IN THE SUPREME COURT OF FLORIDA
No. 76,128

ROBERT BRIAN WATERHOUSE
Appellant

v.

STATE OF FLORIDA
Appellee

APPELLANT'S REPLY BRIEF

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REPLY BRIEF OF APPELLANT

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

In this brief, Mr. Waterhouse does not address every issue raised before this Court, since most have already been thoroughly covered. It must be said, however, that Appellee sees the record in very stark terms: Appellee thinks that Mr. Waterhouse is a bad person, and because of this any error in his trial must be overlooked. Suffice it to say that the Rule of Law is made of sterner stuff than this: "Our Constitution . . . neither knows nor tolerates classes among citizens . . . all citizens are equal before the law. The humblest is the peer of the most powerful." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); Kordenbrock v. Scroggy, 919 F.2d 1091, 1094 (6th Cir. 1990) (en banc) ("[i]t is not the Court's duty to determine

whether Kordenbrock deserves or does not the death sentence for his crime. The Court's duty is to insist upon the observance of constitutional norms of procedure").

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

Mr. Waterhouse has previously noted this Court's rule that evidence of "whimsical doubt" regarding guilt of murder is not admissible at a resentencing trial. See, e.g., King v. State, 514 So. 2d 354, 358 (Fla. 1987). The State elected, however, to seek to prove an independent crime -- that Mr. Waterhouse had committed a sexual battery. Appellee argues that it was sufficient that Mr. Waterhouse be allowed to "present[] evidence that a sexual battery had not occurred." *Brief of Appellee, at 6.*[1]

This argument misses the point. If the State wants to prove up another crime, the prosecution cannot benefit from a directed verdict on one key element of the case -- whether, assuming there was a crime of sexual battery, Mr. Waterhouse was the person who committed it. See In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); Brooke v. State, 128 So. 814, 817 (Fla. 1930) ("The burden is upon the state to prove every material allegation of the charge"). If the State does not wish this

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1. Whether Appellee is correct in arguing that this was actually the ruling in the lower court is certainly open to dispute. However, Mr. Waterhouse must prevail even if one assumes this to be the case.

to be an issue, there is a simple remedy: The State is under no obligation to charge the distinct crime.[2]

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

Under this heading, Appellee initially castigates Mr. Waterhouse for being a "difficult" client. Apparently the rule should be that clients who express genuine concern about the manner in which their cases are being litigated should be deprived of their right to counsel.[3]

There may be those who think that everyone under capital indictment should sit idly by and not care how his or her trial

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2. One minor comment is appropriate, to clear some collateral confusion, on Appellee's representation that Mr. Waterhouse himself precluded questioning on his innocence. See *Brief of Appellee, at 7*. First, the questions referenced by Appellee were a totally insignificant portion of the claim of "residual doubt" (to murder) which Mr. Waterhouse wanted. Second, if Appellee had set forth the context, it would be clearer that the discussion focused on who should do the questioning, not Mr. Waterhouse "waiving" the "residual doubt" issue. The insertion of emphasis in the proper place illustrates what counsel actually said:

> MR. HOFFMAN: I have nothing based on Mr. Waterhouse indicating he doesn't want me to ask those questions.

(Tr. 659) (emphasis supplied) This came at the height of the dispute as to whether Mr. Waterhouse should proceed *pro se*.

3. Appellee represents to this Court that there was "a newspaper article setting forth [Mr.] Waterhouse's statements that he was intentionally being dilatory . . . ." *Brief of Appellee, at 26*. This is again something of a rehabilitation of the record. In fact, Mr. Waterhouse stated that because his life was on the line, he was not going to cooperate with a lawyer who did not seem to be acting in his best interests. (Tr. 195) When he was subsequently given lawyers who did work on his behalf, he cooperated.

is progressing. However, it is unreasonable and unrealistic to criticize someone for taking an active interest in the possibility that 2,000 volts of electricity will be run through his or her brain.[4]

Mr. Waterhouse has some cause to be wary of lawyers. He has previously seen appointed counsel who have failed to preserve his rights subsequently or simultaneously lose their bar licenses. See *Brief of Appellant, at 28 n.18*. Filtered through a haze of legalese, Mr. Waterhouse was being told that the question of whether he actually committed the crime was irrelevant to the issue of whether he should live or die. A lay person might reasonably find this rule hard to accept. Cf. Irving v. State, 441 So. 2d 846, 856 (Miss. 1983) ("few attorneys have 'even a surface familiarity with seemingly innumerable refinements put on Gregg v. Georgia . . . and its progeny'") (citing Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)).

Mr. Waterhouse's skepticism at the manner in which his trial was progressing becomes all the more reasonable when viewed in light of the critical facts omitted by Appellee. For example, Appellee would have this Court believe that "[t]he record shows that counsel did consult with [Mr.] Waterhouse at the jail several times and that [Mr.] Waterhouse refused to see him on numerous occasions. (R 188-200, 232-235)" *Brief of Appellee, at 34 (em-*

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4. "Depend upon it, sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." Samuel Johnson, *Letter of Sept. 19, 1777* (quoted in Boswell, LIFE OF JOHNSON (1791)).

phasis supplied). This is simply not true, and -- to paraphrase the State's brief -- Appellee "is apparently under the mistaken impression that neither this Honorable Court nor [Appellant] review the record. . . ." *Brief of Appellee, at 9*.

The record cited by Appellee reflects that counsel came to see Mr. Waterhouse once. (Tr. 189; see also Tr. 221) After one visit, where counsel and client disagreed on the relevance of Mr. Waterhouse's claim of innocence, counsel decided he was getting nowhere and "the visits [to see Mr. Waterhouse at the jail] were terminated. . . ." (Tr. 221) When counsel and client disagreed, counsel stated in court that he saw no reason to come to visit Mr. Waterhouse to discuss the matter. (Tr. 221-22)

Were the world as black and white as Appellee views it, there would be little need for judges, attorneys or jurors. It is undoubtedly true that Mr. Waterhouse, facing the electric chair, argued that he should be able to prove that he had not committed the crime charged against him. However, Appellee is wrong to lay all the blame at the feet of one person -- Mr. Waterhouse. In this case, everyone seems to have lost patience in the heat of the moment. The only person Appellee would have penalized -- and forfeit his life -- is Robert Waterhouse.

Next, Appellee faults Mr. Waterhouse for not regurgitating verbatim the pages upon pages of the transcript found in Appellee's brief. See *Brief of Appellant, at 10-24*. While Appellee is apparently hoping that this Court will get lost in all the verbiage, no amount of transcript recitation will obscure the

three facts which are actually relevant to this issue: First, whether Appellee likes it or not, defense counsel refused to give a closing argument at all, because Mr. Waterhouse had vetoed the presentation of evidence of his abuse as a child. (Tr. 803-04, 807-08) The law simply does not allow counsel to decide that no closing should be given merely because the evidence is weak.

Second, Appellee tells this Court that Mr. Waterhouse was required to make a simple, rational choice: either counsel would argue without discussing residual doubt, or Mr. Waterhouse could proceed *pro se* and make whatever argument he wished. This was not the choice at all. The trial court imposed the same limitation on both Mr. Waterhouse and upon counsel, and whoever did the argument was not to argue residual doubt. (Tr. 806)

The real "choice" facing Mr. Waterhouse would be more accurately stated as follows: He could make the argument himself, without quite understanding the contours of the trial court's ruling, or he could turn the argument over to counsel, who had already stated twice that he would refuse to do it. This was no choice at all -- or at least no more than Hobson's choice.[5]

Third, Mr. Waterhouse never got to discuss with counsel what the "choice" actually was, or prepare for argument, because he was denied the right to consult. (Tr. 809) See *Brief of Appellant, at 17-18, 21-23*. He therefore blindly "chose" to argue

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5. In liveryman Thomas Hobson's stable, customers were permitted to choose whatever mount they liked, so long as they took "the horse which stood near the stable door." Richard Steele, *The Spectator*, No. 509 (Oct. 14, 1712).

himself -- a decision characterized by the trial court as "kamikaze".

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

Appellee seeks to divert attention from the sorry mess which developed in this case by criticizing Mr. Waterhouse for inferring a malicious intent on the part of his trial lawyer. See *Brief of Appellee, at 34.* Nothing could be further than the truth. Mr. Waterhouse has never cast aspersions on trial counsel's good intentions. See *Brief of Appellant, at 31-32.* Just as the most reasonable people may file for divorce when a marriage founders on irreconcilable differences, so an attorney-client relationship must be severed when differences of opinion lead the lawyer to refuse to act for his or her client.[6]

Perhaps recognizing a problem with this issue, Appellee argues that this Court should look to the weight of evidence supporting the death penalty, and make a finding that the "error, if any, was harmless." *Brief of Appellee, at 35.* To the contrary, it goes without saying that if defense counsel does harbor a conflict of interest, there can be no harmless error: Preju-

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6. Appellee poses another strained interpretation of the record, telling this Court that counsel was unprepared to argue because of "[Mr.] Waterhouse's representation that he was going to do [it]. . . ." *Brief of Appellee, at 34.* This was not the reason trial counsel refused to present an argument. The instructions he had received from Mr. Waterhouse which "precluded" his preparation were Mr. Waterhouse's refusal to allow the presentation of evidence in mitigation, and his desire for a "residual doubt" closing argument.

dice is presumed. See, e.g., Baker v. State, 202 So. 2d 563, 566 (Fla. 1967); Turner v. State, 340 So. 2d 132, 133 (Fla. DCA 2, 1976); Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984).

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

In this case, it will be recalled, the jury wanted to know whether Mr. Waterhouse would be returned to New York to serve the rest of his life sentence there, in the unlikely event that he would ever be paroled in Florida. Appellee seeks to escape the rather inevitable impact of Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990), by citing to authority which has clearly been superseded by the rationale of Jones. See *Brief of Appellee, at 37-38.*

To the contrary, the developing law favors this Court's rule allowing jurors to know the truth about parole. The Mississippi Supreme Court has recently held that the jury must be accurately informed of the parole options. See Turner v. State, ___ So. 2d ___ (Miss. Dec. 12, 1990) (not yet reported); Berry v. State, ___ So. 2d ___ (Miss. Dec. 19, 1990) (not yet reported).

Appellee would prefer to keep the jurors in the dark. First, Appellee argues that "the court didn't know if New York would extradite him to complete his life parole in New York. . . ." *Brief of Appellee, at 38.* The State of New York issued a parole violation warrant on Mr. Waterhouse in 1980, and currently

has a detainer pending against him.[7] If anything about this issue were "speculative," it would be Appellee's belief that New York would waste its time issuing a detainer, and resisting a series of collateral challenges to the prior conviction, if there were no plan to enforce the parole violation.

However, Appellee's argument is flagrantly unfair for another reason: The prosecution argued to the jury that Mr. Waterhouse would be sent back to prison in New York for any parole violation. (Tr. 781)[8]

Finally, Appellee argues that the jury should be left in the dark because the defense proffered no evidence on this matter. See *Brief of Appellee, at 39*. This argument is curious, since the prosecution itself produced evidence of the prior murder conviction, the prior sentence to life, and the prior life-time parole, before the defense had the chance to do so. Surely the

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7. "Waterhouse is subject to future New York incarceration because the murder of which he was convicted in Florida would constitute a violation of parole." Waterhouse v. Rodriguez, 660 F. Supp. 319 (E.D. N.Y. 1987), rev'd, 848 F.2d 375 (2d Cir. 1988). See *New York Violation of Parole Warrant No. 67531 (Jan. 10, 1980)*, filed with the State of Florida.

8. The prosecution relied on Mr. Waterhouse's parole status to support various aggravating factors -- a crime committed while on parole (Tr. 778), and a crime committed to eliminate witnesses to avoid reincarceration. (Tr. 781) Surely this must mean that Mr. Waterhouse may rebut the aggravating effect? Cf. State v. Hamlette, 276 N.E. 2d 338, 347 (N.C. 1981) (if state may introduce prior conviction in aggravation, defendant may produce evidence to show mitigating aspects of the crime); Skipper v. South Carolina, 476 U.S. 1, 5 n.1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986) (discussing "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain'") (quoting Gardner v. Florida, 430 U.S. 349, 362, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

State is not making the doomed argument (yet again) that this Court should sanction the jury's refusal to consider this mitigating evidence? See Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); Parker v. Dugger, 498 U.S. ___, 111 S. Ct. ___, 112 L. Ed. 2d 812 (1991).

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

With respect to the rampant hearsay contained throughout the retired New York policeman's testimony on the prior murder conviction, the State begins with the perennial procedural bar. The propriety of exalting form over substance must first be reviewed in light of the incredible prejudice created by this inadmissible testimony. The trial court stated, apparently in the presence of the jury:

> THE COURT: Well, I think the facts are relevant to show the type of person he is and how he's treated fellow human beings and the conviction standing alone will not speak the facts. So, overruled.

(Tr. 623) Thus, the jury was to accept the "facts" of the prior conviction, as offered by a retired police officer who had no first hand knowledge of an incident which occurred a quarter of a century before.

In any event, Appellee simply fails to identify all the occasions on which Mr. Waterhouse did object to this evidence. Mr. Waterhouse concedes that, while he objected numerous times to the testimony, he never stated the magic word "confrontation."

However, first, defense counsel noted that he was unable to meaningfully confront the 25-year-old conviction when it was being proved up by a retired police officer. Counsel stated that Mr. Waterhouse "want[ed] to relitigate the . . . case which is being brought in here through this witness, and there is no physical way I can do that. That case is lost in antiquity as far as I'm concerned." (Tr. 628) The word "confrontation" does not appear here, and although this is clearly the thrust of the objection, Appellee states that this is not sufficient.

Second, counsel stated that the trial court had previously rejected precisely this issue, so it could not be relitigated. "The only thing I can do is make the objection." (Tr. 628) The word "confrontation" does not appear here, and although this is clearly the thrust of the objection, Appellee states that this is not sufficient.

Third, counsel leveled another objection which was completely sufficient to place the state on notice:

> MR. HOFFMAN: The defendant would have the same objection to this. It's inflammatory, highly prejudicial. Same objection we had. Again, also, I think in the other trial this witness read from this autopsy and I'd like to object in advance on that if he's going to do the same thing. I'd like to have the objection on the record for that.
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> THE COURT: Okay. Overruled.

(Tr. 625) The word "confrontation" does not appear here, and although this is clearly the thrust of the objection, Appellee states that this is not sufficient. (See also, e.g., Tr. 623) However, the objections made were more than sufficient to pre-

serve the issue. See Ford v. Georgia, ___ U.S. ___, 48 Cr. L. Rptr. 2099 (February 19, 1991) (citation to Swain v. Alabama sufficient to preserve Batson v. Kentucky issue).

Passing beyond the chimera of default, the State takes the position that, when the prosecution seeks to introduce hearsay evidence, Mr. Waterhouse bears the burden of proving the unavailability of witnesses. *Brief of Appellee, at 45-46.* For most of a century, the law of this State has been precisely the opposite: The party proponent (in this case, the State) must assure "that a sufficient reason is shown why the original witness is not produced." Putnal v. State, 47 So. 864, 866 (Fla. 1908); see also Spicer v. Metropolitan Dade County, 458 So. 2d 792 794-95 (Fla. DCA3, 1984) (even where witness "was in the Federal Witness Protection Program at an undisclosable location in the United States" the proponent is required to "discharge its burden of establishing that it had taken . . . reasonable steps to procure the witness's attendance"); Rivera v. State, 510 So. 2d 340, 341 (Fla. DCA3, 1987) (prosecution produced "utterly no evidence that the state was 'unable to procure his attendance or testimony by process or other reasonable means'"); Ehrhardt, FLORIDA EVIDENCE, at 547 (2d ed. 1984). If the declarant lives out of state, as in Spicer, then the State is obligated to seek the witness's attendance through the *Uniform Act to Secure the Attendance of Witnesses from Without the State.* See *Fla. Stat. Ann. § 942.03.*

Neither is the error solely predicated on our own rules of hearsay. The United States Supreme Court faced a similar issue

in Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968). In an Oklahoma prosecution, the State introduced hearsay evidence of Woods' testimony, since Woods was then incarcerated in Texas. The Supreme Court found a violation of the Confrontation Clause, noting that "the State made absolutely no effort to obtain the presence of Woods at trial. . . ." Id. at 723. The Court held that Woods' presence could have been compelled from Oklahoma, and the State made no showing why this had not been done. Id. at 724 n.4.

Similarly, in Palmieri v. State, 411 So. 2d 985 (Fla. DCA3, 1982), the Court reversed on constitutional grounds, holding that merely mailing a subpoena to the witness at his address was not sufficient to excuse the witness's absence. Id. at 986; see also State v. Basiliere, 353 So. 2d 820, 825 n.2 (Fla. 1977) (accused not expected to anticipate that "the State would make no effort to produce [the witness] at trial").

It would be charitable to characterize the State's efforts to distinguish Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), as merely "dubious."[9] Appellee correctly notes that neither Rhodes

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9. Similarly, Appellee cannot avoid the impact of the confrontation clause by citation to 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), and 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). See *Brief of Appellee, at 44*. In Stano, this Court found that the "state's argument about these other crimes approached the outermost limits of propriety," id. at 1289, even without any allegation of a confrontation violation. In Tomkins, this Court noted that the trial court had sustained the objection to hearsay testimony concerning the prior conviction. Id. at 420. This Court found the admission of other evidence harmless,

(continued...)

nor Appellant could be required to take the stand to rebut the hearsay evidence against him. However, all is allegedly well in this case "in that [Mr.] Waterhouse was given the opportunity to rebut this testimony without cross examination by the state during his own closing argument." *Brief of Appellee, at 46 n.4.*[10] To the contrary, a closing argument cannot "cure" an error, since it is black letter law that closing argument cannot be considered as evidence, as the trial court instructed the jury in this case. (Tr. 766) ("again, I want to caution you that what is said in these . . . closing arguments is not evidence").

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

With respect to the failure to excuse Venireperson Marshall, Appellee makes the usual allegation that Mr. Waterhouse misrepresents the record. See *Brief of Appellee, at 49-50.* Appellee either misapprehends or misstates the issue, and Mr. Waterhouse

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9. (...continued)
since it did not expand on the actual fact of the prior crimes of kidnapping and sexual battery. Id. In contrast, in Mr. Waterhouse's case, Officer Hawes' hearsay testimony went into graphic and questionable detail concerning how the crime occurred. This was highly prejudicial, and was repeatedly emphasized in closing. See Johnson v. Mississippi, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575, 587 n.8 (1988) (rejection of harmless error "fully support[ed]" where "prior conviction was 'vigorously' argued to the jury as a basis for imposing the death sentence").

10. Mr. Waterhouse correctly pointed out that, in addition to not being able to understand the report himself, he could not elicit the correct answers from Lt. Hawes, since Hawes did not seem to understand the terms. (Tr. 629) Indeed, it is clear that the retired officer could not even read the words correctly, let alone explain them. (1980 Tr. 2261)

respectfully requests that this Court evaluate the entire record independently.

The problem stems from juror confusion, and arises as a direct result of "[t]he ponderous interrogatory" put to the jurors in these cases. Phenizee v. State, 178 So. 579, 581-82 (Miss. 1938). Jurors have a hard time understanding the questions on voir dire, as they do not come to court with a ten-year education on the minutiae of death penalty law. A careful review of Mr. Marshall's voir dire shows that he believed that anyone convicted of first-degree murder should be executed. His idea of "mitigation" was proof that the man actually did not commit the murder, or had a total defense to the crime (such as self-defense).

Appellee raises a more serious issue in citing to a recent decision which essentially holds that any such claim will be considered harmless. See *Brief of Appellee, at 51* (citing Penn v. State, 16 F.L.W. S117 (Fla. Jan. 15, 1991)). Mr. Waterhouse respectfully asks this Court to reconsider some of the broader language in Penn.

Defense counsel used his last challenge to excuse Mr. Marshall. (Tr. 409) Prior to this, he noted that he was moving for cause to preserve the record (id.), since he was forced to accept subsequent jurors, not because he wanted to, but because he was "out of challenges." (Tr. 439) There were certainly subsequent jurors who would have been struck, but for the lack of any peremptory challenges.

The Georgia Supreme Court considered a directly analogous case in Pope v. State, 256 Ga. 196, 345 S.E. 2d 831 (1986), where a juror had stated that he would impose the death penalty "[o]nly if he's found guilty." Id. at 838. The State argued that the error should be harmless, because "Pope's jury was selected before [the juror] was reached." Id. The Court rejected the argument, since the defense had purposefully decided not to use their last strike because to do so would bring up the objectionable juror. Id. at 838-39.

What has occasionally been called the "Atilla the Hun" theory of jury selection requires that peremptory challenges be carefully used, or not used, to avoid certain jurors. Where defense counsel is required to use a challenge on an excludable juror, the apple cart is upset. In this case, defense counsel made it very clear that by forcing him to use his final challenge on Mr. Marshall, he was being forced to accept a subsequent juror whom he would otherwise have struck. The Pope analysis makes sense.

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

On the Minnick v. Mississippi, 498 U.S. ___, 111 S. Ct. ___, 112 L. Ed. 2d 489 (1990), issue, Appellee cites Butler v. McKellar, 494 U.S. ___, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990), for the proposition that Minnick should not be "retroactively" applied to this case. This position is downright untenable, since Butler itself recited the rule that all new decisions will be

applied to cases which have not become final on direct appeal. Id., 108 L. Ed. 2d at 352; accord Teague v. Lane, 489 U.S. ___, 109 S. Ct. ___, 103 L. Ed. 2d 334, 351 (1989). Since this case is pending on direct review it is, by definition, not "final."[11]

Next, Appellee would have this Court bar the Minnick issue, arguing that a statement by the prosecution that the claim was *res judicata* is not sufficient to preserve it. See *Brief of Appellee, at 54.* Closely tied to this is Appellee's argument that the issue actually is *res judicata*, and therefore cannot be revisited.

Appellee would thus have this Court penalize Mr. Waterhouse for failing to look into the crystal ball and divine the outcome of Minnick, prior to Minnick even being accepted for certiorari. To the contrary, the doctrine of *res judicata* does not apply where there has been a change in the law. See, e.g., United States v. Robinson, 690 F.2d 869 (11th Cir. 1982) (new law plainly called for *de novo* review of a legal issues; search found to have been consensual on initial appeal found to have violated

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11. Appellee argues that the affirmance of the conviction made the sentence of death "final" as long ago as 1983. This contorted revision of the law is strange, to say the least, since that would mean that Mr. Waterhouse's death sentence was "final" for two years (from 1988 to 1990) when he was not even under a death sentence. To the contrary, it is clear that the vacatur of part of a judgment renders that judgment less than "final." See Hill v. Black, 920 F.2d 249 (5th Cir. 1990) (on remand, 111 C. St. 28, 111 L. Ed. 2d 6, court agrees that "the entire judgment was vacated by the Supreme Court's order and thus this court has the power to consider issues beyond the Supreme Court's specific mandate on remand"); Moore v. Zant, 885 F.2d 1497 (11th Cir. 1989) (en banc).

Fourth Amendment on second appeal); Epps v. State, 216 Ga. 606, 118 S.E. 2d 574, 579 (1961). At trial, the parties agreed that the issue had been resolved under then-existing law, and Minnick is sufficiently novel to excuse them from beating a dead horse at that time. Since the law changed prior to the disposition of Mr. Waterhouse's direct appeal, the issue must be revisited.

Indeed, Sockwell v. Maggio, 709 F.2d 341 (5th Cir. 1983), is almost precisely on point. In Sockwell, at the time that the state court initially rejected the statements claim, the governing law was Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The Supreme Court subsequently modified the Miranda rule in Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). The Fifth Circuit held that the issue was cognizable on a second petition, since Edwards had been decided three years after his previous petition. Id. at 344; see also Ray v. Jones, 580 F. Supp. 655, 657 (N.D. Ga. 1984). Likewise, the gloss which Minnick has placed, in turn, on Miranda and Edwards sufficiently altered the law to require revisitation by this Court.

Finally, Appellee tries to escape the rule of Minnick by reconstructing this Court's ruling. However, this Court specifically held on Mr. Waterhouse's direct appeal that "[t]here is no *per se* rule . . . requiring officers to notify the defendant's counsel before communicating with the accused and we decline to adopt such a rule now." Waterhouse v. State, 429 So. 2d 301, 305 (Fla. 1983). In Minnick, the Supreme Court explicitly held that,

to satisfy the Fifth Amendment, counsel must be informed prior to reinterrogation, and all police "interrogation must cease until counsel is *present*." Id., 112 L. Ed. 2d at 497 (emphasis in original) (quoting Edwards v. Arizona, 384 U.S. at 474).

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

On the fundamental issue of the comment on silence, the State makes another multi-pronged, and primarily procedural, defense. First, because he gave the closing argument, apparently Mr. Waterhouse did not exercise his Fifth Amendment right to remain silent, so the prosecution was free to comment on it. See *Brief of Appellee, at 58*. Rather than repeat the previous discussion of this red-herring, suffice it to say that closing argument is not testimony.

On the substance of the issue, in addition to the cases already cited, Mr. Waterhouse invites this Court's attention to the recent Alabama Supreme Court decision reversing a capital conviction for a very similar comment. See Ex Parte Wilson, 571 So. 2d 1251, 1259-65 (Ala. 1990) (citing cases).

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

On this instruction issue, Appellee states that it "is not the law in the State of Florida" that jurors must individually determine mitigating circumstances. See *Brief of Appellee, at 60*. Ub contrast, the United States Supreme Court has held, as a

matter of Eighth Amendment jurisprudence, that jurors must individually find and weigh evidence in mitigation. See Mills v. Maryland, 486 U.S. ___, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988); McKoy v. North Carolina, 494 U.S. ___, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990); see also McNeil v. North Carolina, 494 U.S. ___, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990); Petary v. Missouri, 494 U.S. ___, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990). Mr. Waterhouse respectfully suggests that this is, therefore, the law of our State. See *U.S. CONST. art. VI* (Supremacy Clause).

Furthermore, as recently illustrated once again, Parker v. Dugger, 498 U.S. ___, 111 S. Ct. ___, 112 L. Ed. 2d 812 (1991), the effective consideration of mitigating circumstances is absolutely fundamental to "an *individualized* determination . . . of the character of individual and the circumstances of the crime." Id. at 826 (emphasis in original) (quoting Zant v. Stephens, 462 U.S. 862, 879, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)). Thus these flawed instructions must be reviewed as fundamental error even in the absence of an objection.

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

As Mr. Waterhouse has previously discussed, several of the aggravating circumstances submitted in this case were invalid. Mr. Waterhouse does not wish to belabor these issues,

(a) Cold, calculated and premeditated.

This has been adequately covered in the initial brief.

(b) Elimination of Witnesses.

Appellee errs in suggesting that this factor should be found based on the pathologist's determination that the final cause of death was drowning. See *Brief of Appellee, at 63*. If Appellee is suggesting that the perpetrator intended that drowning be the cause of death, there is absolutely no showing -- and it cannot be reasonably deduced -- that the perpetrator knew that the victim was still alive at the time the body was dragged to the water. These actions are most reasonably viewed as a *post hoc* effort to remove the evidence from the perpetrator's vehicle, or use the tides to eliminate physical evidence.

(c) Heinous, atrocious or cruel.

Again, Appellee suggests that a verdict may be duplicitous under Florida law, see *Brief of Appellee, at 64*, even though the United States Constitution says otherwise. See Shell v. Mississippi, 498 U.S. ___, 111 S. Ct. ___, 112 L. Ed. 2d 1, 4-5 (1990) (Marshall, J., concurring). The Supremacy Clause dictates that Appellee's view must be rejected.

(d) Double counting of Aggravating Circumstances.

This has been adequately covered in the initial brief.

(e) Sexual Battery Aggravating Circumstance.

This has been adequately covered in the initial brief.

Despite any errors in the sentencing equation, Appellee suggests that this Court should rubber stamp the penalty of death. This is not the law. See Clemons v. Mississippi, 494 U.S. ___, 110 S. Ct. 1441, 108 L. Ed. 725 (1990).

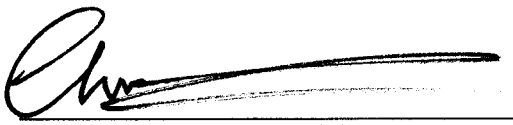
XI. THERE MUST BE A MEANINGFUL LIMITATION ON THE NUMBER AND SHOCKING QUALITY OF GRUESOME AND INFLAMMATORY PHOTOGRAPHS SHOWN TO THE JURY AT THE PENALTY PHASE OF A CAPITAL CASE.

This has been adequately covered in the initial brief.

CONCLUSION

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

Respectfully Submitted,
ROBERT BRIAN WATERHOUSE

BY: 

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Certificate of Service

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

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This the 15th day of March, 1991.