56 pages

IN THE FLORIDA SUPREME COURT

RAYMOND LEON KOON, :

Appellant, :

VS. : Case No. 68,132

STATE OF FLORIDA, :

Appellee. :

:

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APPEAL FROM THE CIRCUIT COURT
IN AND FOR COLLIER COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The Appellant, Raymond Leon Koon, will be referred to by name in this brief.

Page references to the record on appeal and appendix to this brief will be designated by "R" and "A," respectively.

Koon would also note that his Motion for Summary Reversal remains pending before the Court.

STATEMENT OF THE CASE

On February 16, 1982 a Collier County grand jury returned an indictment charging Appellant, Raymond Koon, with the premeditated murder of Joseph Dino (R 1230). Koon was found guilty of the first degree murder charge by a jury on November 19, 1982 (R 1232), and sentenced to death on January 28, 1983 (R 1232). However, this Court reversed Koon's conviction and remanded this cause for a new trial in an opinion rendered on January 10, 1985, which became final on April 9, 1985 (R 1235-1242).

A second jury trial was held in Naples beginning on December 3, 1985, with the Honorable Hugh D. Hayes presiding (R 1). Koon was represented by the public defender's office (R 1245). On December 6, 1985 the jury found Ray Koon guilty as charged (R 1086, 1395).

The penalty phase of the trial was conducted on December 7, 1985 (R 1092-1119). After receiving additional evidence the jury recommended a sentence of death by a seven to five vote (R 1115-1116).

At a sentencing hearing held on December 23, 1985 Judge Hayes adjudicated Koon guilty of murder in the first degree and sentenced him to die in the electric chair (R 1200-1228, 1399-1403).

In his written sentence stating his reasons for imposing a sentence of death Judge Hayes found four aggravating circumstances: (1) Koon was previously convicted of a

felony involving the use or threat of violence to the person (R 1414-1415, A 3-4); (2) the felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws (R 1415-1417, A 4-6); (3) the felony was especially heinous, atrocious or cruel (R 1417-1418, A 6-7); and (4) the felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R 1418-1420, A 7-9). The court found no mitigating circumstances (R 1413, A 2).

Notice of Appeal was filed on January 6, 1986 (R 1422), and the Public Defenders of the Twentieth and Tenth Judicial Circuits were appointed to represent Ray Koon on Appeal (R 1426).

STATEMENT OF THE FACTS

In 1979 Joseph Dino and Charles Williams implicated Appellant, Raymond Leon Koon, in a counterfeiting ring (R 202). Special Agent Eljay Bowron of the United States Secret Service drafted a complaint charging Koon with possession and delivery of counterfeit currency, which led to Koon's arrest on May 31, 1979 (R 202-204).

A preliminary probable cause hearing was held before a United States Magistrate on June 12, 1979 (R 205-206). At the close of testimony at said hearing, defense counsel asked the court to dismiss the case (R 206). The magistrate refused to do so, and instead bound the case over for presentation to a federal grand jury (R 207). She remarked that the complaint should be dismissed if there were only one person implicating Koon, but because there were two independent witnesses, she would not dismiss it (R 207-208).[1]/

Koon was subsequently indicted by a federal grand jury in Miami on charges of possession and delivery of counterfeit money (R 210-211). His trial was set for December 3, 1979, but it did not take place because Joseph Dino was deceased, and Charles Williams refused to testify (R 213). The charges against Koon were dismissed without prejudice. (R 213-214).

1/ At Koon's trial Special Agent Bowron testified to the magistrate's remarks, over a defense hearsay objection (R 207).

In 1981 Koon and his nephew, Joseph Lester Koon, were charged in a federal indictment with conspiracy to injure, oppress, threaten and intimidate Joseph Dino in the exercise of his right to be a witness and attempting to influence, intimidate and impede Joseph Dino by force and violence (R 418-419, 793, 1264-1266). (The indictment also contained a third and fourth count not involving Dino (R 1265).) Ray Koon entered a plea of guilty to the first two counts of the indictment on November 19, 1981 (R 798, 1276-1314). He later attempted to withdraw his plea (R 1270-1275), and he explained during his trial on the state murder charge that he had only pled guilty to secure the release of his wife and stepson, who were incarcerated as material witnesses (R 798-799, 802).

Joseph Lester Koon testified against his uncle at the trial in Naples on the state murder charge, as the principal prosecution witness (R 318-478). He also pled guilty to the federal charges involving Joseph Dino, and was sentenced to five years on one count, 10 on the other (R 418-420). In state court he pled guilty to second degree murder for his involvement in Dino's death in return for a 10 year sentence to run concurrently with his federal sentences (R 419-420). Koon was to spend all his time in federal prison (R 420).

Joseph Lester Koon went to federal prison in 1974 for selling LSD (R 425). After he was paroled he committed a series of burglaries (R 426). He also grew marijuana to sell it (R 426-427). In order to avoid going

to jail for the burglaries, Koon worked undercover for the Columbia County Sheriff's Department; he "made" seven drug cases for them (R 321-323).

According to Joseph Lester Koon, he went to Miami in 1979 to try to buy counterfeit money from his uncle, Ray Koon, for the secret service (R 326-327, 331). He worked for Ray there, finishing concrete (R 334).

J. L. Koon testified that Ray mentioned that Joseph Dino was to be a witness against Ray in his upcoming federal counterfeiting trial (R 346). Ray was aggravated about the trial (R 346). One day he pointed out to J. L. where Dino lived (R 346). Dino was a block mason, and Ray knew him from work (R 346).

Ray wanted J. L. to set up a meeting with Dino so that Ray could talk to him (R 348). J. L. thought Ray was going to try to talk Dino out of testifying, and rough him up if they could not work out a deal (R 348). He did not think Ray would kill Dino (R 348).

On November 21, 1979 Ray and J. L. went to do a concrete job together (R 349-350). Ray's brother, Ralph Koon, was at the job site to work with them (R 350-351).

That morning the men went to a bar to buy beer and liquor (R 351). From the bar, at Ray's request,J. L. called Joseph Dino's residence (R 351-352). He identified himself as James Mason to Dino's wife, who told him Dino was not home (R 352-353).

The men worked until early afternoon, drinking

as they did so (R 353). After work they obtained shotguns from Ralph Koon's house and went hunting (R 353-357). They continued to drink (R 357). Everyone was feeling "pretty high," but no one was drunk. (R 357).

The hunt ended around 6:00, and Ralph took the guns back to his house (R 358-359).

Ray and J. L. then went to a small country store in Ray's truck and bought something to eat (R 359). When J. L. emerged, Ray had placed a telephone call (R 359). He had J. L. speak with Joseph Dino (R 360). J. L. identified himself as James Mason and told Dino he wanted him to look over some blueprints for a house he was building so J. L. could get an idea how much the job would cost (R 360). They set up a meeting at the Ranch House Restaurant for 8:00 (R 361).

J. L. and Ray returned to Ray's house in Ray's truck, which was not running properly (R 361-362). Ray went inside and emerged shortly with a 12 gauge Remington shotgun, which he put in the trunk of J. L.'s car (R 362, 364). Ray unsuccessfully tried to borrow his sister's car (R 363). J. L. agreed to drive him to the restaurant (R 363).

When they arrived at the Ranch House, they saw Dino pull out of the parking lot (R 365). They drove up beside him and asked Dino to go to the Big Daddy's Lounge across the street (R 366-367). Both cars pulled into Big Daddy's parking lot, where Ray and Dino exited

their cars and shook hands (R 367-368). Ray then said to Dino that Dino owed him $500.00 and was going to pay it (R 368). The two men then began fighting and yelling as if in a barroom brawl (R 368-369). Eventually, Ray suggested they go the bookkeeper's house, and said he could show Dino where he owed Ray much more than $500.00 (R 372). Dino agreed, and Ray and J. L. put him in the back seat of J. L.'s car (R 372).

Ray directed J. L. to drive toward Collier County (R 373-374). At one point Ray had J. L. stop the car beside a little lake or canal (R 374-375). There were no residences around (R 375). Everyone got out of the car (R 375). Ray took the shotgun out of the trunk and told Dino to get into the trunk (R 375). Dino refused, and J. L. told Ray he was not putting anyone into his trunk (R 375). Dino asked if they were going to kill him (R 375). Ray responded that he might rough him up a little bit, but he was not going to kill him (R 375). They all got back into the car, and Ray put the shotgun between the seats with the barrel facing forward on the console (R 375-376).

J. L. later stopped for gas, and bought a can of V-8 Juice for Dino and a pack of cigarettes (R 376). When he emerged from the store with his purchases he heard Ray talking about how much trouble and heartache Dino had caused by testifying against him, and how many problems it had caused in his family (R 377).

The trio drove on toward Naples at a high rate of speed (R 377). They stopped outside of Naples on a narrow road flanked by swamps and marshland, where there were no lights (R 378). The three men got out of the car. Ray told J. L. to remain in the car because it was just between him and Dino (R 379). J. L. sat in the car and began rolling a marijuana cigarette (R 379-380). In his rearview mirror he could see Ray and Dino walking toward a lake (R 380). A few minutes later J. L. heard a shotgun go off from the direction in which Dino and Ray had walked (R 380-381). He walked about 60 yards in that direction and found Ray standing 10 or 12 feet from the water's edge (R 381). Dino was lying with his left leg on the edge of the bank (R 381). J. L. went into the water and grabbed him, but Ray said J. L. did not have to worry about him, because Ray watched his head explode, and also remarked that dead men could not tell any lies, and that not Dino could not testify against him (R 381).

The men found the shotgun shell and returned to the car (R 382). Ray was standing with the shotgun, and he kind of pointed it at J. L. and said, if he knew what was good for him he would keep his mouth shut (R 382).

The next morning J. L. and his girlfriend cleaned the blood and a piece of skin out of his car (R 392).

The next weekend Ray cut up the shotgun with an electrical welder, and J. L. disposed of the parts by

dumping them into a body of water (R 393, 396-397). (George Burton, Ray Koon's stepson, testified that he, not Ray, cut up the shotgun (R 568-569).)

Lois Purvis, Ray Koon's mother-in-law, testified that one day when he was extremely drunk Ray had admitted to her that he killed Dino (R 553-556). However, she was hard of hearing and was not sure about what Ray had said, and so she asked him about it a few days later when he was sober (R 556-558). Ray denied having made the statement (R 558).

Ray Koon's stepson, George Burton, testified that Koon had told him he blew Dino's head off in the Everglades (R 569-571).

Peggy Koon, Ray's wife, testified that he had a very serious drinking problem (R 530-531). In spite of this he was an extremely hard worker, a good husband, and treated Peggy's son, George Burton, extremely well (R 529,538).

In addition to his own testimony, Ray Koon presented the testimony of 12 witnesses in his defense (R 586-753). William Koon, J. L. Koon's half-brother, testified that J. L. confessed that he, and not Ray Koon, killed Joseph Dino (R 627-628, 634-635). J. L. similarly confessed to another half borther, Leon Koon, that it was J. L. who killed Dino (R 644, 646). J. L. Koon also admitted to a cellmate in federal prison, Bruce David Johnson, that he killed the man (R 679). Another man

J. L. knew in a federal institution, Nathaniel George Wood, explained how he helped J. L. rehearse questions and answers in preparation for testimony J. L. was to give at a trial (R 713-718a, 720). J. L. told him he had to go over the questions and answers because that was not really the way things had happened. (R 718a, 720).

Edward Peter Robertson testified, among other things, to J. L. Koon's bad reputation (R 596).

Ralph Koon, Ray's brother, testified that Ray was extremely intoxicated when he left Ralph's house on November 21, 1979 after the hunting expedition (R 614).

When Ray Koon took the stand in his own defense, he briefly discussed his background, including his combat service with the army in Korea (R 755-756). He candidly admitted that drinking alcohol had been a regular habit of his for 15 or 20 years (R 759-760, 771).

On November 21, 1979 he had some whiskey before he left his house for work in the morning, and continued drinking throughout the day, as was his custom (R 772-773, 780, 805).

After bird hunting and some target practice, Ray, Ralph, and J. L. Koon went to Ralph's house (R 774-775). By that time Ray was feeling great and was not able to walk straight (R 775). J. L. and Ray stayed at Ralph's house for 15 or 20 minutes (R 776).

On the way back to Ray's house, he and J. L. stopped at a little country store (R 776). Ray bought a beer for himself and one for J. L. (R 777). When Ray came out of the store, J. L. was on the telephone (R 777).

Ray had not asked him to make a call, and did not know to whom J. L. was talking (R 777-778).

Ray arrived home between 8:00 and 9:00 and went straight to bed with his clothes on (R 779, 781).

Ray Koon specifically denied being involved in a counterfeiting ring (R 767), and specifically denied beating Joseph Dino or having anything to do with his death (R 783, 802).

At the penalty phase of Koon's trial the State introduced certified copies of judgments showing that Koon had previously been convicted on five counts of aggravated assault (R 1097, 1251-1253). The defense presented no further evidence (R 1098).

The court instructed the jury on four aggravating circumstances (R 1111-1112): (1) The defendant had been previously convicted of another capital offense or other felony involving the use of threat or violence to some person. (2) The crime for which the defendant was to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. (3) The crime was especially wicked, evil, atrocious or cruel. (4) The crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The court instructed the jury on two mitigating circumstances (R 1112): (1) The capacity of the

defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (2) Any other aspect of the defendant's character or record, and any other circumstance of the offense.

After the jury returned its death recommendation, Judge Hayes told them he did not believe in not following a jury's advisory sentence (R 1118).

In chambers shortly after the penalty phase, Judge Hayes remarked to counsel that Ray Koon had received the sentence he deserved (R 1125).

Judge Hayes prepared his written order sentencing Ray Koon to death in advance of the sentencing hearing of December 23, 1985, at which he read his order into the record (R 1200-1211). Koon disputed a number of factual matters appearing in his presentence investigation report,[2/] and asked that his sentencing be continued so that he could subpoena witnesses who would clarify matters, but the hearing proceeded (R 1212-1222).

Among other things, the presentence investigation report reveals that Ray Koon may suffer from organic brain syndrome, secondary to excessive alcohol abuse (page 4 b of presentence investigation report).

2/ The presentence investigation report was not made part of the original record on appeal, but copies thereof were later provided to the court and to appellate counsel.

SUMMARY OF ARGUMENT

I. The court below conducted an inadequate hearing on Ray Koon's request to have a private attorney substituted in place of his assistant public defender. Koon's attorney was not called upon to address Koon's specific complaints that he was not being adequately represented, and so the court could not, and did not, make an intelligent finding as to whether or not Koon was receiving effective assistance of counsel.

II. Special Agent Bowron of the United States Secret Service should not have been permitted to testify as to the reasons given by a federal magistrate for her refusal to dismiss the federal counterfeiting case against Ray Koon. His testimony constituted inadmissible hearsay, not coming within the "state of mind" exception to the hearsay rule, and was very prejudicial to Koon.

III. The prosecutor should not have been allowed to ask improper questions on cross-examination of defense witness Edward Peter Robertson which exceeded the scope of direct examination and produced prejudicial testimony concerning threats against the witness by third parties, when Ray Koon was not shown to have procur or encouraged the threats in any way.

IV. The prosecutor should not have been allowed to ask defense witness Ralph Koon whether he called the United States Attorney a "smart ass bastard" during a conversation Ralph had with J. L. Koon. This was not proper impeachment, and the state did not introduce evidence to show that Ralph had in fact made

the remark about the U.S. Attorney. Ray Koon's defense was prejudiced by having his witness cast in a bad light, particularly when one also considers Edward Robertson's testimony concerning Ralph Koon's alleged threat toward him (as discussed in Issue III. above).

V. Ray Koon was deprived of a fair trial when the trial court required him to testify before he was fully prepared to do so.

VI. The sentencing hearing that was held herein denied Ray Koon due process of law, the right to confront his accusers, and the right to compel attendance of witnesses on his behalf. The court below failed to require the state to prove disputed matters in the presentence investigation report, and refused to continue the sentencing hearing so that Ray Koon could subpoena witnesses to attack the PSI. At least some of the contested material was relied upon by the court in imposing the death sentence upon Koon.

VII. The trial court failed to fulfill his assigned role in Florida's capital sentencing structure. He felt himself bound by the jury's advisory sentence of death, and thus failed to exercise his independent judgment as to the propriety of sentencing Ray Koon to death.

VIII. The court below misapplied section 921.141 of the Florida Statutes, and erred in sentencing Ray Koon to death, for several reasons:

A.

Contrary to the conclusion of the court below, the

jury's verdict finding Ray Koon guilty of premeditated murder did not negate his use of alcohol as a mitigating circumstance, especially where the jury did not know of the possibility that Koon suffers from organic brain syndrome.

B.

The trial court erroneously failed to consider unrebutted mitigating evidence showing that Ray Koon was an extremely hard worker and a solid family man who was good to his wife and treated his stepson extremely well.

C.

The trial court should not have relied upon disputed information in the presentence investigation report in finding in aggravation that Ray Koon had previously been convicted of a felony involving the use or threat of violence to the person, nor was it proper for him to consider the non-statutory aggravating circumstance of Koon's alleged involvement in a stolen car ring.

D.

As discussed in Issue II. of this brief, the state used inadmissible hearsay testimony from Special Agent Eljay Bowron to help it establish a motive for the killing of Joseph Dino. This evidence tainted the trial court's finding that the homicide was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. Also, the court's discussion of the alleged beating of Dino is factually erroneous and irrelevant to this aggravating circumstance.

E.

The homicide of Joseph Dino was an instantaneous death by shooting, with nothing to set it apart from the norm of capital felonies. The trial court's attempt to qualify the homicide as one that was especially heinous, atrocious, or cruel involved many factual errors and pure speculation.

F.

The cold, calculated and premeditated aggravating circumstance is inapplicable to Ray Koon's case. At most the evidence showed a plan to confront Joseph Dino and possibly to rough him up, but did not show that his killing was contemplated in advance.

G.

The court below should not have used Ray Koon's supposed lack of remorse to aggravate his sentence.

IX. Ray Koon cannot be required to forfeit gain time due to alleged non-payment of costs imposed pursuant to section 27.3455, Florida Statutes, as the crime for which he was convicted was committed long before the effective date of the statute, and he was and is indigent.

X. Costs and attorney's fees should not have been assessed against Ray Koon where he was not given notice and opportunity to be heard and to object thereto.

ARGUMENT

ISSUE I.

THE COURT BELOW FAILED TO CONDUCT AN ADEQUATE INQUIRY AND MAKE APPROPRIATE FINDINGS CONCERNING RAY KOON'S REQUEST TO DISCHARGE HIS APPOINTED COUNSEL.

The Office of the Public Defender of the Twentieth Judicial Circuit was appointed to represent Ray Koon in the proceedings below (R 1245).

On November 15, 1985 Koon filed a pro se motion for the appointment of private counsel to represent him (R 1334-1339). A hearing on the motion was held on November 22, 1985 (R 1129-1166).

In his motion and at the hearing, Koon expressed dissatisfaction with the particular attorney assigned to represent him, Tom Osteen, who had represented him previously on the same charge, as well as dissatisfaction generally with the public defender's office (R 1130-1134). He did not want to represent himself, but wanted a "street" lawyer (R 1130, 1133, 1154-1155, 1158).

Among Koon's specific complaints were that his attorney had not filed all the motions that should have been filed, including a motion for change of venue (R 1130-1132). (The record (R 1230-1433) reflects that defense counsel filed the following motions: four motions

for continuance (R 1246, 1315, 1320, 1388), a Motion to Disqualify Judge (R 1323-1326), a Motion to Prohibit Cameras in Courtroom (R 1331), a Motion to Present Prior Testimony in This Proceeding (R 1389), and a Motion to Dismiss (R 1390).) Koon further complained that his counsel had not adequately discussed the case with him, had not discussed any of the depositions or transcripts, and had only visited Koon for 10 or 15 minutes at a time (R 1130-1131, 1156-1157). Koon also cited the excessive caseload of the public defender's office, and the fact that Osteen was handling 50 to 60 cases (R 1131, 1159). Koon referred to difficulties between he and Osteen during the previous state proceedings on this charge, which resulted in Osteen quitting Koon's case (R 1156).

Assistant Public Defender Tom Osteen responded that Koon would not cooperate with him, and had told Osteen he would not discuss his case with him and would not go to trial with Osteen as his attorney (R 1133, 1152). He said he had conducted discovery in this case, and subpoenaed every witness requested by Koon, except one his office was checking on (R 1152-1153). Osteen felt that the public defender's office was adequately staffed to handle Koon's case, and that he could give fair representation to Koon (R 1152-1153).

The court acknowledged that all public defender's offices in the state are overworked (R 1134), but found the

public defender's office in Collier County to be competent to handle a case of this magnitute or nature (R 1151). He found no legal basis to grant Koon's motion (R 1156).

In Nelson v. State, 274 So.2d 256 (Fla.4th DCA 1973) the court dealt with what the trial court must do when an indigent defendant seeks to discharge his court-appointed counsel. The court first noted that "the right of an indigent to appointed counsel includes the right to effective representation by such counsel," 274 So.2d at 258. The court then continued:

> It follows from the foregoing that where a defendant, before the commencement of trial, makes it appear to the trial judge that he desires to discharge his court appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reason for the request to discharge. If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute. See Wilder v. State, Fla. App. 1963, 156 So.2d 395, 397. If the defendant con-

> tinues to demand a dismissal of his court appointed counsel, the trial judge may in his discretion discharge counsel and require the defendant to proceed to trial without representation by court appointed counsel. See Cappetta v. State, Fla. App. 1967, 204 So.2d 913 for principles that should guide the court in the exercise of such discretion.

274 So.2d at 258-259. (Nelson was followed in Chiles v. State, 454 So.2d.726 (Fla.5th DCA 1984). See also Williams v. State, 427 So.2d 768 (Fla.2d DCA 1983).

The hearing below was inadequate because the court failed to address all of Ray Koon's specific concerns. Under Nelson, where, as here, the defendant alleges incompetency of his counsel, the court should make a full inquiry of both the defendant and his attorney to see if there are reasonable grounds to believe that counsel is not providing effective assistance. Yet Assistant Public Defender Osteen was not called upon to state whether in fact there were other motions that should have been filed on behalf of Ray Koon, whether a motion for change of venue would have been appropriate, whether Osteen had spent sufficient time with Koon and fully discussed the case with him, whether he had gone over the depositions and transcripts with him, etc. Thus the court was in no position to make findings, as required by Nelson, as to whether or not Koon was receiving effective representation, and, in fact, the court did not specifically make the required findings.

It is evident from the remarks of the assistant public defender at the hearing below that he and Ray Koon had reached an impasse; there was little or no communication taking place relative to Koon's defense. Under these circumstances it was imperative that all of Koon's concerns he addressed so that the court could make an informed decision on whether or not to substitute private counsel for Koon's court-appointed lawyer. Because this was not done, Koon must be granted a new trial.

ISSUE II.

THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE AT RAY KOON'S TRIAL PREJUDICIAL HEARSAY TESTIMONY REGARDING WHAT A FEDERAL MAGISTRATE SAID DURING A HEARING ON THE FEDERAL COUNTERFEITING INDICTMENT THAT HAD BEEN LODGED AGAINST KOON.

The first witness for the prosecution at Ray Koon's trial was Eljay Bowron, a special agent with the United State Secret Service (R 194-195). His testimony related to federal counterfeiting charges that had been filed against Koon (R 196-218).

Bowron had testified at a preliminary probable cause hearing on the federal charges on June 12, 1979 (R 205-206). At the close of testimony at said hearing, Koon's attorney asked the court to dismiss the case (R 206). Over defense objections that his testimony constituted hearsay, Bowron was permitted to tell the jury the reason given by the federal magistrate for her refusal to dismiss the case (R 207-208). The magistrate stated that she would likely dismiss the charges if there were only one witness implicating Koon, but she would not do so as there were two independent witnesses against him (R 207-208).[3/] (Ultimately, of course, the indictment

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3/ The prosecutor then bolstered Bowron's testimony by introducing into evidence the transcript of the hearing at which the magistrate made her comments (R 208-210).

against Koon was dismissed after Joseph Dino died and Charles Williams refused to testify against Koon (R 213-214).)

Bowron's testimony concerning what the magistrate said was hearsay as defined in subsection 90.801 (1)(c) of the Florida Statutes (despite the trial court's comment that it was not being admitted as hearsay (R 207).)

Hearsay generally is inadmissible (section 90.802, Florida Statutes) for three reasons: (1) The declarant does not testify under oath. (2) The trier of fact cannot observe the declarant's demeanor. (3) The declarant is not subject to cross-examination. Breedlove v. State, 413 So.2d 1 (Fla.1982). There are however, a number of exceptions to the general rule excluding hearsay, which have been codified in section 90.803 and 90.804 of the Florida Statutes.

The court below admitted Bowron's testimony "as a statement showing the state of mind" (R 207). A statement of the declarant's state of mind may be admitted, as an exception to the hearsay rule, when the evidence is offered to:

> 1. Prove the declarant's state of mind, emotion or physical sensation at that time or at any other time when such state is an issue in the action.
> 2. Prove or explain acts of subsequest conduct of the declarant.

§90.803(3)(a), Fla.Stat. (1985).[4/] Neither aspect of the exception applies here. The magistrate's state of mind was not "an issue in the action," nor was it needed to prove or explain any of her subsequent conduct.

Bowron's testimony clearly was extremely prejudicial to Ray Koon. As mentioned above, Bowron was the lead-off witness for the prosecution. The state used his testimony to set up its case against Koon and suggest a motive for the homicide. The prosecutor emphasized Bowron's testimony during his final argument (R 838-843), and argued to the jury that Koon was the only person with a motive to kill Joseph Dino (R 857). Bowron's testimony undoubtedly played a role in the decision of Judge Hayes to sentence Koon to death, particularly in his finding in aggravation that the homicide was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws (R 1415, A4).

Agent Bowron's prejudicial hearsay testimony should not have been heard by the jury which convicted Ray Koon, or considered by Judge Hayes. Koon is entitled to a new trial.

[4/] This exception to the hearsay rule is itself subject to certain exceptions, which are stated in subsection 90.803(3)(b).

ISSUE III.

THE COURT BELOW ERRED IN ALLOWING THE STATE TO ASK QUESTIONS OF DEFENSE WITNESS EDWARD PETER ROBERTSON WHICH EXCEEDED THE SCOPE OF DIRECT EXAMINATION AND PLACED BEFORE THE JURY IMPROPER EVIDENCE OF THREATS ALLEGEDLY MADE BY PEOPLE OTHER THAN RAY KOON.

Edward Peter Robertson was the first witness called by the defense at Ray Koon's trial (R 586). (Robertson actually testified twice in the defense case (R 586-606, 732-748).) Among other things, he testified that J. L. Koon (Ray Koon's nephew, and the primary witness against him) had passed counterfeit money that he was supposedly getting from Johnny Walker[5/] (R 589-591, 602), that J. L. did not have a very good reputation (R 596), and that J. L. would have people arrested for marijuana and then steal their supply of the drug (R 596).

During cross-examination of Robertson the prosecutor asked whether he had ever been threatened (R 604). Over a defense objection that this inquiry was outside the scope of direct examination, Robertson was permitted to testify that he was indirectly threatened by Ralph Koon (R 604) (Ray's brother (R 607).) Ralph Koon made it known to Robertson, without expressly saying

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5/ Walker was an investigator with the Criminal Investigation Unit of the Columbia County Sheriff's Department, for whom J. L. Koon had worked undercover making drug buys (R 321-323).

so, that it did not matter to him whether Robertson lived or died (R 605).

Robertson was also permitted to testify, over another defense objection that such testimony was outside the scope of direct examination, about his contact with Edward Neary from the public defender's office in Collier County (R 605). The prosecutor asked whether Neary threatened him (R 605). Robertson testified that Neary told Robertson he could be charged with counterfeiting, and that if he knew where counterfeiting plates or presses were, or any counterfeit money, not to contact law enforcement officers, but to contact Neary's office or Neary directly, or Robertson could be charged (R 606). Neary further told Robertson that if he were withholding information regarding Joseph Dino's killing, Robertson could be charged with the murder (R 606).

In McCrae v. State, 395 So.2d 1145, 1151 (Fla. 1980) this court stated the general rule that the state must limit cross-examination "to questions no broader in scope than those propounded by the defense." And the prosecutor must only elicit germane and plausibly relevant testimony, not irrelevant, prejudicial material. Sneed v. State, 397 So.2d 931 (Fla.5th DCA 1981).

Under Florida's Evidence Code,

> cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its

> discretion, permit inquiry into additional matters.

§90.612(2), Fla.Stat. (1985).

The questions the prosecutor asked of Robertson did not relate to the matters pursued by the defense on direct examination. If the testimony elicited had any marginal relevance as affecting Robertson's credibility, such relevance was far outweighed by the danger of unfair prejudice to Ray Koon, rendering the testimony inadmissible. §90.403, Fla.Stat. (1985). Nor was the evidence admissible under the discretionary authority of the court to allow inquiry into additional matters, because of its prejudicial nature.

Through his questioning of Robertson, the assistant state attorney injected into Ray Koon's trial the highly improper matter of threats allegedly made against a witness when there was no showing whatsoever that Koon had in any way procured or encouraged these threats. Such evidence has been held inadmissible by this and other Florida courts in a number of cases. E.g., State v. Price, 11 F.L.W. 319 (Fla. July 10, 1986); Duke v. State, 106 Fla. 205, 142 So. 886 (Fla.1932); Jones v. State, 385 So.2d 1042 (Fla.1st DCA 1980).[6/] The Jones court explained:

6/ Jones was partially overruled on other grounds in Justus v. State, 438 So.2d 358 (Fla.1983).

> An attempt by a defendant or third person to induce a witness not to testify or to testify falsely is admissible on the issue of defendant's guilt, provided it is shown that the attempt was made with the actual participation, knowledge, or authorization of the defendant. Duke v. State, 106 Fla. 205, 142 So. 886 (1932). Absent a link to the defendant, the issue of whether a witness is subject to improper influence is irrelevant and collateral to the issue of whether the defendant committed the crime for which he is charged and its admission over objection is grounds for the granting of mistrial and the denial thereof would be reversible error. Johnson v. State, 355 So.2d 200 (Fla.3d DCA 1978). Furthermore, the admission of such evidence could only serve to create undue prejudice in the minds of the jury against the accused. Coleman v. State, 335 So.2d 364 (Fla.4th DCA 1976).

385 So.2d at 1043. The court concluded:

> Since there was no evidence presented to connect appellant to any threats against the witness as insinuated by the prosecution in its examination, appellant's motion for mistrial should have been granted.

385 So.2d at 1044.

Despite the lack of evidentiary support for doing so, the jury which convicted Ray Koon may very well have held against him the threats made by Ed Neary and Ralph Koon, especially as Neary worked for the public defender's office that was representing Ray, and Ralph was Ray's own brother. Indeed, the prosecutor implied a link between Ray Koon and the threat made by Ralph Koon by asking Eddie Robertson, immediately before asking him if he had ever been threatened, if Robertson knew whether Ralph

Koon was related to Raymond Koon, to which Robertson replied in the affirmative (R 603-604).

Because the state's improper questioning of Edward Robertson produced testimony which prejudiced Ray Koon, he must receive a new trial.

ISSUE IV.

THE COURT BELOW ERRED IN ALLOWING THE PROSECUTOR TO ASK DEFENSE WITNESS RALPH KOON, RAY KOON'S BROTHER, WHETHER THE WITNESS HAD CALLED THE UNITED STATES ATTORNEY A "SMART-ASS BASTARD."

Ralph Koon, Ray Koon's brother, was called as the second defense witness (R 607). He testified to the events that took place on November 21, 1979, including the concrete work and the hunting episode, and testified to Ray Koon's extremely intoxicated condition when he left Ralph's house that evening (R 608-614).

On cross-examination the prosecutor was questioning Ralph with regard to a telephone conversation he purportedly had with J. L. Koon (the state's main witness against Ray) when J. L. was incarcerated (R 620). Ralph did not remember receiving any call from J. L. (R 620), but the prosecutor persisted. He asked whether, during that conversation, Ralph had called the United States District Attorney a "smart-ass bastard" (R 620-621). Ralph responded that he did not even know the man (R 621).

A bench conference was held as to the propriety of the State's question (R 621-623). The prosecutor represented that it was asked for impeachment purposes, and claimed he had a tape recording of the telephone conversation between J. L. and Ralph which he wanted to play for

the jury (R 621-622). The court allowed the question to stand, upon the prosecutor's assurance that it was for impeachment (R 622). However, the prosecutor then asked only two more questions of Ralph Koon, and never played the tape recording he purported to have (R 623). The assistant state attorney then told the court he "did that as a tactical approach," and that he did have the tape recordings (R 623-624).

The question the prosecutor asked of Koon was improper. It was an attempt to impeach the witness on a purely collateral matter. In Eldridge v. State, 27 Fla. 162, 9 So.448 (Fla.1891), this court stated:

> The rules of evidence permit, in the discretion of the trial judge, a great latitude on cross-examination, when in his judgment such a course is essential to the discovery of truth; but they do not permit an inquiry into collateral matters in no way connected with the issue, for the purpose of contradicting a witness. A party has no right, on cross-examination, to interrogate a witness as to a distinct collateral fact for the purpose of contradicting him, and if such examination is permitted by the judge under the latitude allowed on cross-examination as to such matter, the party examining makes the witness his own.

9 So. at 452. Similarly, in Lockwood v. State, 107 So.2d 770 (Fla.2d DCA 1958) the court observed:

> Normally a witness, whether a party to the particular cause or not, may not be impeached as to a collateral matter brought out on cross-examination.

107 So.2d at 772. See also Gamble v. State, 11 F.L.W. 1725 (Fla.5th DCA August 7, 1986) and Johnson v. State, 178 So. 2d 724 (Fla.2d DCA 1965). Whether Ralph Koon had called the United States Attorney a name was totally beside the point.

Because the prosecutor's question to Ralph Koon related to a matter collateral and non-material to any issue at trial, Koon's answer to the question must be deemed conclusive, and it would have been improper for the prosecutor then to attempt impeachment by introducing an inconsistent statement. Gelabert v. State, 407 So.2d 1007 (Fla.5th DCA 1981). Therefore, his stated purpose for asking the question -- to impeach Koon -- was not a legitimate basis for allowing the question.

Had the question asked of Ralph Koon been proper for impeachment purposes, the assistant state attorney would have been required to follow up with evidence that in fact impeached the witness (i.e., the tape recording he supposedly possessed). As the court stated in Smith v. State, 414 So.2d 7 (Fla.3d DCA 1982):

> The difference between a prosecutor's questions to a defense witness which insinuate impeaching facts, the proof of which is non-existent, so clearly impermissible, [citations omitted], and questions, such as those asked below, insinuating impeaching facts which, although said to exist, are not later proved, is one of degree only, and either interrogation, because not followed by actual impeachment, is condemnable.

414 So.2d at 7. See also Alvarez v. State, 467 So.2d 455 (Fla.3d DCA 1985) and Castillo v. State, 466 So.2d 7 (Fla.3d DCA 1985), pertinent part approved, 486 So.2d 565 (Fla. 1986).

The prosecutor's question to Ralph Koon, insinuating that the state possessed information which would have impeached Koon, cast Ray Koon's defense witness in a bad light and exacerbated the harm done by the admission of Edward Robertson's improper testimony concerning threats Ralph Koon allegedly made against him. (Please see Issue III., above.) Indeed some of the prosecutor's comments during the bench conference clearly show that he intended to link the testimony concerning threats with his impeachment of Ralph Koon in order to discredit the witness:

> Mr. Hollander [assistant state attorney]: Your Honor, first of all, the threat part pertains to Eddie Robertson, and then, he is alleged to have made statements to J. L., and I would like to go through those statements, if the Court will allow me to, but in order to do this, I need to bring in the prior inconsistent statement, and we have got a tape recording of the phone call, and in order to bring them in, I need to ask him about the recordings, given the time and dates, and that is what I am trying to do. (R 621 -- emphasis supplied)

* * * *

> Mr. Hollander: Because it pertains to his interest in getting Ray off; he threatened one witness, and he told another witness to change his testimony. (R 622 -- emphasis supplied)

The state's cross-examination of Ralph Koon thus prejudiced Ray Koon's defense. He should be granted a new trial.

ISSUE V.

THE COURT BELOW ERRED IN REQUIRING RAY KOON TO TESTIFY AT HIS TRIAL BEFORE HE WAS FULLY PREPARED TO DO SO.

Before he testified in his own defense, Ray Koon asked to be allowed to get his legal papers from his cell (R 754). The court took a 25-minute recess (R 754). When court resumed and Koon was called to the stand, he said he was not ready (R 754). Nevertheless, the court required him to proceed (R 754-755).

The Constitution of the State of Florida, in Article I, Section 16, guarantees the right of every person accused of a crime in this state to be heard in person, by counsel or both. The right of the defendant to testify at his trial is a "mandatory, organic rule of procedure and a long-accepted constitutional principle." Cutter v. State, 460 So.2d 538, 539 (Fla.2d DCA 1984). See also Hall v. Oakley, 409 So.2d 93 (Fla.1st DCA 1982). This right is rendered meaningless where, as here, the accused is forced to give his testimony before he is fully prepared to do so. At the very least the court should have inquired as to what else Ray Koon needed to do to get ready, and how long it would take. Requiring him instead to proceed to testify deprived Koon of a fair trial, and he is entitled to a new one.

ISSUE VI.

THE COURT BELOW ERRED IN FAILING TO REQUIRE THE STATE TO PROVE MATTERS IN RAY KOON'S PRESENTENCE INVESTIGATION REPORT WHICH HE CONTESTED, AND ERRED IN FAILING TO CONTINUE KOON'S SENTENCING HEARING SO THAT HE COULD SUBPOENA WITNESSES TO DISPUTE INFORMATION APPEARING IN THE PSI.

After Ray Koon was convicted, the court ordered a presentence investigation (R 1120).

In a letter dated December 19, 1985 Koon wrote to Judge Hayes complaining that the presentence investigation report[7/] contained "lies and untrue charges against [him]" (R 1421). The letter asked the court to subpoena certain named witnesses, and to continue the sentencing hearing until the injustice could be corrected. (R 1421).

The sentencing hearing was held as scheduled on December 23, 1985 (R 1199-1229). Koon again complained of mistakes and lies that were in his PSI (R 1211-1223). Among the matters Koon disputed were the following: (1) A statement in the PSI that a Michael Blanco or Blinco[8/] had witnessed

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7/ As noted previously, the record on appeal failed to contain the presentence investigation report, but copies thereof were subsequently furnished to the court and appellate counsel.

8/ The transcript of the sentencing hearing refers to "Blanco" (R 1214). The PSI report says "Blinco" (page 1b).

Koon's stepson cutting up the shotgun that was used to kill Joseph Dino (R 1214-1215). (This appears at page 1b of the PSI report. -- Blinco did not testify at Koon's trial.) (2) A statement in the PSI that Koon had threatened to kill his wife before the month was out (R 1216). (This appears at page 1d of the PSI report. -- There was no testimony concerning this alleged threat at Koon's trial.) (3) Statements in the PSI that Koon struck his wife and mother-in-law and shot at his wife, mother-in-law, and stepson (R 1217). (This appears at page 3 of the PSI. -- Again, this was not brought out at Koon's trial.) (4) A statement in the PSI that Koon barricaded himself in his house after the domestic dispute referred to in (3) above (R 1218-1219). (This appears at page 3a of the PSI. -- Once again, this was not developed at trial.)

Koon also again strongly requested a delay in the sentencing proceeding so that he could subpoena witnesses, but his request was not granted (R 1212, 1216, 1218).

Where, as here, the defendant disputes hearsay found in a presentence investigation report, the trial court must require the state to present evidence to corroborate the report. Eutsey v. State, 383 So.2d 219 (Fla. 1980); Morris v. State, 483 So.2d 525 (Fla.5th DCA 1986); Stacy v. State, 483 So.2d 542 (Fla.1st DCA 1986); Delaine v. State, 486 So.2d 39 (Fla.2d DCA 1986); Vandeneynden v. State, 478 So.2d 429 (Fla. 5th DCA 1985); Davis v. State, 463 So.2d 398 (Fla.1st DCA

1985). See also Engle v. State, 438 So.2d 803 (Fla.1983) and §921.231 (3), Fla. Stat. (1985). The court below made no effort to put the state to its proof of the very damaging material contained in Koon's PSI.

Further, Koon was not given the time he needed to prepare for the sentencing hearing by having witnesses subpoenaed on his behalf, as Eutsey requires.

Florida Rule of Criminal Procedure 3.720 mandates that a sentencing hearing be held after a defendant is convicted. At said hearing the court shall "[e]ntertain submissions and evidence by the parties which are relevant to the sentence." Fla.R.Crim.P. 3.720(b). See also State v. Scott, 439 So.2d 219(Fla.1983) and Tuthill v. State, 478 So.2d 409 (Fla.3d DCA 1985). Koon was, in effect, denied his right to present evidence at a sentencing hearing by the court's ignoring of his letter and refusal to continue the hearing until Koon could bring his witnesses to court. Nowhere is the requirement of a sentencing hearing more important than in a capital case, due to the severity of the penalty faced by the defendant.[9/]

9/ It should be noted that Koon apparently did not get to see his attorney between the time the PSI was prepared and the time of his sentencing hearing (R 1212). He filed a pro se motion on December 18, 1985 for an order for his attorney to visit him, but Judge Hayes refused to issue such an order (R 1211-1212, 1398). Therefore, Koon did not have the legal assistance he needed to prepare for the sentencing hearing.

Koon would point out that Judge Hayes had already decided his sentence prior to the hearing of December 23; copies of his sentencing order had already been provided to the prosecutor and defense counsel, and the court merely read his written sentencing order soon after the hearing began (R 1200-1211).

In Palmes v. State, 397 So.2d 648 (Fla.1981) this court found no error in the trial court's preparation of her sentencing order prior to the sentencing hearing at which she imposed the death penalty. However, in Palmes the court at least heard the evidence and argument before reading her pre-prepared order into the record. Here Judge Hayes did ask counsel if they had any other information to put on the record, or "any other procedures, technical issues or other matters," but did not wait to hear what Ray Koon had to say before he condemned him to die (R 1200). It strains credulity past the breaking point to believe a judge will be open-minded and properly receptive to a defendant's remarks once he has reduced his sentence to writing and spoken it into the court record; at that point it would be virtually impossible for him to change his decision.

It is somewhat unclear to what extent the court relied upon the PSI in his decision to sentence Ray Koon to death. At one point the court stated:

> The only thing that came from the PSI report were the key, critical factors of whether you were convicted of an aggravated assault.

(R 1218). Yet in his written order imposing the death sentence the court went far beyond the mere fact of conviction and cited in some detail the factual bases for the aggravated assault charges as set forth in the PSI, including some of the very facts Koon had disputed with regard to the alleged domestic disturbance involving his wife, mother-in-law and stepson (R 1414-1415, A 3-4).

The manner in which Ray Koon's sentencing hearing was conducted deprived him of due process of law, the right to confront his accusers and the right to have compulsory process for witnesses on his behalf, as guaranteed by the Florida and United States Constitutions. Amends. VI. and XIV., U.S. Const.; Art. I, §9 and 16., Fla. Const.[10/] Therefore, Koon's sentence should be reduced to one of life imprisonment or, in the alternative, he should be accorded a new sentencing hearing.

10/ There was other improper material in the presentence investigation report in addition to what has been discussed here. For example, at page 1b and 1c there is a reference to some statements Koon allegedly made to his wife, which statements this court held inadmissible in Koon v. State, 463 So.2d 201 (Fla.1985) because they fell within the marital privilege. Defense counsel lodged no objection to this material, and indeed did not speak on his client's behalf at all during the sentencing hearing (R 1199-1229). It appears that by that time the assistant public defender had, in effect, stopped representing Ray Koon, apparently due to the many differences and disagreements between the two men. (Please see Issue I. in this brief.)

ISSUE VII.

THE COURT BELOW ERRED IN GIVING THE JURY'S DEATH RECOMMENDATION CONTROLLING WEIGHT, THUS FAILING TO EXERCISE HIS INDEPENDENT JUDGMENT CONCERNING THE SENTENCE TO BE IMPOSED, AND ABROGATING FLORIDA'S DEATH PENALTY SENTENCING SCHEME, RESULTING IN A DEATH SENTENCE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

An essential step in Florida's scheme for deciding the propriety of a sentence of death is the independent, reasoned judgment of the trial judge as to whether death is the appropriate punishment in the case before him. In upholding Florida's death penalty law in State v. Dixon, 283 So.2d 1 (Fla.1973), this court discussed the trial judge's role as follows:

> The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed-guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

283 So.2d at 8. See also Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

The court below abdicated his responsibility under section 921.141 of the Florida Statutes by blindly adhering to the jury's recommendation without making an independent determination of his own as to whether Ray Koon should live or die. Immediately after the jury was polled on its seven to five death recommendation, the court told the jurors he did not "believe in not following a jury's advisory sentence" (R 1118). Then, moments later in chambers, the court commented to counsel as follows (R 1125):

> ...[I]t is absolutely beyond question of anyone who participated in this trial, that the defendant has received what he deserves, as far as a sentence is concerned.

This latter remark shows that the court considered Ray Koon to have been "sentenced" by the jury's death recommendation.

> It is necessary that the trial judge exercise a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances.

Jacobs v. State, 396 So.2d 1113, 1119 (Fla.1981). Instead of exercising such "reasoned judgment," Judge Hayes committed the same error as the trial court in Ross v. State, 386 So.2d 1191 (Fla.1980) and

> gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not the death penalty should be imposed.

386 So.2d at 1197. As did the trial judge in Ross, Judge Hayes mistakenly felt himself bound by the jury's advisory sentence,

leading to his uncritical acceptance thereof.

A vital stage in the capital sentencing process thus was omitted from Ray Koon's case: the interposition of judicial reason between the inflamed emotions of the jury and the death sentence. Koon's sentence must therefore be reversed and a life sentence imposed in its place or, in the alternative, Koon must be granted a new sentencing hearing.

ISSUE VIII.

THE TRIAL COURT ERRED IN SENTENCING RAY KOON TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The trial court improperly applied section 921.141, Florida Statutes in sentencing Ray Koon to die in the electric chair. He found some improper aggravating circumstances and overlooked existing mitigating circumstances. This misapplication of Florida's sentencing law renders Koon's death sentence unconstitutional. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). Specific misapplications will be addressed separately in the remainder of this argument.

A.

The Trial Court Applied An Incorrect Legal Standard In Rejecting Ray Koon's Use Of Alcohol As A Mitigating Circumstance On The Basis Of The Jury's Verdict Finding Ray Koon Guilty Of Premeditated First Degree Murder.

The court below concluded that the jury which tried Ray Koon determined that the effect of alcohol on his sense of responsibility and actions was minimal because the jury convicted him of murder in the first degree (premeditated) (R 1413, A2). The court misinterpreted the legal effect of the jury's verdict. Merely because the jurors did not find Koon's level of intoxication to have deprived him of the ability to form the requisite intent for first degree murder does not

mean that they found him only minimally intoxicated. Nor does it mean they found Koon not to qualify for the mitigating circumstance of substantial impairment of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, §921.141 (6)(f), Fla. Stat. (1985). Indeed five of the 12 jurors found some reason to recommend that Koon live, and his use of alcohol may well have played a part in their recommendation. It was, after all, undisputed that Koon was drinking heavily the day Joseph Dino died, and his brother described him as being "extremely intoxicated" that evening. (R 614).

Another reason why the court should not have relied upon the jury's guilty verdict in rejecting Koon's use of alcohol as a mitigating circumstance is that the court had access to important information to which the jury was not privy, namely, the presentence investigation report in which Dr. Robert J. Wald, a psychiatrist, raised the possibility that Koon suffers from mild organic brain syndrome due to his chronic alcohol abuse. (The court never addressed this aspect of the PSI, and so may have overlooked it.)

The error committed by the court below is similar to that committed in Ferguson v. State, 417 So.2d 639 (Fla. 1982) and Mines v. State, 390 So.2d 332 (Fla. 1980), in which the sentencing courts misconceived the standard to be applied by using the test for insanity in determining the nonexistence of the mitigating factorsfound in section 921.141 of the Florida Statutes which relate to the defendant's mental condition at the

time of the offense. In Holmes v. State, 429 So.2d 297 (Fla. 1983) this court noted:

> A psychological disturbance at the time of a capital felony may be relevant in mitigation even though it is not sufficient ground for invoking the insanity defense.

429 So.2d at 300. It is equally true that a psychological disturbance may be relevant in mitigation even though it is not sufficient to negate the mental state of premeditation, and it is in this light that the court should have considered evidence of Ray Koon's use of alcohol.

B.

The Trial Court Erred In Failing To Consider All Mitigating Evidence Presented In The Proceedings Below.

According to the court below, the defense alleged that Ray Koon was a "good man," but this allegation should be rejected because it was rebutted by the evidence (R 1413, A2). In reality, the evidence concerning Ray Koon's character was much more specific than that he was a "good man." Unrebutted testimony showed that he was an extremely hard worker (R 529) and a solid family man who was good to his wife and treated his stepson extremely well (R 538, 558). Yet the record does not reflect that the court even considered this specific mitigating evidence.

A sentencing judge in a capital case must consider and weigh all evidence offered in mitigation. Lockett v. Ohio , 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Songer v. State, 365 So.2d 696 (Fla.1978). The evidence adduced

at Ray Koon's trial was of the type this court has recognized as potentially mitigating. See, for example, McCampbell v. State, 421 So.2d 1072 (Fla. 1982) and Jacobs v. State, 396 So. 2d 713 (Fla.1981). The failure of Judge Hayes to fulfill the requirement that he consider all evidence in mitigation impermissibly tipped the capital sentencing process in favor of death instead of life.

C.

In Finding As An Aggravating Circumstance That Ray Koon "Was Previously Convicted Of Another Felony Or Of A Felony Involving The Use Or Threat Of Violence To The Person" The Court Improperly Relied Upon Information Contained In The Presentence Investigation Report, And Improperly Considered A Non-Statutory Aggravating Circumstance.

In his discussion of this aggravating circumstance the court relied heavily upon information contained in Ray Koon's presentence investigation report (R 1414-1415, A3-4). As noted in Issue VI. herein Koon disputed many facets of the PSI, including some of the very facts the court used to justify this aggravating circumstance, and the state did not prove the information in the PSI to be accurate. Therefore, the court should not have used this material from the PSI in support of his finding in aggravation.

Furthermore, the court improperly referred in his sentencing order to Ray Koon's alleged involvement in a stolen car ring (again relying upon the PSI) (R 1414, A3). This alleged offense is not relevant to any of the aggravating circumstances enumerated in section 921.141(5) of the Florida Statutes, which are the only factors in aggravation the sentencing court is permitted to consider. Drake v. State, 441 So.2d 1079 (Fla.1983);

Miller v. State, 373 So.2d 882 (Fla.1979); Purdy v. State, 343 So.2d 4 (Fla.1977).

D.

The Trial Court's Finding That The Killing Of Joseph Dino Was Committed To Disrupt Or Hinder The Lawful Exercise Of Any Governmental Function Or The Enforcement Of Laws Necessarily Depended At Least In Part On Inadmissible Evidence And Contained Discussion Of Erroneous And Irrelevant Facts.

The court based his finding of this aggravating circumstance upon the assumption that Ray Koon killed Joseph Dino for the purpose of eliminating him as a witness in Koon's federal counterfeiting case. A key piece of evidence in the state's attempt to establish this motive was testimony from Special Agent Eljay Bowron that a federal magistrate had said she would probably dismiss the case against Koon if there were only one person implicating him, but would not dismiss it, as there were two independent witnesses (R 207-208). As discussed in Issue II. herein, Bowron's testimony was inadmissible hearsay which should have been excluded from Koon's trial, and without which this aggravating circumstance loses validity.

Furthermore, the court included a discussion of erroneous and irrelevant facts in support of this aggravating circumstance when he claimed that Joseph Dino was "mercilessly beaten" (R 1416, A5). The evidence did not show that Dino was "beaten" at all; rather he and Ray Koon engaged in mutual combat which Joseph Lester Koon described as resembling a barroom brawl (R 369). Nor was whether or not Dino was beaten at all relevant to the question of whether the homicide was committed to disrupt or hinder the lawful exercise of any governmental function or

the enforcement of laws.

E.

The Court Below Erred in Instructing The Jury On, And Finding The Existence Of, The Aggravating Circumstance of Especially Heinous, Atrocious, Or Cruel.

The court's finding of this aggravating circumstance is full of inaccurate factual assumptions and speculations. He asserted that Ray Koon "physically beat the victim unmercifully" (R 1417, A6). However, as noted in subpart B. above, Koon and Joseph Dino engaged in mutual combat in the nature of a barroom brawl; their altercation did not consist of the unilateral beating of one man by another. Nor may the so-called "beating" accurately be termed "unmerciful." The fight stopped when Dino indicated he had had enough (R 369, 372).

Dino was not "thrown into the car" as the court claimed (R 1417, A6). Joseph Lester Koon testified he and Ray "helped [Dino] get in the back seat of the car" (R 372).

The court also said that Joseph Dino "on several occasions pleaded with the Defendant" and asked Koon if he was going to kill him (R 1417, A6). There is no evidence Dino "pleaded" with Koon even once, let alone "on several occasions." Furthermore, in response to Dino's single query as to whether Koon was going to kill him, Ray responded that he was not going to kill him (R 375).

The court next stated in his sentencing order:

> The victim went through a period of an hour or two of pure agony knowing that he was going to be taken to his execution, and that the defendant was going to literally blow his brains out with the shotgun which was held on him.

(R 1417, A6). The record does not reflect how long J. L. Koon, Ray Koon, and Joseph Dino were riding in J. L.'s car. The court engaged in speculation by saying it was "an hour or two." J. L. Koon was very uncertain as to how much time elapsed between meeting Dino at Big Daddy's Lounge and his death at the rock pit (R 455-456). Nor does the record reflect that the shotgun was "held on Joseph Dino" at any time prior to the time he was shot. The shotgun was initially placed in the trunk (R 362) where, obviously, Dino could not even see it. When it was removed from the trunk some time during the car ride, it was placed in between the seats, with the barrel facing forward on the console (R 375-376), not trained on Dino. And the court's assertion that Dino went through a period of "pure agony" was purely speculative.

Equally speculative was the court's conclusion that Joseph Dino

> went through at least one hour's worth of agonizing, pain and suffering, and emotional trauma, in that he knew he was in the very imminent future going to be murdered, he just did not know exactly where or when.

(R 1418, A7). Again, the time it took to complete the car ride was not established. There was no evidence to show that Dino experienced the kind of mental agony depicted by the court. J. L. and Ray Koon gave him no reason to believe he was going to be murdered. Dino initially agreed to go with Ray and J. L. to a bookkeeper's house to discuss a debt Ray said Dino owed him (R 372). There is nothing to indicate that Ray and J. L. mistreated Dino during the ride. When Dino balked at getting into the trunk of J.L.'s car, he was not forced to do so (R 375). J. L. even

bought a can of V-8 Juice for Dino (R 376, 455). Thus, nothing was done during the time preceding Joseph Dino's death that should have caused him to fear for his life.

The actual killing itself was accomplished by a single shotgun blast to the head, resulting in instantaneous death (R 309-310, 312, 380-381). This court has held in a number of cases that an instantaneous shooting death, in and of itself, does not qualify for the especially heinous, atrocious, or cruel aggravating circumstance. E.g., Cooper v. State, 336 So.2d 1133 (Fla. 1976); Kampff v. State, 371 So.2d 1007 (Fla.1979); Maggard v. State, 399 So.2d 973 (Fla.1981); Maxwell v. State, 443 So.2d 967 (Fla. 1983); Oats v. State, 446 So.2d 90 (Fla. 1984).

In State v. Dixon, 283 So.2d 1 (Fla. 1973) this court defined what the aggravating circumstance of especially heinous, atrocious or cruel means:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d at 9. The facts of Joseph Dino's killing do not set it apart from the norm of capital felonies, and his homicide should not be considered especially heinous, atrocious, or cruel.

F.

The Court Below Erred In Instructing The Jury On, And Finding The Existence Of, The Aggravating Circumstance Of Cold, Calculated And Premeditated.

The evidence presented below did not prove beyond a reasonable doubt that the homicide of Joseph Dino was "planned for a long period of time" as found by the trial court (R 1418, A7). While a confrontation with Dino may have been planned in advance, it was not shown that killing Dino was contemplated ahead of time. When Ray Koon discussed with J. L. Koon the setting up of a meeting with Dino, J. L. thought Ray was going to try to talk Dino out of testifying, and rough Dino up if a deal could not be worked out; he did not think Ray was going to kill Dino (R 347-348). There is nothing in the record to indicate that Ray and J. L. even discussed the possibility of killing Dino before it happened. Also, during the car ride, when Dino asked if he were going to be killed, Ray replied that he might rough Dino up, but he was not going to kill him (R 375).

A plan to confront Dino and perhaps rough him up would not be sufficient to qualify Dino's homicide for the aggravating circumstance found in section 921.141 (5)(i) of the Florida Statutes. Only if the murder itself was premeditated in a cold and calculated manner could this aggravating factor be applied against Ray Koon, Gorham v. State, 454 So.2d 556 (Fla.1984) and Hardwick v. State, 461 So.2d 79 (Fla.1984). The evidence fell short of showing this heightened degree of premeditation as to the killing of Dino itself, and so this aggravating circumstance must fail.

G.

The Trial Court Erred In Considering Ray Koon's Alleged Lack Of Remorse In Sentencing Him To Death.

A defendant's lack of remorse may not be considered in aggravation, but may only be considered to negate mitigating circumstances. Doyle v. State, 460 So.2d 353 (Fla.1984); Agan v. State, 445 So.2d 326 (Fla.1983); Pope v. State, 441 So.2d 1073 (Fla.1983).

Although the court below did not make a specific finding of lack of remorse as an aggravating circumstance, his belief (for which he cited no evidence) that Ray Koon "has no remorse or misgivings for the taking of the life of Joseph Dino" played a prominent role in his conclusion that Koon should receive the death penalty (R 1419, A8). Therefore, this consideration was, in effect, improperly used in aggravation.

ISSUE IX.

RAY KOON SHOULD NOT BE DENIED GAIN TIME BECAUSE OF HIS ALLEGED NON-PAYMENT OF COURT COSTS IMPOSED PURSUANT TO SECTION 27.3455 (1) OF THE FLORIDA STATUTES.

A deputy clerk of the circuit court executed a certificate on the same day Ray Koon was sentenced which stated that Koon would not receive gain time because he had not paid court costs imposed pursuant to section 27.3455 (1) of the Florida Statutes (R 1409). This was error.

In the first place, section 27.3455 cannot be applied to crimes committed prior to its effective date of July 1, 1985. McDowell v. State, 11 F.L.W. 1572 (Fla. 5th DCA July 17, 1986); Moseley v. State, 11 F.L.W. 1597 (Fla.3d DCA July 22, 1986); Signorelli v. State, 11 F.L.W. 1599 (Fla.4th DCA July 23, 1986); Yost v. State, 489 So.2d 131 (Fla.5th DCA 1986). The homicide of Joseph Dino occurred on November 21, 1979 (R 348, 380-381, 1230), and so application of the statute to Ray Koon clearly is prohibited.

Furthermore, Koon was and is indigent, as found by the court below (R 1244-1245, 1426). Under section 27.3455 (1) community service must be required of indigent defendants in lieu of costs. Lawton v. State, 11 F.L.W. 1439 (Fla.1st DCA June 27, 1986); Noland v. State, 489 So.2d 873 (Fla.1st DCA 1986).

Therefore, section 27.3455, Florida Statutes may not be used to deny Ray Koon any gain time to which he is entitled.

ISSUE X.

THE COURT BELOW ERRED IN ASSESSING COSTS AND ATTORNEY'S FEES AGAINST RAY KOON WITHOUT GIVING HIM PRIOR NOTICE AND AN OPPORTUNITY TO BE HEARD AND TO OBJECT TO THESE ASSESSMENTS.

On January 22, 1986 the court below signed an "Order and Final Judgment" against Ray Koon for $6,075.00 in attorney's fees and $615.60 in costs pursuant to section 27.56, Florida Statutes (R 1431). In addition, the judgment adjudicating him guilty of first degree murder requires him to pay $10.00 to the Crimes Compensation Trust Fund pursuant to section 960.20, Florida Statutes, and $2.00 as a court cost pursuant to section 943.25 (4), Florida Statutes (R 1400). The record does not reflect that Koon, an indigent, was given any notice or an opportunity to be heard and to object to these amounts before they were assessed, and so they must be stricken. §27.56 (7), Fla.Stat. (1985); Jenkins v. State, 444 So.2d 947 (Fla. 1984); A.R. v. State, 475 So.2d 308 (Fla.2d DCA 1985); Hankerson v. State, 464 So.2d 700 (Fla.2d DCA 1985); Fason v. State, 446 So.2d 260 (Fla.2d DCA 1984).

CONCLUSION

Appellant, Raymond Leon Koon, respectfully prays this Honorable Court to reverse his conviction and sentence and remand this cause for a new trial for the reasons expressed in Issues I. - V. herein. If a new trial is not granted, Koon asks the Court to reduce his sentence to life in prison or, in the alternative, to grant him a new sentencing trial, or a new sentencing hearing before the Court, for the reasons expressed in Issues VI. - VIII. As explained in Issues IX. and X., Koon also requests that the assessments of costs and attorney's fees against him be stricken, and that he not be required to forfeit any gain time to which he might otherwise be entitled due to an alleged failure to pay court costs.

Respectfully submitted,

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