings. When given repeated opportunities by the trial court to determine exactly what it is he wanted to do, Mr. Waterhouse continually vacillated between the two positions. It was within the trial court's discretion to make this final determination.

The state further asserts that the inquiry made by the trial court was sufficient to satisfy the dictates of Faretta. The trail court was sufficiently familiar with Waterhouse to know his extensive familiarity with the legal system and his own case. The court repeatedly warned the defendant of the dangers of self-representation and his alternatives under the law.The trial court bent over backwards to accommodate Waterhouse, and if any error was committed, it was committed in Waterhouse's favor. The defendant has been afforded more than a fair trial and was not denied his right to counsel or his right to self representation.

As to Issue III -- Appellant's claim herein is that his failure to cooperate with his counsel resulted in counsel having a conflict of interest. This claim is absolutely not supported by anything in this record or the law. The fact is that in spite of Mr. Waterhouse's repeated attempts to disrupt the proceedings and to keep his counsel from being able to adequately represent him, that counsel acted as a professional and continued to assist Waterhouse throughout the difficult proceedings. There has been no demonstration that an actual conflict existed or that such conflict adversely affected appellant. The evidence supporting the imposition of death was overwhelming. Accordingly, error, if any, was harmless.

As to Issue IV --The trial judge's refusal to answer the jury's questions in the instant case was within his discretion and appellant has failed to show an abuse of that discretion. Even if this information has been presented and would have somehow benefited Mr. Waterhouse by persuading some member of the jury to impose a life sentence knowing that Mr. Waterhouse would get out of Florida prison in fifteen years and may or may not be subjected to extradition to New York based on his life parole, the record shows in the instant case that the jury recommendation was 12 to 0. The evidence in the instant case was overwhelmingly in support of death as the prior jury had found, as this Honorable upheld on direct appeal and as the instant jury found. Accordingly, any error was harmless beyond a reasonable doubt.

As to Issue V -- Appellant was not denied his right to confront the witnesses against him when the state presented evidence of his prior murder conviction as Waterhouse was afforded a full opportunity to rebut the evidence against him. Further, the only confrontation objection was made to the reading of the autopsy report by Dr. Wood. As this testimony was not prejudicial and was already before the jury, error, if any was harmless.

As to Issue VI -- This issue has been squarely addressed by this Honorable Court recently in Penn v. State, 16 F.L.W. S117 (Fla. January 15, 1991), wherein this Honorable Court held that it was not an abuse of the trial court's discretion in refusing to excuse prospective jurors for cause because they ultimately demonstrated their competency by stating that they would base their decisions on the evidence and the instructions. Prospective juror Marshall clearly stated that he could follow the law and that he would apply the aggravating and mitigating circumstances as instructed. Mr. Marshall's statements do not indicate a juror that has made up his mind and would impose the death penalty in all cases of first degree murder.

As to Issue VII -- The statements in the instant case had very little effect on the sentence as imposed. Therefore, even if Mennick v. Mississippi did apply and even if the claim was not procedurally barred, the error in the instant case is harmless.

As to Issue VIII -- Even if any of the challenged comments had been improper and properly objected to, prosecutorial error

does not warrant automatic reversal of the sentence unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The comments in the instant case were clearly harmless in light of the overwhelming evidence in support of the death sentence.

As to Issue IX -- First, this is not the law in the State of Florida, and second Waterhouse's counsel never objected to the instruction. Absent fundamental error, failure to object to the jury instruction at trial precludes appellate review.

As to Issue X -- The state urges this Honorable Court to uphold the sentence of death as imposed in the instant case where the jury recommended death by 12 to 0 and where there was no mitigating evidence presented or found. The state further urges this Honorable Court to uphold the sentence even if this Court should strike one or more of the aggravating factors because at least three of these factors have been previously upheld and found sufficient to support the sentence.

As to Issue XI -- The photographs in the instant case were relevant to show the manner in which the murder had been committed, the defensive wounds of the victim, the nature and the heinousness of the wounds that the victim received, the location of the body and the extent of the injuries. As the photographs were relevant, and not unduly prejudicial, the trial court did not err in admitting them into evidence.

ARGUMENT

ISSUE I

WHETHER THE DEFENDANT WAS PRECLUDED FROM PRESENTING EVIDENCE TO REBUT THE AGGRAVATING CIRCUMSTANCE OF THE COMMISSION OF A SEXUAL BATTERY AGAINST THE VICTIM AT OR ABOUT THE TIME HE MURDERED HER.

Appellant contends that the trial court's admittedly proper limitation upon the presentation of whimsical doubt evidence had the effect of directing a verdict as to the aggravating circumstance that during the course of the murder the defendant committed a sexual battery upon Deborah Kammerer. This position is baseless as a matter of fact and law.

First, as appellant concedes, this Honorable Court in King v. State, 514 So.2d 354 (Fla. 1987), rejected King's claim that the trial court had erred in limiting the presentation of evidence to evidence going to aggravating and mitigating circumstances, thereby, precluding King from presenting evidence of lingering doubt. This Court stated:

> "King had been convicted, and his convictions had been affirmed on appeal; his guilt, therefore, was not an issue. The state, however, still needed to prove beyond a reasonable doubt the aggravating circumstances it felt supported a death sentence and, to this end, could present evidence rather than rely on the bare admission of the convictions." Id. at 358.

This Court has consistently held that residual, or lingering, doubt is not an appropriate nonstatutory mitigating circumstance. Id. at 358. The introduction of mitigating evidence is limited to evidence relevant to the problem at hand, i.e.,

that it go to determining the appropriate punishment. The admission of evidence is within the discretion of the trial court and a reviewing court will not disturb the trial court's ruling unless an abuse of discretion is shown. Id. at 357, citing Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982).

In the instant case, the trial court properly precluded Waterhouse from presenting evidence regarding his guilt for the murder as charged. The trial court at no time, however, precluded Waterhouse from presenting evidence that a sexual battery had not occurred. At the motion to withdraw hearing on March 9, 1990, defense counsel noted that he was aware that he could not retry guilt/innocence but that he could challenge some of the guilt phase issues such as the evidence of sexual intercourse. (R 190) This position was reiterated by defense counsel prior to closing argument and was never disputed by the state or the trial court. (R 806)

Defense counsel and the defendant were allowed considerable leeway in the cross examination of state witnesses regarding the evidence of sexual battery. (R 580 - 586, 655, 669 - 677, 689, 692 - 696, 720) And, in fact, much of the evidence that the defendant presented to the trial court as a proffer to substantiate his innocence was used to cross examine the state's experts.[1] Further, the record shows that during the cross

[1] This evidence consisted of affidavits prepared in 1985 for Waterhouse's 3.850 proceeding. (R 85 - 137).

examination of former St. Petersburg Police Department Detective John Long, the defendant proffered numerous questions that he wanted counsel to ask regarding his innocence. After the trial court approved the questions, the defendant then refused to allow defense counsel to ask same. (R 653 - 659) Additionally, during closing arguments the defendant was allowed considerable leeway in arguing to the jury lingering doubt and his innocence of not only the sexual battery, but the murder itself.

There is absolutely no question that the trial court did not direct a verdict on this issue and that any limitations placed on the evidence were in accordance with this Court's ruling in King v. State.

The defendant also seems to suggest that somehow the court's instructions resulted in a directed verdict on the issue of sexual battery. First, these instructions as presented by appellant were taken out of context. The trial court instructed the jury prior to voir dire that they were here for the issue of sentencing, that guilt had already been resolved. This was certainly true and certainly proper in accordance with King. After the close of the evidence and arguments by the state and the defendant, the jury was instructed on the aggravating factors it had to consider. In accordance with the aggravating factor that the defendant had committed a sexual battery during the course of the murder, the jury was given a definition of sexual battery and told that it had to find that it was established beyond a reasonable doubt. This instruction was given without

objection by defense counsel. In no way did the instruction suggest to the jury that the issue of sexual battery had already been resolved, thereby relieving them of their responsibility to find that it had been proven beyond a reasonable doubt. And, in fact, the evidence did establish beyond a reasonable doubt that the defendant committed a sexual battery during the course of the murder.

ISSUE II

WHETHER MR. WATERHOUSE WAS DENIED THE RIGHT TO COUNSEL DURING CLOSING ARGUMENT.

Counsel for appellant is apparently under the mistaken impression that neither this Honorable Court nor the state review the record in its entirety, instead of relying on the defendant's misleading presentation of the facts. The facts are that Mr. Waterhouse, from the time that he was originally prosecuted and up to this current appeal, has done everything within his power to disrupt the judicial system. Mr. Waterhouse is not interested in due process or justice, but rather merely hindering the system in order to delay the inevitable consequences of his murderous actions.[2] Waterhouse repeatedly moved to have counsel withdrawn prior to the sentencing hearing. During the sentencing hearing itself, the record is replete with instances where Mr. Waterhouse attempted to fire his counsel or ask the court for the opportunity to assist his counsel by taking over the cross examination of witnesses and presentation of evidence. (R 188 - 200, 540 - 544, 629 - 632, 650 - 659) Nevertheless, when actually given the opportunity to dismiss his lawyer, Waterhouse repeatedly rejected the court's offer.

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[2] This is also evidenced by Waterhouse's demanding a new sentencing hearing because the jury had not considered nonstatutory mitigating evidence and then upon resentencing, refusing to introduce mitigating evidence.

With regard to the claim that Mr. Waterhouse was forced into doing closing arguments against his wishes by trial counsel's refusal to deliver the closing argument, a review of the motion and resulting arguments disputes his claim. The following excerpts show that the final result was entirely at the hands of Mr. Waterhouse. After ten months of experiencing Mr. Waterhouse's attempts to delay and interfere with the orderly process of the hearing, (R 70, 77 - 79, 80 - 81, 138, 144, 146 - 150, 151, 188 - 197), the trial court was confronted by a demand for Mr. Waterhouse that he present his own closing argument.

> MR. HOFFMAN: Judge, the posture I'm in right now is early this morning he indicated that he did not want a case. In fact, did not want me to close. He'd like to close himself. So, I think what we should do is get the jury out and let him reiterate that position on the record.
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> THE COURT: Why don't we go ahead and take a break and you can talk to him some more and we'll come back in and find out what his feelings are about it.
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> MR. HOFFMAN: Just preliminarily, I need to ask the State if they have a problem with him closing. I mean --
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> MR. CROW: Judge, I think we need to find out if he, in fact, wants to do that before I object or not. (R 737)
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> * * *
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> MR. HOFFMAN: That's what I'm telling the Court, your Honor. Judge, the other thing now is whether or not he's going to testify -- I'm sorry -- going to address the jury in closing, and my feeling is that he ought to be allowed to do it. I think that probably some reasonable limitations could be put on that. I think that without him doing this, we're in a posture --

THE COURT: Well, do you wish to address the jury in closing argument, Mr. Waterhouse?

THE DEFENDANT: Yes, sir, if I may be allowed to do so in respect to what I want to put forth to them.

THE COURT: What is it you want?

THE DEFENDANT: Mr. Hoffman told me that there may be some limitations as to what I could put forth.

MR. HOFFMAN: Why don't you proffer right now just the best you can what you want to tell the jury?

THE DEFENDANT: Basically, I would like to tell the jury what they didn't hear through testimony of State witnesses, of witnesses that could have been called for me.

THE COURT: Well, I think to do that -- are you going to say what these witnesses would have testified to?

MR. HOFFMAN: Tell the Judge right now. In other words, this is part of the lingering doubt. This is the lingering doubt.

THE DEFENDANT: It could create lingering doubt. It would probably lean more in that area, yes.

THE COURT: You better tell us everything that you're going to tell the jury so I can tell you whether or not I'd let it in. Otherwise, you won't make a record.

THE DEFENDANT: Basically, like I said, basically, your Honor, if we had to go through the whole thing --

THE COURT: You better do it.

THE DEFENDANT: I also plan to address the death penalty as a separate issue by itself other than what certain witnesses would have testified to. What certain people did, what certain people didn't do.

MR. CROW: Judge, I don't understand. I thought when we began this proceeding, we went down every potential witness that he had and either all those people were available to him or are still here. I don't understand. He keeps talking about all these things I'm going to show. Yet, when the time comes to be specific, there is nothing there.

It seems to me that he's making statements for the record that are not substantiated and cannot be substantiated. If he's saying that there is other witnesses, where are they? Are they available? Can we put them on now? It's time for him to put on witnesses.

MR. HOFFMAN: That's not my understanding of what he's trying to convey. It may be that he hasn't had a lot of time to prepare a statement to the Court which would be in the nature of proffer. I understand what's going to be the concern here by both the Court and the State, that if he gets up there and starts going into a full-blown lingering doubt case, then you're going to cut him off. That's why I kind of asked him if he could proffer just in general terms, I want to comment on this witness that was not presented, I want to comment on this witness. Just given the Court some idea.

THE COURT: I'm going to do this. I'm gong to stick to my original ruling, which was in midway during the trial in which he requested to be able to participate in the cross-examination of the witnesses. I consider this the same problem, that he wants to now take over his own defense in presenting a closing argument.

Assuming that I have discretion in allowing that, I'm going to exercise my discretion against it on the basis that it would not be in his best interest to allow him to do that because it is apparent to me that he would be getting into some areas that would be objectionable, and were the State to object, which I think they probably would, I would sustain the objection, and he, therefore, would be very ineffective on his own behalf.

As such, I feel it would create error to allow him to, in effect, commit kamikaze, to paraphrase it, in the presence of the jury. I think that in his own best interest, he's best served by allowing a skilled lawyer such as yourself to present all the points favorable to him for the jury to consider. I do not feel that he's equipped to do so. I think the areas that he's suggesting he wants to get into I would have to prohibit him from getting into, and I think by doing so it would simply harm his case.

So, I'm not going to allow him to make a closing argument, but you'll make one in his behalf.

MR. HOFFMAN: Judge, not to argue to the Court, so the Court is fully appreciative of what is happening, he's also restricted me very much on what I can do in closing, and I may just have to sit down with him to see what arguments he wants me to make on the death penalty. He's restricted me also in the closing argument.

If the Court out of an abundance doesn't want him to do that, then this may be where he sets up error later on where I followed his instructions, but he will not confirm those on the record.

THE COURT: Well, you tell us what areas you want to cover on closing. You tell us what areas he wants you to cover on closing. I'll ask him whether or not that's correct and I'll rule on whether or not the areas he wants you to cover are permissible. So we'll have a complete record on it. That's all I can do.

I feel I would be creating error to allow him to close and make and ineffective closing that might tip the scales against him. I don't think that's in his best interest. I have to safeguard that interest by denying it.

MR. HOFFMAN: Judge, could I have just a moment?

MR. CROW: Judge, obviously this has been a continuing concern throughout the trial. My concern is that perhaps this request isn't the same as the previous request that was within the Court's discretion to deny. The previous request was for hyper-representation in which both counsel and defendant would cross-examine the same witness. I think clearly it's within the Court's discretion on hyper-representation. I'm not sure at this pint whether we're dealing with the request by Mr. Waterhouse --

THE COURT: Same thing.

MR. CROW: -- to represent himself and take over fully his defense and do the closing.

THE COURT: As far as I'm concerned, it's the same principle.

MR. CROW: Well --

THE COURT: If he wants to discharge Mr. Hoffman, Mr. Hoffman, you can pack right up and leave.

MR. HOFFMAN: Judge, the concern I have is that by my acquiescing to the client's wishes on both the closing and the mitigation evidence, which the Court has alluded to in that other opinion, per se causes an ineffective counsel issue, as opposed to what the Court's phrased as ineffective assistance if he does it.

My personal feeling is I have not seen any law on this. I've looked for some. Mr. Crow can't quote anything. I would trust him on this. I think we're erring. If we err, we're erring by allowing him not to testify -- not to address the jury. I think he should address the jury in some manner or fashion.

THE COURT: Well, I've already made for the record a statement that I think that he would harm himself by doing that and he now has effective counsel. I think I would created 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.

MR. HOFFMAN: Judge, what I'm saying --

THE COURT: 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.

MR. CROW: Judge, I'm not asking him to say anything he wants.

THE COURT: Pardon?

MR. CROW: I'm not asking him to say anything.

THE COURT: You're going to object to your heart's content. I've ruled on the objection. You can sit down, Mr. Hoffman. That's what you both seem to want. I am not going to object to it.

MR. CROW: Judge, that's not my point. My point is that I think there is a lack of clarity in the record as to what the defendant's requesting and I don't want him to simply say I want to make a speech or do this without us getting specific with him and find out, do you want to discharge Mr. Hoffman and represent yourself, realizing that's your only option, or do you want to continue?

THE COURT: That's not what I've been saying, Mr. Crow. That's what I suggested at first and you kind of overruled that suggestion.

MR. CROW: Well, I'm sorry if I was unclear. I think the point I was trying to make is I don't think -- this may not be a request for hyper-representation. I would like to clarify.

THE COURT: I'm just asking. I said if you want want -- I told him if he wants to discharge Mr. Hoffman, that's fine. As long as Mr. Hoffman's in the case, it was my

position that Mr. Hoffman should give the closing argument. I assume from your statement that you felt that Mr. Waterhouse had a right to make the closing statement, whether Mr. Hoffman was in the case or not.

MR. CROW: No, your Honor.

THE COURT: I simply conceded that I would go along. If you both agreed that Mr. Waterhouse can make the statement, that's fine, whether Mr. Hoffman is in the case or not in the case. It really doesn't make a bit of difference to me, one way or the other.

MR. CROW: I'm sorry if I was unclear.

THE COURT: You were unclear.

MR. CROW: What I was suggesting is that I think he does have some rights under California to assert a pro se defense and that my suggestion to the Court is that rather than simply say that, with no response from the defendant, that there be a direct inquiry in that regard, so that we have it.

THE COURT: That's what I'm trying to do, but you cut me off at the pass.

MR. HOFFMAN: Judge, may I have a couple of seconds with him? Maybe we can clear it up.

THE COURT: Let me interrupt you for a minute. Here's what I'm going to do. Just so he'll have no complaint. You're still in the case. He can say anything he wants. I'll rule on the objections.

MR. HOFFMAN: I think that's fair, Judge.

THE COURT: It's my observation that he is not best served by doing that, but if the result is adverse to him, he cant's be heard to complain I didn't allow him to make a statement.

MR. HOFFMAN: It may take a little preparation time, I would assume.

THE COURT: You can come back at one o'clock. We've still got to resolve the instructions.

MR. CROW: Judge, for the record, I don't have any objection if both Mr. Hoffman and Mr. Waterhouse give closing statements. Perhaps, in discussing with Mr. Bartlett, there might be a lingering issue concerning whether Mr. Waterhouse wants to take the stand and testify. I would ask the Court inquire of him and there be a determination on the record.

THE COURT: We'll come back at one o'clock and he'll make that announcement. (R 741-750)

After the recess and subsequent to the jury charge conference, the following exchange took place:

THE COURT: All right. An hour. How is your closing going to be held?

MR. HOFFMAN: Mr. Waterhouse is going to do it.

You want sometime, two hours; how much time do you want?

MR. WATERHOUSE: I really couldn't say, your Honor. I only had an hour and a half.

To put ten years into an hour and a half here, it's hard to even do it today.

I'm not going to be fully prepared, I'm going to have to go with just what I have and wing the rest of it.

MR. HOFFMAN: Judge, if I might interject one thing?

THE COURT: Are you going to participate at all?

MR. HOFFMAN: Judge, based on what he's asked me to do and the way that he's asking me to do that I don't see, under the circumstances, any purpose.

I would like that to be on the record, that he chose to do it that way. There's no sense in me half participating.

One thing, the judge is going to have a lot of objection to what he has to say.

I would ask the court to give him a lot of latitude.

And I would cite the case of Amos Lee King at 514 So.2d 354, Judge Barkett, for that proposition

I would like to cite to the court Judge Barkett's partial dissenting opinion, which indicates that there is some federal case law and most notably is the Lockett case, Lockett versus Ohio, 438 U.S. 536, et cetera, which stands for the proposition that the defendant should be able to put in just about anything he wants to, including this final, ultimate doubt, whimsical doubt, whatever you want to call it.

So, I would ask the court to give him a lot of latitude and that may solve this problem of having to run up to the beach a lot.

And I know what the state's attitude is, and I appreciate that, and I would ask -- as I said on the record, we appreciate that, but I would ask to give Mr. Waterhouse a lot of latitude when he speaks.

THE COURT: Well, I guess we'll just listen to what he says.

I don't see why you have to run up the bench on that.

You say objection, I say overruled or sustained.

MR. HOFFMAN: What about --

THE COURT: Well, if I overrule the objection --

MR. HOFFMAN: -- if we have a proffer?

THE COURT: Well, if I overrule his objection, I don't have to have a proffer.

MR. HOFFMAN: Well, the standard objection we need to put on the record.

MR. BARTLETT: Obviously, quotation dissent on the record.

THE COURT: I understand that. Well, who has opening and closing?

MR. BARTLETT: Judge, I believe the rule provides that opening argument by the state and closing by the defense.

Ordinarily there is no rebuttal; however if, in fact, the defendant gets into inappropriate areas, I might be in the posture of having to request that.

Normally, there is only opening.

THE COURT: Well, I'm going to give you opening and closing.

The closing is conditioned upon whether he gets into that.

If he maintains that he's not guilty and lets that come in or it comes in directly, I'll give you the right to come in and talk about the conviction.

MR. BARTLETT: I thank the court. Hopefully, that won't be necessary; I don't want to use rebuttal argument.

THE COURT: Okay. All right. Anything else.

MR. HOFFMAN: No, your Honor.

(R 762 - 765)

The trial court then gave the standard cautionary instruction regarding closing arguments and the state presented its closing argument. After the state's closing argument, the

court took a ten minute recess. (R 802) The court was then again subjected to Mr. Waterhouse's attempts to delay the process.

> THE COURT: Okay, have your decided how you're going to proceed?
>
> MR. HOFFMAN: Mr. Waterhouse wants to make his statement.
>
> THE COURT: Pardon?
>
> MR. HOFFMAN: Mr. Waterhouse wants to make his statement.
>
> THE COURT: Are you ready to proceed.
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> MR. HOFFMAN: I think he would like more time but --
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> THE COURT: Well, it's been ten years.
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> MR. HOFFMAN: I told him to do the best he can; it's his to do it.
>
> THE COURT: That's fine. Are you prepared to go in his place?
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> 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.
>
> THE COURT: Is it still your desire to go forward with your own statements?
>
> THE BAILIFF: Stand, please.
>
> MR. WATERHOUSE: I would like Mr. Hoffman to do it; he's more articulate than myself.
>
> We seem to be at odds.

THE COURT: He says he wants you to do it. Are you refusing?

MR. HOFFMAN: Yes. Aside from for the record, I think that's what I have to do.

What he wants me to do, I feel might be totally unethical, to go into the guilt phase issue.

And he refused to put on anything in mitigation.

Therefore, I don't know of -- I don't have anything in mitigation to talk about.

And I can get up there and speak about things unethical and this happened before he told me what to do.

And I have gone on for what he told me to do, and we may have to do this again, but we may not.

THE COURT: Well, this judge won't. All right then, he proceeds on his own.

Bring in the jury.

MR. HOFFMAN: My feeling is just give him the chance to do it.

THE COURT: Okay. Bring in the jury.

MR. CROW: Judge, I'm concerned with this new turn of events that he's now changed his mind and wants his lawyer to do it.

And I really feel like we may need further inquiry.

THE COURT: He says -- he's indicated he wants his lawyer to do it now but he's indicated in the past that he didn't want his lawyer to do it.

So, his lawyer didn't prepare himself.

MR. CROW: Well, if we need to take time for Mr. Hoffman to prepare, let's do that.

THE COURT: He further says that the condition with having Mr. Hoffman do this is to require Mr. Hoffman to present an argument that he knows is unethical.

He knows he can't present that argument and I'm not going to force him to stand up there to argue something that he knows is wrong.

MR. CROW: I understand that, judge. My only concern is that the record reflects from the defendant's mouth what it is he's asking Mr. Hoffman to stand and argue.

And I'm afraid a year down the road he's going to say no, that's not what I asked him to do.

THE COURT: He didn't refute it.

MR. HOFFMAN: He's told me unequivocally what he wants done and when it comes back down the line he --

THE COURT: Now is the time to fish or cut bait, Mr. Waterhouse.

Do you want Mr. Hoffman to make your closing argument? And if so, what is it you want him to argue?

And I'll tell you right now, your guilt or innocence is not an arguable issue, that's already been decided by a jury ten years ago.

MR. HOFFMAN: Guilt and innocence of murder. Obviously, the sexual battery is at issue and that could be gone into.

MR. WATERHOUSE: Am I allowed to point out inconsistencies in the state's evidence; am I not?

THE COURT: In so as far as it pertains to the recommendation of the sentence, yes, but you're not allowed to go back to the case originally ten years ago and talk about guilt or innocence of murder.

That's already been decided by a jury, and it's been affirmed on appeal.

MR. WATERHOUSE: It seems to me, your Honor had there is kind of a gray area here.

THE COURT: Not in my mind.

MR. HOFFMAN: The posture I've decided to take on this, right or wrong, is that he can't now 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 then do that and make a half hearted attempt to skirt the issue of ethical bounds with regard to whether or not I can talk about the guilt issue, I would rather leave him to do what he said he wants to do.

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

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

That certainly is 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.

THE COURT: The question to you, Mr. Waterhouse, is do you want Mr. Hoffman to make the closing argument within the confines of the penalty, not the guilt or innocence of a homicide?

MR. WATERHOUSE: Well, your Honor, Mr. Hoffman, as you know, and I have had a very -- you can't even call it a rocky relationship, it's not even that good.

He's been to see me once --

THE COURT: Well, I'm not -- I've heard this for the last year.

MR. WATERHOUSE: I have not had a change to sit down with him and explain to him the things that I want to put forth in mitigation at the closing.

He's only been over there once, and all we discussed --

THE COURT: Well, the description of your relationship with Mr. Hoffman is one of your own doing, not of his.

MR. HOFFMAN: Judge, what he's doing now is back to what we already talked about, that I didn't want mitigating things put before the jury.

I mean, people were here to do it. The court items that were in the previous case --

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 statement 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 got together on it.

THE COURT: Yes or no?

MR. WATERHOUSE: No.

THE COURT: Bring in the jury.

(R 803 - 809)

Previously, in the March 9, 1990 motion to withdraw hearing, the court noted for the record that he was not going to let Waterhouse control the case by discharging a lawyer that was appointed for him on the eve of the trial and that it was obvious to the court that he had been doing this over the years merely for the purpose of delay. The court further instructed defense counsel:

> "As far as I'm concerned, Mr. Hoffman, you're on the case. I know it's tough for you. If he wants to dictate the terms of your representation and make it impossible for you to make a defense in mitigation, that's his choice. If he's done that, he's only himself to blame.
>
> His accusations against you are unfounded. I have found you to be a capable lawyer and you are an effective lawyer when your client cooperates with you in and allows you to be so. If he wants to hinder his defense in this case by withholding his cooperation from you, I guess that's his choice, but I am not going to allow him to discharge a lawyer and get another lawyer on the eve of his trial.
>
> And so for those reasons you're in, and his request for another lawyer is denied." (R 197)

The court further noted:

> "If we force him to go to trial without a lawyer over his objection, which I think would be a far more serious mistake than it would be to keep him on the case, or he delays it again, and delays it until such a time that the witnesses are no longer available, and that's just not going to happen. I'd rather err at the point in favor of concluding the case than letting him have his way throughout the trial and never have the penalty phase and never get it over with. That's the route we're taking." (R 198)

The court directed that a newspaper article setting forth Waterhouse's statements that he was intentionally being dilatory be included in the record.

Having done his best to create a shambles of this whole proceeding, Waterhouse now attempts to capitalize on the results and suggests that he was somehow denied a fair trial by his own actions. In Jones v. State, 449 So.2d 253 (Fla. 1984), this Court reviewed a similar case and held that neither the exercise of the right to self representation or to appointed counsel may be used as a device to abuse the dignity of the court or to frustrate orderly proceedings. Id. at 257. This Court further noted:

> "The defendant's behavior and attitude posed continuing problems for the trial court, concerned as it was with preserving defendant's constitutional rights and the right of the state to an orderly and timely trial. We have no criticism of the trial judge's conduct of the trial. On the contrary, given the contumacious behavior of the defendant, the judge struck an admirable balance which preserved both defendant's and the state's rights. Nevertheless for the guidance of other courts we have two comments. First, whatever his motivation, the defendant burdened and delayed the court

by his vacillation in not unequivocally choosing between court appointed counsel, proceeding pro se, or obtaining his own counsel of choice. Instead, defendant persistently demanded that to which he was not entitled -- counsel of his choice provided by the state. As a matter of guidance, defendants who without good cause who refuse appointed counsel but do not provide their own counsel are presumed to be exercising their right to self representation. They should be so advised and the trial court should forthwith proceed to a Faretta inquiry. Second, the appointment of standby counsel under Faretta, is constitutionally permissible; it is not constitutionally required . . .

We are prepared to say, however, and do so in order to forewarn future defendant's that both the state and the defendant are entitled to orderly and timely proceedings. Florida's capital punishment law, which has been repeatedly upheld, contemplates that the sentencing phase will follow on the guilt phase, using the same jury. Faretta explicitly recognizes that:

> The right of self representation is not a license to abuse the dignity of the court. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel". 422 U.S. at 835 note 46, 95 S.Ct. at 2541 note 46 (emphasis supplied).

We consider it implicit in Faretta that the right to appointed counsel, like the right to self representation, is not a license to abuse the dignity of the court or to frustrate orderly proceedings, and a defendant may not manipulate the proceedings by willy-nilly leaping back and forth between the choices." Id. at 258 - 259.

See also McCall v. State, 481 So.2d 1231 (Fla. 1st DCA 1985) (the unreasonable refusal to accept appointed counsel is equivalent to a request for self representation).

The record clearly shows that Mr. Waterhouse was not concerned with his representation, but was merely concerned with disrupting the proceedings. When given repeated opportunities by the trial court to determine exactly what it is he wanted to do, Mr. Waterhouse continually vacillated between the two positions. It was within the trial court's discretion to make this final determination.

> "The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe that trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." Jones v. State, 449 So.2d 253, 261 (Fla. 1984) quoting Illinois v. Allen, 397 U.S. 337, 343 - 344 (1970).

Clearly, the record shows that Mr. Waterhouse was given every opportunity to decide and that the trial court's final determination was well supported by the record. (R 809)

Waterhouse, also contends that even if he had made a Faretta demand, the trial court failed to make the requisite Faretta inquiry. The Supreme Court has described the Faretta holding as recognition that "a defendant may elect to act as his or her own advocate," signifying the defense of own's own case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983). While the Court has not defined the particular of a

Faretta inquiry, the Eleventh Circuit has established the following factors that the trial court should consider in determining whether a criminal defendant is aware of the dangers of proceeding pro se:

> "(1) the background, experience and conduct of the defendant including his age, educational background and his physical and mental health; (2) the extent to which the defendant had contact with lawyers prior to the trial; (3) the defendant's knowledge of the nature of the charges, the possible defenses, and he possible penalty; (4) the defendant's understanding of the rule of procedure, evidence and courtroom decorum; (50 the defendant's experience in criminal trial; (6) whether standby counsel was appointed and the extent to which he aided the defendant; (7) whether the waiver of counsel was the result of mistreatment or coercions; or (8) whether the defendant was trying to manipulate the events of the trial."

Stano v. Dugger, 5 F.L.W. Fed. C88 (11th Cir., January 2, 1991) (quoting) United States v. Fant, 890 F.2d 408, 409 - 10 (11th Cir. 1989) (per curiam) (quoting Strozier v. Newsome, 871 F.2d at 998), cert. denied, ___ U.S. ___, 110 S.Ct.1498, 108 F.2d at 1065 -67.

In the instant case, the court was sufficiently familiar with Waterhouse to know his extensive familiarity with the legal system and his own case. The court had repeatedly warned the defendant of the dangers of self-representation (R 188 - 200, 233 - 234, 540 - 544, 629 - 632, 650 - 659) and only gave in to the demand after the close of all the evidence with only closing arguments remaining. Specifically, the court instructed him after he had again withdrawm a demand to discharge counsel:

> THE COURT: All right. You do have the right to represent yourself if that's your choice. As I read your motion, it's quite clear that you want not only Mr. Hoffman off your case, but you want other counsel appointed, which I'm not going to do. If you wish to have him off the case and proceed ahead without counsel, that's your constitutional right. I wouldn't interfere with it. However, I must caution you that in the even that you do that, you will be held in the same standard as any other officer of the court as to the evidentiary rules and your conduct before the jury. So, that's your choice. (R 234)

The record also shows that when an attempt was made to have a doctor examine the defendant to determine his competency to represent himself, that Mr. Waterhouse refused to cooperate with the doctor. (R 201) Under these circumstances the Court's numerous inquiries were sufficient to satisfy Faretta.

In spite of his claims to the contrary, Waterhouse indeed received the best of both worlds by his equivocating demands. Waterhouse was allowed to argue during closing statements his lingering doubt claims. He was given beyond considerable leeway to make this argument to the jury. He was allowed to argue evidence that had not been presented without any showing that such witnesses would have testified accordingly. (R 832, 835, 836, 837, 839) The trial court bent over backwards to accommodate Waterhouse, and if any error was committed, it was committed in Waterhouse's favor.

Nevertheless, counsel argues that Waterhouse was damaged in the closing argument by admitting to the prior murder and by commenting on his own right to remain silent. Counsel cites to

Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987), to support his proposition that it constitutes ineffective assistance of counsel to concede prior convictions at the penalty phase. In Lewis the court held that it was ineffective for trial counsel to stipulate to the existence of four prior felony convictions without asking the state's attorney whether he had actual proof of those convictions and where it was ultimately ascertained that New the York felony convictions did not actually exist. Clearly, Waterhouse's conviction was well established and Waterhouse was not admitting to something that did not exist. Accordingly, it would not have been error for even defense counsel to admit the existence of this murder. The admission is especially harmless in light of Waterhouse's arguments in mitigation of that prior murder.

As for appellant's contention that he was damaged by his comment on his own right to remain silent, which he claims would have resulted in an automatic reversal had it been made by the prosecution, the state notes that it was not made by the prosecution and that a comment on the right to remain silent is only reversible when the defendant has in fact invoked his right to remain silent. See, Issue VIII, infra. The statement, challenged herein by appellate counsel, made during closing argument by Waterhouse was as follows:

> "The only thing is we didn't hear it all. I -- my whole purpose in this was throughout this time Robert Waterhouse has said nothing to you.

> Because he said nothing, he was convicted and spent ten years on death row and is going to spend a few more there probably after Mr. Crow has retired, it wouldn't surprise me if you voted for death unanimously, but what I state here, again, is not evidence it's simply the truth."

How it can be argued that this was a comment on his own right to remain silent is incredible, but it certainly is not reversible. This is especially true where the comment is made in the context of the defendant himself making statements to the jury.

Based on the foregoing, your appellee respectfully suggests that the defendant has been afforded more than a fair trial and was not denied his right to counsel or his right to self representation and begs this Honorable Court not to allow Waterhouse to benefit from his dilatory tactics.

ISSUE III

WHETHER DEFENSE COUNSEL HAD A CONFLICT OF INTEREST THAT ADVERSELY AFFECTED WATERHOUSE'S RIGHT TO COUNSEL.

Appellant's claim herein is that his failure to cooperate with his counsel resulted in counsel having a conflict of interest. This claim is absolutely not supported by anything in this record or the law. The fact is that in spite of Mr. Waterhouse's repeated attempts to disrupt the proceedings and to keep his counsel from being able to adequately represent him, that counsel acted as a professional and continued to assist Waterhouse throughout the difficult proceedings.

In general, however, in order to demonstrate a conflict of interest, the defendant must show that both an actual conflict of interest existed and that such conflict adversely effected the adequacy of representation. Strickland v. Washington, 466 U.S. 668 (1984); Cuyler v. Sullivan, 446 U.S. 335 (1980); Smith v. White, 815 F.2d 1401 (11th Cir. 1987); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). In Smith v. White, supra, the Eleventh Circuit cited the test adopted to distinguish actual from potential conflict of interest as previously stated in Barham v. United States, 724 F.2d 1529 (11th Cir.), cert. denied, 467 U.S. 1230 (1984):

> "We will not find an actual conflict [of interest] unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interests . . . Appellants must make a factual showing of inconsistent interest and must demonstrate the attorney made a choice

> between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client, harmful to the other. If he did not make such a choice, the conflict remained hypothetical. (815 F.2d at 1404)

Although appellant does not claim that counsel's conflict existed because of another client, the conflict alleged herein is that counsel was more concerned for himself than he was the defendant. There is absolutely no basis for this in the record nor in any of the cases relied upon by the appellant. Appellant claims that counsel's conflict arose to such an extent that he refused to give closing argument and that he refused to consult with Mr. Waterhouse at the jail. Again neither of these claims are supported by the record. The record shows that counsel did consult with Waterhouse at the jail several times and that Waterhouse refused to see him on numerous occasions. (R 188 - 200, 232 - 235) The record also shows that counsel's reluctance to do closing argument came upon the heels of Waterhouse's demand, and the court's acquiescence in that demand, that Waterhouse be allowed to do his own closing argument. (R 723, 738 - 750, 763 - 767, 805 - 810) It was only after the state had finished closing argument and Waterhouse was again confronted with the opportunity to delay the trial did counsel, who had not prepared for closing argument based upon Waterhouse's representation that he was going to do same, expressed a reluctance to do the closing argument. It is beyond peradventure that had he been instructed to do so and had Waterhouse

unequivocally refused to do his own closing argument, that counsel for the defendant would have done closing argument. (R 804 - 809) His only reluctance was that Waterhouse wanted him to argue lingering doubt which trial counsel had been prohibited by the Court from doing. (R 808)

Appellant's only conflict with counsel arose from appellant's own contumacious behavior. Mr. Hoffman certainly demonstrated considerable professonalism during the sentencing proceeding and at all times appeared to want to represent Waterhouse to the best of his abilities within the confines of the law. There has been no demonstration that an actual conflict existed or that such conflict adversely affected appellant. The evidence supporting the imposition of death was overwhelming. Accordingly, error, if any, was harmless.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ANSWER THE JURY'S QUESTIONS CONCERNING WATERHOUSE'S ELIGIBILITY FOR PAROLE.

During the jury deliberations, the jury sent out the following three questions: (1) If he is sentenced to life, when would he be eligible for parole? (2) Does the time served count towards the parole time? and, (3) If paroled from Florida, would the defendant then be returned to New York to finish his sentence there? (R 854) After consulting with the attorneys, the trial judge determined that he would tell the jury that they would simply have to depend on the evidence and the instructions that they were already given. (R 855) Defense counsel objected to the court's refusing to answer all three questions and asked the court to answer as follows:

> Judge, after consulting with Mr. Waterhouse, I would request the court to handle it this way, that on part -- question one, part "A", if sentenced to life, when will he be eligible for parole?" And, your answer is not permitted to tell them that but refer them to the jury instruction, 25 to life. And the second part of the question, "does time served count towards the parole time?" And for the record, I would like to suggest. And then the third question, if paroled, would the defendant be returned to New York to serve his time there?" And then I would request the court to say that's true. (R 852 - 853)

The court responded, "Well, we don't know if that's true. I've seen them parole them and then not extradite them. I don't know what's going to happen; I'm just going to say, 'I'm sorry. I not permitted by law to answer these question. You'll have to refer to the instructions.'" (R 853)

Now on appeal, Mr. Waterhouse is claiming that this was error in that the possibility that Waterhouse would be subject to parole in New York constituted mitigating evidence. To support this claim, appellant relies on this Honorable Court's decision in Jones v. State, 569 So.2d 1234 (Fla. 1990), wherein this Honorable Court held that it was improper for the trial court to prevent counsel from arguing that the defendant could be sentenced to two consecutive minimum 25 year prison terms on the murder charges should the jury recommend life sentences.[3] This Court held that the potential sentence is a relevant consideration of the circumstances of the offense, which the jury may not be prevented from considering. The instant case is distinguishable from Jones, however, because, Waterhouse's potential sentence was not a circumstance of the offense.

In King v. Dugger, 555 So.2d 355 (Fla. 1990), this Honorable Court rejected King's argument that the trial court erred in not allowing him to introduce testimony by the executive director of the Florida Parole and Probation Commission that a life sentence for first degree murder includes a minimum mandatory sentence of 25 years imprisonment.

> Lockett requires that a sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the

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[3] The reversal in Jones was a result of cumulative errors affecting the penalty phase.

> offense that the defendant proffered as a basis for a sentence less than death." 438 U.S. at 604, 98 S.Ct. at 2965 (emphasis in original, footnote omitted). Lockett goes on, however, to note: "nothing in this opinion limits the traditional authority of the Court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Id. at n. 12. Testimony that King would have to serve at least 25 years of a life sentence is irrelevant to the character, prior record, or the circumstances of the crime. Excluding that testimony was within the trial court's discretion. King v. Dugger, at 359 (emphasis added, cites omitted).

This Court further noted that there is no statutory imperative or authority that requires a capital jury be told that the Governor may commute any sentence or that life imprisonment with 25 years being served before one is eligible for parole means anything other than exactly that.

The trial judge's refusal to answer the jury's questions in the instant case was within his discretion and appellant has failed to show an abuse of that discretion. Indeed, if the jury had been told the truth, it would have been told that the defendant would get credit for the ten years he had already served on death row and that the court didn't know if New York would extradite him to complete his life parole in New York once he was paroled in Florida. This information could only have damaged Waterhouse and would not have resulted in a jury being more inclined to give him a life sentence. In Downs v. State, 15 F.L.W. S478 (Fla. September 28, 1990), this Honorable Court rejected Down's claims concerning the trial court's instructions

before and during the jury deliberations. First, this Court rejected the claim that the jurors should have been instructed about any lingering doubt that they may have had about Downs being the trigger man and next this Court rejected Down's claim that the trial court erred in answering a jury question as to whether Downs had received credit for time served. Down's had argued that the trial court's answer that Downs would receive credit for time served towards the 25 years life sentence invited the jury to assess future dangers, thereby adding a nonstatutory aggravating circumstance to the jury instruction. Again, this Court found that this was a matter within the trial court's discretion and that this was not abuse of its discretion.

Further, even if the defendant's potential for parole in New York could have been considered a mitigating factor, all of those cases concerning the consideration of mitigation evidence provide that the trial court consider any aspect of the defendant's character or record and any of the circumstances of the offense the defendant proffers as a basis for a sentence less than death. In the instant case, the defendant in no way argued to the jury that he should be given less than a life sentence because he would return to New York on parole. The defendant did not provide any evidence to support such a claim and did not make any argument to the jury or the court below. Accordingly, where there is no evidence to support this argument and where it was not presented by the defendant, the defendant is precluded from raising this issue on appeal.

Even if this information has been presented and would have somehow benefited Mr. Waterhouse by persuading some member of the jury to impose a life sentence knowing that Mr. Waterhouse would get out of Florida prison in fifteen years and may or may not be subjected to extradition to New York based on his life parole, the record shows in the instant case that the jury recommendation was 12 to 0. The evidence in the instant case was overwhelmingly in support of death as the prior jury had found, as this Honorable upheld on direct appeal and as the instant jury found. Accordingly, any error was harmless beyond a reasonable doubt.

Appellant also challenges a statement made by the prosecutor in closing argument concerning the sufficiency of a twenty-five year sentence after ten years in custody. (R 800) There was no objection made to this comment. Therefore, this issue has not been preserved for appellate review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Castor v. State, 365 So.2d 701 (Fla. 1978).

ISSUE V

WHETHER THE INTRODUCTION OF EVIDENCE REGARDING THE FACTS OF WATERHOUSE'S PRIOR CONVICTION FOR MURDER VIOLATED HIS RIGHT TO A FAIR SENTENCING PROCEEDING.

Appellant contends that the introduction at the hearing below of testimony regarding Waterhouse's prior conviction for murder in New York constituted error for two reasons; 1) Waterhouse claims that he was denied a fundamental right to confront witnesses against him because of the introduction of hearsay evidence and, 2) he claims the failure on the part of the prosecution to even make an effort to secure witnesses who could testify from personal knowledge violated the rules of evidence. (Brief of Appellant, page 41)

First, it is necessary to review the evidence that was presented and the objections that were made by the defendant. The state initially presented retired Detective Lawrence Hawes, who was one of the officers that investigated the murder in New York in 1966. (R 621) During Mr. Hawes' testimony, the defendant objected, claiming that the aggravating factors only contemplate a prior conviction and that it is beyond the realm and highly prejudicial and inflammatory to talk about the facts of the other case. (R 623) The court overruled the objection finding that the facts of the prior conviction were relevant. A second objection was entered when the state sought to introduce a copy of the autopsy report that came from the Detective's file for that investigation. (R 624) The objection was that the

report was irrelevant, inflammatory and highly prejudicial. The objection was overruled. (R 625) The third objection to Hawes' testimony came from the defendant. Mr. Waterhouse objected to the testimony claiming that it did not go towards aggravation and that it was simply overkill. The defendant then stated:

> Your Honor, this witness is testifying to medical matters. He is not a doctor. I can't cross examine him. How can I cross examine him? He has already lied twice about stuff that is supposed to be in the autopsy and is not. (R 629)

This discussion took place during one of the numerous motions to discharge that Waterhouse presented to the court and subsequently retracted. Subsequently, when Dr. Joan Wood was called to the stand to explain the autopsy report from the New York murder, counsel objected claiming that the document speaks for itself and that there was a violation of the defendant's right of confrontation. (R 725) The court overruled the objection finding that the document had already been admitted and that it was permissible for Dr. Wood as an expert to explain the document. Dr. Wood then read from the autopsy report that the victim had blood all over her scalp, nose, mouth, stomach, genitalia, upper part of her leg, and pinpoint hemorrhages in her eyes and bruising of the eyes. The autopsy report further showed that the victim's upper dentures were broken, there were cuts on her chin and bruises on her neck. (R 727) The victim also had extensive bruising and tearing of the vagina as well as defensive wounds to the hands. (R 728) The report further provided that

there was damage to the muscles in the neck and that the hyoid bone and ribs were fractured. (R 729) On cross examination, defense counsel brought out that Dr. Wood obviously did not prepare the autopsy report and had not consulted with the actual doctor that did the autopsy report. (R 730)

Detective Hawes testified that he was assigned to investigate the homicide in Greenport Long Island, New York involving a female victim by the name of Ella Mae Carter. He testified that when he entered the premises, he noticed an elderly female laying on the bed, multiple scratches and contusions, and blood all over the bed sheets and her body. (R 622) The victim had been severely beaten. She was an elderly woman and there was evidence that she had been sexually assaulted. (R 623) There was blood in the kitchen, in the hallway, under the refrigerator, along side the bed, and on the rug. There was blood on the window, and there was a pane of glass which was later determined to have the defendant's blood on it along with his fingerprints. (R 623 - 624) The victim's teeth had been broken off where she had been hit and there were human teeth marks on one of her breasts. (R 624) The detective testified that he spoke to the defendant about the murder,and that the defendant acknowledged killing Ella Mae Carter. (R 632) The detective was also present when Waterhouse entered a plea to second degree murder for the Carter murder. At that time the charges against Waterhouse were read and Waterhouse acknowledged those charges. (R 633)

During closing arguments Waterhouse admitted to the prior New York conviction stating:

> "One thing I would like to mention is my prior New York conviction. I know it wasn't pretty. I was a young, wild kid. I ain't saying that justified it; I was an alcoholic, that doesn't even justify it. All I want to say is that I have to live with that; I've been living with it. It's not been pleasant. The State of New York, because I was a first offender, with no prior record, decided to parole me. I committed the crime, I admitted to it. You heard him say it. I did it. I admitted to it. I did my time. I'm still living with that; somehow I hope you can understand. They saw fit to parole me, I guess they figured I had done enough for a first time. Maybe some people don't, but that was their decision."

This Honorable Court has repeatedly held that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction. Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); Stano v. State, 473 So.2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986).

> "Testimony concerning the events which resulted in the conviction assist the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence. Rhodes v. State, supra. at 1204."

Accordingly, the trial court correctly overruled the defendant's objection to the relevancy of Detective Hawes'

testimony in that this testimony was clearly relevant to the proceedings. As the defendant did not enter an objection to this testimony based on hearsay or confrontation clause issues, he has waived review of any such claim herein.

Such an objection was made, however, to the reading of the autopsy report by Dr. Joan Wood. (R 725) The state recognizes that while hearsay evidence may be admissible in penalty phase proceedings, such evidence is admissible only if the defendant is accorded a fair opportunity to rebut any hearsay statements. *Section 921.141(1), Fla. Stat. (1985).*

Section 921.141(1), Fla. Stat. (1984) provides that:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is afforded a fair opportunity to rebut any hearsay statements. (emphasis added)

The state contends however, that the defendant was not denied the opportunity to rebut or cross examine this information. The record indicates that the autopsy report was presented at the first penalty phase and that counsel was well apprised of the existence of the autopsy report long before its introduction at the resentencing; thus, no violation of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) is present. Furthermore, the appellant was afforded a full

opportunity to rebut the autopsy by either subpoenaing its declarant, presenting his own expert, or by choosing to rebut the testimony himself.[4] Moreover, when appellant plead guilty to the New York murder, he is deemed to have admitted the facts as presented by the prosecutor in that case -- including the evidence presented in the autopsy report.

Appellant relies on three cases wherein testimony was presented by a police officer concerning a confession of a codefendant. Engle v. State, 438 So.2d 803 (Fla. 1983); Tompkins v. State, 502 So.2d 415 (Fla. 1986) and Gardner v. State, 480 So.2d 91 (1985). By its very nature, a confession of a codefendant denies a defendant the right to confront the witness against him. This Court in Engle noted that this problem is not present in consideration of a presentence report because if the defendant disputes the latter, he can secure confrontation and cross examine its preparers or otherwise rebut the same. The instant case is more analogous to the situation in the PSI report and should be so treated.

Appellant also claims that he is entitled to relief under Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified on rehearing, 706 F.2d 311 (11th Cir.), cert. denied, 464 U.S.

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[4] The instant case is distinguishable from Rhodes v. State, wherein this Honorable Court held that Rhodes could not be required to take the stand to rebut the testimony, in that Waterhouse was given the opportunity to rebut this testimony without cross examination by the state during his own closing argument.

1002 (1983), It should be noted that upon modification, the Eleventh Circuit limited its holding to psychiatric reports. Thus, by the very holding of the case it is inapplicable to the instant case. Further, the defendant in Proffitt, supra was denied his opportunity to confront the reports as he was not present during the presentation of these reports. This is clearly distinguishable from the instant case.

Further, as this Court noted in Tompkins, supra, and as the Eleventh Circuit noted in Proffitt v. Wainwright, supra, the admission of such testimony is subject to the harmless error rule. In the instant case, the testimony of Detective Hawes (which was not objected to based on a confrontation issue, and which was clearly admissible under Tompkins, supra.) presented all the facts that were subsequently presented by way of the autopsy report. Furthermore, the defendant himself admitted the facts of the crime by entering a plea of guilty and in his closing argument in the instant case. Thus, as this Court noted in Tompkins v. State:

> However, even if we assume that the victims of the prior offenses were unavailable for appellant to confront, the officers testimony was clearly harmless under the facts of the case. The state introduced certified copies of appellant's prior convictions, establishing two separate instances of kidnapping and sexual battery. The certified copies disclosed that appellant had pleaded guilty to the kidnap and rape charges in one case and had entered a plea of no contest to the charges filed in the other incident. This evidence alone was sufficient to establish the aggravating circumstance under Section 921.141(5)(b), Florida Statutes

> (1985) (prior conviction for felonies involving use or threat of violence to the person), we find no prejudice to Tompkins resulting from the officer's testimony. Id. at 420.

Even if the autopsy report had been excluded, the prior conviction was established beyond a reasonable doubt. Therefore, the finding of the aggravating circumstance was appropriate. As no prejudice resulted to the defendant from the admission of the autopsy report, the admission, if erroneous, was harmless.

Appellant also raises several other objections to the admission of the testimony, however, none of these objections were raised below and therefore he has waived review of the claims on appeal. Steinhorst v. State, supra, (objections must be raised with specificity).

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE PROSPECTIVE JUROR MARSHALL FOR CAUSE.

Once again, appellant is presenting a claim to this Honorable Court that is not supported by the record. This claim is based merely upon misrepresentation of the facts of the instant case and supposition as to the subjective meaning of prospective juror Marshall's statements. Again, in order to clarify exactly what transpired below, the state presents the following portions of the record:

> MR. HOFFMAN: Being in the Army for twenty years, you have probably been picked on quite a bit, Sir. I think in our questioning so far, on our football field, you have picked ten in favor of the death penalty. I didn't hear anybody else say that; is that what you are?
>
> PROSPECTIVE JUROR MARSHALL: Yeah, if I saw that the situation justified it, give it to him.
>
> MR. HOFFMAN: And you said on a scale of one to yen you said you would be up on the high end?
>
> PROSPECTIVE JUROR MARSHALL: Yes.
>
> MR. HOFFMAN: Why do you feel that way?
>
> PROSPECTIVE JUROR MARSHALL: It's just my idea, that you pay for what you do. If you want to kill somebody you pay for it.
>
> MR. HOFFMAN: Would it be fair to say then that you are telling us the only punishment that you can envision for somebody that commits murder would be the death penalty?
>
> PROSPECTIVE JUROR MARSHALL: No, I didn't say that.

MR. HOFFMAN: So, it's possible --

PROSPECTIVE JUROR MARSHALL: I said if its justified. It would have to be justified in my mind that that person had a chance not to do it, had to make a decision to go back and do it. It's not something that during the heat of anger, you know.

MR. HOFFMAN: Um-hum.

PROSPECTIVE JUROR MARSHALL: That they had time to think about it and then went and did it; that they would necessarily pay for it.

MR. HOFFMAN: So, is what you're saying then that in a case of premeditated, first degree murder, you could not see anything but the death penalty?

PROSPECTIVE JUROR MARSHALL: I wouldn't say that either. It would have to be -- again it would have to be justified; I mean, it's not black and white.

MR. HOFFMAN: Okay. You feel on any case you would look at the aggravating factors, the reason why somebody should be killed, and then look at the mitigating factors and weigh everything; you think you could do that?

PROSPECTIVE JUROR MARSHALL: That's the way you should look at it.

(R 399 - 401)

This issue has been squarely addressed by this Honorable Court recently in Penn v. State, 16 F.L.W. S117 (Fla. January 15, 1991), wherein this Honorable Court held that it was not an abuse of the trial court's discretion in refusing to excuse prospective jurors for cause because they ultimately demonstrated their competency by stating that they would base their decisions on the evidence and the instructions. In Penn, as in the instant case, a prospective juror indicated that he strongly favored the death

penalty, but on further questioning he said he would follow the law as instructed.

Prospective juror Marshall clearly stated that he could follow the law and that he would apply the aggravating and mitigating circumstances as instructed. Mr. Marshall's statements do not indicate a juror that has made up his mind and would impose the death penalty in all cases of first degree murder.

Further, this Honorable Court in Penn, supra, held that even assuming that the court erred in refusing to excuse a prospective juror that such error would be harmless where the defendant has failed to show prejudice, i.e., that he had to accept an objectionable juror. Quoting Young v. State, 85 Fla. 348, 354, 96 So. 381, 383 (1923), this Court stated:

> That the action of the court in holding a juror to be qualified over defendant's objection works no injury to the accused if the objectionable venireman does not serve, even though the accused exhausted his statutory number of peremptory challenges, when it does not also appear that any objectionable jury was selected after the defendant's challenges were exhausted. The reason given for the rule is that the accused has a right to an impartial jury but is not entitled to any particular persons as jurors.
>
> In a case where an objectionable juror is challenged by the defendant for cause and the court wrongfully overrules the challenge and the defendant uses one of its peremptory challenges to excuse the objectionable venireman, the record should show that the jury finally empaneled contained at least one juror objectionable to the defendant, who sought to excuse peremptorily but the challenge was overruled.

In the instant case, as in Penn, the defendant never objected to any of the jurors after exhausting his peremptories and has not alleged, let alone demonstrated, that an incompetent juror sat on his jury. Accordingly, there is no merit to this point on appeal.

ISSUE VII

WHETHER THE ADMISSION OF STATEMENTS MADE BY MR. WATERHOUSE WAS PROPER.

The argument set forth by counsel herein appears to be that the lower court improperly admitted statements made by Mr. Waterhouse during his original questioning in 1980 based upon the United States Supreme Court's recent decision in Mennick v. Mississippi, 59 U.S.L.W. 403 (December 3, 1990). He does not appear to be reasserting the challenge to the admission of these statements in the original guilt phase, but has apparently limited this challenge to the resentencing phase that is presently before this Court. Accordingly, your appellee will not address any possible challenges to the original admission beyond asserting that the law of the case principle precludes relitigation of this issue. Valsecchi v. Proprietor's Insurance Company, 502 So.2d 310 (Fla. 3d DCA 1987); Strazzulla v. Hendrix, 177 So.2d 1 (Fla. 1965); Vining v. American Bakeries Company, 163 So. 396 (Fla. 1935).

It appears, however, that appellant is challenging the use of the statements at the resentencing hearing. He argues that this Court's original decision in Waterhouse v. State, 429 So.2d at 304 - 306 has been explicitly superseded by Justice Kennedy's recent opinion in Mennick v. Mississippi. It is the state's contention that Mennick does not apply to the instant case and that appellant would not be entitled to relief even if it was applicable. See Butler v. McKellar, 494 U.S. ___, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990).

Initially, there was not an objection raised to the admission of these statements below. For an issue to be raised on appeal it has to be first presented to the trial court with specificity. Appellant argues in a footnote, however, that over Mr. Waterhouse's objection the state took the position that the statement's issue was res judicata, and therefore could not be reviewed by the trial court. (Brief of Appellant page 56, footnote 37). This statement misrepresents the proceeding before the court below in that the issue was only raised during a hearing on a motion to discharge Mr. Hoffman and was not presented by the defendant or his counsel, but rather was a statement made by the prosecutor. This argument was not presented to the court on its merits and no ruling was issued by the court on the issue. It is encumbant upon a defendant to present all issues to the trial court in order to preserve the issue for appellate review. The prosecutor's statement did not relieve the defendant of his burden to raise the issue.

Acccordingly, this issue is precedurally barred. Further, Mennick v. Mississippi simply does not apply in the instant case. In Waterhouse v. State, supra, this Honorable Court held that Edwards v. Arizona did not apply because appellant did not express a desire to deal with the police only through counsel. This Court held that Waterhouse's statement that he should talk to an attorney was at most an equivocal request to consult with counsel and that the officers were not precluded from initiating further communication for the purpose of clarifying appellant's

request. This court distinguished Edwards by finding that appellant never explicitly stated that he did not want to talk to the police nor was he ever told that he was required to. Therefore, this Court held that the police did not act improperly in visiting appellant and questioning him further after his two equivocal statements expressing possible interest in seeing an attorney. Id. at 305.

In Mennick, supra, the United States Supreme Court held that it was a violation of the defendant's Fifth Amendment rights for officials to reinitiate interrogation without counsel present after the defendant had demanded the right to see counsel. The Court in Mennick held that the fact that the defendant had been able to consult with counsel did not negate his request for counsel and allow interrogation without counsel. As this Court found in Waterhouse, supra, this was not the situation in the instant case. Waterhouse did not make an unequivocal demand for counsel and thus had never exercised his right to remain silent and the right to counsel. Thus, to the extent that Mennick has set forth a new rule of law, that rule of law is inapplicable to the instant case.

Even if this new rule of law was applicable to the facts of the instant case, it is not applicable to this instant proceeding. In Butler v. McKellar, supra, the United States Supreme Court held that any refining of the rule as set forth in Edwards v. Arizona does not apply retroactively to any case if the result was not dictated by a precedent existing at the time

the defendant's conviction became final. Id at 108 L.Ed.2d 355. As the rule recently set forth in Mennick v. Mississippi is a further refinement of the Edwards v. Arizona protections, it would not be applicable to the instant case because the conviction has long since become final.

Additionally, it should be noted that the statements in the instant case had very little effect on the sentence as imposed. Therefore, even if Mennick v. Mississippi did apply and even if the claim was not procedurally barred, the error in the instant case is harmless.

ISSUE VIII

WHETHER THE CHALLENGED COMMENTS BY THE PROSECUTOR CONSTITUTED AN IMPROPER COMMENT ON THE DEFENDANT'S RIGHT TO REMAIN SILENT.

Appellant challenges two comments made by the prosecutor during closing argument. Neither of the challenged comments was objected to by counsel below. Therefore, this issue has been waived for appeal. Teffeteller v. State, 495 So.2d 744 (Fla. 1986); Rose v. State, 461 So.2d 84 (Fla. 1984); Jones v. State, 449 So.2d 253 (Fla. 1984); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Castor v. State, 365 So.2d 701 (Fla. 1978); Clark v. State, 363 So.2d 331 (Fla. 1978).

Further, even if this issue had been properly preserved for appellate review, the comments were proper. The closing argument by the prosecutor focused on the evidence as it stood before the jury. Wide latitude is permitted counsel in argument before the jury. Breedlove v. State, 413 So.2d 1 (Fla. 1982). The state is allowed in closing to refer to evidence as it exists and to point out the absence of evidence in certain issues. Gray v. State, 28 So.2d 53 (Fla. 1900). Comments by counsel are controllable and within the sound discretion of the trial court. The appellate courts will not interfere with the exercise of that discretion unless clear abuse is demonstrated. Johnson v. State, 332 So.2d 69 (Fla. 1976) and Paramore v. State, 229 So.2d 855 (Fla. 1969).

This Honorable Court has long held that any comment on an accused's exercise of his right to remain silent, properly objected to, is reversible error without regard to the harmless

error doctrine. See e.g., Bennett v. State, 316 So.2d 41 (Fla. 1975); Clark v. State, 363 So.2d 331 (Fla. 1978). These cases do not apply, where, as here, a defendant does not exercise his right to remain silent or where no objection was entered. Cf. Donavan v. State, 417 So.2d 674 (Fla. 1982).The record reflects that appellant gave several statements to the investigating officers. Thus, appellant did not exercise his right to remain silent and, therefore, the comment does not constitute reversible error, even if it had been objected to.

Assuming arguendo, that the challenged remark was not in reference to appellant's statements to the officers, they could then only be considered as statements on the failure of the defense (as opposed to the defendant) to counter or explain the evidence. The Fifth Circuit in United States v. Fogg, 652 F.2d 551 (5th Cir. 1981), upheld a similar case where it appeared that the prosecutor merely commented on the failure of the defense to rebut the government's case. The court held that there is a distinction between comments concerning failure of the "defense" as opposed to the "defendant" to counter or explain the evidence and a comment about the former does not violate the defendant's Fifth Amendment rights.

Further, it should be noted that although the defendant did not testify at the penalty phase of the hearing, the defendant did his own closing argument and was allowed to present by way of this closing argument substantial evidence to support his theory of lingering doubt. The defense also presented evidence by way

of cross examination that other people were in the defendant's car bleeding and that the defendant himself had been scratched and possibly bled in the car.

With regard to the second challenged comment, the prosecutor's statement to the jury that they knew more than the overwhelming evidence of guilt that led to his conviction was again not objected to, was a true statement and was a proper comment to the jury.

The third and last comment challenged by appellant he alleges is a Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), violation. First there was no objection to the comment, thereby waiving appellate review. Second, the prosecutor correctly stated the law in Florida; the judge is the sentencing authority and the jury's role is merely advisory. Grossman v. State, 525 So.2d 833 (Fla. 1988). And, finally, the jury was correctly instructed by the trial court.

Even if any of the challenged comments had been improper and properly objected to, prosecutorial error does not warrant automatic reversal of the sentence unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The comments in the instant case were clearly harmless in light of the overwhelming evidence in support of the death sentence.

ISSUE IX

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

First, this is not the law in the State of Florida, and second Waterhouse's counsel never objected to the instruction. Absent fundamental error, failure to object to the jury instruction at trial precludes appellate review. Walton v. State, 547 So.2d 622 (Fla. 1989); Smalley v. State, 546 So.2d 720 (Fla. 1989); Preston v. State, 531 So.2d 154 (Fla. 1988).

ISSUE X

WHETHER THE TRIAL COURT ERRED IN FINDING EACH OF THE AGGRAVATING FACTORS.

Based upon a jury recommendation of 12 to 0, the court below imposed a sentence of death upon the defendant based upon a finding of six aggravating factors. (R 168) Appellant challenges the trial court's finding on each of these factors. While this Honorable Court has previously upheld the finding of (1) heinous, atrocious or cruel, (2) the defendant was on parole at the time of the offense and, (3) that he had previously been convicted of an offense of a prior violent felony, the state will address each of these issues in the order presented by the defendant.

(a) Cold, Calculated and Premeditated --

This aggravating factor was not presented to the jury in the original sentencing hearing. In the instant case, over defense objection, the jury was instructed on cold, calculated and premeditated. Based upon the evidence before it, the trial court found this factor to have been established beyond a reasonable doubt. (R 169) Appellant challenges the finding stating that there is absolutely no evidence that there was any preformed intent to kill or prearranged design. To the contrary, the state contends that the evidence of heightened premeditation was sufficient to uphold this aggravating factor. The evidence adduced at the hearing showed that after the defendant had beaten the victim to the point of unconsciousness he then dragged her

body out of the car, down to the water and tossed her into the bay. (R 495, 496, 497, 498, 687, 685, 705) The cause of death was drowning. (R 522) The manner of the killing in the instant case was sufficient to demonstrate the heightened form of premeditation which was required to find this aggravating factor. Hamblen v. State, 527 So.2d 800 (Fla. 1988). Where the evidence shows that victim had been transported to another location and killed at some later time, this Court has consistently held that this factor been amply demonstrated. Parker v. State, 476 So.2d 134 (Fla. 1985); Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983).

Further, even if this Honorable Court found that this factor was insufficiently established, the elimination of this aggravating circumstance would not result in Waterhouse's receiving a life sentence. Hamblen v. State, supra; Stano v. Dugger, 524 So.2d 1018, 1019 (Fla. 1988).

(b) Elimination of Witnesses --

This aggravating factor was found at the time of the defendant's original sentencing. Upon appellate review, this Honorable Court stated:

> "Appellant argues that there was insufficient proof that the murder was committed for the purpose of avoiding arrest. In support of this finding the state refers us to the statement made to his interrogators when they asked him what he thought he should do about his 'problem'. He said, 'You do what you have to do to protect Bobby Waterhouse. No one wants to go to jail.' It is questionable whether this statement supports the inference drawn by the state. Appellant's statements

> also include suggestions that the murder was committed in spur-of-the-moment rage. We need not decide, however, whether the lone statement is sufficient to prove a witness -- elimination motive, since even without this aggravating circumstance there are numerous other aggravating circumstances to support the sentence, and no mitigating circumstances." Id. at 307.

In addition to the evidence that the defendant had stated that you do what you have to do to protect Bobby Waterhouse, no one wants to go to jail, the state also points out that the evidence shows the defendant knew the victim previously and that she could identify him. (R 509) Further, the record does not support Waterhouse's statement that this murder was committed during a rage. While it is possible that the assault itself was committed during a rage, the victim died of drowning. Therefore, having committed this assault, the defendant had to make the conscious decision to end this victim's life in order to keep her from identifying him. It was at this point that the defendant drug the victim's body out of the car and threw her into the bay. Additionally, the absence of any evidence of broken glass or other signs of struggle at the scene of the victim's body, supports a conclusion that the victim had been taken to the site subsequent to the attack and prior to the actual murder.

However, if this Honorable Court should find that this factor was not sufficiently established by the evidence, the sentence in the instant case still stands as there are four other aggravating factors, (three of which have previously been upheld by this Court) and no mitigating factors. See Waterhouse v. State, at 307.

(c) Heinous, Atrocious or Cruel --

Appellant also contends that the trial court erred in finding that the crime was especially heinous, atrocious or cruel. Again, this Honorable Court has previously upheld the finding of heinous, atrocious or cruel based upon the same facts as presented at this sentencing hearing. Waterhouse v. State, 429 So.2d 301, 307:

> "Appellant argues that the trial court's finding that the crime was especially heinous, atrocious or cruel was erroneous. The clearly established facts of the murder show that this contention is without merit. The victim's suffered numerous bruises and lacerations inflicted with a hard, sharp weapon. There were defense wounds showing that she was alive and conscious when she was attacked. The victim was left in the water where she drowned. The capital felony was especially heinous, atrocious or cruel. Id. at 307.

Appellant also contends that the factor was improperly found where the jury is not required to find heinous, atrocious or cruel individually. He claims that this therefore results in the possibility of an ununanimous decision. This argument was not presented to the trial court below and is therefore waived for appellate review. Furthermore it is without merit as this is not the law in Florida. Smalley v. State, supra.

(d) Double Counting of Aggravating Circumstances --

The trial court found that the defendant was under a sentence of life time parole for second degree murder at the time he murdered Deborah Kamerer and that the defendant had previously been convicted of a felony of second degree murder involving

violence to another person. (R 168) Appellant contends herein, that this is a double counting of aggravating circumstances. Again, this argument was previously rejected in Waterhouse v. State, supra:

> "Appellant argues that the trial court gave improper double consideration to a single circumstance by reciting both that the appellant had been previously convicted of a violent felony and that he was on parole, citing Province v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). The principle of Province, is not applicable here. In Province we reasoned that proof that a capital felony was committed during the course of a robbery necessarily was based on the same aspect of the crime that provided the basis for finding the motive of pecuniary gain. The same reasoning does not apply to the two aggravating circumstances in question here. The previous conviction and the parole status were two separate and distinct characteristics of the defendant, not based on the same evidence and the same essential facts. Therefore separate findings of the two factors were proper." Id. at 307 (emphasis added)

Accordingly, these factors are valid aggravating factors.

e) Sexual Battery Aggravating Circumstances --

Again, this aggravating circumstance was previously upheld by this Honorable Court. Additionally appellant argues that this finding was tainted by the refusal to permit evidence on the point. Again this is a misrepresentation of the facts in the instant case. The trial court never precluded the defendant from presenting evidence that he was not responsible for the sexual battery or that a sexual battery did not occur. There was substantial evidence presented through cross examination that the

alleged evidence of sexual battery was not inconsistent with other factors, and that the alleged instrument of the sexual battery was devoid of any evidence of having been used for the sexual battery.

Based on the foregoing, the state urges this Honorable Court to uphold the sentence of death as imposed in the instant case where the jury recommended death by 12 to 0 and where there was no mitigating evidence presented or found. The state further urges this Honorable Court to uphold the sentence even if this Court should strike one or more of the aggravating factors because at least three of these factors have been previously upheld and found sufficient to support the sentence.

ISSUE XI

WHETHER THE TRIAL COURT IMPROPERLY ADMITTED PHOTOGRAPHS OF THE VICTIM.

The test of admissibility of photographs in a situation such as this is relevancy and not necessity. This Honorable Court has repeatedly stated:

> "The current position of this Court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in the case. Relevancy is to be determined in a normal manner, that is, without regard to any special characterization of proffered evidence. Under this conception, the issues of 'whether cumulative', 'whether photographed away from the scene,' are routine issues basic to determination of relevancy, and not issues arising from any 'exceptional nature' of the proffered evidence."

State v. Wright, 265 So.2d 361, 362 (Fla. 1972) See also Henninger v. State, 251 So.2d 862, 864 (Fla. 1971); Meeks v. State, 339 So.2d 186 (Fla. 1976). In Henderson v. State, 463 So.2d 196 (Fla. 1985), Henderson argued that the trial court erred by allowing into evidence gruesome photographs which he claimed were irrelevant and repetitive. This Court found that the photographs, which were of the victim's partially decomposed body, were relevant.

> Persons accused of crime can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murder of human beings should expect to be confronted by photographs of their accomplishments. The photographs are relevant to show the location of the victims' bodies, the amount of time that had passed

> from when the victims were murdered to when the bodies were found, and the manner in which they were clothed, bound and gagged." Id. at 20.

This Court further held that it is not to be presumed that gruesome photographs so inflamed the jury that they will find the accused guilty in the absence of evidence of guilt. This Court presumed that jurors are guided by logic and thus, that pictures of the murder victims do not alone prove the guilt of the accused. Id. at 200.

The law is well established that the admission of photographic evidence is within the trial court's discretion and that a court's ruling will not be disturbed on appeal unless there is a clear showing of abuse. Wilson v. State, 436 So.2d 908 (Fla. 1983). Appellant has failed to show an abuse of that discretion.

The photographs in the instant case were relevant to show the manner in which the murder had been committed, the defensive wounds of the victim, the nature and the heinousness of the wounds that the victim received, the location of the body and the extent of the injuries. (R 535 - 540) As the photographs were relevant, and not unduly prejudicial, the trial court did not err in admitting them into evidence.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, appellee would pray that this Honorable Court affirm the sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 13 day of February, 1991.

OF COUNSEL FOR APPELLEE