IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,
Petitioner,

vs. CASE NO. SC01-2845

MICHAEL W. MOORE et. al,
Respondent.
_____/

AMENDED PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPS

COMES NOW the Petitioner, ROBERT BRIAN WATERHOUSE, by and through his undersigned attorney, and files his Reply to the Respondent's Response to Petition for Writ of Habeas Corpus filed in the above-styled cause, and states as follows:

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.

The State first argues that this claim (as well as all the other claims in the Petition for Writ of Habeas Corpus) is procedurally barred because this claim was

raised in Mr. Waterhouse's Petition for Writ of Habeas Corpus filed in 1987 and that relief was denied on those claims citing Waterhouse v. State, 522 So. 2d 341 (Fla. 1998). (State's Response at 12-15) Contrary to the State's assertion relief was not denied on those claims. Instead, this Court found that the claims concerning effective assistance of appellate counsel were moot based on the writ being granted on another claim. This Court's opinion stated as following:

> Turning to the petition for a writ of habeas corpus, Waterhouse raises two additional issues. The first, concerning effective assistance of appellate counsel, is rendered moot by our granting the writ based on the second issue.

Waterhouse at 344.

The State next argues that this claim should be denied because ". . . none of the comments during the prosecutor's opening or closing statements were objected to at trial. . . " (State's Response at 15). What the State overlooks in making this argument is that defense counsel at trial did object to the testimony that provided a basis for the prosecutor's improper opening statement and closing arguments. For example, see, R1154-1157 and R1320. For this reason, the Petitioner is not required to establish fundamental error in order to obtain relief for the ineffective assistance of appellate counsel for failing to raise this issue. Even assuming the Petitioner was required to establish fundamental error, the testimony offered against Mr. Waterhouse was so

prejudicial that the admission of this testimony denied him a fundamentally fair trial. See, Shaw v. Boney, 695 F. 2d at 864; Panzavecchia v. Wainwright, 658 F. 2d at 340; Barnard v. Henderson, 514 F. 2d 744, 746 (5th Cir. 1975).

The State next argues in the context of their "fundamental error" argument that the error is ". . . at worst, harmless." (State's Response at 15-16). The one case cited by the State in support of this position is clearly distinguishable from the case at bar. In Gibson v. State, 661 So. 2d 288 (Fla. 1995), this Court held that it was error in allowing the State to present the defendant's conversation with his wife and girlfriend about anal intercourse, but that the error was harmless where both the wife and girlfriend testified that he did not press the request with them, that the matter was not emphasized or made a feature of the trial, and that the evidence against the defendant was overwhelming. The facts in the instant case are distinguishable from the facts in Gibson with respect to the error being harmless. In Gibson, the testimony was that the defendant asked both his wife and girlfriend to have anal sex, that both the wife and girlfriend declined this invitation, and that the defendant in no way attempted to have anal intercourse with them. In the instant case, there was testimony that Mr. Waterhouse actually had anal sex with his sexual partners, as well as testimony by his girlfriend that he actually had anal sex with her more than once. Not only was there testimony about anal intercourse, but also testimony that Mr. Waterhouse liked to hit

his sexual partners during sex, and testimony from his girlfriend that once during sex he asked her if he could hit her and even though she said no he hit her anyway. In Gibson, the matter was not emphasized or made a feature of the trial. In the instant case, the matter was emphasized and made a feature of the trial. Robert Van Vuren, Mr. Waterhouse's construction foreman, was questioned extensively about Mr. Waterhouse's sexual propensities. Sherry Rivers, Mr. Waterhouse's girlfriend, was also questioned extensively about Mr. Waterhouse's sexual propensities. The prosecutor in his opening statement made Mr. Waterhouse's sexual propensities part of his theory of the case and stated that Mr. Waterhouse's sexual propensities were a significant aspect of the case. (R895-896) The prosecutor in his closing argument made repeated, detailed argument regarding Mr. Waterhouse's sexual propensities. (R2066-2067, 2090, 2106, 2106-2107, 2184-2185). In Gibson, the evidence of guilt was overwhelming. This Court noted "Absent eyewitness identification and a confession, it is difficult to imagine a case in which the State could assemble a more compelling body of evidence." Gibson, at 292. In the instant case, the evidence of guilt was not overwhelming, and the issue of the identity of the perpetrator was a hotly contested issue. Also, it should be noted that in the Petitioner's first appeal the erroneous testimony regarding some bags of marijuana found in Mr. Waterhouse's car was found to be harmless error not because of overwhelming evidence of guilt, but

because the irrelevant evidence involved a dissimilar and much less serious crime. See, Waterhouse v. State, 429 So. 2d 301, 306 (Fla. 1983).

The State next argues that Mr. Waterhouse put these matters in issue because at the time of his arrest he made several statements to the police that included statements concerning his personal problems with alcohol, sex and violence. (State's Response at 16-17) The statements that Mr. Waterhouse made to the police were put into evidence by the prosecution during their case-in-chief. The State's argument that the prosecution's introduction of Mr. Waterhouse's statements to the police opens the door to the prosecution's introduction of evidence regarding sexual propensities is frivolous and illogical. The concept of opening the door to evidence of collateral bad acts requires that the defendant do something to open the door. See, Ehrhardt, Florida Evidence (2001 Edition), Section 404.19 at page 226, including the cases in footnote 11. In Bozeman v. State, 698 So. 2d 629, 630-31 (Fla. 4th DCA 1997) the court noted that in order to open the door ". . . the defense must first offer misleading testimony or make a specific factual assertion which the State has the right to correct so that the jury will not be misled. . . " Clearly, Mr. Waterhouse did not open the door by first offering misleading testimony or by making a specific factual assertion which the State has the right to correct so that the jury will not be misled.

Finally, the State argues that Mr. Waterhouse's sexual propensities were relevant

to show motive, intent and non-consent of the victim. (State's Response at 17). It should be noted that the State fails to cite even one case in support of this position. It should also be noted that in the Gibson case (cited by the State as part of their "harmless error" argument supra) this Court held that the admission of evidence of sexual propensity was error. Gibson at 292. In Gibson, evidence of the defendant's interest in anal intercourse with his wife and girlfriend was not relevant with respect to the violent abuse of the victim, including a slight tear in her anal area. Gibson at 291. In the instant case, evidence of the defendant's engaging in anal intercourse and rough sex with his sexual partners and girlfriend was not relevant with respect to the violent abuse of the victim, including lacerations in the anal area and acid phosphates in the victim's rectum. Also, see Hayes v. State, 660 So. 2d 257 (Fla. 1995) in which this Court held that a defendant's violent altercation with a prior girlfriend was not admissible to prove a subsequent violent attack on another woman.

Appellate counsel should have challenged the highly prejudicial evidence of unrelated bad acts. Appellate counsel's failure to challenge the highly prejudicial evidence of unrelated bad acts denied Mr. Waterhouse the effective assistance of counsel. Mr. Waterhouse was prejudiced as a result of the ineffective assistance of appellate counsel.

B. MR. WATERHOUSE WAS DENIED EFFECTIVE

ASSISTANCE OF COUNSEL ON APPEAL WHEN HIS
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APPELLATE COUNSEL FAILED TO RAISE THE ISSUE OF JURY MISCONDUCT.

The State first argues that this claim is procedurally barred because this claim was raised in Mr. Waterhouse's Petition for Writ of Habeas Corpus filed in 1987. (State's Response at 18). As noted in IA of this Reply, this Court did not deny relief on this claim but instead found that the claims concerning effective assistance of appellate counsel were moot based on the writ being granted on another claim.

The State next argues that appellate counsel could have decided not to brief this issue for strategic reasons. (State's Response at 18-19). Contrary to this assertion by the State, Mr. Waterhouse's appellate counsel, Phillip J. Padovano, signed a sworn affidavit that "I left no issue out of the appeal for any strategic reason." See Appendix 1 to Petition for Writ of Habeas Corpus.

The State next argues harmless error. (State's Response at 19-24). In making this argument the State first asserts that this claim ". . . 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." (State's Response at 19-20). Contrary to the State's assertion that there was a possibility that jurors read the booklet, the bailiff's statement regarding the booklet was as follows:

> Some juror found out that he was going to be a juror and he sent away for it. . . I guess it was No. 9 juror. . . he handed me this book

> and asked me why this county didn't give out pamphlets like that
>
>
>
> little book, how interesting it was and how it had helped them and he let all the jurors in the room read it, and they all enjoyed reading it.

(R. 2047). Thus, the only available evidence regarding the jurors having read the booklet is that all the jurors in the room read it, that they all enjoyed reading it, that it was interesting, and that it helped them. The State's harmless error argument fails on this point.

In making the harmless error argument, the State cites two cases: Livingston v. State, 458 So. 2d 235 (Fla. 1984) and Keen v. State, 639 So. 2d 597 (Fla. 1994). Both of these cases in actuality support Mr. Waterhouse's position. In Livingston, this Court held that in capital cases once the jury's deliberations have begun, the jury must be sequestered until it reaches a verdict or is discharged after not being able to reach a verdict. Livingston at 239. The reason for this rule is to protect the defendant's fundamental right to a trial by an impartial jury as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 16 of the Florida Constitution. Livingston at 238. In Livingston, this Court noted the following regarding deliberating jurors who are allowed to separate:

> Jurors in such a situation are subject to being improperly influenced by conversations, by reading material, and by entertainment even if they obey the court's admonitions. . . (emphasis supplied)

Livingston. at 238. Thus even a correctly instructed juror can be improperly influenced by reading material. In the instant case even though correctly instructed, the booklet tells the jurors that:

> The power of the jury to determine it's verdict free and untrammeled is supreme. . . [n]o court can dictate a verdict.

Jury Duty by Godfrey Lehman at 11. In the instant case, even though correctly instructed, the booklet tells the jurors that:

> 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 at 28-29. Thus, even though the jurors were correctly instructed in the instant case, this booklet advised them that for many centuries the jury in effect can go beyond their proper boundaries. Thus, even though the jurors were correctly instructed in the instant case, this booklet advises them that in effect they can bring in verdicts contrary to the evidence. Thus, even though the jurors were correctly instructed in the instant case, this booklet advises them that in effect they can defy that law.

In Keen, this court granted a new trial based on an unauthorized magazine

article in the jury room that concerned tactics of defense attorneys who demean a victim's

character and make personal attacks on prosecutors. Keen. at 599. This Court noted that even though the record did not reflect similar defense tactics, it was relevant because it dealt with criminal cases and the tactics of defense lawyers. Keen. at 599. This Court also noted that one of the jurors had underlined and bracketed some portions of the article, thereby indicating that some emphasis had been placed on the article. Keen at 599. Based on these facts, this Court could not say beyond a reasonable doubt that the article did not influence the jurors in some way. Keen. at 599. In the instant case, the booklet is relevant because it dealt with criminal cases. See Jury Duty at 1-30. The booklet also concerned the tactics of defense attorney's with respect to witnesses and states that:

> After the conclusion of the direct testimony the defense attorney questions the witness to try to break down his original story. . . .the defense will try to make insignificant contradictions appear large. During cross examination the attorney may be abusive or bullying. Such tactics might be intended to demean the witness or might uild undue sympathy for him.

Jury Duty. at 23. The booklet also concerned the tactics of defense attorneys with respect to argument and states that:

> It often makes good theater when a defense attorney leaves his entire case to an emotion-charged closing presentation, but it may not be good trial

> procedure. Nothing he says can be used as evidence. He is actually asking the jury to overstep its official function of determining the facts by appealing to emotionalism. And this, every judge will tell you is not what you're supposed to do. Nonetheless the highly dramatic and emotional appeal is permitted.

Jury Duty. at 24. The booklet further concerned the tactics of defense attorneys (as well as attorneys in general) with respect to argument and states that:

> The defense has the option of deferring his exposition until the middle of trial and sometimes does. These statements may be helpful to you in understanding the controversy, but it is important to remember they contain no facts or evidence. 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 might choose. They are in court to present the strongest possible "sell" in the hope you are persuaded to "buy" their respective arguments.

Jury Duty. at 21-22. Thus, in the instant case it is clear that the type of improper material in the jury room was the same type of improper material that resulted in a new trial in Keen. In the instant case, it is also clear that some emphasis had been placed on the article based on the bailiffs' statements that the jurors in the room had read it, that they enjoyed reading it, that it was interesting, and that it had helped them. (R2047). Similar to the situation in Keen, the error was compounded by a conversation with a juror about the improper material. In Keen, the error was compounded when the trial judge questioned the jurors about the material. In the instant case the error was compounded by the bailiff that spoke to the juror who was the source of the improper material. (R2047). Thus, as in Keen, this Court cannot say

beyond a reasonable doubt that the booklet in the instant case did not influence the jurors in some way.

Appellate counsel should have raised the issue of jury misconduct. Appellate counsel's failure to raise the issue of jury misconduct denied Mr. Waterhouse the effective assistance of counsel. Mr. Waterhouse was prejudiced as a result of the ineffective assistance of appellate counsel.

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

The State first argues that this claim is procedurally barred because this claim was raised in Mr. Waterhouse's Petition for Writ of Habeas Corpus filed in 1987. (State's Response at 24). As noted in IA of this Reply , this Court did not deny relief on this claim but instead found that the claims concerning effective assistance of appellate counsel were moot based on the writ being granted on another claim.

The State next argues that the claim was not properly preserved for appellate review. (State's Response at 24-25). Contrary to the State's assertion, defense counsel did properly preserve this issue for appellate review. At the point in time when the trial court considered the State's challenge for cause of the two prospective jurors the following ensued:

THE COURT: They are both confused on that.

Knock them both out.

MR. SCHERER: Well, can we object?

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THE COURT: You want some people that can understand what we are talking about, don't you?

MR. SCHERER: Well, I agree, yes, I think - - I think the prosecutor is confusing them.

THE COURT: Huh?

MR. SCHERER: I think the prosecutor is confusing them.

THE COURT: I think that may be true. That's why I gave you both a shot at them, hoping to clarify it, but they are both baffled, and therefore - - - so I'm going to let them both go.

(R.725-726) Clearly, when defense counsel asked if they could object, it was in the context of the trial court already having announced that he was going to knock off the two jurors because they were confused. After defense counsel asked if they could object, the trial court then questioned defense counsel in effect as to why they would want to keep the two jurors. In response to this question defense counsel asserted two times that the prosecutor was confusing these two jurors. Clearly, in this context this constitutes an objection to the trial court knocking them both out because they were confused.

The State next asserts that the two prospective jurors made it clear that they

could not follow the law. (State's Response at 25) Contrary to the State's assertion, the trial court never found that the two prospective jurors could not follow the law.

The trial court found that they were confused. (R725) The trial court also found that their confusion may be due to the prosecutor confusing them. (R726). The two prospective jurors were released because they were baffled (R726) and not because of a finding by the trial court that they could not follow the laws. It was clearly improper for the trial court to grant the State's challenges for cause because the two prospective jurors were confused by the prosecutor.

Appellate counsel should have challenged the excusal of these two prospective jurors for cause. Appellate counsel's failure to raise this issue denied Mr. Waterhouse the effective assistance of counsel. Mr. Waterhouse was prejudiced as a result of the ineffectiveness of appellate counsel.

D. 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.

The State first argues that this claim is procedurally barred because this claim was raised in Mr. Waterhouse's Petition for Writ of Habeas Corpus filed in 1987. (State's Response at 25). As noted in IA of this Reply, this Court did not deny relief on this claim but instead found that the claims concerning effective assistance of

appellate counsel were moot based on the writ being granted on another claim.

The State next argues that the trial court did not abuse its discretion in denying

Mr. Waterhouse's motion for a two week continuance. (State's Response at 25-26). It is Mr. Waterhouse's position that the trial court did abuse its discretion in denying the request for a two week continuance based on the State's failure to respond until the eve of trial to a Brady motion which had been filed several months before the trial, the trial court's reversal of the decision on Mr. Waterhouse's motion to suppress statements, and defense counsel's need to review laboratory reports and physical evidence which had not been provided to the defense. Mr. Waterhouse would rely on the facts, law and argument in his Petition for Writ of Habeas Corpus on this claim.

Appellate counsel should have raised the issue of the trial court's denial of a two week continuance. Appellate counsel's failure to raise this issue denied Mr. Waterhouse the effective assistance of counsel. Mr. Waterhouse was prejudiced as a result of the ineffectiveness of appellate counsel.

CONCLUSION

Based on the foregoing facts, law and argument this Court should grant Mr. Waterhouse's Petition for Writ of Habeas Corpus and grant Mr. Waterhouse a new appeal or in the alternative vacate his judgment and sentence and order a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Assistant Attorney General Candance M. Sabella, Westwood Building, 7th Floor, 2002 North Lois Ave., Tampa, FL 33607; The Honorable Robert Beach, Circuit Court Judge, 1 Beach Drive SE, St. Petersburg, FL 33701; Doug Crow, Assistant State Attorney, 14250 49th Street North, Clearwater, FL 33762, and Mr. Robert Waterhouse, DC#075376; P1119S, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this ___ day of April, 2002.

ROBERT A. NORGARD
Attorney for Petitioner
P.O. Box 811
Bartow, FL 33831
(863)533-8556
Fla. Bar No. 322059

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Time New Roman, in compliance with Fla. R. app. P. 9.210(a)(2).