IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,

Appellant,

vs. **CASE NO. SC95103**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

In January of 1980, while on life parole for the rape-murder of 77 year-old Ella Carter, Robert Waterhouse picked up victim Deborah Kammerer at a local bar. In what can only be characterized as a savage and merciless attack, he repeatedly beat the victim with a tire iron or similar object, penetrated her anally, stuffed a bloody tampon down her throat and drug her still breathing body onto the mud flats of Tampa bay, leaving her to drown with the incoming tide. Waterhouse was indicted for Kammerer's murder in January of 1980, convicted as charged after trial in August of 1980 and sentenced to death pursuant to the jury's recommendation in September of that year. This Court affirmed the conviction in sentence on direct appeal. Waterhouse v. State, 429 So.2d 301 (Fla. 1983), cert. denied, 464 U.S. 977, 104 S.Ct. 415, 78 L.Ed.2d 352 (1983), setting forth the following facts:

> On the morning of January 3, 1980, the St. Petersburg police responded to the call of a citizen who had discovered the dead body of a woman lying face down in the mud flats at low tide on the shore of Tampa Bay. An examination of the body revealed severe lacerations on the head and bruises around the throat. Examination of the body also revealed -- and this fact is recited not for its sensationalism but because it became relevant in the course of the police investigation -- that a blood-soaked tampon had been stuffed in the victim's mouth. The victim's wounds were such that they were probably made with a hard instrument such as a steel tire changing tool. Examination of the body also revealed lacerations of the rectum. The cause of death

> was determined to have been drowning, and there was evidence to indicate that the body had been dragged from a grassy area on the shore into the water at high tide. The body when discovered was completely unclothed. Several items of clothing were gathered from along the shore at the scene.
>
> The body showed evidence of thirty lacerations and thirty-six bruises. Hemorrhaging indicated the victim was alive, and defense wounds indicated she was conscious, at the time these lacerations and bruises were inflicted. Acid phosphates was found in the victim's rectum in sufficient amount to strongly indicate the presence of semen there. Also, the lacerations in this area indicated that the victim had been battered by the insertion of a large object. The medical examiner was also able to determine that at the time of the murder the victim was having her menstrual period.

Waterhouse v. State, 429 So.2d 301, 302-03 (Fla.), cert. denied, 464 U.S. 977, 104 S.Ct. 415, 78 L.Ed.2d 352 (1983).

In 1985 Waterhouse filed a Motion to Vacate in the trial court attacking his conviction for first degree murder and death sentence and concurrently sought similar relief by filing a Petition for Habeas Corpus in this Court. This Court denied relief as to the guilt phase but granted a new sentencing phase based upon the belief that Waterhouse had not been given the opportunity to present evidence of nonstatutory mitigation. Waterhouse v. State, 522 So.2d 341 (Fla. 1988). At his 1990 resentencing, a new jury recommended a sentence of death which the judge again imposed.

At the 1990 resentencing, the state presented evidence of the instant conviction. Additionally, the state established that the

defendant had been previously convicted of a violent felony - the 1966 murder of 77 year old Ella Mae Carter and that he was on parole for that crime at the time he murdered Deborah Kammerer. Detective Halle vividly recalled the scene when on February 11, 1966 he arrived at Carter's residence in Greenport, Long Island. He found the elderly victim lying on her bed severely beaten and covered in blood. She had bruises over her face, neck, shoulder, elbows and abdomen and had defensive wounds on her hands. Her dentures were broken. An autopsy revealed she had been strangled; there was bruising of the strap muscles of the neck and her hyoid bone and larynx were fractured. She had six broken ribs on her right side and four on her left. Waterhouse's bloody fingerprints were found on a pane of glass he had broken in exiting the residence after the crime and on a beer can left on top of the refrigerator. He pled guilty to second degree murder and was sentenced to life in prison.

At the insistence of Waterhouse, no mitigating evidence was presented although his attorney was prepared to do so. Waterhouse also insisted on making a closing argument, waiving his right to have argument by counsel.

The sentence was affirmed by this Court, which in the process considered on the merits and resolved many of the issues which Waterhouse raises in his current 3.850 appeal. Waterhouse v. State, 596 So.2d 1008 (Fla 1992), cert. denied, 113 S.Ct. 418 (1992).

After certiorari review was denied in the United States

Supreme Court, Waterhouse once again sought collateral review of his conviction and sentence in circuit court. On January 22, 1998, the Honorable Judge Beach summarily denied the motion. The instant appeal ensued.

PRELIMINARY STATEMENT

Waterhouse is precluded from litigating many of the issues now urged in his motion for post conviction relief because they either were or should have been raised on direct appeal or in Waterhouse's prior 3.850 motion; this Honorable Court should affirm the summary denial of all issues which are clearly barred from collateral review.

It has long been the law in this state that claims which could have or should have been raised on direct appeal are not cognizable in a motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.850. Ziegler v. State, 654 So.2d 1162 at 1164 (Fla. 1995); Torres-Arboleda v. Dugger, 636 So.2d 1321, 1323 (Fla. 1994); Johnson v. State, 593 So.2d 206 (Fla.), cert. denied, ___ U.S. ___, 113 S. Ct. 119 (1992); Raulerson v. State, 420 So.2d 567 (Fla. 1982); Alvord v. State, 396 So.2d 184 (Fla. 1981); Meeks v. State, 382 So.2d 673 (Fla. 1980). It is also not appropriate to use a different argument to relitigate the same issue. Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995); Torres-Arboleda, 636 So.2d at 1323; Medina v. State, 573 So.2d 293, 295 (Fla. 1990). The purpose of Rule 3.850 is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are cognizable on direct appeal. McCrae v. State, 437 So.2d 1388 (Fla. 1983). Many of the issues typically raised in collateral review are procedurally barred because they were or should have been presented on direct appeal. See, Jennings v.

State, 583 So.2d 316 (Fla. 1991); Swafford v. Dugger, 569 So.2d 1264 (Fla. 1990); Roberts v. State, 568 So.2d 1255 (Fla. 1990); Blanco v. State, 507 So.2d 1377 (Fla. 1987). Many of the issues Waterhouse presents in the instant motion are not cognizable for the same reason.

In addition, as to any claims challenging the validity of Waterhouse's convictions, the instant motion is improper as successive and untimely. See, Fla.R.Crim.P. 3.850(b);(f). Waterhouse previously attacked the propriety of his convictions under Rule 3.850, and he has no right to seek further review of his guilty verdicts absent a showing of newly discovered evidence. Porter v. State, 653 So.2d 374, 377 (Fla. 1995). Any claims predicated on alleged constitutional error during the guilt phase of Waterhouse's capital trial were or should have been presented in his initial 3.850, and are consequently procedurally barred. Atkins v. State, 663 So.2d 624 (Fla. 1995); Ziegler, 654 So.2d 1162 at 1164 (Fla. 1995).

Additionally, to counter the procedural bar to some of these issues, Waterhouse has couched his claims in terms of ineffective assistance of counsel in failing to preserve or raise those claims. This Court has consistently recognized that "[a]llegations of ineffective assistance cannot be used to circumvent the rule that post-conviction proceedings cannot serve as a second appeal." Medina v. State, 573 So.2d 293, 295 (Fla.1990); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995). The state urges this Court to

deny Waterhouse's attempts to undermine the procedural bar rule with a gratuitous assertion that counsel was ineffective.

This Court must enforce the procedural default policy, or appeal will follow appeal and there will be no finality in capital litigation. See, Johnson v. State, 536 So.2d 1009 (Fla. 1988)(the credibility of the criminal justice system depends upon both fairness and finality.) The express finding by this Court of a procedural bar is also important so that any federal courts asked to consider Waterhouse's claims in the future will be able to discern the parameters of their federal habeas review. See, Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1083, 103 L.Ed.2d 308 (1989); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

SUMMARY OF THE ARGUMENT

Waterhouse's first complaint is that the trial court erred in summarily denying his ineffective assistance of counsel claims at the penalty phase without an evidentiary hearing. This Court has repeatedly recognized that a hearing is warranted on an ineffective assistance of counsel claim only where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrates a deficiency in performance that prejudiced the defendant. As the instant claim does not render the conviction or sentence vulnerable to collateral attack, the trial court correctly denied the claim without an evidentiary hearing.

Waterhouse next contends that he was denied fair proceedings in front of Judge Beach on the basis of statements the judge made to the parole commission in 1981. As an issue that could have been and should have been raised on direct appeal, it is procedurally barred.

Waterhouse next argues that he was denied a mental health evaluation. The record shows that he refused counsel's attempt to have him evaluated. This is simply another example of Waterhouse's continued effort to capitalize on his own efforts to delay justice in this case. The trial court properly denied the claim.

The remainder of Waterhouse's claims are all direct appeal issues which are not cognizable in a post conviction proceeding pursuant to Rule 3.850. Accordingly, these claims should be denied

as procedurally barred.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING WATERHOUSE'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AT THE PENALTY PHASE WITHOUT AN EVIDENTIARY HEARING.

Waterhouse's first complaint is that the trial court erred in summarily denying his ineffective assistance of counsel claims at the penalty phase without an evidentiary hearing. This Court has repeatedly recognized that a hearing is warranted on an ineffective assistance of counsel claim only where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrates a deficiency in performance that prejudiced the defendant. Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995); Jackson v. Dugger, 633 So.2d 1051, 1055 (Fla. 1993); Mendyk v. State, 592 So.2d 1076, 1079 (Fla. 1992); Roberts v. State, 568 So.2d 1255, 1259-60 (Fla. 1990); Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). As the instant claim does not render the conviction or sentence vulnerable to collateral attack, the trial court correctly denied the claim without an evidentiary hearing. See Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); Puiatti v. Dugger, 589 So.2d 231 (Fla. 1991).

In order to prevail on a claim of inadequate assistance of counsel, a defendant must allege and prove specific deficiencies in counsel's performance falling below accepted norms and that there

is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. See generally, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Waterhouse complains eleven specific errors of counsel. As the trial court noted, many of these claims were resolved at the time of the resentencing on the direct appeal because Waterhouse raised a number of challenges to counsel's performance on direct appeal. Upon denying these claims this Court explained the context in which these claims arose:

> We address first Waterhouse's claim that he was denied the right to counsel by defense counsel's refusal to make closing argument at the resentencing hearing. Waterhouse also alleges in this claim that the trial court erred by refusing to allow him to consult with counsel before requiring him to present his own closing argument.
>
> An awareness of the events preceding the closing argument is necessary to an understanding of this claim. At the outset, it should be noted that several lawyers had previously withdrawn from representing Waterhouse because of his refusal to cooperate with them. During the proceedings below, Waterhouse and his counsel, Mr. Hoffman, began to differ about trial strategy. Prior to the resentencing hearing, Hoffman sought to withdraw because Waterhouse did not wish him to put on any evidence in mitigation and insisted that he present a lingering doubt defense. Because this Court has held that lingering doubt is not an appropriate nonstatutory mitigating circumstance, (FN2) Hoffman recognized that he could not ethically pursue this course of action. Hoffman

protected the record to make clear that Waterhouse desired to present such a defense.

During the resentencing hearing, Waterhouse made various complaints about Hoffman, but it was clear that he was not seeking to represent himself. The court found Waterhouse's accusations against Hoffman to be unfounded and observed:

THE COURT: Well, I'm not going to let him control this case by discharging a lawyer that's appointed for him on the eve of the trial. It is obvious to me that he has been doing this over the years purely for the purpose of delay, and I'm not going to let that happen.

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 present a defense in mitigation, that's his choice. If he's done that, he has only himself to blame.

In the middle of the resentencing hearing, Hoffman advised the court that Waterhouse once again was complaining about his representation because he had not gone far enough in trying to relitigate the guilt issue. (FN3) The court observed that Hoffman was providing effective representation. However, the court stated that if Waterhouse insisted, he would permit him to take over the trial but would keep Hoffman present so as to provide legal advice if requested. The court then asked Waterhouse whether or not he was discharging Hoffman and proceeding on his own:

THE DEFENDANT: Will he remain as advisory counsel?

THE COURT: What?

THE DEFENDANT: Will he remain as advisory counsel? That will be all?

THE COURT: That's right. But he won't

be participating. If you have a question, you'll take it up with him, but you're on your own.

MR. CROW [Prosecutor]: I think what he's trying to indicate is he doesn't want Mr. Hoffman in an advisory capacity.

THE COURT: I'll have him here available. He doesn't have to consult with him. He doesn't have to talk to him. If he doesn't have any questions to ask him, then obviously his advisory capacity is for naught; but he will be available to him. He will not be participating in the trial and Mr. Waterhouse will be handling the rest of this case on his own.

THE DEFENDANT: What I'm actually trying to get at is will he have to be present in the courtroom?

THE COURT: Doesn't have to be if you don't want him. We can have him sit outside. That's kind of a stupid place to put him if he's going to try and advise you on what he heard in here.

THE DEFENDANT: Doesn't seem to matter where he is. We'll let it go.

THE COURT: I'm sorry?

THE DEFENDANT: Excuse me. Let it go.

THE COURT: Let it go. In other words, he will continue as your lawyer?

THE DEFENDANT: The railroad train is running, your Honor.

THE COURT: I take it that you are accepting him as your lawyer?

THE DEFENDANT: Excuse me?

THE COURT: Pardon?

THE DEFENDANT: I didn't hear what you

said.

THE COURT: He is your lawyer, is that correct?

THE DEFENDANT: Not by much.

THE COURT: Over your objection.

THE DEFENDANT: On paper. He's doing nothing, your Honor.

THE COURT: I didn't ask you that. Answer the question, please.

THE DEFENDANT: I would respectfully refuse.

THE COURT: Okay. Bring in the jury. Mr. Hoffman continues to remain as the lawyer.

At the close of the State's testimony, Hoffman made clear that Waterhouse refused to allow him to put on any mitigating evidence. Hoffman also indicated that Waterhouse wanted to address the jury in closing argument. The judge advised Waterhouse that this would not be a good idea because much of what he proposed to say would probably be stricken on objection. However, the judge said that if Waterhouse wished to do so, he would permit him to make the closing statement, even though Hoffman remained in the case. This is reflected in the following colloquy:

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 can't 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.

After the recess and the jury charge conference, Hoffman announced that Waterhouse would be making the closing argument. The prosecutor then presented his closing argument. Thereafter, the court took a ten-minute recess. When the trial resumed, Waterhouse stated that he would like Hoffman to make the closing argument. Hoffman responded that Waterhouse was still insisting that he make a lingering doubt argument and that he felt that he could not do this because it would be unethical. The following colloquy then occurred:

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 than do that and make a half hearted attempt and 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 chance 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 four 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.

We do not find that Waterhouse was denied his right to counsel by these actions. Waterhouse initially indicated on the record that he wished to make the closing argument. He reneged on that at the last possible minute. At that point, Hoffman did not refuse to make closing argument. He was simply unwilling to make the argument that Waterhouse demanded because he felt it would be unethical. Waterhouse rejected the choice of a closing argument by counsel confined to the appropriate issues. Under the facts of this case we do not find that Waterhouse was denied his right to counsel. "[A] defendant may not manipulate the proceedings by willy-nilly leaping back and forth between the choices [of self-representation and appointed counsel]." Jones v. State, 449 So.2d 253, 259 (Fla.), cert. denied, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984). We refuse to permit an

intransigent defendant to completely thwart the orderly processes of justice.

Nor do we find error in the trial court's refusal to permit Waterhouse to consult with his counsel before making the decision to make his own closing argument. It is obvious from the colloquies quoted above that this matter had been under consideration for an extended period of time, and Waterhouse had already consulted with Hoffman about this. Ironically, as things worked out, Waterhouse gave a closing argument in which he was given great latitude on what to say, including matters bearing on guilt or innocence. Clearly, the trial court, the prosecutor, and his own attorney bent over backwards in trying to give Waterhouse the benefit of every legal right to which he was entitled.

Waterhouse also argues that, in the event he is deemed to have asserted his right to self-representation insofar as closing argument is concerned, the trial court failed to conduct the inquiry required by Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Faretta requires that once a defendant asserts the right of self-representation, the court must make an appropriate inquiry to determine whether the defendant knowingly and intelligently waived the right to counsel. Normally, this requires a waiver hearing to insure that the defendant understands the disadvantages of self-representation. Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir.1986). However, under the facts of this case we find that the standards of Faretta were met despite the lack of a final hearing.

The trial judge warned Waterhouse on numerous occasions of the dangers in representing himself. The judge informed Waterhouse that he would be held to applicable procedural and evidentiary rules if he acted as his own counsel. From Waterhouse's conduct throughout the proceedings below, it is apparent that he was thoroughly knowledgeable about the proceedings against him. He filed

motions in his own behalf with citation to supporting cases. During hearings on defense counsel's motion to withdraw and Waterhouse's motion to dismiss counsel, Waterhouse addressed the court at length, citing and discussing cases. He gave the court the names of witnesses he wished to call and indicated what their testimony would be. He took an active part in his defense during the resentencing hearing. He presented his counsel with questions for witnesses and raised objections to various testimony. He was obviously aware of the defenses available to him. He was allowed to represent himself only at the very end of the proceedings in closing argument. Defense counsel assisted him in closing argument by responding to the prosecutor's objections and by consulting with Waterhouse when Waterhouse so requested. Finally, Waterhouse's manipulation of the proceedings and his attempts to delay show an obvious understanding of the proceedings against him. Under these facts, we find that the requirements of Faretta were met. See Fitzpatrick, 800 F.2d 1057 (Faretta requirements met despite lack of hearing where defendant manipulated the proceedings, had knowledge of possible defenses, had contacted numerous attorneys prior to trial, and understood the nature of the charges against him).

Waterhouse next asserts that he was improperly precluded from challenging the State's claim that the murder occurred during the commission of a sexual battery. (FN4) Waterhouse argues that, in effect, the trial court directed a verdict against him on the issue of the sexual battery by refusing to allow evidence on the issue of guilt of the murder.

The judge appropriately precluded Waterhouse from presenting evidence questioning his guilt. However, Waterhouse was not precluded from challenging the State's evidence that a sexual battery occurred or from presenting evidence that a sexual battery did not occur. Our review of the record

> indicates that the court afforded Waterhouse and his counsel considerable leeway in cross-examining State witnesses on the evidence of sexual battery. The jury was instructed on the elements of a sexual battery and informed that each aggravating factor must be established beyond a reasonable doubt. We find no error.
>
> Waterhouse claims that he was denied the right to counsel because of his counsel's conflict of interest. The alleged conflict arose from the difficulties between Waterhouse and his counsel. This claim is not supported by the record. Although a conflict of interest may be present where counsel's interests are inconsistent with those of his client, there was no such conflict here. It is apparent from the record that counsel's interest was in presenting the best possible case for Waterhouse. Any conflict between them was attributable solely to Waterhouse's own contumacious behavior and not to any competing interest of his counsel.

Waterhouse v. State, 596 So.2d 1008, 1011-1015 (Fla. 1992)

As the foregoing illustrates this claim has been substantially litigated contrary to Waterhouse's position. As such, Waterhouse is barred from reasserting these claims. Loren v. State, 601 So.2d 271, 273 (Fla.App. 1 Dist. 1992), citing, Johnson v. State, 522 So.2d 356 (Fla.1988); Parker v. State, 491 So.2d 532 (Fla.1986).

Further, as the following demonstrates, these claims fail individually and collectively to constitute inadequate assistance of counsel.

A) Failure to Investigate and Prepare Case

The claim that counsel failed to sufficiently investigate the

case was presented below as a general allegation of ineffectiveness without *any* supporting facts. (PCR6:924) Accordingly, the trial court denied that allegation stating:

> Defendant's allegation that defense counsel failed to adequately investigate this case prior to the trials is not supported by any factual allegations in the motion and should be denied. Further, this matter should have been raised in the initial stages of trial and appeal and therefore is procedurally barred.

(PCR 7:1163)

Having failed below to present any supporting facts, Waterhouse now adds several references to the record below to demonstrate his claim that resentencing counsel failed to investigate and prepare. See Initial Brief of appellant, pages 8 through 13. In a footnote, Waterhouse attempts to excuse the failure to raise these arguments below by asserting that since the trial court had read the record, it was aware of the facts pertaining to the claim. See footnote 2, page 12, Initial Brief of Appellant. It is not the trial court's responsibility to sift through the record in an attempt to find evidence that may support an allegation. As previously noted, it is the defendant's responsibility to *allege specific facts which demonstrates a deficiency in performance that prejudiced the defendant*. Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995); Jackson v. Dugger, 633 So.2d 1051, 1055 (Fla. 1993). He cannot assert error when the

specific claim was not fairly presented to the court below.

Even if Waterhouse had made these arguments below, the quoted passages in no way demonstrate a deficiency in performance that prejudiced the defendant. A review of the prior proceedings clearly refutes the allegation.

Waterhouse alleges that arguments between counsel and him on the record show that there were witnesses that Waterhouse had asked counsel to locate that counsel had failed to locate. He alleges that there was a female witness who was in his car and a male alibi witness. Despite his newly crafted theory that these witnesses could negate the HAC and CCP factors, it is clear that the witnesses in question were sought in furtherance of Waterhouse's determination to relitigate his guilt or innocence, a question that was not before the resentencing court.

> During the proceedings below, Waterhouse and his counsel, Mr. Hoffman, began to differ about trial strategy. Prior to the resentencing hearing, Hoffman sought to withdraw because Waterhouse did not wish him to put on any evidence in mitigation and insisted that he present a lingering doubt defense. Because this Court has held that lingering doubt is not an appropriate nonstatutory mitigating circumstance, (FN2) Hoffman recognized that he could not ethically pursue this course of action. Hoffman protected the record to make clear that Waterhouse desired to present such a defense.
>
> Waterhouse v. State 596 So.2d 1011 (Fla. 1992)

Moreover, despite Waterhouse's claim that the trial court was

incorrect in determining that this claim could not have been raised on direct appeal– - the fact is Waterhouse raised a number of such claims on direct appeal which were reviewed and rejected by this Court. Waterhouse v. State, 596 So.2d at 1011-1015 (Fla. 1992).

B) Failure to Make a Closing Argument

Waterhouse next complains that counsel was ineffective for failing to do the closing argument. This issue was specifically resolved by this Court on direct appeal. Waterhouse, 596 So.2d at 1011-1015. This Court refused "to permit an intransigent defendant to completely thwart the orderly processes of justice", and concluded that Waterhouse had not been abandoned by his counsel nor had counsel refused to do a closing argument but that counsel was unwilling to make an unethical and illegal closing on Waterhouse's behalf.

Commenting that his attorney had "bent over backwards" to accord him all rights to which he was entitled, this Court concluded Waterhouse had waived his right to have his attorney make the closing argument in accordance with the requirements of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975):

> "From Waterhouse's conduct throughout the proceedings below, it is apparent that he was thoroughly knowledgeable about the proceedings against him. He filed motions in his own behalf with citation to supporting cases. During hearings on defense counsel's motion to withdraw and Waterhouse's motion to dismiss counsel, Waterhouse addressed the court at length, citing and discussing cases.... Under these facts we find the requirements of Faretta were met."

Waterhouse, supra at 1014, 1015.

Thus the issue was not whether Hoffman could have argued against the aggravating factors or in favor of mitigation, since Waterhouse refused to let him do so. As Waterhouse himself told the sentencing jury:

> Mr. Hoffman could have presented at least a half a dozens (sic) factors in mitigation, but I wouldn't let him do that because I don't feel that he should be up here begging you. I shouldn't be up here begging you for my life.
> It goes against my moral principals and furthermore, spares my family the embarrassment, the trauma. (R812)

C. Failure to Rebut the Sexual Battery Aggravator

Waterhouse next claims that counsel was ineffective for failing to rebut the facts supporting the during the course of a sexual battery aggravator.

The trial court denied this claim as follows:

> With respect to the allegation that defense counsel was ineffective because he did not rebut evidence of sexual battery on the victim, the physical evidence of sexual battery was of such graphic and verbal description by the photographs and medical examiner to defy rebuttal of its occurrence. To deny before a jury that a sexual battery had occurred would insult their intelligence. Defense counsel did the far wiser tact in not attempting to persuade the jury that a sexual battery had not occurred and was not attributable to the defendant.
> Further, the Florida Supreme Court had previously ruled on this issue as follows in *Waterhouse v. State*, 596 So.2d. At 1015 (Fla. 1992).

> The judge appropriately precluded Waterhouse from presenting evidence questioning his guilt. However, Waterhouse was not precluded from challenging the State's evidence that a sexual battery occurred or from presenting evidence that a sexual battery did not occur. Our review of the record indicates that the court afforded Waterhouse and his counsel considerable leeway in cross-examining State witnesses on the evidence of sexual battery. The jury was instructed on the elements of a sexual battery and informed that each aggravating factor must be established beyond a reasonable doubt. We find no error.
>
> (PCR7:1164)

Waterhouse urges that the trial court erred in summarily denying his claim. He contends that evidence indicating the blood may have been from another source would have negated the evidence of a sexual battery. Even if Waterhouse could have established a possible source for the blood, such evidence would not eliminate the incontrovertible fact that the victim's rectum was ruptured by bursting injuries almost two inches deep into the body cavity. This clearly forced and nonconsensual penetration establishes the sexual battery independent of whether the blood was from the attack. The suggestion that this penetration committed by someone other than the murderer and that counsel was ineffective for failing to establish same is untenable and ludicrous.

The record also shows that 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. (SR 190) This position was reiterated by defense counsel prior to closing argument and was never disputed by the state or the trial court. (SR 806)

Defense counsel and the defendant were allowed considerable leeway in the cross examination of state witnesses regarding the evidence of sexual battery. (SR 580-586, 655, 669-677, 689, 692-696, 720) 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. Further, the record shows that during the cross-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. (SR 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.

Given that counsel did challenge the evidence and that Waterhouse himself precluded counsel from pursuing additional evidence to challenge the state’s case, Waterhouse has failed to establish either deficient performance or prejudice.

D. Failure to Object to the Use of Previously Obtained Statements

Waterhouse also complains that Hoffman failed to get the Court to suppress certain statements of Waterhouse that “nobody wants to go to jail. You do what you have to to protect Bobby Waterhouse”. This statement was litigated in the initial appeal and this Court held it to be admissible, ruling that Waterhouse had never directed the detectives to deal with him only through counsel, and that they were not prevented from seeking clarification of his equivocal request. Despite Waterhouse’s contentions to the contrary however, current case law makes it clear that detectives may continue substantive questioning when faced with an equivocal request for counsel. In Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), the United States Supreme Court clarified the rule and established a bright-line test. According to Davis, once a defendant waives his or her Miranda rights, an officer is not required to clarify a suspect's subsequent equivocal request for counsel and may continue questioning a suspect until the suspect makes a clear assertion of the right to counsel. In fact, the Court stated, "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning." Id. at 461-62 (emphasis added). In State v. Owen, 696 So.2d 715 (Fla.1997), this Court adopted the rule in Davis. Id. at 720. See, also, Almeida v. State, 737 So.2d 520 (Fla. 1999). Certainly, counsel cannot be held to be inadequate for following existing precedent and a controlling decision of the Florida Supreme Court.

Moreover, the Supreme Court specifically ruled that even if the admission of the statements in the resentencing were error, it was harmless beyond a reasonable doubt since it related only to the defendant's guilt, a fact not in issue.

E. Failure to Object to Allegedly Improper Prosecutorial Comments

Waterhouse also alleges inadequate assistance in failing to object to prosecution comments in closing that (1) allegedly diminished the jury's sense of responsibility; (2) commented on Waterhouse's fifth amendment rights and (3) relayed "false" information to the jury. This claim although couched in terms of ineffective assistance is an issue that could have been and was raised on direct appeal to this Court. As such, Waterhouse cannot use his post conviction motion as a second appeal regarding the merits of these claims. This Court has consistently recognized that "[a]llegations of ineffective assistance cannot be used to circumvent the rule that post-conviction proceedings cannot serve as a second appeal." Medina v. State, 573 So.2d 293, 295 (Fla.1990); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995). The state urges this Court to deny Waterhouse's attempts to undermine the procedural bar rule with a gratuitous assertion that counsel was ineffective.

This claim was denied by the lower court as follows:

> The Defendant's complaint that defense counsel's failure to object to comments made by the prosecutor during closing argument as evidence of ineffective representation by defense counsel is without merit. Neither are

> the prosecutor's statements objectionable, or if so, such error to warrant a new trial. Whether or not defense counsel had successfully objected to these statements would not have made a difference in the outcome of the jury's sentencing recommendation. Defendant's objection that defense counsel failed to object to numerous instructions given by the Court is without merit. Defendant has made no showing that any of the given instructions were in error.
>
> (PCR7:1165)

This finding is supported by this Court's ruling on this issue on the appeal from the Resentencing, wherein this Court rejected each of the claims now being asserted by Waterhouse. Waterhouse at 1017.

Even if Waterhouse could establish that counsel should have objected to the challenged statements, he has failed to establish prejudice therefrom. The alleged comments concerning diminishing the jury's sense of responsibility were not objectionable. One comment referred to the nature and seriousness of the underlying felony aggravator and the weight it should be accorded by the jury. The other was an appropriate reference which simply focused the jurors on their duty to determine factual issues and apply the law. The jury instructions clearly spelled out the jury's important role and the significance of their recommendation and the prosecution argument did not attempt to diminish it.

The prosecution's statement that the guilt phase jury had not heard evidence concerning Ella Carter's murder was a truthful and

innocuous acknowledgment that evidence in addition to and different from the evidence necessary to prove guilt was admitted in the penalty phase. This evidence was not admitted in the guilt phase of Waterhouse's trial and was not part of the evidence which resulted in his conviction of the murder. The suggestion that this comment may have led the resentencing jury to conclude that the previous jury had recommended life is both illogical and speculative. It is equally ludicrous to further suggest that the resentencing jury's supposition that another jury had recommended mercy in a prior sentencing phase would be prejudicial to the defense.

F. Failure to Impeach State Witness Kenneth Young

Waterhouse next claims that counsel was ineffective for failing to impeach state witness Kenneth Young with evidence that he had been offered a deal in exchange for his testimony against Waterhouse. The trial court rejected this claim as follows:

> CLAIM IV
>
> THE DEFENDANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL.
>
> The Court adopts the finding of Claims I, II and III as partially dispositive of this claim because of the similarity of allegations and arguments.
>
> Further, with respect to this Defendant's claim concerning the defense counsel's failure to impeach witness Kenneth Young and failure to investigate and/or advance a voluntary intoxication defense, these have been resolved by prior motions and appeals or, if not raised at that time, should have been and therefore are procedurally barred.

> Therefore, it is the finding of this Court that Defendant's Claim IV is without merit and should be denied as a matter of law.
>
> (PCR7:1165-66)

Waterhouse now contends that the court erroneously held that this issue had either "been resolved by prior motions and appeals or, if not raised at that time, should have been and therefore are procedurally barred." He contends that this claim had never been raised and that this information was not discovered until the post conviction process. Interestingly, in the 3.850 motion Waterhouse noted that this claim had been raised as a Brady claim in his *first Rule 3.850 motion, was the subject of an evidentiary hearing and was raised and rejected on appeal to this Court.* (PCR6: 960-69)

This Court rejected this claim as follows:

> Waterhouse's second allegation of Brady violations states that the prosecutor was aware of, and did not disclose, information and reports which would have seriously damaged the credibility of one of the state's leading witnesses, Kenneth Young. Young testified that, while a cellmate of Waterhouse, he had witnessed Waterhouse attempt to sexually assault another prisoner. He also testified that, after the assault, Waterhouse confessed to Young the details of the Kammerer murder. What the prosecutor allegedly failed to disclose were police reports that Young operated an extortion business while in prison and that Young asked for, and received, favorable treatment in return for testifying against Waterhouse. The state claims that, although the prosecutor did not disclose the police reports to Waterhouse, Waterhouse had already gained possession of the impeaching evidence through other means, and therefore was not prejudiced by the nondisclosure of the

report.

In Brady, the United States Supreme Court held that the prosecution is required to disclose all evidence that is favorable to the accused. There is no question that this includes evidence which affects a witness's credibility as well as evidence tending to negate the defendant's guilt. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The Court stated that the proper standard for determining a Brady violation is whether there is a reasonable probability that the result would have been different. The term reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. See Bagley, 473 U.S. at 682, 105 S.Ct. at 3383.

There is no such undermining of confidence in the outcome in this case. As stated, Waterhouse knew of the evidence tending to impeach Young. He simply chose not to use it. Moreover, despite knowing throughout the trial of the two exculpatory witnesses, Waterhouse declined to call one of them, believing that his testimony would do more harm than good. Thus, although it seems clear that the prosecution should have timely disclosed the information to Waterhouse, it has not been shown that Waterhouse was in any way prejudiced by the nondisclosure, or late disclosure, of the information.

Were it true that the information improperly withheld possessed some value, Waterhouse might have been prejudiced sufficiently to require a reversal based on Brady. However, as any information which may have been improperly withheld was either already in Waterhouse's possession, or it was of little or no use to Waterhouse, we cannot state to any degree of certainty that there is a reasonable probability that the outcome of the trial would have been different. There simply is none of the undermining of confidence in the proceedings necessary to cause a reversal of Waterhouse's conviction.

Waterhouse v. State, 522 So.2d 341, 342-43 (Fla. 1988)

Even though this claim is now being raised as an ineffective assistance of counsel claim, this Court's prior determination that this information possessed no value refutes any contention that Waterhouse was prejudiced by the failure to use it.

G. Failure to Seek Trial Judge's Recusal on the Basis of Prejudice

Waterhouse next contends that counsel should have sought recusal of Judge Beach on the basis of statements he made to the parole commission in 1981. The trial court rejected this claim as follows:

> CLAIM V
>
> THE DEFENDANT WAS DENIED A FAIR SENTENCING TRIAL BECAUSE THE TRIAL JUDGE WAS PREJUDICED AGAINST THE DEFENDANT.
>
> At no time does the record reflect that defense counsel, including present counsel, motioned the trial judge to recuse himself for bias and prejudice before this present motion was filed although the information which is the basis of this complaint was a matter of record for sixteen years and assumedly known by all defense counsel. Further, there are no allegations in the complaint to suggest the trial court conducted any of the motion hearing or trials in a biased or prejudicial manner toward the defendant. In fact, the Florida Supreme Court made this observation about trial judge in *Waterhouse v. State*, 596 So.2d 1008, 1014.
>
> > Clearly, the trial court, the prosecutor, and his own attorney bent over backwards in trying to give Waterhouse the benefit of every legal right to which he was entitled.

> Therefore, it is the finding of this court that defendant's Claim V is without merit and should be denied as a matter of law.
>
> (PCR7: 1166)

Waterhouse contends that the trial court's order misses the point–that his claim of ineffectiveness rests on the fact that Judge Beach's statements had been known for a number of years and that no one had acted on it. However, the fact that the alleged bias was or should have been known to trial counsel, the failure to raise this claim in the trial court and on appeal waives the substantive claim and it is procedurally barred from being considered on collateral attack. Allegations of ineffective assistance of counsel cannot be used to circumvent the rule that post-conviction proceedings cannot serve as a second appeal. Medina v. State, 573 So.2d 293, 295 (Fla. 1990); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995). cf. Steinhorst v. State, 695 So.2d 1245 (Fla. 1997)(rejecting claim that recusal on codefendant's case rendered judgment null and void).

The alleged evidence of bias, (a comment made in a 1981 post sentence investigation) was or should have been known to prior collateral counsel and could have and should have been raised in the trial court and appeal from those proceedings. By allowing Judge Beach to continue presiding over the initial post conviction proceedings, Waterhouse had waived the issue, prior to current counsel taking over the case. The claim's speciousness is

understood by current counsel's failure, once Judge Beach was reassigned to the case in the fall of 1996, to file a timely motion to disqualify him. Fla. R. Jud. Admin. 2.160.

More importantly, however, the Courts have repeatedly held that neither exposure to negative evidence about a defendant nor having found the death penalty appropriate in a prior proceeding in the same case, requires recusal of initial judge from post-conviction proceedings or a resentencing. Dragovich v. State, 492 So.2d 350 (Fla. 1986). Dailey v. State, 659 So.2d 246 (Fla 1995). No rational person could have viewed the evidence presented in the initial trial and sentencing phase and not come to the conclusion that Waterhouse, having twice been convicted of exceedingly cruel and brutal murders of women who were sexually assaulted, having harassed or sexually assaulted a young male while in jail, and having told Detectives he had a "problem with sex and violence" was a "dangerous and sick man". There is no basis however, to conclude that the Court in following the jury's unanimous recommendation of death relied on any aggravating evidence other than the evidence lawfully admitted in the resentencing. Even if this statement were to be construed as an exposure to extraneous evidence, Judges unlike jurors are presumed to have the capacity to follow the law and fairly weigh the aggravating and mitigating circumstances. Dragovich v. State, 492 So.2d 350 (Fla 1986).

The State suggests that this issue is procedurally barred, having been waived by the defendants failure to timely raise the

issue and that the issue is in any event not of substantive merit.

H. Failure to Present Mitigating Evidence

Waterhouse next contends that Hoffman should have argued mitigation to the sentencing judge. As previously noted, it was Waterhouse's decision that mitigating evidence not be presented.[1] The defendant has a right to elect not to present or argue mitigating evidence. An attorney cannot be deemed incompetent for following a client's directive on a decision that is the client's to make. Johnson v. Singletary, 162 F.3d 630 (11th Cir. 1998)("...when the strategy an attorney might otherwise pursue is virtually foreclosed by his client's unwillingness to facilitate that strategic option); Koon v. Dugger, 619 So.2d 246 (Fla. 1993) (counsel not ineffective in following defendant's instruction not to present mitigating evidence in penalty phase.)

As in Koon this is not a case where counsel simply latched onto the defendant's decision to not present mitigating evidence. The mitigating evidence had been investigated, accumulated and presented to this Court in support of Waterhouse's Hitchcock[2] claim. Waterhouse v. State, 522 So.2d 341, 344 (Fla.

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[1] ". . .Although we later vacated Waterhouse's death sentence in order to allow him to present nonstatutory mitigating evidence, Waterhouse refused to allow the presentation of mitigation evidence at resentencing. Thus, this case stands in the same posture as it stood on direct appeal when the death sentence was upheld." Waterhouse v. State, 596 So.2d 1008, 1020, n.6 (Fla. 1992)

[2] Hitchcock v. Dugger, 481 U.S. 393 (1987).

1987)(granting habeas relief based on failure to instruct upon, and allow jury to consider, evidence of nonstatutory mitigating circumstances.) Having been given the opportunity by this Court to have the jury consider such evidence, Waterhouse refused to allow counsel to present it. As the failure to argue mitigating evidence rests totally on the shoulders of Waterhouse, he should not now be afforded the same relief this Court gave him in 1987.

I. Failure to Object to the State's Comment that the Previous Jury Did Not Know About the New York Murder

The underlying basis of this claim is an issue that could have been and should have been raised on appeal. As such it is procedurally barred. Waterhouse is again attempting to circumvent the procedural bar rule by couching the claim in terms of ineffectiveness. This claim should be denied as barred.

Furthermore, it does not support a finding of deficient performance or prejudice. The prosecution's statement that the guilt phase jury had not heard evidence concerning Ella Carter's murder was a truthful and innocuous acknowledgment that evidence in addition to and different from the evidence necessary to prove guilt was admitted in the penalty phase. This evidence was not admitted in the guilt phase of Waterhouse's trial and was not part of the evidence which resulted in his conviction of the murder. The suggestion that this comment was somehow erroneous or that it may have prejudiced appellant is clearly unsupported.

J. Failure to Object to State's Comment Regarding the Lack of

Evidence that Waterhouse Was Beaten with a Tire Iron in His Own Car

Waterhouse is again attempting to circumvent the procedural bar rule by couching the instant claim in terms of ineffectiveness where the underlying basis of this claim was raised and rejected on appeal.[3] As such it is procedurally barred.

Moreover, even if this claim was not barred, this Court has already determined that "[t]he complained-of remark is not fairly susceptible of being interpreted as a comment on silence." Waterhouse, 596 So.2d 1017. Accordingly, counsel cannot be deemed ineffective for failing to object to the comment.

K. Failure to Object to Comments That Allegedly Diminished Jury's Sense of Responsibility

Waterhouse is again attempting to circumvent the procedural bar rule by couching the instant claim in terms of ineffectiveness where the underlying basis of this claim was raised and rejected on appeal. Waterhouse v. State, 596 So.2d 1008, 1017 (Fla. 1992). As such it is procedurally barred.

Moreover, even if this claim was not barred, counsel cannot be

---

[3] This Court held:

"Waterhouse claims that the prosecutor improperly commented on his failure to take the stand during the sentencing hearing. The complained-of remark is not fairly susceptible of being interpreted as a comment on silence. Even if it could be so interpreted, defense counsel failed to object to the comment and thus the issue is waived. Clark v. State, 363 So.2d 331, 333 (Fla.1978), receded from on other grounds, State v. DiGuilio, 491 So.2d 1129 (Fla.1986)."

Waterhouse v. State, 596 So.2d 1008, 1017 (Fla. 1992)

deemed ineffective for failing to object to the comment where appellant has failed to establish that the comment was erroneous. Teffeteller v. Dugger, 1999 WL 106810, 24 Fla. L. Weekly S110, (Fla. 1999)(rejecting ineffective assistance claim based on alleged Caldwell violation.)

ISSUE II

WHETHER WATERHOUSE WAS DENIED A FAIR AND IMPARTIAL TRIBUNAL WHERE HE ALLEGES THAT THE TRIAL JUDGE, THE HONORABLE JUDGE BEACH WAS PREJUDICED AGAINST HIM PRIOR TO, DURING AND AFTER WATERHOUSE'S RESENTENCING PROCEEDINGS.

Waterhouse next contends that he was denied a fair proceeding in front of Judge Beach on the basis of statements the judge made to the parole commission in 1981. This claim was also raised in Issue I as a facet of Waterhouse's ineffective assistance of counsel claim. As previously noted, the trial court rejected this claim as follows:

CLAIM V

> THE DEFENDANT WAS DENIED A FAIR SENTENCING TRIAL BECAUSE THE TRIAL JUDGE WAS PREJUDICED AGAINST THE DEFENDANT.
>
> At no time does the record reflect that defense counsel, including present counsel, motioned the trial judge to recuse himself for bias and prejudice before this present motion was filed although the information which is the basis of this complaint was a matter of record for sixteen years and assumedly known by all defense counsel. Further, there are no allegations in the complaint to suggest the trial court conducted any of the motion hearing or trials in a biased or prejudicial manner toward the defendant. In fact, the Florida Supreme Court made this observation about trial judge in *Waterhouse v. State*, 596 So.2d 1008, 1014.
>
> > Clearly, the trial court, the prosecutor, and his own attorney bent over backwards in trying to give Waterhouse the benefit of every legal right to which he was entitled.
>
> Therefore, it is the finding of this court

> that defendant’s Claim V is without merit and should be denied as a matter of law.
>
> (PCR7: 1166)

As an issue that could have been and should have been raised on direct appeal, it is procedurally barred. Claim that trial court erred in denying defendant's motion to recuse judge in capital murder prosecution was procedurally barred in postconviction proceedings where it was not raised at trial or on appeal. See, Blanco v. State, 702 So.2d 1250 (Fla. 1997) and Stano v. State, 520 So.2d 278 (Fla. 1988)(holding that recusal issue should have been raised on appeal and is procedurally barred in 3.850 proceedings.)

ISSUE III

WHETHER WATERHOUSE WAS PREJUDICED BY THE FAILURE TO OBTAIN A MENTAL HEALTH PROFESSIONAL TO CONDUCT AN EVALUATION.

This claim was rejected by the court below as follows:

> CLAIM XVII
>
> THE FAILURE OF DEFENSE COUNSEL TO HAVE DEFENDANT EXAMINED BY A MENTAL HEALTH EXPERT WAS ERROR.
>
> The record demonstrates that the Defendant's attorney attempted to have the Defendant assessed by a retained expert for penalty phase purposes which was refused by the Defendant.
>
> Therefore, it is the finding of this Court that Defendant's Claim XVII is without merit and should be denied as a matter of law.

(PCR7:1170)

Incredibly Waterhouse argues that he was denied a mental health evaluation when the record shows that he refused counsel's attempt to have him evaluated. Although the portions of the record quoted in this Court's prior opinion make it clear that this was Waterhouse's desire, any question is eliminated by his address to the jury:

> Mr. Hoffman could have presented at least a half a dozens (sic) factors in mitigation, but I wouldn't let him do that because I don't feel that he should be up here begging you.
> I shouldn't be up here begging you for my life.
> It goes against my moral principals and furthermore, spares my family the embarrassment, the trauma. (SR812)

The record shows that when Hoffman attempted to have

Waterhouse assessed by a retained expert for penalty phase purposes, Waterhouse refused to cooperate and frustrated his efforts. Clearly, there was no inadequacy on Mr. Hoffman's part. The defendant's own contumacious behavior, his attempts to manipulate the judicial system and his exercise of his right not to present mitigating evidence were the sole reasons that psychological mitigation was not developed and presented. This is simply another example of Waterhouse's continued effort to capitalize on his own efforts to delay justice in this case. The trial court properly denied the claim.

ISSUE IV

WHETHER THE TRIAL COURT GAVE IMPROPER JURY INSTRUCTIONS.

As the lower court found, this issue has already been presented to this Court on direct appeal and rejected. *Waterhouse v. State*, 596 So.2d 1008. (PCR7:1166) Accordingly, it is procedurally barred.

Moreover, it is without merit. Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988); Johnson v. State, 660 So.2d 637 (Fla. 1995); Combs v. State, 525 So.2d 853 (Fla.1988); Grossman v. State, 525 So.2d 833 (Fla.1988), cert. denied, 489 U.S. 1071 (1989).

ISSUE V

WHETHER WATERHOUSE'S TRIAL WAS REPLETE WITH ERROR WHICH CANNOT BE HELD HARMLESS WHEN VIEWED AS A WHOLE.

As no facts or specific claims of error were or are offered in support of Waterhouse's claim that a combination of alleged errors rendered his trial fundamentally unfair, summary denial of this point was proper. Engle v. Dugger, 576 So.2d 696 at 700, 702 (Fla. 1991); Gorham v. State, 521 So.2d 1067 at 1070 (Fla. 1988).

Moreover, to the extent that Waterhouse is contesting errors that occurred during his guilt phase, those claims are barred.

Moreover, the claim as presented is not an independent claim, but is contingent upon the appellant demonstrating error in at least two of the other claims presented. For the reasons previously discussed, he has not done so in the instant brief. This Court has also rejected this claim in similar cases. Melendez v. State, 23 Fla. L. Weekly S350 (Fla. 1998); Johnson v. Singletary, 695 So.2d 263 (Fla. 1996)(where claims were either meritless or procedurally barred there was no cumulative effect to consider.)

Accordingly, although this may be a legitimate claim on the facts of a particular case, such facts are not present herein. Thus, because none of the allegations demonstrate any error, individually or collectively, no relief is warranted and this claim should be rejected.

ISSUE VI

WHETHER FLORIDA'S SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

As the trial court found, this is a matter that should have been raised on direct appeal which was not done in this case. Having failed to do so Waterhouse is procedurally barred from consideration of this claim. (PCR7: 1169)

This Court has repeatedly rejected challenges to be procedurally barred because they have not been properly preserved for appeal and, even if preserved, they have been rejected on the merits. Hunter v. State, 660 So.2d 244, 253 (Fla. 1995); Fotopoulos v. State, 608 So.2d 784, 794 n. 7 (Fla. 1992). This claim was properly denied.

Finally, although this argument is also procedurally barred, it should be noted that Waterhouse's claim with regard to death by electrocution has been rendered moot by the legislature's approval of the use of lethal injection.

ISSUE VII

WHETHER WATERHOUSE'S RIGHTS WERE DENIED BY THE JUDGE AND JURY'S CONSIDERATION OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES.

This is a matter that should have been raised on direct appeal which was not done in this case. Having failed to do so Waterhouse is procedurally barred from consideration of this claim. (PCR7:1167)

Even if this claim was not barred it is without merit. Consideration of the passage referred to in the instant brief merely reflects that the state was arguing the weight of the prior violent felony aggravator and rebutting any possible suggestion of Waterhouse's ability to be rehabilitated as mitigation. No error has been shown.

ISSUE VIII

WHETHER THE STATE IMPROPERLY ASSERTED THAT SYMPATHY TOWARD APPELLANT WAS AN IMPROPER CONSIDERATION.

This is a matter that should have been raised on direct appeal which was not done in this case. Having failed to do so Waterhouse is procedurally barred from consideration of this claim. (PCR7:1167) Even if this claim was not barred it is without merit. White v. State, 729 So.2d 909, 916 (Fla. 1999); Medina v. State, 573 So.2d 293, 295 (Fla. 1990); Blanco v. Wainwright, 507 So.2d 1377, 1380 (Fla. 1987).

ISSUE IX

WHETHER THE SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING.

This is a matter that should have been raised on direct appeal which was not done in this case. Having failed to do so Waterhouse is procedurally barred from consideration of this claim. Even if this claim was not barred it is without merit. Johnson v. Singletary, 695 So.2d 263, 267 (Fla. 1996).

ISSUE X

WHETHER THE JURY WAS MISLED AND INCORRECTLY INFORMED ABOUT ITS FUNCTION AT CAPITAL SENTENCING.

This claim is also procedurally barred as a claim that could have been and should have been raised on direct appeal. Rivera v. State, 717 So.2d 477, 488 (Fla. 1998).

ISSUE XI

WHETHER WATERHOUSE'S CLAIM CHALLENGING THE JURY INSTRUCTIONS AND FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES AS FACIALLY VAGUE AND OVERBROAD IS PROCEDURALLY BARRED.

In order to press a claim that limiting instructions were not given, the issue must be preserved in the trial court and raised on appeal or they are waived. Doyle v. Singletary, 655 So.2d 1120 (Fla. 1995). Hodges v. State, 619 So.2d 272 (Fla. 1993). Having failed to do so, these claims are procedurally barred. Even if the claims were preserved and properly raised in a collateral motion, any error would be harmless beyond a reasonable doubt.

Upon review of the direct appeal, this Court specifically found that the erroneous consideration of the "cold, calculated and premeditated" and "avoiding arrest/elimination of a witness" aggravators, were harmless beyond a reasonable doubt in light of the four strong remaining aggravators and the absence of mitigation. Similarly, any ambiguity in the jury instruction on "heinous, atrocious or cruel" aggravator would also be harmless.

In Johnson v. State, 608 So.2d 4 (Fla. 1992), this Court considered a similar claim and held:

> During our consideration of this case, the United States Supreme Court decided Espinosa v. Florida, --- U.S. ----, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), and held our former instruction on the heinous, atrocious, or cruel aggravator insufficient. Although the trial court gave Johnson's jury the instruction struck down in Espinosa, we hold the error to have been harmless. Both the state and the

> defense requested an expanded instruction on this aggravator, but the court decided to give the standard instruction. In closing argument the state listed the aggravators, but did not dwell on this one or mention it again. The defense explained the aggravator, telling the jury, among other things, that it was meant "to separate those crimes of torture, of excessive wickedness, vileness of the person wanting to inflict not just death, but inflict pain" and that the facts did not support finding it. In addition to this argument the court instructed the jury that its recommended sentence "must be based on the facts as you find them from the evidence." During its consideration of the sentence, the court specifically found the evidence insufficient to support this aggravator. As stated by the Supreme Court, a jury is "likely to disregard an option simply unsupported by evidence." Sochor v. Florida, --- U.S. ----, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992). We see no way that the instruction abrogated in Espinosa could have affected the jury's consideration as to what sentence it would recommend. Therefore, reading that instruction to the jury was, beyond doubt, harmless error.
>
> Johnson v. State, 608 So.2d at 13

Accordingly, just as this Court concluded in Johnson, the instant murder which involved strangulation, a bursting laceration of the rectum and a vicious beating inflicting more than 30 lacerations and 36 bruises upon a victim that was conscious and resisting, would have been found to have been heinous, atrocious or cruel by the jury under any instruction. No relief is warranted.

ISSUE XII

WHETHER WATERHOUSE'S CLAIM THAT HIS SENTENCE RESTS ON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE.

This claim is procedurally barred since not raised in the trial court or pursued on appeal. Even if this claim was not procedurally barred, this Court and the federal courts have repeatedly rejected this contention. Johnson v. State, 660 So.2d 637 (Fla. 1995) *citing*, Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) and Stewart v. State, 588 So.2d 972 (Fla. 1991).

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's summary denial of the Rule 3.850 motion should be affirmed.

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 Jack W. Crooks, Assistant CCRC, Capital Collateral Regional Counsel, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of April, 2000.

COUNSEL FOR APPELLEE