IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,

Petitioner,

v. **Case No.SC01-2845**

MICHAEL W. MOORE,

Respondent.

_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, MICHAEL W. MOORE, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

FACTS AND PROCEDURAL HISTORY

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. 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 and sentence on direct appeal. Waterhouse v. State, 429 So. 2d 301 (Fla.), cert. denied, 464 U.S. 977 (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.
>
> Id. at 302-303.

This Court denied relief on the following claims raised by Waterhouse on his direct appeal:

> **ARGUMENT A: THE MOTION TO SUPPRESS**
>
> POINT ONE
> THE STATEMENTS OF THE DEFENDANT AND THE TANGIBLE EVIDENCE TAKEN FROM HIS CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THEY WERE OBTAINED AS A RESULT OF AN ILLEGAL ARREST OR DETENTION.
>
> POINT TWO
> THE TANGIBLE OBJECTS TAKEN FROM THE DEFENDANT'S CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THE POLICE OFFICERS LACKED PROBABLE CAUSE TO SEIZE THE VEHICLE PRIOR TO THE TIME THEY OBTAINED A WARRANT TO SEARCH ITS CONTENTS.
>
> POINT THREE
> THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO TERMINATE THEIR QUESTIONING AFTER THE DEFENDANT EXPRESSED HIS INTENTION TO REMAIN SILENT.
>
> POINT FOUR
> THE DEFENDANT'S FINAL STATEMENT SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO ADVISE THE DEFENDANT'S COURT APPOINTED ATTORNEY THAT THEY WERE CONDUCTING AN INTERVIEW.
>
> POINT FIVE
> THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THEY WERE NOT SHOWN TO HAVE BEEN MADE VOLUNTARILY.

ARGUMENT B: THE TRIAL

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

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

ARGUMENT C: THE PENALTY PHASE

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

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

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

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

In 1985, Waterhouse filed a Motion to Vacate in the trial court attacking his conviction for first degree murder and death sentence which was denied after an evidentiary hearing. An appeal from the denial and a Petition for Habeas Corpus were filed in this

Court, raising the following claims:

(3.850 Appeal)

I. BY WITHHOLDING EXCULPATORY EVIDENCE UNTIL THE LAST MINUTE AND BY FAILING TO DISCLOSE OTHER EXCULPATORY EVIDENCE ALTOGETHER, THE PROSECUTION VIOLATED MR. WATERHOUSE'S RIGHTS UNDER THE UNITED STATES CONSTITUTION AND FLORIDA LAW.

II. ROBERT WATERHOUSE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

III. THE RELIANCE UPON AN UNCONSTITUTIONAL PRIOR CONVICTION FOR TWO OF THE AGGRAVATING CIRCUMSTANCES AGAINST MR. WATERHOUSE DEPRIVED HIM OF HIS RIGHTS SECURED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(Habeas)

I. ROBERT WATERHOUSE WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN HIS PREVIOUS APPEAL TO THIS COURT.

A. APPELLATE COUNSEL'S FAILURE TO CHALLENGE HIGHLY PREJUDICIAL EVIDENCE OF UNRELATED BAD ACTS DENIED MR. WATERHOUSE THE EFFECTIVE ASSISTANCE OF COUNSEL.

1. A Central Theme of the State's Case Was to Establish Waterhouse's Propensity to Commit the Crime Through Evidence of Extraneous Acts.

2. The Evidence and Arguments Regarding the Extraneous Acts Violated Waterhouse's Constitutional and Statutory Rights.

B. APPELLATE COUNSEL FAILED TO RAISE ON APPEAL THE VIOLATION OF WATERHOUSE'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AT THE SENTENCING PHASE OF THE TRIAL.

C. MR. WATERHOUSE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHEN HIS APPELLATE COUNSEL FAILED TO RAISE THE ISSUE OF JURY MISCONDUCT.

D. APPELLATE COUNSEL'S FAILURE TO CHALLENGE THE EXCUSAL FOR CAUSE OF TWO JURORS DENIED MR. WATERHOUSE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

E. MR. WATERHOUSE WAS DENIED EFFECTIVE ASSISTANCE WHEN HIS APPELLATE COUNSEL FAILED ON DIRECT APPEAL TO RAISE THE TRIAL COURT'S DENIAL OF A CONTINUANCE PRIOR TO TRIAL.

II. THIS COURT FAILED TO CORRECT FUNDAMENTAL ERROR IN ITS PREVIOUS REVIEW OF MR. WATERHOUSE'S SENTENCE OF DEATH.

An additional issue was added after a Motion for Leave to Amend Petition for Writ of Habeas Corpus was filed on or about June 5, 1987.

III. THE INTRODUCTION OF AN UNCONSTITUTIONAL PRIOR CONVICTION AT THE SENTENCING PHASE OF MR. WATERHOUSE'S TRIAL FATALLY TAINTED THE RESULTANT SENTENCE OF DEATH.

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, 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 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 resentencing jury again recommended a sentence of death which the judge again imposed.

An appeal was taken to this Court raising the following claims:

> 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.

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.

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

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.

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.

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

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

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.

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

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

XI. THERE MUST BE A MEANINGFUL LIMITATION ON THE NUMBER OF SHOCKING QUALITY OF GRUESOME AND

INFLAMMATORY PHOTOGRAPHS SHOWN TO THE JURY AT THE PENALTY PHASE OF A CAPITAL CASE.

The sentence was affirmed by this Court. Waterhouse v. State, 596 So. 2d 1008 (Fla), cert. denied, 506 U.S. 957 (1992).

In November 1994, Waterhouse filed another 3.850 motion for postconviction relief, his first 3.850 motion after the second penalty phase proceeding. On January 22, 1998 the trial court summarily denied all of the claims presented in Waterhouse's 3.850 motion. Waterhouse's appeal to this Court asserting the following claims was denied. Waterhouse v. State, 792 So. 2d 1176 (Fla. 2001):

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

A. FAILURE TO INVESTIGATE AND PREPARE THE CASE.
B. FAILURE TO MAKE A CLOSING ARGUMENT.
C. FAILURE TO REBUT THE "IN THE COURSE OF SEXUAL BATTERY" AGGRAVATING FACTOR.
D. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AT THE RE-SENTENCING TRIAL TO THE USE OF ILLEGALLY OBTAINED INCRIMINATING STATEMENTS BY MR. WATERHOUSE.
E. FAILURE TO OBJECT TO IMPROPER AND PREJUDICIAL COMMENTS BY THE PROSECUTOR.
F. FAILURE TO IMPEACH ESSENTIAL STATE WITNESS KENNETH YOUNG WITH AVAILABLE INFORMATION.
G. FAILURE OF TRIAL COUNSEL TO MOVE TO RECUSE THE TRIAL JUDGE ON THE BASIS THAT HE WAS PREJUDICED AGAINST MR. WATERHOUSE.

H. TRIAL COUNSEL FAILED TO ARGUE BEFORE THE SENTENCING JUDGE THE MITIGATION THAT WAS ESTABLISHED DURING MR. WATERHOUSE'S INITIAL TRIAL AND POSTCONVICTION PROCEEDINGS.

I. TRIAL COUNSEL FAILED TO OBJECT TO THE STATE'S FALSE COMMENT THAT THE PREVIOUS JURY DID NOT KNOW ABOUT THE NEW YORK MURDER.

J. TRIAL COUNSEL FAILED TO OBJECT TO THE STATE'S COMMENT INFERRING THAT MR. WATERHOUSE HAD FAILED TO TAKE THE STAND IN HIS OWN DEFENSE.

K. TRIAL COUNSEL FAILED TO OBJECT TO THE STATE'S COMMENTS THAT DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY.

II. MR. WATERHOUSE WAS DENIED A FAIR AND IMPARTIAL TRIBUNAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. MR. WATERHOUSE'S TRIAL JUDGE, THE HONORABLE ROBERT E. BEACH, WAS PREJUDICED AGAINST MR. WATERHOUSE PRIOR TO, DURING, AND AFTER MR. WATERHOUSE'S RE-SENTENCING TRIAL AND POST-CONVICTION PROCEEDINGS. JUDGE BEACH WAS PREDISPOSED TO SENTENCE MR. WATERHOUSE TO DEATH BEFORE ANY EVIDENCE WAS RECEIVED IN MR. WATERHOUSE'S RE-SENTENCING TRIAL. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING JUDGE BEACH.

III. MR. WATERHOUSE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE DEFENSE COUNSEL FAILED TO OBTAIN A MENTAL HEALTH EXPERT WHO COULD CONDUCT A PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATION OF MR. WATERHOUSE DURING THE TRIAL AND RE-SENTENCING COURT PROCEEDINGS. MR. WATERHOUSE'S RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION WERE DENIED. (PRO SE)

IV. MR. WATERHOUSE'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO

MR. WATERHOUSE TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED IMPROPER STANDARD IN SENTENCING MR. WATERHOUSE TO DEATH. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

V. MR. WATERHOUSE'S TRIAL COURT PROCEEDINGS WERE REPLETE WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

VI. FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND FOR VIOLATING THE CONSTITUTIONAL GUARANTEE PROHIBITING CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

VII. MR. WATERHOUSE'S RIGHT'S UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY THE JURY'S AND THE JUDGE'S CONSIDERATION OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES.

VIII. AT MR. WATERHOUSE'S RE-SENTENCING TRIAL THE PROSECUTOR ERRONEOUSLY ASSERTED THAT SYMPATHY TOWARDS MR. WATERHOUSE WAS AN IMPROPER CONSIDERATION IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

IX. MR. WATERHOUSE'S SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

X. MR. WATERHOUSE'S JURY WAS MISLED AND INCORRECTLY INFORMED ABOUT ITS FUNCTION AT CAPITAL SENTENCING, IN VIOLATION OF EIGHTH AND FOURTEENTH AMENDMENTS.

> XI. FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. WATERHOUSE'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE NARROWING CONSTRUCTIONS. AS A RESULT, MR. WATERHOUSE'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED NOW IN LIGHT OF NEW FLORIDA LAW, ESPINOSA V. FLORIDA AND RICHMOND V. LEWIS.
>
> XII. MR. WATERHOUSE'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD, V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Waterhouse has now returned to this Court in a second Petition for Writ of Habeas Corpus asserting ineffective assistance of counsel in his original direct appeal.

STATEMENT REGARDING PROCEDURAL BARS

This is Waterhouse's ***second*** petition for writ of habeas corpus filed in this Court. Any issue which was or could have been raised in his prior petition is clearly procedurally barred. All of the claims raised in the instant petition allege that Waterhouse was provided ineffective assistance of appellate counsel on his initial direct appeal. Waterhouse's prior habeas petition filed in 1987, asserted claims of ineffective assistance of appellate counsel for failing to raise the same guilt phase issues raised herein. Relief was denied on those claims. Waterhouse v. State, 522 So. 2d 341

(Fla. 1988). As the claims raised herein could have been, should have been and, *in fact were,* raised in the original habeas proceeding Waterhouse is barred from reasserting his allegations of ineffective assistance of appellate counsel. See Lambrix v. Singletary, 641 So. 2d 847, 848 (Fla. 1994) ("Because ineffective assistance of counsel claims have been considered and rejected in a previous petition, Lambrix is procedurally barred from raising such claims again in a subsequent habeas petition"); Aldridge v. State, 503 So. 2d 1257 (Fla. 1987) (defendant procedurally barred from raising an ineffective assistance of counsel claim when such a claim has been raised previously even though the current claim is based on a different issue). Relief should be denied.

This Court has consistently and repeatedly stated that a state habeas proceeding cannot be used as a second appeal. Issues that were or could have been raised on direct appeal or in prior collateral proceedings may not be litigated anew, even if couched in ineffective assistance of counsel language. See Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999) (holding that habeas petition claims were procedurally barred because the claims were raised on direct appeal and rejected by this Court or could have been raised on direct appeal); Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996) ("All of Johnson's twenty-three claims are procedurally barred--because they were either already examined on the merits by this Court on direct appeal or in Johnson's 3.850

proceeding, or because they could have been but were not raised in any earlier proceeding--or meritless."); Medina v. State, 573 So. 2d 293 (Fla. 1990) (stating that it is inappropriate to use a different argument to relitigate the same issue).

Thus, this Court should expressly reject the claims raised in the instant petition as procedurally barred.

ARGUMENT IN OPPOSITION TO CLAIMS FOR RELIEF

Claim I

ROBERT WATERHOUSE WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN HIS PREVIOUS APPEAL TO THIS COURT.

Petitioner Robert Waterhouse submits that appellate counsel representing Waterhouse in the initial direct appeal in 1983 was ineffective for failing to raise on the previous appeal to this Court the following issues: 1) the introduction of evidence of the sexual preferences of Waterhouse and the decedent; 2) the consideration of extraneous materials by the jury; 3) the excusal of two jurors; and 4) the denial of a two week continuance.

Each of these claims was raised in the 1987 habeas in support of Waterhouse's claim of ineffective assistance of appellate counsel. Relief was denied on the claims. Waterhouse v. State, 522 So. 2d 341 (Fla. 1988). Accordingly, although, the State will address each of the claims presented to demonstrate that even if properly before this Court no relief is warranted, the claim of

ineffective assistance of appellate counsel should be denied as procedurally barred.

A) The introduction of evidence of the sexual preferences of Waterhouse and the decedent

The first claim of ineffective counsel is that counsel should have raised on appeal other evidence of bad acts in addition to the ones raised. More particularly, petitioner argues appellate counsel should have challenged on appeal certain statements concerning the sexual preferences of Waterhouse and the victim. Again, this claim is procedurally barred and should be rejected as such where this Court has already declined relief on this issue.

Furthermore, where, as here, none of the comments during the prosecutor's opening or closing statements were objected to at trial, appellate counsel cannot be deemed ineffective for failing to challenge the comments. This Court has repeatedly held that a defendant is not entitled to relief on a claim of ineffective assistance of counsel for failing to raise issues not preserved for appeal unless a petitioner can establish fundamental error, i.e., error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Robinson v. Moore, 773 So. 2d 1, 4 (Fla. 2000); Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1997); Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991); Harick v. Wainwright, 484 So. 2d 1237 (Fla. 1986). There was no question based on the overwhelming evidence introduced that the

jury would convict Waterhouse of first degree murder. Thus, any error based on the introduction of this evidence and the comments made with regard to the evidence was clearly not fundamental and, at worst, harmless. See Gibson v. State, 661 So. 2d 288 (Fla. 1995) (error in allowing presentation of defendant's conversation with his wife and girlfriend about anal intercourse was harmless where both wife and girlfriend testified that he did not press request with them, matter was not emphasized or made a feature of the trial, and evidence against defendant was overwhelming).

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

> Q. What did he indicate that his problem was, during the interview?
>
> A. He stated that he had a problem in that he really liked sex, and he had a problem with violence. He said when he drank a lot he found himself doing things that he knew were bad, but that he couldn't have any control over.
>
> Q. Did he talk about his sex drive?
>
> A. Yes. He stated that he felt he had a large sex drive. He stated that he didn't like anything abnormal, that he wasn't into bestiality or anything strange, but just that he liked sex any way that he could get it, and then stated oral, anal, or vaginal. (Emphasis added)

* * * *

> A. Yes, he stated that sometimes he would be out with a girl and he would be getting worked up and excited, and that he would then find that she was cursed, and he stated that this would make him frustrated.
>
> I then asked him if by cursed he was referring to her being in her monthly period, and he stated that was correct.
>
> Q. Did he indicate this problem about getting worked up and frustrated and then realizing that a girl was cursed, did he relate that to any particular night?
>
> A. When we then asked him about his problem, he related this to the date of Wednesday night.
>
> (V10/R. 1821-1822)

Accordingly, Waterhouse himself, through his statements, put his sexual motive at issue. Moreover, it was consistent with the evidence which indicated sex was involved in this murder; there were wounds to the victim's anus and the bloody tampon had been stuffed in her mouth.

When the sexual testimony was objected to at trial, the prosecutor argued the evidence was relevant to show motive, intent and non-consent of the victim. Section 90.404, Florida Statutes, the codification of Williams v. State, 110 So. 2d 654 (Fla. 1985), provides for the admission of other crimes, wrongs, or acts when relevant to prove a material fact in issue. Motive, intent and non-consent of the victim were all issues in this case. One of the first degree murder theories was that the murder was committed during the course of a sexual battery. Not only was this argued

and the jury so instructed, but this was also found as an aggravating circumstance in both penalty phases. Sexual battery, when the victim is over the age of eleven (11), generally involves the question of the consent of the victim.

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

Notwithstanding the foregoing, the claim should be denied as procedurally barred as it was previously raised and rejected in the prior habeas petition to this Court.

B) The consideration of extraneous materials by the jury

It is also being argued that counsel was ineffective for not asserting as error the fact that there was a pamphlet on juror conduct in the jury room. Again this claim is procedurally barred and should be rejected as such where this Court has already declined relief on this issue.

Moreover, it must be remembered that an appellate counsel is not required to raise on appeal every non-frivolous issue. Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990); Jones v. Barnes, 463 U.S. 745 (1983). "One of appellate counsel's responsibilities is to 'winnow out' weaker arguments on appeal and

to focus upon those most likely to prevail." Smith v. Murray, 477 U.S. 527 (1986). While defense counsel objected once knowledge of the booklet was made known, counsel could have decided to brief issues more likely to succeed, i.e., the search and seizure and Miranda issues.

Respondent further submits that this Court's prior decision in the instant case to deny relief on this claim is correct. Even if this claim had been raised on direct appeal, this Court has adopted the harmless error test and held that "'defendants are entitled to a new trial unless it can be said that there is no reasonable possibility that the [unauthorized] books affected the verdict.'" Livingston v. State, 458 So. 2d 235, 237 (Fla.1984)(quoting Paz v. United States, 462 F.2d 740, 745 (5th Cir. 1972)). Cf. Keen v. State, 639 So. 2d 597, 599 (Fla. 1994) (Presence of unauthorized magazine article in jury room during deliberations not harmless error where article concerned tactics of defense attorneys *and* trial court compounded error by questioning jurors who read article about whether it affected their decision-making processes.) As the following demonstrates, any error was harmless beyond a reasonable doubt and, therefore counsel's decision to not raise the claim does not constitute ineffective assistance of counsel.

The instant claim which Waterhouse urges appellate counsel should have presented to this Court on direct appeal is based on the possibility that jurors read a booklet while on jury duty which

had been obtained by one of the jurors by mail. Waterhouse cites a number of passages from the booklet which he asserts gave erroneous information to the jury. As will be shown, the trial court clearly instructed the jurors in the correct application of the facts and law. The judge in the instant case instructed the jury that they must follow the law:

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

(V12/R. 2220); cf. Florida Standard Jury Instruction 2.05.

This instruction clearly informed the jury that they were only to rely on the instructions given and explains the challenged passage from the booklet, which reads:

> The court will instruct you that no matter how you feel about the law you must obey it as written. Officially the judge interprets the law to you, and the jury passes only on the facts. This is what judges have been doing for centuries, but for as many centuries the jury has stepped beyond its official boundaries. Jurors have understood the evidence, but bring in verdicts contrary to the evidence; they have been told what the law

is and they have defied that law.

Jury Duty, by Godfrey Lehman, at 28-29.

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

Waterhouse also challenges the following passages from the booklet:

> The defense does not have to prove innocence. The defense only has to create a reasonable doubt of guilt in your mind.
>
> Id. at 19.
>
> * * * *
>
> The power of the jury to determine its verdict free and untrammeled is supreme . . . [n]o court can dictate a verdict.
>
> Id. at 11.
>
> * * * *
>
> All that [the indictment] does mean is that some persons in the government feel they have good reason to think that it is possible he has committed a crime, and perhaps they are right. But equally perhaps they might be wrong . . .
>
> Id. at 19.

The trial court in the instant case, clearly instructed the jury that the indictment was not evidence of guilt, that the burden

was on the State to prove guilt beyond a reasonable doubt and that the defendant was to be presumed innocent.

> Again, as I did at the beginning of the case, I want to remind you the mere fact that this charge has been brought against the defendant is not evidence of guilt; the burden is on the State to prove guilt beyond and to the exclusion of every reasonable doubt.
>
> (V12/R. 2194)

> The defendant in every criminal case is presumed to be innocent until his guilt is established by the evidence.
>
> Before the presumption of innocence leaves the defendant, every material allegation of the indictment must be proved by the evidence to the exclusion of and beyond every reasonable doubt.
>
> The presumption accompanies and abides with the defendant as to each and every material allegation of the indictment through each stage of the trial until it has been overcome by the evidence, and if any of the material allegations of the indictment is not proved beyond every reasonable doubt, you must give the defendant the benefit of the doubt and find him not guilty; but if you find from the evidence that all the material allegations of the charge have been proved beyond every reasonable doubt, then you must find the defendant guilty.
>
> To overcome the presumption of innocence of the defendant, the law places the burden upon the State, to prove the defendant is guilty to the exclusion of and beyond a reasonable doubt. The law does not require the defendant to prove his innocence. Accordingly, you must assume that the defendant is innocent unless you are convinced from all the evidence in the case that he is guilty beyond a reasonable doubt.
>
> (V12/R. 2214-2215)

Defense counsel further asserts as error that, "The booklet misinstructed the jury by encouraging them to suspect Mr. Waterhouse's lawyers of misleading them, and ignore any defense offered:

> 'The lawyers are appealing for their respective causes. They are not sworn to tell the truth, which means they are free to say anything they wish, to introduce any misleading argument they choose.'"
>
> Petition at 29.

To the contrary, however, there is no statement in the booklet that infers that only defense counsel can be misleading. The booklet's use of "lawyers" in the plural clearly indicates that it applies to the attorneys on both sides. The impact of this statement must be viewed in the light of a reasonable lay person and, upon so viewing, it is apparent that the impact of this excerpt is to impress upon the jury that what the lawyers say is not evidence. In fact, the jurors were so instructed in the instant case by the trial judge who stated: "What the attorneys tell you is not evidence. The evidence comes from the lips of the witnesses who will be under oath and not from the attorneys". (V5/R. 879); cf. Florida Standard Jury Instruction 1.01.

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

The attorneys for both sides were made aware of the booklet. (V11/R. 2046-2050) The defense attorney admitted that the booklet

itself said that the jurors are finders of fact and they are not to use outside sources. (V11/R. 2049) In his instructions the trial judge stated:

> "You alone, as jurors sworn to try this case, must pass on the issues of fact, and your verdict must be based solely on the evidence or lack of evidence and the law as it is given to you by me.
>
> You are not to consider any matters that have not been presented into this courtroom by way of evidence through the lips of the witnesses or the tangible evidence before you. You are not to consider anything that you have read outside the courtroom; that has no bearing on this case. You are only to consider the evidence as it comes from the lips of the witnesses who have testified and the physical evidence within the courtroom. Is that understood by everybody? Good."
>
> (V12/R. 2193-2194)

The state submits that there was no prejudice to Waterhouse from the booklet even if all jurors were aware of it. The entire tone of the booklet would, in actuality, aid rather than hamper the defense. As counsel cannot therefore, be considered ineffective for declining to assert this claim where no harmful error could be established, this Court properly denied relief on this claim and should now find it procedurally barred.

C) The excusal of two jurors

Again, this claim is procedurally barred and should be rejected as such where this Court has already declined relief on this issue. Respondent further submits the issue of whether or not

prospective jurors Ashcraft and Clark were properly excused was not properly preserved for appellate review. Therefore, counsel cannot be ineffective for failing to raise the issue. After the final questioning of these two prospective jurors, the court indicated they should be excused. The defense counsel did not object, rather, he questioned his right to object. (V4/R. 725) There ensued a discussion, albeit brief, concerning the confusion of two people. Defense counsel never made the objection.

Furthermore, both the two prospective jurors made it clear they could not follow the law. See Lockhart v. McCrae, 106 S.Ct. 1758 (1986). Venirewoman Ashcraft was asked specifically if she could, under any circumstances, vote to impose a sentence of death. Ashcraft answered, "No. I'm sorry." (V4/R. 724) Likewise, venireman Clark made it unmistakably clear that he could not find guilt on circumstantial evidence. (V4/R. 725) Under either circumstances excusal was proper, no fundamental error has been shown and relief should be denied.

D) The denial of a two week continuance.

As a final claim of ineffective appellate counsel, it is alleged that counsel should have raised the trial court's failure to grant Waterhouse's motion for a continuance. Again this basis for Waterhouse's claim of ineffective assistance of counsel was asserted and relief was denied in 1988.

Moreover, this Court has continually held the granting or

denial of a motion for a continuance lies within the sound discretion of the trial judge. Kearse v. State, 770 So. 2d 1119 (Fla. 2000). No abuse has been demonstrated here.

The record on the hearing on the motion for a continuance indicates there was no necessity for the continuance since all of the items the defense indicated they did not have was provided for or arranged to be provided. (V4/R. 599-604) Mr. Vasquez, one of the witnesses the defense had been recently informed of, had indicated to the prosecutor he would make himself available to the defense. (V4/R. 604) This individual did, in fact, testify at trial. (V10/R. 1928-1994) The prosecutor also indicated the other witness, Mr. Spitzig was local and the state's investigator was in the process of bringing that witness to court. (V4/R. 601-602) Defense counsel, at the evidentiary hearing, stated he talked with Spitzig, but he could not get the dates straight concerning when he was with Waterhouse.[1]

There was no indication that the defense team had deposed all of the state's expert witnesses. Any tests or reports which had not been received would be immediately turned over. (V4/R. 603-604) Under these circumstances, it was not an abuse of discretion to deny a continuance.

Since this issue would not have generated relief even if

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

argued on appeal, Waterhouse cannot show deficiency or prejudice in counsel's failure to raise the claim. He is not entitled to relief on this issue. Notwithstanding the foregoing, as this issue could have been raised in Waterhouse's prior habeas petition, it should be denied as procedurally barred.

It cannot be said that the failure to raise these issues compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Therefore, appellate counsel was not ineffective for failing to raise these issues on appeal. See Johnson v. Singletary, 695 So. 2d 263, 266-67 (Fla. 1996); Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986).

WHEREFORE, Respondent respectfully requests that this Honorable Court DENY Waterhouse's Petition for Writ of Habeas Corpus.

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 Richard E. Kiley, Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of January, 2002.

_____
COUNSEL FOR APPELLEE

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____
COUNSEL FOR APPELLEE