

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,103

**ROBERT B. WATERHOUSE,
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT FOR PINELLAS COUNTY,
STATE OF FLORIDA**

AMENDED REPLY BRIEF OF APPELLANT

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INTRODUCTION

Mr. Waterhouse was denied relief by the lower court without the benefit of an evidentiary hearing on **any** of his claims. The law strongly favors full evidentiary hearings in capital post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters (A post-conviction movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief.") Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986).

Moreover, this Court has clearly indicated the need for mandatory evidentiary hearings on initial rule 3.850 motions. In his concurring opinion in Mordenti v. State, 711 So. 2d 30, 33 (Fla. 1998). Justice Wells stated that "the rule should be amended to require that an evidentiary hearing is mandated on initial motions which assert ineffective assistance of counsel, Brady, or other legally cognizable claims which allege an ultimate factual basis."

Subsequently, Justice Pariente, in a special concurring opinion in Gaskin v. State, 737 So. 2d 509, 519 (FLA1999), reiterated her agreement with Justice Wells that "the better practice would be to require trial courts to hold evidentiary hearings on the initial 3.850 motion in death penalty cases..."

More recently, this Court issued proposed amendments to rule 3.851, which include the requirement of an evidentiary hearing on the initial motion for postconviction relief. Amendments To Florida Rules Of Criminal Procedure 3.851, 3.852, and 3.993, No. SC96646 (April 14, 2000).

Mr. Waterhouse has pled substantial, serious allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. An evidentiary hearing is warranted on several of appellants' claims.

ARGUMENT I

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

Appellee argues that none of Mr. Waterhouse's assertions warranted an evidentiary hearing by the lower court (Answer at 10, 20). As will be discussed below, Appellee's argument is erroneous.

A. FAILURE TO INVESTIGATE AND PREPARE THE CASE.

A proper review of this ineffective assistance of counsel claim requires an evidentiary hearing to determine the reasons that counsel failed to call witnesses and completely investigate the case. The failure to conduct an evidentiary hearing

on this issue was error by the lower court.

In its order denying relief, the lower court held:

Defendants' allegations 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 the trial and appeal and therefore is procedurally barred.

(PC-R. 1163).

The trial record itself is manifest with indications of ineffectiveness.

As Mr. Hoffman, Mr. Waterhouse's trial attorney stated:

... And he refused to put on anything in mitigation.
Therefore, I don't know of ... **I don't have anything in mitigation to talk about.**

(PC-R. 927)(emphasis added). This statement clearly shows that Mr.

Waterhouse's attorney had not completed his investigation contrary to the

Appellees argument that the claim was not fairly presented to the court below

(Answer at 22).

Further, the record does not support the lower court's finding that the claims in the 3.850 Motion to Vacate are not supported by any factual allegations in the motion. The motion contains allegations concerning failure of defense counsel to

investigate and prepare (PC-R. 923). A postconviction movant is entitled to an evidentiary hearing unless the motion and the record conclusively show that he is entitled to no relief. A movant's allegations must be accepted as true except to the extent that they are conclusively rebutted by the record. LeCroy v. Dugger, 727 So.2d 236 (Fla. 1998); Gaskin v. State, 737 So.2d 509 (Fla. 1999).

The court in making the determination that claims are rebuttal by the record, “ may take into consideration . . . such portions of the trial record as may be applicable, and any other circumstance bearing on the issue.” Valle v. State, 705 So. 2d 1331 (Fla. 1997). While the Appellee is correct about adding references to the record to support the claim, the commentary about the court's responsibility is misplaced (Answer at 21, 22). The court must show that the record conclusively rebuts the claim which it failed to do in the instant case.

Appellee further asserts that even if these arguments had been made below that there was not a demonstration of deficient performance (Answer at 22). However, the totality of counsel's performance dictates that there was deficient performance, and that the outcome of the case would have been different but for the ineffectiveness. Failure to call witnesses to rebut the HAC aggravator cannot be minimized as not having any bearing on the outcome of the sentence.

Ineffective assistance of counsel claims are not generally reviewable on direct appeal, but they are appropriate when raised in a motion for postconviction

relief contrary to the Appellee's argument (Answer at 23). *See also*, Kelly v. State, 486 So.2d 578 (Fla. 1994).

B. FAILURE TO MAKE A CLOSING ARGUMENT.

Contrary to the Appellee's argument, Mr. Hoffman did not participate in the closing argument as he should have to assist Mr. Waterhouse, and counsel's failure was ineffectiveness (Answer at 23). In Waterhouse v. State, 596 So.2d 1008, 1017 (Fla. 1992), Justice Kogan made precisely this point in his dissenting opinion on the direct appeal:

In my five years on this Court, I have read countless records in which defense counsel had far less to argue than did Hoffman, yet counsel still developed a moving and legally sound closing statement. In many instances, such attorneys have persuaded more than a few jurors to vote for a recommendation of life. I see no reason why Hoffman could not have done the same when his client asked him in open court to make the closing argument. For example, Hoffman could have argued against the existence of all or some of the aggravating factors, two of which this Court today finds inappropriate. The failure even to notice the inapplicability of these two aggravating factors, much less argue against them to judge and jury, reveals Hoffman's claims in court as an unacceptable excuse.

Waterhouse v. State, 596 So.2d 1008, 1020 (Fla. 1992)(emphasis added).

When Judge Beach asked Mr. Waterhouse what, his desires were, it was

clear that Mr. Waterhouse wanted the assistance of counsel. However, at this point, defense counsel simply refused to give a closing argument:

THE COURT: Is it still your desire to go forward with your own statements?

* * *

MR. WATERHOUSE: I would like Mr. Hoffman to do it [closing argument]; he's more articulate than myself. We seem to be at odds.

THE COURT [to defense counsel]: He says he wants you to do it. Are you refusing?

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

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

(RS. 803-04)(emphasis added).

The real objection here was that counsel felt there was little to say. Counsel has the responsibility to deliver a closing argument on behalf of his client even if he believes the defense case is weak. It is improper for counsel to refuse to give an argument because the client has refused to allow the presentation of certain evidence.

In its order, the lower court denied the ineffective assistance of counsel

claim for failure to make a closing argument on the basis that “[t]he Florida Supreme Court previously ruled that counsel bent over backwards to accord the defendant all rights to which he was entitled and waived his right to have his attorney make the closing argument” (R. 1163).

The lower court’s reliance on this ruling is misplaced. The claim that was made on direct appeal before the Florida Supreme Court was one of denial of counsel, not ineffective assistance of counsel. Any meaningful review as to the viability of this ineffective assistance of counsel claim requires an evidentiary hearing.

There is a reasonable probability that a competent closing argument would have changed the jury’s recommendation from death to life since the 3.850 motion also alleged that counsel was ineffective for failing to argue the mitigation that was established during Mr. Waterhouse’s initial trial and postconviction proceedings (R. 935). Trial counsel was free to argue these mitigating factors, but he failed to do so. The record is silent as to the reasons for this failure, and therefore an Evidentiary Hearing is necessary.

The Appellee urges this Court to deny this claim based upon a waiver argument which does not apply to this claim (Answer at 23, 24).

C. FAILURE TO REBUT THE “IN THE COURSE OF A SEXUAL BATTERY” AGGRAVATING FACTOR.

Mr. Waterhouse did not receive a proper review of the failing to rebut the “in the course of a sexual battery” aggravating factor claim. The lower court reached conclusions that are not supported by the record. The record is in fact silent as to counsel’s reasons for failing to challenge the sexual battery as to who committed the battery, and yet, the lower court determined that it was a strategic decision.

This Court ruled that 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. However, this Court issued no ruling or comment concerning the ineffectiveness of counsel in failing to present evidence.

Waterhouse v. State, 596 So. 2d 1015 (Fla. 1992). The lower court’s reliance on this ruling in support of denial of the claim constitutes reversible error.

Appellees’ argument relates to the overwhelming facts of a ruptured rectum and other indications which clearly show that a sexual battery occurred, however the accent is misplaced since the issue that should be considered is not whether a sexual battery occurred but whether Mr. Waterhouse committed the battery

(Answer at 25, 26). Additionally Appellee asserts that at a motion to withdraw hearing counsel noted he was aware that while he could not retry guilt/innocence, he knew he could challenge guilt phase issues such as the evidence of sexual intercourse (Answer at 26). The fact that counsel admittedly was aware that he could challenge the sexual battery, but did not, is another indication of ineffectiveness.

Appellee further argues that either Mr. Waterhouse precluded counsel from action or that since Mr. Waterhouse was allowed considerable leeway in closing argument that the ineffectiveness is cured (Answer at 26).

D. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AT THE RE- SENTENCING TRIAL TO THE USE OF ILLEGALLY OBTAINED INCRIMINATING STATEMENTS BY MR. WATERHOUSE.

The 3.850 motion contained an allegation that counsel was ineffective for failing to object at the re-sentencing trial to certain damaging statements that Mr. Waterhouse had made to the police. Mr. Waterhouse relies on the argument in his initial brief for this issue.

E. FAILURE TO OBJECT TO IMPROPER AND PREJUDICIAL COMMENTS BY THE PROSECUTOR.

The lower court's findings that the comments by the prosecutor were not objectionable is error as a matter of law. The first comment by the prosecutor concerning the "overwhelming evidence of guilt" is both untruthful and prejudicial. It is improper for a prosecutor to try and sway a jury based upon the evidence a previous jury did or did not receive. Further, the prosecution should not have been able to argue the degree of the defendant's guilt. The lower court had already ruled that the defendant's guilt had already been established and would not allow counsel to address "guilt issues." Thus, argument concerning such issues was improper.

Trial counsel was ineffective for not objecting and moving for an immediate mistrial based upon these improper arguments concerning the degree of Mr. Waterhouse's guilt.

Another comment by the prosecutor was a statement concerning the defendant's right to remain to silent. The comment specifically referred to a lack of witnesses and testimony provided by the defense by stating, "Well have you heard any testimony that Robert Waterhouse got beaten with a tire iron in his own vehicle?"

Florida case law establishes that remarks such as the ones made by the prosecutor in this case are fairly susceptible to being interpreted by the jury as a comment on the failure of the accused to testify. Shelton v. State, 654 So.2d 1295 (Fla. 2nd DCA 1995). In State v. Marshall, 476 So.2d 150, 151 (Fla. 1985), this Court found a similar comment to be reversible error-“Ladies and gentleman, the only person you heard from in this courtroom with regards to the events on November 9, 1981, was Brenda Scarrone” (a witness for the prosecution).

The thrust of the Appellees' argument is that this is a gratuitous assertion that counsel was ineffective to circumvent the procedural bar rule as to these issues (Answer at 29). This position is ludicrous because the issue here relates to counsel's failure to cure these issues or preserve them for an appeal which at its best is ineffectiveness. The Appellee asserts that even if counsel should have objected, Mr. Waterhouse has failed to show prejudice (Answer at 29). The verdict was death which is indicative of the prejudice sustained as a result of the ineffectiveness.

It was incumbent upon trial counsel to make timely objections to these remarks or demand a mistrial.

**F. FAILURE TO IMPEACH ESSENTIAL STATE WITNESS
KENNETH YOUNG WITH AVAILABLE INFORMATION.**

The 3.850 motion contained an allegation that counsel was ineffective for failing to impeach witness Young's testimony with available evidence. Mr. Waterhouse relies on the argument in his initial brief for this issue.

**G. FAILURE OF TRIAL COUNSEL TO MOVE TO RECUSE
THE
TRIAL JUDGE ON THE BASIS THAT HE WAS
PREJUDICED
AGAINST MR. WATERHOUSE.**

The Appellee asserts that this claim is procedurally barred or should be barred because no one acted upon the information (Answer at 34, 35). The trial judge's prejudice is inherent in his statement that " Mr. Waterhouse is a dangerous and sick man and that many other woman have probably suffered because of him. " (Probation Commission Report 1981).

The basis of this claim is that counsel failed to move for recusal based upon Judge Beach's statement to the probation commission in 1981. Yet in denying the claim, the court simply states that no counsel for Mr. Waterhouse had requested his recusal. **This is again the point of the ineffectiveness claim.** The fact that trial counsel knew about the statement for a period of years only strengthens the ineffectiveness allegation and is not a legal reason to deny the claim.

Florida law is clear that due process under capital sentencing procedures requires a trial judge who is not predisposed to a life sentence or a death sentence but rather is committed to impartially weighing aggravating and mitigating circumstances. Appellee also argues that Mr. Waterhouse waived the issue (Answer at 35). However, trial counsel should have recused the judge to ensure an impartial court. His failure to do so was ineffective assistance of counsel. Ineffectiveness of counsel does not equate to waiver because only if the waiver is

valid does it become ineffectiveness. It is not procedurally barred as suggested by the Appellee (Answer at 36).

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

At the sentencing hearing before the trial judge, Mr. Waterhouse's trial attorney was free to argue and/or proffer the wealth of mitigation that had been established in Mr. Waterhouse's initial trial and postconviction proceedings. There was substantial and compelling mitigation in the record that trial counsel could have argued in favor of life. There is evidence that Mr. Waterhouse suffered from organic brain damage as a result of a severe automobile accident when he was a teenager. His record reflects that following this accident Mr. Waterhouse suffered behavioral problems at school. This is mitigation under Florida law. Cooper v. Dugger, 526 So.2d 900 (Fla. 1988).

Further, nationally renowned psychiatrist, Dr. Berline, opined that **two statutory mitigating factors** applied in Mr. Waterhouse's case, and that Mr. Waterhouse suffered from mental disorders related to his alcoholism (Emphasis supplied). Counsel should have at least proffered if not argued these factors irrespective of what Mr. Waterhouse directed. Appellees' assertion that Mr. Waterhouse should not now be afforded relief because of his own actions is

contrary to the law and our system which protects individuals, even if, from themselves (Answer at 37).

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

The state's answer brief is incorrect in stating that this claim could have been and should have been raised on appeal. Since defense counsel did not object, the issue was not preserved for direct appeal. Therefore, an ineffective assistance of counsel claim is the only vehicle available for Mr. Waterhouse to assert this claim.

As to the merits of the claim, the prosecutor's remarks as to the evidence presented to the previous jury was improper and prejudicial. Mr. Waterhouse's guilt was not an issue in the re-sentencing proceedings. That fact was underscored by the trial court's rulings which did not allow the defense to present "lingering doubt" evidence. While the state is allowed to present evidence of the facts surrounding the homicide, the only legal purpose for such evidence is to establish aggravators, not guilt. Therefore, there was no legal reason for the prosecutors remarks about the "overwhelming evidence of guilt" that led to the first conviction

or the evidence that the jury received or did not receive. It is fundamentally unfair for the prosecution to be given a “free shot” and argue overwhelming evidence of guilt while at the same time the defendant is precluded from presenting “lingering doubt” evidence. Counsel's failure to properly object allowed this prejudicial information to be presented to the jury.

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.

The answer brief from the state is incorrect in stating that this issue could have been raised on direct appeal. Since counsel did not object the issue was not preserved for direct appeal. Therefore, an ineffective assistance of counsel claim is the only avenue available to Mr. Waterhouse to present this claim.

As to the merits of the claim, the state is incorrect in alleging that the Court has already ruled on this issue. The direct appeal was simply an analysis of the comment itself. The 3.850 motion alleges facts relating to counsel's ineffectiveness for matters outside the record. More specifically, one of the claims is failure to call witnesses to testify as to other sources of blood in Mr. Waterhouse's car.

Therefore, counsel should have been aware of the unique prejudice associated with

this comment since the prosecutor was commenting on a lack of evidence that counsel had negligently failed to present. Mr. Waterhouse can present evidence at an evidentiary hearing to establish other sources of blood in Mr. Waterhouse's car in order to put the prejudicial impact of the prosecutor's remark in the proper context.

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

In violation of Caldwell v. Mississippi, 472 U.S. 320, 105, S. Ct. 2633, 86 L. Ed. 2d 231 (1985), the prosecutor told the jury that they were not responsible for the sentence of death.

Additionally, the prosecutors sought to lessen the gravity of the sentence of death by arguing that the "probable anal intercourse" would have been worth life imprisonment itself.

Therefore, Mr. Waterhouse would be getting a "free murder" if he "only" received life. Mr. Waterhouse's trial counsel failed to object to either of these statements. Those remarks are far more prejudicial than those made by the prosecutor in Teffeteller (Answer at 39) .

ARGUMENT 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.

The answer brief from the state is incorrect in stating that this issue could have been raised on direct appeal. Since counsel did not object or file the motion to recuse the judge the issue was not preserved for direct appeal. Therefore, an ineffective assistance of counsel claim is the only avenue available to Mr. Waterhouse to present this claim.

ARGUMENT 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.

The answer brief from the state is incorrect in stating that this issue could have been raised on direct appeal. Since counsel did not obtain a mental health expert the issue was not preserved for direct appeal. Therefore, an ineffective assistance of counsel claim is the only avenue available to Mr. Waterhouse to present this claim.

ARGUMENT AS TO REMAINING CLAIMS

The Appellee argues that as to claims 4, 5, 6, 7, 8, 9, 10, 11, and 12 that they are procedurally barred for the reason of raising the issue for the first time in a

postconviction proceeding or because the claims were addressed on direct appeal. Appellant argues that Appellee is incorrect in this assertion. Appellant will rely on argument presented in the initial brief regarding these issues.

CERTIFICATE OF FONT AND SERVICE

I HEREBY CERTIFY that a true copy of the Foregoing *Amended Reply Brief of Appellant*, which has been typed in **Times New Roman**, font size 14, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on June 12, 2000.

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