IN THE SUPREME COURT OF FLORIDA

NO. 74245

FILED
SID J. WHITE
JUN 1 1989
CLERK, SUPREME COURT
By _____ Deputy Clerk

RAYMOND LEON KOON

Petitioner,

v.

RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida,

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND, IF NECESSARY, APPLICATION FOR STAY OF EXECUTION PENDING THE FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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I. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Koon's capital conviction and sentence of death. On December 23, 1989, Mr. Koon was sentenced to death. Direct appeal was taken to this Court. The trial court's judgment and sentence were affirmed. Koon v. State, 513 So. 2d 1253 (Fla. 1987). Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwrisht, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwrisht, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Koon to raise the claims presented herein. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwrisht, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and

reliability of Mr. Koon's capital conviction and sentence of death, and of this Court's appellate review. Mr. Koon's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwrisht, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwrisht, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n. 4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwrisht, supra; Johnson v. Wainwrisht, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Koon's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Koon's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Koon's claims, Knight v. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson, supra; Johnson, supra. This and other Florida courts have consistently recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due

to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983): State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, susra, 287 So. 2d at 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Koon will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

Mr. Koon's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

B. REQUEST FOR STAY OF EXECUTION

Mr. Koon's petition includes a request that the Court stay his execution, presently scheduled for July 7, 1989. As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Provenzano v. Dugger (No. 73,981, Fla. May 4, 1989); Jackson v. Dusser (73,982, Fla. May 4, 1989); Harich v. Dugger, (No. 73,931, Fla. March 28, 1989); Lightbourne v. Dugger (No. 73,609, Fla. Jan. 31. 1989): Marek v. Dugger (No. 73,175, Fla. Nov. 8, 1988); Gore v. Dugger (No. 72,202, Fla. April 28, 1988); Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986). *See* also Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Kennedv v. Wainwright, 483 So. 2d 426 (Fla. 1986); cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987): State v. Crews, 477 So. 2d 984 (Fla. 1985).

This is Mr. Koon's first and only petition for a writ of habeas corpus. The claims he presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

11. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner asserts that his convictions and his sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Koon's case, substantial and fundamental errors occurred in both the guilt and penalty phases of trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

MR. KOON'S SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENT BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. KOON TO PROVE THAT DEATH WAS INAPPROPRIATE CONTRARY TO MULLANEY V. WILBUR, 421 U.S. 684 (1975), MCKETT V. OHIO, 438 U.S. 586 (1978), AND MILLS V. MARYLAND, 108 S. CT. 1860 (1988).

Mr. Koon's sentencing jury was instructed at the outset of the sentencing process:

> The State and the Defense may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that, this evidence, when considered with the evidence that you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penaty, and secondly, whether there are mitigating circumstances sufficient to outweigh the

> aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(R. 1097).

Defense counsel argued that the jury's task was to look at Raymond Koon as an individual when determining the aggravating and mitigating factors (R. 1104-1111), but the State had already made it clear that the aggravating and mitigating circumstances meant the defendant had the burden of proving that life was appropriate.

> This crime was a premeditated execution, and that is the only word for it, and it goes to the very heart of the criminal justice system. For those reasons, and for Mr. Dino, I respectfully request that you come back with a recommendation of capital punishment, the death penalty. This is the exact type of a case, and Raymond Koon is the exact type of a person for which the death penalty was designed. He is a man with five aggravated convictions, and those are violent crimes, and this was his most violent crime. One of the factors that Mr. Osteen is going to argue to you is that the defendant was unable to control his conduct or that his ability to control his conduct was substantially impaired.

(R. 1103).

The court's instructions supported the burden-shifting notion:

> THE COURT: Ladies and gentlement of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of Premeditated First Degree Murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 1111) and to emphasize it again:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating

circumstances exist that outweigh the aggravating circumstances.

(R. 1112).

Such instructions use an implicit presumption of death to shift to the defendant the burden **of** proving that life is the appropriate sentence. As a result, the instructions violated the principles of Mullanev v. Wilbur, 421 U.S. 684 (1975), just as the Court of Appeals for the Ninth Circuit recently **held** in a similar case in Adamson V. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc). In Adamson, the Ninth Circuit held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable sentencing determination:

> We **also** hold A.R.S. sec. 13-703 unconstitutional on its face, to the extent that it imposes a presumption of death on the defendant. Under the statute, once any single statutory aggravating circumstance has been established, the defendant must not only establish the existence of a mitigating circumstance, but must also bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance(s). See Gretzler 135 Ariz. at 54, 659 P.2d at 13 (A.R.S. sec. 13-703(E) requires that court find mitigating circumstances outweigh aggravating circumstances in order to impose life sentence). The relevant clause in the statute--"sufficiently substantial to call for **leniency"--thus** imposes a presumption of death once the court has found the existence of any single statutory aggravating circumstance.
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> Recently, the Eleventh Circuit **held** in Jackson **v.** Dugger, 837 F.2d 1469 (11th Cir. 1988), that a presumption of death violates the Eighth Amendment. The trial judge, applying Florida's death penalty statute, had instructed the jury to presume that death was to be recommended a5 the appropriate penalty if the mitigating circumstances did not outweigh the aggravating circumstances. Examining the jury instructions, the Eleventh Circuit held that a presumption that death is the appropriate sentence impermissibly "tilts the scales by which the [sentencer] is to balance aggravating and mitigating circumstances in favor of the state." Id. at 1474. The court further held that a presumption of death "if employed at the level of the sentencer, vitiates the

individualized sentencing determination required by the Eighth Amendment." Id. at 1473.

The Constitution "requires consideration of the character and record of the individual offender and the circumstances of the particular offense," Woodson, 428 U.S. at 304, because the punishment of death is "unique in its severity and irrevocability," Gregg, 428 U.S. at 187, and because there is "fundamental respect for humanity underlying the Eighth Amendment." Woodson, 428 U.S. at 304 (citation omitted). A defendant facing the possibility of death has the right to an assessment of the appropriateness of death as a penalty for the crime the person was convicted of. Thus, the Supreme Court has held that statutory schemes which lack an individualized evaluation, thereby functioning to impose a mandatory death penalty, are unconstitutional. See, e.g., Sumner v. Shuman, 107 S.Ct. 2716, 2723 (1987); Roberts, 428 U.S. at 332-33; see also Poulos, Mandatory Capital Punishment, 28 Ariz. L. Rev. at 232 ("In simple terms, the cruel and unusual punishments clause requires individualized sentencing for capital punishment, and mandatory death penalty statutes by definition reject that very idea.").

In addition to precluding individualized sentencing, a presumption of death conflicts with the requirement that a sentencer have discretion when faced with the ultimate determination of what constitutes the appropriate penalty. See Comment, Deadly Mistakes: Harmless Error in Capital Sentencing, 54 U. Chi. L. Rev. 740, 754 (1987)("The sentencer's authority to dispense mercy . . . ensures that the punishment fits the individual circumstances of the case and reflects society's interests.").

Arizona Revised Statute sec. 13-703(E) reads, in relevant part: "the court . . . shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Thus, the Arizona statute presumes that death is the appropriate penalty unless the defendant can sufficiently overcome this presumption with mitigating evidence. In imposing this presumption, the statute precludes the individualized sentencing required by the Constitution. It also removes the sentencing judge's discretion by requiring the judge to sentence the defendant to death if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard, which outweigh the aggravating circumstances. See Arizona v. Rumsey, 467 U.S. 203, 210 (1984)("death must be imposed

if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency"); State v. Jordan, 137 Ariz. 504, 508, 672 P.2d 169, 173 (1983)("Jordan III")(sec. 13-703 requires the death penalty if no mitigating circumstances exist).

The State relies on the holdings of its courts that the statute's assignment of the burden of proof does not violate the Constitution. The Arizona Supreme Court reasons that "[o]nce the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the defendant to establish mitigating circumstances." Richmond, 136 Ariz. at 316, 666 P.2d at 61. Yet this reasoning falls short of the real issue--that is, whether the presumption in favor of death that arises from requiring that the defendant prove that mitigating circumstances outweigh aggravating circumstances, offends federal due process by effectively mandating death.

In addition, while acknowledging that A.R.S. sec. 13-703 places the burden on the defendant to prove the existence of mitigating circumstances which would show that person's situation merits leniency, State v. Poland, 144 Ariz. 388, 406, 698 P.2d 183, 201 (1985) aff'd, 476 U.S. 147 (1986), the State suggests that its statute does not violate the Eighth Amendment because subsection (E) requires the court to balance the aggravating against the mitigating circumstances before it may conclude that death is the appropriate penalty. While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. This is because in situations where the mitigating and aggravating circumstances are in balance, or, where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death and thus precludes the individualized sentencing required by the Constitution. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence, and we note that "[p]resumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect." Jackson, 837 F.2d at 1474 (citing Francis and Sandstrom).

Thus, we hold that the Arizona statute, which imposes a presumption of death, is unconstitutional as a matter of law.

Adamson, supra, 865 F.2d at 1041-44 (footnotes omitted)(emphasis in original).

What occurred in Adamson is precisely what occurred in Mr. Koon's case. The instructions, and the standard upon which the court based its own determination, violated the eighth and fourteenth amendments, Mullaney v. Wilbur, 421 U.S. 684 (1975), Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988). The burden of proof was shifted to Mr. Koon on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Koon's due process and eighth amendment rights. See Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). It is apparent that the trial court imposed a burden of proof on the defense when the sentencing order is reviewed. Judge Hayes found that Mr. Koon had failed to establish intoxication as a mitigating circumstance which justified life by outweighing the aggravation. The application of that unconstitutional standard at the sentencing phase violated Mr. Koon's rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Adamson, supra; Jackson, supra. The instruction as given was fundamental error under the eighth amendment.

The focus of a jury instruction claim is "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307 (1985); see also Sandstrom v. Montana, 442 U.S. 510 (1979). The gravamen of Mr. Koon's claim is that the jury was in essence told that death was presumed appropriate once an aggravating circumstance was established, unless Mr. Koon proved that the mitigating circumstances outweighed the aggravating circumstance(s). A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the

instructions, that Mr. Koon had the ultimate burden to prove that life was appropriate.

The express application of a presumption of death has been found to violate eighth amendment principles:

> Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985). When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state.
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> It is now clear that the state cannot restrict the mitigating evidence to be considered by the sentencing authority. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). . . . Rather than follow Florida's scheme of balancing aggravating and mitigating circumstances as described in Proffitt [v. Florida, 428 U.S. 242, 258 (1976)], the trial judge instructed the jury in such a manner as virtually to assure a sentence of death. A mandatory death penalty is constitutionally impermissible. Woodson v. North Carolina, 428 U.S. 280 (1976); see also State v. Watson, 423 So. 2d 1130 (La. 1982) (instructions which informed jury that they must return recommendation of death upon finding aggravating circumstances held unconstitutional). Similarly, the instruction given is so skewed in favor of death that it fails to channel the jury's sentencing discretion appropriately. Cf. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (sentencing authority's discretion must "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

Jackson v. Dugger, 837 F.2d 1469, 1474 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988). Here, the jury may have understood the instructions as imposing the exact same presumption of death condemned in Jackson v. Dugger.

Proper analysis requires consideration of the United States Supreme Court's recent decision in Mills v. Maryland, 108 S. Ct. 1860 (1988). There, the Court focused on the special danger that

an improper understanding of jury instructions in a capital sentencing proceeding could result in a failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114.

Mills, supra, 108 S. Ct. at 1865 (footnotes omitted). Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

In Mills, the court concluded that, in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States, 354 U.S. 298, 312 (1957); Strombers v. California, 283 U.S. 359, 367-368 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., Lockett v. Ohio, 438 U.S., at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments''); Andres v. united States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions

> given other than the proper meaning of [section] 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, Zant v. Stephens, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

Mills, supra, 108 S. Ct. at 1866-67 (footnotes omitted). Thus under Mills the question must be: could reasonable jurors have read the instructions as calling for a presumption of death which shifted the burden to the defendant and deprived him of an individualized sentencing under Lockett, Eddings, Skipper, and Hitchcock, supra. The answer to that question in Mr. Koon's case must be yes.

The United States Supreme Court recently granted a writ of certiorari in Blystone v. Pennsylvania, 109 S. Ct. 1567, 44 Cr. L. 4210 (March 27, 1989), to review a very similar claim. The question presented in Blystone has obvious ramifications here. Under Pennsylvania law, the jury is instructed that where it finds an aggravating circumstance present and no mitigation is presented, it "must" impose death. However, if mitigation is found then the jury must decide whether the aggravating circumstances outweigh the mitigating. Specifically, in Blystone, the defendant decided no mitigation was to be presented. Thus, the jury after finding an aggravating circumstance returned a sentence of death.

Clearly, under Pennsylvania law, the legislature chose to place upon a capital defendant a burden of production as to evidence of mitigation and a burden of persuasion as to whether mitigation exists. However, once evidence of a mitigating circumstance is found then the State bears the burden of persuasion as to whether the aggravating circumstances outweigh the mitigating such that a death sentence should be returned.

Under Florida law and the instructions presented here, once one of the statutory aggravating circumstances is found by

definition sufficient aggravation exists to impose death. The jury is then directed to consider whether mitigation has been presented which outweighs the aggravation. Thus under Florida law the finding of a statutorily-defined aggravating circumstance operates to impose upon the defendant, the burden of production and the burden of persuasion of the existence of mitigation, and the burden of persuasion as to whether the mitigation outweighs the aggravation. Certainly, the Florida law is more restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in Blystone. The outcome in Blystone will directly affect correct resolution of the issue presented and the viability of Mr. Koon's death sentence.

Moreover, the error raised here can not be written off as harmless. Any consideration of harmlessness must also consider that had the jury voted for life, that vote could not have been disturbed -- the evidence before the jury established much more than a "reasonable basis" for a jury's life recommendation. See Hall v. State, 14 F.L.W. 101 (Fla. 1989); Mann v. Dugger, 844 F.2d 1446, 1450-51 (11th Cir. 1988)(en banc); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Tedder v. State, 322 So. 2d 908 (Fla. 1975). Under Florida law, to be binding, a jury's decision to recommend life does not require that the jury reasonably concluded that the mitigating circumstances outweighed the aggravating. In fact, the Tedder standard for overriding a jury recommendation of life belies any contention of harmlessness made by the Respondent. Under Tedder and its progeny, a jury recommendation of life may not be overridden if there is a "reasonable basis" discernible from the record for that recommendation, regardless of the number of aggravating circumstances, and regardless of whether the mitigation "outweighs" the aggravation. See, e.g., Ferry v. State, 507 So. 2d 1373 (Fla. 1987)(override reversed irrespective of presence of five aggravating circumstances); Hawkins v. State, 436 So. 2d 44

(Fla. 1983)(same). In this case if the jury had recommended life, that recomendation could not have been overridden since a reasonable basis for it clearly exists in the record.

The instruction not only violated Mullaney and Adamson, but it was not an accurate statement of Florida law. To recommend life all the jury had to find was a reasonable basis for such a recommendation. The error can not be found to be harmless beyond a reasonable doubt because if the jury here had been correctly told that it could recommend life so long as it had a reasonable basis for doing so and the jury had recommended life, a reasonable basis for that recommendation existed in the record. This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Koon. The jury did not know that it could recommend life if it had a reasonable basis for doing so.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Koon's death sentence. The ends of justice also call on the court to entertain the merits of the claim, Moore v. Kemp, 824 F.2d 847 (11th Cirt. 1987); Potts v. Zant, 638 F.2d 727 (11th Cir. 1981), subseauent history, 734 F.2d 526 (11th Cir. 1984). The constitutional errors herein asserted "precluded the development of true facts, and "perverted the jury's deliberations concerning the ultimate question[s] whether in fact [Raymond Koon was guilty of first-degree murder and should have been sentenced to die.]" Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). Under such circumstances, the ends of justice require that the claim now be heard. Moore, supra; Potts, supra.

For each of the reasons discussed above the Court should vacate Mr. Koon's unconstitutional sentence of death. At the very least this Court must stay Mr. Koon's execution pending Blvstone.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Mullaney, Aranso v. State, 411 So. 2d 172 (Fla. 1982). It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Koon of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM II

MR. KOON'S SENTENCE OF DEATH, RESTING ON THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR, IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH AND CONTRARY TO MAYNARD V. CARTWRIGHT, 108 S. CT. 1853 (1988), IS IN CONFLICT WITH THE NINTH CIRCUIT COURT OF APPEALS DECISION IN ADAMSON V. RICKETTS, 865 F.2D 1011, (9TH CIR. 1988)(EN BANC), AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The issue raised by Mr. Koon's claim is identical to that raised in Maynard v. Cartwright, 108 S. Ct. 1853 (1988).[1] Under

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[1] Oklahoma 's "heinous, atrocious, or cruel" aggravating circumstance was founded on Florida's counterpart, see Cartwrisht v. Maynard, 802 F.2d 1203, 1219, and the Florida Supreme Court's construction of that circumstance in State v. Dixon, 283 So. 2d 1 (Fla. 1973) was the construction adopted by the Oklahoma courts.

the Cartwright decision, Mr. Koon is entitled to relief. However, this Court on direct appeal applied an improper standard of review for determining the applicability of the heinous, atrocious and cruel aggravating circumstance. This determination must be re-evaluated in light of the standard set forth by the United States Supreme Court in Cartwrisht. The issue is also identical to that raised in Adamson V. Ricketts, 865 F.2d 1011, (9th Cir. 1988)(en banc), and Mr. Koon's sentencing determination is in conflict with that decision.

In the present case, as in Cartwrisht, the jury instructions provided no guidance and no definition whatsoever regarding the "heinous, atrocious or cruel" aggravating circumstance. The jury was simply told: The capital felony for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel" (R. 1112).

The Tenth Circuit's en banc opinion explained that the jury in Cartwrisht received the following instruction:

> the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

Cartwright V. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987)(en banc), affirmed 108 S. Ct. 1853 (1988). Thus, Mr. Koon's jury received and the trial judge applied even less of a limiting construction of this aggravating circumstance than what was contained in the instruction found wanting in Cartwrisht. In Cartwright, the United States Supreme Court unanimously held that such an instruction did not "adequately inform juries what they must find to impose the death penalty." 108 S. Ct. at 1858.

When this claim was presented to this Court in Mr. Koon's direct appeal, again as in Cartwrisht, the Court rejected the claim, merely finding the aggravating circumstance was "sufficient to support a finding of atrocity." Koon v. State, 513 So. 2d 1253, 1257 (Fla. 1987). This, too, was similar to

what the appellate court found in Cartwrisht. There, the state appellate court recited facts which in its opinion supported the application of the circumstance. Cartwrisht v. Maynard, 822 F.2d at 1488-89. Here, this Court recited evidence which would have permitted an inference that the murder was heinous, atrocious, or cruel. In essence the Court merely conducted a sufficiency of the evidence inquiry. See Koon, 513 So. 2d at 1257. Such an analysis is not sufficient under Cartwrisht to channel the sentencer's discretion in applying this aggravating circumstance.

The United States Supreme Court affirmed the Tenth Circuit's grant of relief in Cartwrisht, explaining that the death sentence did not comport with the fundamental eighth amendment principle requiring the limitation of capital sentencers' discretion. The failure to adequately instruct on the aggravating circumstance rendered the circumstance unconstitutionally vague in the particular case at issue. The Court's eighth amendment analysis in Cartwrisht fully applies with full force to Mr. Koon's case; here the trial court announced no limitation on the meaning or applicability of this aggravating factor: these proceedings are even more egregious than those upon which relief was mandated in Cartwrisht. The jury in Cartwrisht received more guidance than Mr. Koon's jury. The result here should be the same as in **Cartwrisht**:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).

108 S. Ct. at 1859.

The Court there discussed its earlier decision in Godfrey v. Georgia, 446 U.S. 420 (1980):

> Godfrey v. Georgia [] which is very relevant here, applied this central tenet of

Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at 422. The jury had been instructed in the words of the statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable'' and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:

> "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterized almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation.!' Id., at 428-429 (footnote omitted).

The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance. Id., at 429, 432. This Court concluded that, as a result of the vague construction applied, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id., at 433. Compare Proffitt v. Florida, 428 U.S. 242, 254-256

(1976). It plainly rejected the submission that a particular set of facts surrounding a murder, however, shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.

Cartwright, supra, 108 S. Ct. at 1858-59.

Accordingly, the Court concluded that words given to the jury in the instructions regarding heinous, atrocious or cruel were inadequate: "To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" 108 S. Ct. at 1859.

In Mr. Koon's case, as in Cartwright, what was relied upon by the jury, trial court, and this Court did not guide or channel sentencing discretion. Likewise, here, no "limiting construction" was ever applied to the "heinous, atrocious or cruel" aggravating circumstance. The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe any murder to be heinous, atrocious or cruel under the instructions. Mills v. Maryland, 108 S. Ct. 1860 (1988). These terms require definition in order for the statutory aggravating factor genuinely to narrow, and its undefined application here violated the eighth and fourteenth amendments. Godfrey v. Georgia, 446 U.S. 420 (1980). Jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988). In essence the jury must be told of the elements constituting this circumstance.

In Mr. Koon's case, the Court offered no explanation or definition of "heinous, atrocious, or cruel" but simply

instructed the jury that the third aggravating circumstance the jury could consider was that the crime "was especially wicked, evil, atrocious or cruel." (R. 1112). The judge's oral instructions may have been interpreted by the jury as telling them that in fact the murder was wicked, evil, atrocious or cruel. This alone violated Mills v. Maryland, 108 S. Ct. 1860 (1988).

In declining to find a violation of Cartwrisht, this Court on direct appeal applied the very analysis which Cartwrisht condemned. This Court concluded that "This death is sufficient to support a finding of atrocity." poon v. State, 513 So. 2d at 1257. In so concluding, the court failed to consider that the instruction at issue here did not "adequately inform [the jurors] what they must find to impose the death penalty." 108 S. Ct. at 1858. The analysis on direct appeal contravenes the United States Supreme Court's holding in Cartwright.

When Mr. Koon challenged this aggravating circumstance on direct appeal, this Court did not have the benefit of Mavnard v. Cartwrisht, decided by the United States Supreme Court in June, 1988. However, Cartwright is merely an extension of Godfrev which did exist at the time of Mr. Koon's trial, sentencing and direct appeal. Just as Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), had applied retroactively to Lockett v. Ohio, Cartwright also applied retroactively to Godfrev. The Tenth Circuit Court of Appeals has recognized that Cartwrisht is retroactive. Davis v. Maynard, ___ F.2d ___, No. 87-1657 (10th Cir., March 14, 1989); Coleman v. Saffle, ___ F.2d ___, No. 87-2011 (10th Cir., March 6, 1989).

Maynard V. Cartwright, supra, like Hitchcock v. Dugger, supra, constitutes a development of fundamental significance by concluding that state courts, such as the Florida Supreme Court, were misconstruing Godfrev v. Georsia, 446 U.S. 420 (1980). State courts had interpreted Godfrey as not requiring a sentencer

to be instructed on or to apply limiting principles which were to guide and channel the sentencer's construction of the "heinous, atrocious or cruel" aggravating circumstance. Thus, the decision in Maynard v. Cartwright is very much akin to the decision in Hitchcock v. Dugger, which held that this Court and the Eleventh Circuit Court of Appeals had failed to properly construe Lockett v. Ohio, 438 U.S. **586 (1978). Cartwrisht**, like Hitchcock, changed the standard of review previously applied. **See** Thompson v. Dugger, 515 So. 2d **173** (Fla. **1987); Downs v. Dugger**, 514 So. 2d 1069 (Fla. **1987).**

Indeed, this Court had previously passed off Godfrev as only effecting its own appellate review of death sentences. Brown v. Wainwright, 392 So. 2d **1327,** 1332 (Fla. **1981) ("Illustrative** of the Court's exercise of the review function is Godfrev **v.** Georgia"). Thus it is clear that this Court has refused to honor Godfrev and declined to address the impact of Godfrev upon the adequacy of jury instructions regarding this aggravating circumstance.**2**

In its decision in Mavnard v. Cartwright, the United States Supreme Court held that state courts had failed to comply with **Godfrev** when they did not require adequate jury instructions which guided and channelled the jury's sentencing discretion. More is required than simply asking the jury if the homicide was "wicked, evil, atrocious or cruel." Maynard **v.** Cartwrisht also applies to the judge's sentencing where there has been a failure to apply the controlling limiting construction of "heinous, atrocious, or **cruel."** Adamson v. Ricketts, **865 F.2d 1011** (9th Cir. 1988)(en banc). This Court's limited reading of Godfrey (as only effecting appellate review of a death sentence) was thus in

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[2]In fact, through **1988,** Shepards' United States Citations shows that the Florida Supreme Court cited Godfrev three times, once in Brown, once in Witt v. State, **387 So.** 2d **922** (Fla. **1980),** and once in the dissent in Hitchcock v. State, 413 So. 2d 741, **748** (Fla. **1982).**

error, That error has been recognized and spelled out in Maynard v. Cartwrisht. Thus the heinous, atrocious, or cruel aggravating circumstance was improperly found here.

The error here cannot be considered harmless beyond a reasonable doubt. Here without the aggravating circumstance at issue here, there remains only three aggravating circumstances. In Cartwrisht, state law at the time of Mr. Cartwright's direct appeal required that a death sentence be set aside when one of several aggravating circumstances was found invalid on appeal. Id. Similarly, in Florida, this Court remands for resentencing when aggravating circumstances are invalidated on direct appeal. See, e.g., Schaefer v. State, ___ So. 2d ___, No. 70,834 (Fla. Jan. 19, 1989)(remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). Moreover in this case mitigation was presented and argued to the jury which would have served as a reasonable basis for a life recommendation which would have precluded an override. Hall v. State, 14 F.L.W. 101 (Fla. 1989). Certainly a resentencing before a new jury is required where an aggravating circumstance is stricken and mitigation is contained in the record which would have served as a resonable basis for a life recommendation. Thus, the striking of this aggravating factor requires a resentencing under Florida law. See Elledge v. State, 346 So. 2d 998 (Fla. 1977) (resentencing required where mitigation present and aggravating factor struck); cf. Mann v. State, 420 So. 2d 578 (Fla. 1982).

The application of the heinous, atrocious and cruel aggravating factor must be vacated in light of Cartwright's clear holding. The application of this factor was error.

Just as this claim is identical to that found meritorious in Cartwright, so is it identical to the claim upon which the Ninth Circuit Court of Appeals granted relief in Adamson v. Ricketts, 865 F.2d 1011, (9th Cir. 1988)(en banc). There, the sentencing judge's verdict stated, "the aggravating circumstance[] . . . exists [since Adamson] committed the offense in an especially cruel, heinous and depraved manner," and described the murder. Adamson, supra, 865 F.2d at 1036. In Mr. Koon's case, the jury was instructed with and the trial judge applied the identical erroneous standard. The en banc Ninth Circuit found that the standard at issue lacked "any discussion or application of the 'actual suffering' cruelty standard" enunciated by the Arizona Supreme Court as a limiting construction of the circumstance, and that thus the circumstance did not provide for the "suitably directed discretion" of the sentencer required by Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988) and Godfrey v. Georgia, 446 U.S. 420 (1980). Adamson, supra, 865 F.2d at 1036.

The "heinous, atrocious, or cruel" aggravating factor, as applied in this case, violated the eighth and fourteenth amendments. Indeed, there is no principled distinction between Mr. Koon's case and Maynard v. Cartwrisht. Relief is proper.

This error undermined the reliability of the jury's sentencing determination and failed to sufficiently channel the jury's sentencing discretion. For each of the reasons discussed above the Court should vacate Mr. Koon's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Koon's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine

confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. Accordingly, habeas relief must be accorded now.

CLAIM III

> THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. KOON'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE JURY WAS NOT ADEQUATELY INSTRUCTED ON THE ELEMENTS OF THIS AGGRAVATING CIRCUMSTANCE, AND COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO ADEQUATELY LITIGATE THIS ISSUE.

The sentencing court unconstitutionally found that the crime was committed in a cold, calculated and premeditated manner. The record reflects that the concerns of Maynard v. Cartwright, 108 S.Ct 1853 (1988), discussed supra, similarly apply to the overbroad application of this aggravating circumstance. As the record in its totality reflects, the jury was **never** given, and the sentencing court and the Florida Supreme Court on direct appeal never applied, the limiting construction of the cold, calculated aggravating circumstance required by Maynard v. Cartwright.

Aggravating circumstance (5)(i) of Section 921.141, Florida Statutes, is unconstitutionally vague, overbroad, arbitrary, and capricious on its face, and, as applied, is in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution and Article I, 2, 9 and 16 of the Florida Constitution. This circumstance is to be applied when:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

921.141(5)(i), Florida Statutes.

This aggravating circumstance was added to the statute subsequent to the United States Supreme Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976). The constitutionality

of this aggravating circumstance has yet to be reviewed by the United States Supreme Court. The United States Supreme Court has set standards governing the function of aggravating circumstances:

> Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition, they circumscribe the class of persons eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 77 L.Ed 2d 235, 103 S. Ct. 2733 (1983). The Court went on to state that:

> An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty.

Id. at 2742-2743. Thus, it is evident that certain aggravating circumstances can be defined and imposed so broadly as to fail to satisfy eighth and fourteenth amendment requirements.

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing the death penalty be narrowly limited. Gregg v. Georgia, 428 U.S. 153, 188-89 (1976); Furman v. Georgia, 408 U.S. 238 (1972). The Court in Gregg interpreted the mandate of Furman as one requiring that severe limits be imposed due to the uniqueness of the death penalty:

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.

428 U.S. at 189. Capital sentencing discretion must be strictly guided and narrowly limited.

The manner by which Florida (like most states) has attempted to guide sentencing discretion is through propounding aggravating circumstances. The United States Supreme Court has held that the aggravating circumstances must channel sentencing discretion by clear and objective standards:

> [I]f a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.

> Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." [Citations omitted.] It must channel the sentencer's discretion by "clear and objective standards" and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

In Godfrey the Supreme Court held that capital sentencing discretion can be suitably directed and limited only if aggravating circumstances are sufficiently limited in their application to provide a principled, objective basis for determining the presence of the circumstances in some cases and their absence in others. Although the state courts remain free to develop their own limiting constructions of aggravating circumstances, the limiting constructions must, as a matter of eighth amendment law, be both instructed to sentencing juries and consistently applied from case to case by courts. Id. at 429-433. In Godfrey, the Court examined the use of one particular aggravating circumstance. It first found the jury instruction concerning this circumstance deficient for failing to limit the circumstance in any meaningful way. Id. at 428-29. The Court then examined the facts of the case and determined that while the Georgia Supreme Court had developed three criteria limiting the application of this circumstance, "[T]he circumstances of this case . . . do not satisfy the criteria laid out by the Georgia Supreme Court itself . . ." Id., at 432. Aggravating circumstances must be applied in a consistent, narrow fashion that is neither arbitrary nor capricious.

It is well established that, although a state's death penalty statute may pass constitutional muster, a particular aggravating circumstance may be so vague, arbitrary, or overbroad as to be unconstitutional. People v. Superior Court (Engert), 647 P.2d 76 (Cal. 1982); Arnold v. State, 224 S.E.2d 386 (Ga. 1976).

Section 921-141(5)(i), on its face and as applied has failed in a number of respects to "genuinely narrow the class of persons eligible for the death penalty." The circumstance has been applied by the Florida Supreme Court to virtually every type of first degree murder. This aggravating circumstance has become a global or "catch-all" aggravating circumstance. Even where the Florida Supreme Court has developed principles for applying the (5)(i) circumstance, those principles have not been applied with any consistency whatsoever, and here there was no attempt to instruct the jury regarding those limiting principles which are in essence elements of the aggravating circumstances. Section 921.141(5)(i), is unconstitutionally vague, on its face. Even words of the aggravating circumstance provide no true indication as to when it should be applied. This is precisely the flaw which led to the striking of aggravating circumstances in People v. Supreme Court (Engert), supra, and Arnold v. State, supra.

The aggravating circumstance here at issue requires a finding that the homicide,

> was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Section 921.141(5)(i), Florida Statutes.

The requirement of commission in a "cold, calculated, and premeditated manner" gives little guidance as to when this factor should be found. While the word "premeditated" may be meaningful, the adjectives "cold" and "calculated" are vague, subjective terms directed to emotions. Webster's New Twentieth Century Unabridged Dictionary (Second Edition) defined cold, as follows:

> 1. of a temperature much lower than that of the human body; very chilly; frigid.
>
> 2. lacking heat; having lost heat; of less heat than is required; as, this soup is cold.
>
> 3. having the sensation of cold; feeling chilled, shivering, as, I am cold.
>
> 4. bland; lacking pungency or acridity.

Cold plants have a quicker perception of the heat of the sun than the hot herbs.

Bacon

5. dead; lifeless.

Ere the placid lips be cold.

Tennyson

6. without warmth of feeling; without enthusiasm; indifferent; as a cold personality.

7. not cordial; unfriendly; as, they had a cold realization of their plight.

8. chilling; gloomy; disparing; as, they had a cold realization of their plight.

9. calm; detached; objective; as, a cold logic.

10. designating colors that suggest cold, a5 those of blue, green, or gray.

11. still far from what is being sought.

12. completely mastered; as, the actor had his lines down cold. [Slang].

13. insensible; as, the boxer was knocked cold. [Slang].

14. in hunting, faint; not strong: said of a scent.

cold comfort; little or no comfort at all.
In cold blood; without the excuse of passion; with deliberation.

to catch cold; to become ill with a cold; also, to take cold.

to throw cold water on; to discourage where support was expected; to introduce unlooked for objections.

Syn. -- wintry, frosty, bleak, indifferent, unconcerned, passionless, apathetic, stoical, unfeeling, forbidding, distant, reserved, spiritless, lifeless.

Id. at 354. There are at least fourteen definitions of this word. The five most common definitions are not helpful to the question here. However, definitions 6, 8, and 9 above are all arguably relevant to the issue here. All of these meanings are highly subjective attempts to describe emotional states. Indeed, the very word "cold" is subject to many different interpretations, all of which are highly subjective.

The word **"calculated"** is equally subjective. It is defined, as follows:

> 1. relating to something which may be or has been subjected to calculation; as, a calculated plot.
>
> 2. designed or suitable for, as, a machine calculated for rapid work. [Colloq.]

Webster's, **supra** at 255. The term **"calculate"** is defined as follows:

> 1. to ascertain by computation; to compute, to reckon; as, to calculate distance.
>
> 2. to ascertain or determine by reasoning; to estimate.
>
> 3. to fit or prepare by the adaptation of means to an end; to make suitable: generally in the past participle.
>
> > This letter was admirably calculated to work on those to whom it was addressed.
> >
> > Macaulay
>
> 4. to intend; to plan: used in the passive.
>
> 5. to think; to suppose; to guess; as, I calculate it will rain. [Colloq.]
>
> Syn. -- compute, estimate, reckon, count.

Webster's, supra at 255. Thus, this word is also subject to differing meanings, which are highly subjective.

The terms **"cold"** and **"calculated"** suffer from the same deficiency as terms held vague in People v. Superior Court of Santa Clara County (Engert), supra.

Thus, here also:

> The terms address the emotions and subjective, idiosyncratic values. While they stimulate feelings of repugnance, they have no direct content.

647 P.2d at **78**. Here, as in Arnold v. State, supra, the terms are "highly subjective." **224 S.E.2d** at **392**. The finding of this aggravating circumstance depends on a finding that the homicide is "cold, calculated, and premeditated." The terms cold and calculated are unduly vague and subjective. This is especially

true when considered in the context of the special need for reliability in capital sentencing.

The requirement that the homicide be committed "without any pretense of moral or legal justification" is also vague and subjective. It is clear that no person convicted of first degree murder has a true legal justification; otherwise, the conviction would be invalid. Although a true moral justification is theoretically possible; it is highly unlikely. Thus the essence of this phrase depends on the existence of a "pretense" of moral or legal justification. The word "pretense" is defined as follows:

> 1. a claim, as to some distinction or accomplishment; pretension; as, he made no pretense to being infallible.
>
> 2. a false claim or profession; as, under the pretense of friendship.
>
> 3. a false show of something.
>
> 4. something said or done for show.
>
> 5. a pretending, as, to play; make-believe.
>
> 6. a false reason or plea; a pretext.
>
> 7. aim; intention. [Rare.]
>
> 8. pretentiousness.
>
> 9. a pretentious act or remark.
>
> false pretenses; in law, deliberate misrepresentation of fact in speech or action in order to defraud someone of the title to a certain property or money.
>
> Syn. -- pretext, mask, appearance, color, show, excuse.

Webster's, supra at 1425. The word pretense has several definitions. This phrase is also unconstitutionally vague and subjective. There is the problem of ascertaining the offender's personal attitudes, as well as the problem of qualifying what level of justification rises to a "pretense" of justification. The problem of applying this aggravating circumstance is further compounded by the possibility of the offender having a psychiatric disturbance, either temporary or permanent. This

additionally complicates the problem of ascertaining and understanding thoughts, feelings, attitudes, and motivations, and carries with it the inherent danger that the jury will treat as aggravating that which is mitigating (psychological disorders) when applying this aggravating factor. The danger of the arbitrary application of this circumstance, by juries, is magnified by the fact that none of the terms in this circumstance are defined in the Standard Jury Instructions. It is clear that this aggravating circumstance is unconstitutionally vague, and that it can be (and has been) applied in violation of the eighth and fourteenth amendments.

This aggravating circumstance has been applied in such a way as to allow it to be applied to virtually any premeditated murder. Prosecutors usually argue that this circumstance applies whenever as here the jury convicted of premeditated murder. If prosecutors understand this circumstance to apply in such situations, certainly reasonable jurors may and probably do believe this circumstance covers any premeditated killing. Under Mills v. Maryland, 108 S. Ct. 1860 (1988), this is fifth amendment error. Moreover, the few originally limiting principles developed by this Court have been applied in such an inconsistent manner as to render this circumstance arbitrary and capricious. Certainly here the jury was apprised of none of these limitations.

This Court has discussed this aggravating factor a number of times. See Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1982); McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Combs v. State, 403 So. 2d 418 (Fla. 1981). In Jent, supra, the Court stated:

> the level of premeditation needed to convict in the penalty phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor -- "cold, calculated,,,and without any pretense of moral or legal justification".

408 So. 2d at 1032. The court in McCray stated:

> That aggravating circumstance [(5)(i)] ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive.

416 *So.* 2d at *807.* Although this Court has attempted to **require** more in this aggravating circumstance than simply premeditation, it has not adequately defined what this circumstance requires. More importantly, however, the jury was not told in Mr. Koon's case what more was required.

The arbitrariness of this aggravating circumstance is further compounded by this the Florida Supreme failure to provide a guiding interpretation to the phrase **"without** pretense of moral or legal **justification."** The Florida Supreme Court has never attempted to define the phrase or explicitly determine when it applies and when it does not. The Court has only referred to this language in one case. Cannadv v. State, **427** So. 2d 723 (Fla. 1983). In Cannady the defendant abducted the night auditor of a hotel and drove him to a remote area and shot him. 427 So. 2d at 725.

The Court analyzed this factor **as** follows:

> We find that the state failed to prove beyond a reasonable doubt that this murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The only direct evidence of the manner in which the murder was committed was appellant's own statements. When he first began incriminating himself, he repeatedly denied that he meant to kill Carrier. During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own **life.**
>
> The trial judge expressed disbelief in appellant's statements because the victim was **a** quiet, unassuming minister and because appellant shot him not once but five times. Though these factors may cause one to disbelieve appellant's version of what happened, they are not sufficient by themselves to prove beyond a reasonable doubt that the murder was committed in a cold,

> calculated, and premeditated manner without any pretense of moral or legal justification...
>
> Thus, the unlikelihood that the victim threatened or jumped appellant had the appellant's shooting the victim five times are insufficient facts to prove premeditation beyond that necessary to sustain a conviction for premeditated murder. We therefore find that the court erred in finding that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

427 So. 2d at 730-31. It is important to note that this case involved an abduction and shooting of a robbery victim.

This aggravating circumstance on its face is unconstitutional. It is so vague in language that it does not genuinely narrow the class of persons eligible for the death penalty. Zant v. Steshens, supra. The vagueness of this circumstance also renders it capable of arbitrary and capricious application. Grayned v. City of Rockford, supra; Peosle v. Superior Court (Engert), supra; Arnold v. State, susra.

This circumstance is also unconstitutional, as applied. The original limits imposed by this Court have been applied so inconsistently that this circumstance has failed to narrow the class of persons eligible for the death penalty and has been arbitrarily and capriciously applied, in violation of the mandate of Furman, supra; Godfrev, supra; Cartwright, supra.

This inappropriate application of the circumstance was noted by now Chief Justice Ehrlich, of this Court.

> We have, since McCray and Combs, gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated in Section 921.141(5)(i), Florida Statutes (1981). Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, as applied, of Florida's death penalty statute.

Herring v. State, supra, 446 So. 2d at 1058 (Ehrlich, J.).

The failure of this aggravating circumstance to genuinely narrow the class of persons eligible for the death penalty, also

threatens the entire statute. Section 921.141(5)(d), creates an aggravating circumstance in all felony murders. The vague wording of (5)(i), and its arbitrary application allows for its application in all premeditated murders. Thus, the court and jury in the State of Florida now have the unbridled and uncontrolled discretion to apply the death penalty in any first degree murder case, whether it is based upon a theory of premeditated murder or felony murder. Because of the inclusion of subparagraph (d) and the addition of subparagraph (i) to said section, the burden is shifted to the defendant to establish that a life sentence is proper. Even if the State puts on no evidence whatsoever in phase two, either in subparagraph (d) or subparagraph (i) of said section would automatically apply. This shifts the burden of proof to the defendant in violation of the eighth and fourteenth amendments. Cf. State v. Dixon, 283 So. 2d 1 (Fla. 1973). This aggravating circumstance in fact creates a presumption that death is the proper sentence. This is an unconstitutional shifting of the burden of proof. Mullaney v. Wilbur, 421 U.S. 684 (1975). See Claim I, supra.

Mr. Koon was denied his eighth and fourteenth amendment rights to have aggravating circumstances properly limited for the jury's consideration. The jury's discretion was unlimited. No limiting construction was ever applied. Since Cartwright is new law which was unavailable to the court at the time of direct appeal, the issue must be reconsidered in light of Cartwright and habeas corpus relief granted. For the same reasons set out in Claim 11, supra (Mr. Koon's challenge to the failure to empanel a new jury after the striking of the "heinous, atrocious or cruel" aggravating factor), this error can not be found to be harmless beyond a reasonable doubt. A new sentencing before a new jury must be ordered.

In part because of the concerns discussed above, since the time of Mr. Koon's direct appeal, this Court has redefined the

"cold, calculated and premeditated" aggravating circumstance. Rogers V. State, 511 So. 2d 526 (Fla. 1987). In **Rogers,** that Court **held** that "'calculation' consists of a careful plan or prearranged **design."** Id. at 533. As the Court recognized, Rogers represented a clear change in law from Herring v. State, 446 So. 2d 1049, 1057 (Fla.), where the Florida Supreme Court defined the **"cold** calculating" aggravator in an ad hoc, rather than "all **inclusive," manner.** Id. at **1057. The** Court's subsequent decisions have plainly recognized that Rosers is indeed a change in law requiring proof beyond a reasonable doubt of a "careful plan or prearranged design." See Mitchell v. State, **527** So. **2d 179, 182** (Fla. 1988)("We recently defined the cold, calculated and premeditated factor as requiring a careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988)(application of aggravating circumstance "error under the principles we recently enunciated in **Rogers.").**

Because Mr. Koon was sentenced to death based on a finding that his crime was "cold, calculated and premeditated," but neither the jury nor trial judge had the benefit of the narrowing definition set forth in Rogers, petitioner's sentence violates the eighth and fourteenth amendments. The jury was instructed on the elements of the aggravating circumstance. This failure was fundamental error. Moreover it was ineffective assistance of counsel not to adequately litigate this issue. Under Maynard v. Cartwrisht, supra, the error cannot be considered harmless.

As noted above, the "cold, calculating and premeditated" aggravator is also defective under Maynard V. Cartwright, 108 S. Ct. 1853, 1859 (1988). At the time of petitioner's sentencing, there was no principle limiting application of **"cold,** calculating and premeditated" as required under Cartwrisht. In fact, the trial court neither gave the jury a limiting instruction as to the elements necessary to establish that the crime was "committed in a cold, calculated and premeditated manner."

No limiting construction was provided to the jury, and absolutely no limiting construction was employed by the sentencing court. This violated Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988). Thus, application of the cold, calculated circumstance to petitioner violates not only Rogers, but also Maynard v. Cartwrisht and the eighth and fourteenth amendments.

In Cartwright, the court looked to state law to determine the appropriate remedy when an aggravating circumstance has been stricken. 108 S. Ct. at 1860. In Cartwrisht, state law required that a death sentence be set aside when one of several aggravating circumstances was found invalid. Id. Similarly, in Florida, the state high court remands for resentencing when aggravating circumstances are invalidated on direct appeal. See, e.g., Schaefer v. State, So. 2d ___, No. 70,834 (Fla. Jan. 19, 1989)(remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). As the Florida Supreme Court recently made clear in Hall v. State, 14 F.L.W. 101 (Fla. 1989), when capital sentencing error is shown relief is appropriate when the mitigation proffered by the petitioner provides a reasonable basis for a life recommendation. See also Harich v. State, 437 So. 2d 1082, 1087 (Fla. 1983)(McDonald, J., dissenting).

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Koon's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital

proceedings, see Wilson v. Wainwrisht, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of eighth amendment jurisprudence. See Godfrey, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwrisht, 811 F.2d 1430, 1438 (11th cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwrisht, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Koon of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwrisht, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM IV

THE TRIAL COURT IMPROPERLY APPLIED THE AGGRAVATING CIRCUMSTANCE OF HINDERING THE ROLE OF LAW ENFORCEMENT, AND THE JURY WAS NEVER INSTRUCTED AS TO THE REQUISITE ELEMENTS.

The third aggravating circumstance improperly argued by the State and relied upon by the sentencing jury and court was the fact that the offense was allegedly committed to disrupt the lawful exercise of a governmental function on the enforcement of laws. In the prosecutor's argument to the jury and the court's sentencing findings there is a presumption that the aggravating circumstance that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the

enforcement of laws automatically applied to Mr. Koon, or to anyone who killed someone who was a potential witness in a case. At no time was the jury asked to consider, and at no point did the judge's findings refer to, any specific intent by Mr. Koon to hinder the exercise of a governmental function or the enforcement of the law.

The United States Supreme Court has repeatedly held that every capital defendant is entitled to an individualized sentencing determination before a death sentence can be constitutionally imposed. Beginning with Gregg v. Georsia, the case law has established that in capital cases, "it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence." Gregg v. Georgia, 428 U.S. at 189 n.38 (emphasis added); see also Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). Raymond Koon was not afforded an individualized determination with regard to the hindering governmental function aggravating circumstance.

The jury was instructed that they could find the following circumstances in aggravation of the sentence to be imposed:

> Secondly, the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(R. 1111-1112). The instruction was not limited in any way.

The judge found the aggravating circumstance that Mr. Koon interfered with the governmental function or enforcement of the laws based solely on evidence that would apply to any killing of someone who happened to be a potential witness. In the Findings of Fact the court never addressed Raymond Koon's intent to interfere with governmental or law enforcement functions and in fact Mr. Koon's intent was never referred to in the penalty phase instructions given to the jury. At no time did the court ever

refer to any intention on the part of Raymond Koon to disrupt the governmental function or hinder enforcement of the laws. There are simply no findings in this regard. It is clear that the court automatically applied this aggravating circumstance based solely on a particular set of circumstances and would have applied it to any individual who killed someone who happened to be a potential witness in a case. The State's theory that Mr. Koon allegedly committed the crime to interfere with a government function is wholly without merit. Mr. Dino was not the only witness that had implicated Mr. Koon for federal counterfeiting charges. The other witness, Charles Williams was alive and capable of testifying at the counterfeiting trial.

The constitutional mandate of individualized determinations in capital sentencing proceedings has emerged as the central precept of eighth amendment jurisprudence since the original articulation of the standard in Gregg v. Georgia:

> Beginning with Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), a plurality of the Court recognized that in order to give meaning to the individualized-sentencing requirement in capital cases, the sentencing authority must be permitted to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense." Id., at 604, 98 S.Ct., at 2965 (emphasis in original). In Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), a majority of the Court accepted the Lockett plurality's approach. Not only did the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but "Lockett requires the sentencer to listen" to that evidence. Id., at 115, n. 10, 102 S.Ct., at 877, n. 10. Finally, earlier this Term, in Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the court, by a unanimous vote, invalidated a death sentence because "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence on nonstatutory mitigating circumstances." Id., at ___, 107 S.Ct., at 1824. We unequivocally relied on the rulings in Lockett v. Ohio, and Eddings v. Oklahoma, that the Eighth and Fourteenth Amendments require that the sentencing authority be permitted to consider any relevant mitigating evidence before imposing a death sentence.

481 U.S., at ___ and ___, 107 S.Ct., at 1822 and **1824.**

Sumner **v.** Shuman, 107 S. Ct. 2716, 2722-23 (1987).

In Sumner v. Shuman, the court found automatic aggravation of a capital sentence is unconstitutional. Even a murder committed by a defendant serving a life sentence without parole did not provide an adequate basis for an automatic death penalty:

> The fact that a life-term inmate is convicted of murder does not reflect whether any circumstance existed at the time of the murder that may have lessened his responsibility for his acts even though it could not stand as a legal defense to the murder charge. This Court has recognized time and again that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime. See, e.g., Tison v. Arizona, **481** U.S. ___, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); Enmund **v.** Florida, 458 U.S. 782, 102 S.Ct. **3368,** 73 L.Ed.2d **1140** (1982). Just as the level of an offender's involvement in a routine crime varies, so too can the level of involvement of an inmate in a violent prison incident. An inmate's participation may be sufficient to support **a** murder conviction, but in some cases it may not be sufficient to render death an appropriate sentence, even though it is a life-term inmate or an inmate serving a particular number of years who is involved.
>
> The simple fact that a particular inmate is serving a sentence of life imprisonment without possibility of parole does not contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death. It does not specify for what offense the inmate received a life sentence nor does it permit consideration of the circumstances surrounding that offense or the degree of the inmate's participation.

107 **S.** Ct. at 2724-25.

The eighth amendment principle that a death sentence cannot be automatically imposed, without reference to a defendant's individual intent or mens rea, **see** Enmund, supra; Tison, supra, also applies to the automatic application of an aggravating circumstance. If an aggravating circumstance is so vague that it can be applied to any person without discretion or guidance, it violates the right to individualized sentencing.

In Godfrey v. Georgia, 446 U.S. 420 (1980), the court reversed a death sentence because the Georgia Supreme Court did not apply a limiting construction to a statutory aggravating circumstance:

> In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman."

446 U.S. at 428-29. In Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988), the Court affirmed the important eighth amendment principle that a particular set of facts, in and of themselves, cannot warrant a death sentence:

> It plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.

108 S. Ct. at 1859. The same overbroad standard was applied by the sentencing court in Mr. Koon's case: the eighth amendment was violated here as well.

In Mavnard v. Cartwrisht, supra, the Supreme Court reaffirmed the principle that an otherwise vague aggravating circumstance must be limited to meet eighth amendment requirements:

> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey.

108 S. Ct. at 1859.

In the application of the aggravating circumstance of hindrance of governmental function or enforcement of law to

Raymond Koon, the jury instruction was so vague as to leave the jury with the impression that any killer of a potential witness should automatically be aggravated for interfering with the police. No limiting construction was given.

In its Findings of Fact, the trial court then clearly applied only this overbroad interpretation. See Maynard v. Cartwright, supra. The trial court found that regardless of intent, anyone who shoots a witness should be aggravated for interfering with a governmental or law enforcement function. This automatic application of aggravation regardless of Raymond Koon's specific intent violated the eighth amendment.

Previously, this Court had required a showing that: 1) the police officer was engaged in performing a governmental or law enforcement function; 2) the defendant knew what that function was; and 3) the defendant committed the murder specifically to interfere with that function. Tafero v. State, 403 So. 2d 355 (Fla. 1981)(Officer killed after stopping a car and ordering the occupants out after seeing a gun); Antone v. State, 382 So. 2d 1205 (Fla. 1980)(the defendant committed a contract killing to prevent the victim from testifying before a grand jury); Sonser v. State, 322 so. 2d 481 (Fla. 1975)(the defendant shot a policeman as he was approaching the car after searching another occupant of the car). In each of these cases the victim was performing a governmental or law enforcement function, the defendant knew what that function was and the defendant took deliberate action specifically to interfere with that function. The defendant, in each of those cases, intended to interfere with a governmental function or hinder enforcement of the law.

Mr. Koon's intoxication could also certainly have been considered on the question of specific intent. There was no such intent here, and, more importantly, there were no instructions to the jury in this regard. None of the requisite findings were made in Raymond Koon's case.

There was no individualized finding by the jury or the court that Raymond Koon knew what, if any, function the victim was performing or that he had any intent to interfere with that function. Instead there was an automatic application of an aggravating circumstance on a particular set of facts without regard to the defendant's individual intent. The court simply found that any person who kills someone who was a government witness automatically interferes with a governmental or law enforcement function. Counsel's failure to object or ask that the jury be instructed on the elements of the aggravating circumstance was ineffective assistance of counsel. Moreover, the failure to instruct on an element of the aggravating circumstance was fundamental error.

The automatic application of this aggravating circumstance thus violated Mr. Koon's right to individualized and reliable capital sentencing, and thus the eighth and fourteenth amendments. His sentence of death should not be allowed to stand. An evidentiary hearing and sentencing relief are appropriate.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Koon's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of eighth amendment jurisprudence. See Godfrey, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th

Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Koon of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, susra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM V

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

Pursuant to the eighth and fourteenth amendments, a state's capital sentencing scheme must establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 242 (1976). On appeal of a death sentence the record should be reviewed to determine whether there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). Where that finding is clearly erroneous the defendant "is entitled to new resentencing." Id. at 1450.

The sentencing judge in Mr. Koon's case found no mitigating circumstances (R. 1413). Finding four aggravating circumstances the court imposed death (R. 1419). The court's conclusion that no mitigating circumstances were present, however, is belied by the record, and by the fact five jurors voted for life.

Both statutory and nonstatutory mitigating circumstances were set forth in the record. The record clearly established that Mr. Koon was a chronic alcoholic with a very bad drinking problem:

> Q. Now during this time, Ray had a drinking problem; didn't he?
>
> A. Yes, a very bad one.
>
> Q. You say a very bad one; what do you mean?
>
> A. I mean that he was drinking about a quart a day and it was 100 proof

(R. 530).

> And I said, oh, you are drunk, boy, and I sat there for about a split second, and then I opened the truck door, got out, and went across the way, across the driveway over to my own house, and when I got in the yard, I stooped at my front door, and I looked over at Ray, and he was getting out of the truck, and he fell, and I stood there and I watched him, and he was crawling into his house

(R. 555).

> Q. And at that time, you talked to him and he was quite drunk then; wasn't he?
>
> A. Yes. He was very drunk, drunk, and he couldn't even keep his head off the steering wheel. He was just like this.
>
> * * *
>
> Q. Because he was stone-out drunk?
>
> A. Oh, he was passed out drunk.
>
> Q. And when you saw him fall down, he was pretty drunk; wasn't he?
>
> A. Yes.
>
> Q. And he couldn't walk in the house; could he?
>
> A. No, he crawled in

(R. 556).

> A. It was getting close to dark, I would say it was about seven or 7:30; well, I would actually say that it was a little before that time.
>
> Q. Okay, do you know what kind of condition your Uncle Ray was in at that time?

A. Yes, sir, very well-lit.

Q. What do you mean very well-lit?

A. Drunk, staggering

(R. *656).*

Aside from Mr. Koon's problem with alcohol abuse, other mitigating factors are present in the record. Despite Mr. Koon's history of drinking he worked everyday of his life. He had a difficult life and managed to support his wife and his stepson (R.1108). He was a proud man and never sought food stamps or unemployment. (R. 1108). When his nieces and nephews became orphaned, he took several of them into his home and tried to support them. He was neighborly and did not harbor racial prejudice. On Thanksgiving Day he gave money to a needy black family.

The judge also declined to find as a mitigating circumstance the fact that Joseph Lest Koon had plead guilty to this very same offense, but received a much lighter sentence. Joseph Lester Koon testified as a witness for the State and said that the shooting occurred at a lake and the body was left in the lake. This testimony conflicts with the testimony of Theresa Marie Awad who testified that on the morning after the shooting, Joseph Lester Koon was wiping blood out of the front and back of his car and that he had blood on his shoulder (R. 484, 488). Despite Joseph Lester Koon's obvious participation in this offense he pled guilty to second degree murder in exchange for his agreement to testify against his uncle Raymond Koon. The Court should have considered the disparate treatment between the defendant and Joseph Lester Koon as a mitigating circumstance.

The State did not contest this evidence; however, the court refused to find this mitigation:

CONCLUSION OF THE COURT

There are no mitigating circumstances, either statutory or otherwise, which would outweigh any aggravating circumstances, to

> justify a sentence of life imprisonment rather than a sentence of death when compared to the Aggravating Circumstances which follow.

(R. 1413).

The Court also failed to find the statutory mitigating circumstances that Mr. Koon's capacity to conform his conduct to the requirements of the law was substantially impaired. The Court found that there was sufficient evidence of Mr. Koon's drunkenness at the time of the offense to warrant an instruction during the guilt phase on voluntary intoxication. (R. 921). The Court erred by failing to find that Mr. Koon's intoxication at the time of the offense was not at least a nonstatutory mitigating factor even if the court felt it did not rise to the statutory threshold.

Despite the presence of clearly mitigating circumstances, the court concluded that no mitigating circumstances were present. This Court has recognized that factors such as poverty, emotional deprivation, lack of parental care, cultural deprivation, and a previous history of good character are mitigating. See, e.g., Perry v. State, 522 So. 2d 817 (Fla. 1988)(non-violent background is mitigating).

In Eddings v. Oklahoma, 455 U.S. 104 (1982), by a 5-4 majority the Supreme Court reversed a death sentence. Justice O'Connor writing separately explained why she concurred in the reversal:

> In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstance. See Okla. State., Tit. 21, Section 701.10 (1980). Nonetheless, in sentencing the petitioner (which occurred about one month before Lockett was decided), the judge remarked that he could not "in following the law. . . consider the fact of this young man's violent background." App. 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in Lockett compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors

> which may call for a less severe penalty.''
> 438 U.S., at 605, 98 S. Ct., at 2965.
>
> I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it **appears** that the trial believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to **offset** the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

455 U.S. at 119-20. Justice O'Connor's opinion makes clear that the sentencer is entitled to determine the weight due a particular mitigating circumstance; however, the sentencer may not refuse to consider that circumstance as a mitigating factor.

Here, that is undeniably what occurred. The judge said mitigating circumstances were not present and held that they were not to be considered.

Under Eddings, supra, and Magwood, supra, the sentencing court's refusal to accept and find the statutory and non-statutory mitigating circumstances which were established was error. Mitigating circumstances that are clear from the record must be recognized or else the sentencing is constitutionally suspect. How can the required balancing occur when the "ultimate" sentencer has failed to consider obvious mitigating circumstances? The factors should now be recognized and relief must be granted.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Koon's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy **errors** which undermine confidence in the fairness and correctness of capital

proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of eighth amendment jurisprudence. See Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Koon of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM VI

MR. KOON'S SENTENCING JUDGE USED A NON-RECORD REPORT TO SENTENCE MR. KOON TO DEATH, IN VIOLATION OF GARDNER V. FLORIDA, AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. MR. KOON'S COUNSEL FAILED TO ZEALOUSLY ADVOCATE FOR HIM AND IN FACT TACITLY AGREED DEATH WAS APPROPRIATE.

The sentencing court took into account a sentencing report that Mr. Koon had no opportunity to rebut. Immediately after the court read its findings in support of the death sentence and imposed the penalty Mr. Koon asked to have the opportunity to rebut and explain matters contained within the presentence investigation report but it was too late because the court had already imposed sentence (R. 1121).

At the conclusion of the penalty phase the court stated that the presentence investigation report (PSI) was necessary "Prior to the time of sentencing" R. 1120. The court obviously considered the PSI when making its sentencing determination because the court alleged facts during the sentencing hearing that were not brought out by the state during the penalty proceedings before the jury. Compare R. 1199-1211 with R. 1097-1098.

Mr. Koon was unconstitutionally denied the opportunity to rebut or deny the allegations in the presentence investigation report. The United States Supreme Court has directly addressed Florida's practice of using information contained within a PSI as the basis for the imposition of a death sentence. Gardner v. Florida, 430 U.S. 349 (1977).

The Gardner court held that death sentence is not constitutionally imposed when it is based on inaccurate information contained within a presentence investigation report:

> We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.

Gardner, 430 U.S. at 362, 97 S.Ct. at 1197.

The court based its holding on the possibility that the PSI may contain information which was inaccurate:

> Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

Gardner, 430 U.S. at 360, 97 S.Ct. at 1206. Mr. Koon was denied his fundamental eighth amendment rights when his sentence was imposed based on inaccurate information contained in the PSI information which he had no opportunity to rebut or deny.

After the court imposed sentence Mr. Koon asked for an opportunity to address the court. Mr. Koon informed the court of

a litany of inaccuracies contained within the PSI (R. 1212-1227). Mr. Koon obviously overwrought after being convicted and sentenced to death tried to point out the inaccuracies in the PSI:

> THE DEFENDANT: It says that Michael Blanco saw George Burton cutting up the shotgun, and if you would read the original deposition of Michael Blanco, he could, he would say that he did not see no shotgun, and no money, and that is the man that has all the depositions, right over there, that goddamn nitwit, and I can prove them to you, Judge, if you would make him go and get them right now.

(R. 1214-1215).

* * *

> And here is another goddamn lie -- they said that when Peggy delivered gasoline to me, that she was instructed to stay in the truck while I walked down to the care to bring the gas to J. L., and I'll tell you something right now, and you can go out there and look for yourself, but there is no dirt road down there within twenty miles, not a one.

(R. 1215).

The defendant requested the court to have the person that prepared the PSI brought in to testify so that Mr. Koon could establish the inaccuracies contained in the report:

> The PSI report is just filled with lies, and all these charges are untrue, and if you let me subpoena my witnesses, 1 can prove it. This damn report says that I said I would kill my wife before the month was out, and would you mind telling me, Judge, where in the world do you all get your information? Just please tell me, where in the world do you all dig this information up?
>
> THE COURT: The PSI report -- the only thing that I can tell you that was relied upon in preparing the sentencing was actually --
>
> THE DEFENDANT: Why don't you have the damn man here that prepared this report? Why don't you get him over here and tell me where he got this stuff, because I am telling you that these are all a bunch of lies.

(R. 1216).

The court acknowledged having read the PSI report but asserted that it only relied on information about Mr. Koon's prior convictions:

> THE COURT: That is why I didn't put that on the record. If you dispute those facts --
>
> THE DEFENDANT: I do dispute these facts -- they're not facts at all, they're a bunch of damn lies. And you just got through reading that, and it is here, right here in the PSI report.
>
> THE COURT: The only thing I read was the prior convictions of aggravated assault --

(R. 1216-1217).

This is exactly the error that the ~~Gardner~~ court addressed. Mr. Koon was sentenced to death by a court that considered inaccurate information contained in the PSI report, Mr. Koon had no opportunity to rebut or explain the inaccuracies in the PSI before his death sentence was imposed, by the time Mr. Koon attempted to address the inaccuracies in the PSI the court had already imposed sentence. Furthermore, the sentencing judge in a conference with trial counsel outside the presence of Mr. Koon indicated that everyone present, apparently including trial counsel, agreed that Mr. Koon would get the sentence he deserved when he got death (R. 1125). The record does not reflect any effort by counsel to rebut the court's comments, to object to the procedure, or to protest that he does not agree that death is the appropriate punishment. Under ~~Osborn v. Shillinger~~, 861 F.2d 612 (10th Cir. 1988), this was error which should have been raised on appeal to this Court.

At the beginning of the sentencing proceeding the court inquired of counsel whether he had anything to say before sentence was imposed (R. 1200). Counsel cannot waive Mr. Koon's right to rebut the PSI. Gardner, 430 U.S. at 360, 97 S.Ct. at 35; and see Johnson v. Zerbst, 304 U.S. 458 (1938). Mr. Koon's sentence of death was unconstitutionally imposed.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Koon's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwrisht, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of federal constitutional law. See Gardner, supra and Faretta v. California, 422 U.S. 806 (1975). It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Koon of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM VII

THE SENTENCING COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MR. KOON'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Mr. Koon's sentence of death was illegally imposed because the sentencing court failed to perform its statutorily mandated

function of independently weighing aggravating and mitigating circumstances before imposing Mr. Koon's death sentence.

Florida's death penalty statute clearly outlines the bifurcated penalty and sentencing proceedings that must be followed in a murder case where the death penalty is sought. Fla. Stat. 921.141. Part of the guidelines enacted by the legislature requires the Court to conduct an independent assessment of the propriety of the jury's recommendation if the penalty jury advises the Court to impose a death sentence. The statute provides:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--Notwithstandins the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set for in writing its findings upon which the sentence is based as to the facts:
>
> (a) The sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082

(Fla. Stat. 921.141(3)(emphasis added).

The court, when sentencing Mr. Koon to death, failed to recognize his independent role in the sentencing process. When discharging the jury at the conclusion of the sentencing process the judge assured the jury that he would follow the jury's penalty recommendation ignoring his duty to independently weigh and determine the proper sentence:

> THE COURT: Okay, let me briefly explain to you what the next procedure will be. The court is required in imposing sentencing, and

> assuming that the Court agrees to abide by your advisory sentence, and quite frankly, I might as well tell you that I don't believe in not following a jury's advisory sentence, so that more or less explains why there is the next state.

(R. 1118-1119)(emphasis added). In chambers outside the presence of the defendant the court indicated the defendant was going to receive the sentence everyone agreed he deserved (R. 1125).

The fundamental precept of this Court's and the United States Supreme Court's modern capital punishment jurisprudence is that the sentencer must afford the capital defendant an individualized capital sentencing determination. To this end, this court has mandated that capital sentencing judges conduct a reasoned and independent sentencing determination. This Court has therefore consistently held that the trial judge must engage in an independent and reasoned process of weighing aggravating and mitigating factors in determining the appropriateness of the death penalty in a given case:

> Explaining the trial judge's serious responsibility, we emphasized, in State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed 2d 295 (1974):
>
> > [T]he 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 lonser sentence a man to die. . . .
> >
> > The fourth step required by Fla. Stat. sec. 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant.

Patterson v. State, 513 So. 2d 1257 (Fla. 1987)(emphasis added).

In this case the trial court relied solely on the findings by the jury. The judge here simply provided a factual and legal basis to support the jury's recommendation. In fact, the record here reflects that no independent weighing of aggravating and mitigating circumstances whatsoever was afforded by the sentencing judge. The judge told the jury that he would follow their recommendation.

This Court has addressed the ramifications of a trial judge's failure to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. In a number of cases, the issue has been presented where findings of fact were issued long after the death sentence was actually imposed. Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). In Van Royal, the Court set aside the death sentence because the record did not support a finding that the imposition of that sentence was based on a reasoned judgment. Chief Justice Ehrlich's concurring opinion explained:

> The statutory mandate is clear. This court speaking through Mr. Justice Adkins in the seminal case of State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943, 94 S.Ct 1950, 40 L.Ed2d 295 (1974), said with respect to the weighing process:
>
> > It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather 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 present.
>
> 283 So. 2d at 10. (emphasis supplied).
>
> How can this Court know that the trial court's imposition of the death sentence was based on a "reasoned judgment" after weighing the aggravating and mitigating circumstances when the trial judge waited almost six months after sentencing defendant to death before filing his written findings as to aggravating and mitigating circumstances in support of

> the death penalty? The answer to the rhetorical question is obvious and in the negative.

497 So. 2d at 629-30.

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the Florida Supreme Court was presented this very issue. The Court ordered a resentencing, emphasizing the importance of the trial judge's independent weighing of aggravating and mitigating circumstances. In Patterson, the trial judge failed to engage in any independent weighing process; the responsibility was delegated to the state attorney:

> [W]e find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant.

Patterson, supra, 513 so. 2d at 1261.

The Patterson court observed that in Nibert v. State, 508 So. 2d 1 (Fla. 1987), it had held that the judge's failure to write his own findings did not constitute reversible error "so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." Patterson, 513 So. 2d at 1262, quoting Nibert, 508 So. 2d at 4. Indeed, in Nibert, the judge made his findings orally and then directed the State to reduce his findings to writing. 508 So. 2d at 4. The record in Patterson demonstrated that there the trial judge "delegat[ed] to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors." 513 So. 2d at 1262. This constitutes sentencing error because the Court fails to engage in independent assessment of the appropriate sentence.

Here, the trial court denied Mr. Koon's right to an individualized and reliable sentencing determination by failing to conduct the independent weighing which the law requires. He merely followed the jury's recommendation of death which was by the slightest majority of only 7-5. The trial judge here never exercised independent judgment. This Court has made it clear in Dixon, supra, Van Royal, supra, and Patterson, supra, that the trial court must (a) engage in a reasoned weighing process of aggravating and mitigating circumstances, and (b) not delegate the responsibility for that weighing process to another entity.

The trial court here abdicated its responsibility: simply relied on the jury's recommendation. A trial court cannot impose a death sentence in an arbitrary or capricious manner:

> In order to satisfy the requirements of the eighth and fourteenth amendments, a capital sentencing scheme must provide the sentencing authority with appropriate standards "that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, 428 U.S. 2542, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913, 926 (1976). After reviewing the psychiatric evidence that was before the state court, we must conclude that the state court's rejection of the two mental condition mitigating factors is not fairly supported by the record and that, as such, Magwood was sentenced to death without proper attention to the capital sentencing standards required by the Constitution.

Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). In Magwood the court found that it was error for the trial court to totally disregard evidence of mitigation. Similarly, the court here acted in an arbitrary and capricious manner in totally relying on the jury's advisory sentence and in failing to provide any independent consideration to the mitigation set forth in the record.

This error has permeated this proceeding. On direct appeal of Mr. Koon's conviction and sentence, the Court rejected Mr. Koon's claim that the Court felt bound by the jury's recommendation. The court failed to consider the fact that the

trial court did not conduct any independent assessment of the proper sentence. In Ross v. State, 388 So. 2d 1191, 1197 (Fla. 1980), the defendant's death sentence was vacated when the trial judge did not make an "independent judgment of whether or not the death penalty should be imposed." The Court based its analysis on State v. Dixon, supra. This Court found that failure to conduct an independent weighing, violates the dictates of Tedder v. State, 322 So. 2d 908 (Fla. 1975) stating:

> Although this Court in Tedder v. State, supra, and Thompson v. State, supra, stated that the jury recommendation under our trifurcated death penalty statute should be given great weight and serious consideration, this does not mean that if the jury recommends the death penalty, the trial court must impose the death penalty. The trial court must still exercise its reasoned judgment in deciding whether the death penalty should be imposed. The standard for our review of death sentences where the jury has recommended life was enunciated in Tedder v. State, supra, as follows:
>
> > In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

322 So. 2d at 910. In LeDuc v. State, 365 So. 2d 149 (Fla. 1978), this Court considered the standard of review of a death sentence where the jury recommends death and stated:

> The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation. On the record placed before the jury in this case, a recommended sentence of death was certainly reasonable. Indeed, the only data on which a life recommendation could have been made would have had to be grounded on the nonevidentiary recommendation of the prosecutor and the emotional plea of defense counsel.

Id. at 151. Since it appears that the trial court did not make an independent judgment whether the death sentence should be imposed, we remand to the trial court to reconsider its sentence in light of this opinion.

Ross v. State, 386 So. 2d 1197-98.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Koon's death sentence. Counsel was ineffective in failing to explain to the sentencing judge his obligation to blindly follow a death recommendation. Mr. Koon's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. He respectfully urges that the error be corrected now.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Koon's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. Accordingly, habeas relief must be accorded.

CLAIM VIII

MR. KOON'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985) AND MANN V. DUGGER, 844 F.2D 1446 (11TH CIR. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. KOON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE.

In Mann V. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 44 Cr. L. 4192 (1988), relief was granted to a capital habeas corpus petitioner presenting a Caldwell V. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Koon's eighth amendment rights. Raymond Koon should be entitled to relief under Mann, for there is no discernible

difference between the two cases. A contrary result would result in the totally arbitrary and freakish imposition of the death penalty and violate the eighth amendment principles.

Caldwell v. Mississippi, 472 U.S. 320 (1985), involved prosecutorial/judicial diminution of a capital jury's sense of responsibility which is far surpassed by the jury-diminishing statements made during Mr. Koon's trial. The en banc Eleventh Circuit in Mann V. Dugger, 844 F.2d 1446 (11th Cir. 1988), and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), determined that Caldwell assuredly does apply to a Florida capital sentencing proceeding and that when either judicial instructions or prosecutorial comments minimize the jury's role relief is warranted. See Mann, supra. Caldwell involves the most essential eighth amendment requirements to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having nothing to do with the character of the affender or circumstances of the offense), and that such a sentence be reliable. Id., 105 S. Ct. at 2645-46.

At all trials there are only a few occasions when jurors learn of their proper role. At voir dire, the prospective jurors are informed by counsel and, on occasion, by the judge about what is expected of them. When lawyers address the jurors at the close of the trial or a segment of the trial, they are allowed to give insights into the jurors' responsibility. Finally, the judge's instructions inform the jury of its duty. In Mr. Koon's case, as in Mann v. Dugger, at each of those stages, the jurors heard statements from the judge and/or prosecutor which diminished their sense of responsibility for the awesome capital sentencing task that the law would call on them to perform.

Throughout the proceedings, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. As to

guilt or innocence, they were told they were the only ones who would determine the facts. As to sentencing, however, they were told that they merely recommended a sentence to the judge.

Mann v. Dugger makes clear that proceedings such as those resulting in Mr. Koon's sentence of death violate caldwell and the eighth amendment. In Mann, as in Mr. Koon's case, the prosecutor sought to lessen the jurors' sense of responsibility during voir dire and repeated his effort to minimize their sense of responsibility during his closing argument. In Mann, the en banc Eleventh Circuit held that "the Florida [sentencing] jury plays an important role in the Florida sentencing scheme," 844 F.2d at 1454, and thus:

> Because the jury's recommendation is significant . . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that has been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing.

Id. at 1454-55. The comments and arguments provided to Mr. Koon's jurors were as egregious as those in Mann and went far beyond those condemned in Caldwell. Pertinent examples are reproduced immediately below.

From the very start of the trial the role of the jury in sentencing was trivialized in a steady stream of misstatements. The jury was repeatedly told it was the court -- not the jury -- that decides the sentence (R. 40, 41, 1097, 1110, 1113-1114). What was emphasized to Mr. Koon's jury was not, as required, that the jury's sentencing role is integral, central and critical. Rather they were told the "final decision" was the judge's (R. 1097, 1111) and that the jury only makes a "recommendation."

The State misinformed the jury concerning the seriousness of their role in determining whether Mr. Koon's lived or was put to death. The prosecutor told the entire venire panel from which Mr. Koon's jury was selected:

> This is a first degree murder case, and there are certain lesser included charges, but if a man is convicted of murder in the State of Florida, there are two choices: life with a minimum-mandatory of twenty-five years prison, or the death penalty. The State is going to be seeking the death penalty in this case, and what I need to do is go over with you how that works, so I can ask you a couple of questions about that. There is a phase, that is the first phase of the trial, and the first stage of the trial is the evidentiary stage -- all the evidence and testimony is presented, and at the close of that stage, there is an argument by counsel for both the State and the defense. Then, the Court will instruct you on the law, and you will then go out to deliberate as to whether the State has proved the Defendant guilty of first-degree murder, then there is second proceeding whereby more evidence and argument is presented, and then you must go back and you make and opinion to the Court as to whether the death penalty should be imposed, and that is based on certain standards that the Court will instruct you on, called aggravating and mitigating circumstances.

(R. 40). The prosecutor continued in this vein:

> After the arguments and evidence has been presented to you, and the Judge has instructed you on aggravating and mitigating circumstances, you will go back and deliberate, and then you will make a recommendation to the Court by a form that you will fill out, and in that recommendation, you would be deciding for either the death penalty or for life imprisonment.

(R. 41).

The jury was lulled into a false and improper sense of non-responsibility for determining the sentence:

> THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of Premeditated First Degree Murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge;
>
> . . . .

> Your advisory sentence should be based upon the evidence you have heard while trying the guilty or innocence of the Defendant and the evidence that has been presented to you in these proceedings.

(R. 1111).

Rather than stressing that the jury's sentencing decision is integral, and will stand unless patently unreasonable, the court and the prosecutor stressed to Mr. Koon's jury that the "final decision" was the courts.

> The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weight the aggravating circumstances against the mitigating circumstances, and your **advisory** sentence must be based on these considerations.
>
> In these proceedings, it is not necessary that the **advisory** sentence of the jury be unanimous.

(R. 1113)

Again and again, the **jury** was **told it is** the judge **who "pronounces"** sentence **(E.g.,** R. 40, **41, 1097, 1110-114).** The jury, as if their sentencing determination were but **a** political straw poll, were told that they were simply making a recommendation (R. **41),** providing **a** view which could be taken for whatever it was worth by the true sentencing authority who carried the entire responsibility on his shoulders -- the judge. At the guilt-innocence phase, the jury was instructed: **"It** is the judge's **job** to determine what a **proper** sentence would be if the Defendant is guilty." **(R.** 922). Then, at sentencing, they were time and again instructed that their role was merely advisory and only a recommendation which could be accepted or rejected as the sentencing **judge saw** fit.

These instructions, **and** the trial judge's earlier comments, like the instructions in Mann, "expressly put the court's imprimatur on the prosecutor's previous misleading statements." Id. at 1458. **Cf.** Mann, **844** F.2d at **1458 ("[A]s you have been**

told, the final decision as to what punishment shall be imposed is the responsibility of the judge." [Emphasis in original]).

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell v. Mississippi, 105 S. Ct. 2633, 2641-42 (1985)(emphasis supplied). When we understand these factors, we can appreciate why comments and instructions such as those provided to Mr. Koon's jurors, and condemned in Mann, served to diminish their sense of responsibility, and why the State cannot show that the comments at issue had "no effect" on their deliberations. Caldwell, 105 S. Ct. at 2645-46.

The comments here at issue were not isolated, but were made by prosecutor and judge at every stage of the proceedings. They were heard throughout, and they formed a common theme: the judge had the final and sole responsibility, while the critical role of the jury was substantially minimized. The prosecutor's and the judge's comments allowed the jury to attach less significance to their sentencing verdict, and therefore enhanced the risk of an unreliable death sentence. Mann v. Dugger; Caldwell v. Mississippi.

Under Caldwell the central question is whether the prosecutor's comments minimized the jury's sense of responsibility. See Mann, 844 F.2d at 1456. If so, then the reviewing court must determine whether the trial judge sufficiently corrected the prosecutor's misrepresentation. Id. Applying these questions to Mann, the en banc Court of Appeals found that the prosecutor did mislead or at least confuse the jury and that the trial court did not correct the misapprehension. Applying these same questions to Mr. Koon's

case, it is obvious that the jury was equally misled by the prosecutor, and that the prosecutor's persistent misleading and jury minimizing statements were not adequately remedied by the trial court. In fact, the trial court compounded the error.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. At the sentencing phase of a Florida capital trial, the jury plays a critical role. See Mann, supra; see also Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Brookings V. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Ferry V. State, 507 So. 2d 1373 (Fla. 1987); Fead V. State, 512 So. 2d 176 (Fla. 1987); Hall v. State, 14 F.L.W. 101 (Fla. 1989). Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. See Mann v. Dugger, 844 F.2d at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme). The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as a "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooser v. State, 336 So. 2d 1133, 1140 (Fla. 1976). While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. Mann, supra; McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Koon's jury, however, was led to believe that its determination

meant very little, as the judge was free to impose whatever sentence he wished. Cf. Mann v. Dugger.

In Caldwell, 105 S. Ct. 2633, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id., 105 S. Ct. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,"' the Court vacated Caldwell's death sentence. Caldwell, 105 S. Ct. at 2645. The same vice is apparent in Mr. Koon's case, and Mr. Koon is entitled to the same relief.

The constitutional vice condemned by the Caldwell, Court is not only the substantial unreliability that comments such as the ones at issue in Mr. Koon's case inject into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. Id. at 2640. A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S. Ct. at 2641. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 208 (1971), might find a

diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42. As the ~~Caldwell~~ Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 2641-42 (emphasis supplied).

The comments and instructions here went a step further -- they were not isolated, as were those in ~~Caldwell~~, but as in ~~Mann~~ were heard by the jurors at each stage of the proceedings. These cases teach that, given comments such as those provided to Mr. Koon's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. This the State cannot do. Here the significance of the jury's role was minimized, and the comments at issue created a danger of bias in favor of the death penalty. Had the jury not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden -- for example, the evidence of non-statutory mitigation was more than a "reasonable basis" which would have precluded an override. See

Hall v. State, 14 F.L.W. 101 (Fla. 1989); Brookings v. State, supra, 495 So. 2d 135; McCampbell v. State, supra, 421 So. 2d at 1075. The Caldwell violations here assuredly had an effect on the ultimate sentence. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received. This case also presents a classic example of a case where no Caldwell error can be deemed to have had "no effect" on the verdict.

Moreover, appellate counsel was ineffective for not raising this error. Longstanding Florida case law established the basis for such an claim. See Pait v. State, 112 So. 2d 380, 383-84 (Fla. 1959)(holding that misinforming the jury of its role in a capital case constituted reversible error). See Breedlove v. State, 413 So. 2d 1 (Fla. 1982). No tactical decision can be ascribed to counsel's failure. Counsel's failure could not have been based upon ignorance of the law. It deprived Mr. Koon of the effective assistance of counsel. Accordingly, Mr. Koon's was denied his eighth amendment rights. His sentence of death is neither "reliable" nor "individualized."

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Koon. For each of the reasons discussed above the Court should vacate Mr. Koon's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Koon's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and

prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Pait, Breedlove, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Koon of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM IX

DURING THE COURSE OF MR. KOON'S TRIAL, THE PROSECUTION AND THE COURT IMPROPERLY ASSERTED THAT SYMPATHY TOWARDS MR. KOON WAS AN IMPROPER CONSIDERATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FAILURE TO LITIGATE THIS CLAIM DEPRIVED MR. KOON OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

During the course of the trial, the State and the court informed the jurors chosen to sit on Mr. Koon's trial that sympathy was an improper factor for their consideration. During voir dire, Mr. Hollander instructed the jury panel including every prospective juror that they should not base their determination on personal feelings (R.84). Again later in the voir dire the prosecutor instructed the jurors to dispel any consideration of their personal feelings when making their decision (R. 107).

The prosecutor also argued that sympathy had no part in the jury's deliberations:

> Ladies and gentlemen of the jury, let me remind you strongly to listen very carefully when the Judge instructs you on sympathy. Sympathy has no part in your verdict, and don't let sympathy sway your verdict.

(R. 871).

The court then instructed the jury:

> Feelings of prejudice, bias or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way.

(R. 922). This instruction was given in the guilt phase, but no instruction was given in the penalty phase indicating that sympathy towards Mr. Koon could then be considered.

In Wilson v. Kemp, 777 F.2d **621, 624** (11th Cir. **1985),** the court found that statements of prosecutors, which may mislead the jury into believing personal feelings of mercy must be cast aside, violate the federal Constitution:

> **The** clear impact of the [prosecutor's statement's] is that a sense of **mercy** should not dissuade one from punishing criminals to the maximum extent possible. This position on mercy is diametrically opposed to the Georgia death penalty statute, which directs that **"the** jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant." **O.C.G.A.** Section 17-10-2(c)(Michie 1982). Thus, as we held in Drake, the content of the [prosecutor's closing] is "fundamentally opposed to current death penalty jurisprudence." 762 F.2d at 1460. Indeed, the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases. See, e.g., Woodson v. North Carolina, **428** U.S. **280, 303,** 96 S.Ct. 2978, 2990, **49 L.Ed.2d 944** (1976)(striking down North Carolina's mandatory death penalty statute for the reason, inter alia, that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death"); Lockett v. Ohio, 438 **U.S. 586, 604, 98** S.Ct. **2954, 2964,** 57 L.Ed.2d **973** (1978)(striking down Ohio's death penalty statute, which allowed consideration only of certain mitigating circumstances, on the grounds that the sentencer may not **"be** precluded from considering as a mitigating

> factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The [prosecutor's closing] in strongly suggesting otherwise, misrepresents this important legal principle.

Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985).

Requesting the jury to dispel any sympathy they may have towards the defendant undermined the jury's ability to reliably weigh and evaluate mitigating evidence. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988)(en banc). See Coleman v. Saffle, ___ F.2d ___, No. 87-2011 (10th Cir., March 6, 1989); Davis v. Maynard, ___ F.2d ___, No. 87-1157 (10th Cir., March 14, 1989). The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddinss v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition to disregard the consideration of sympathy improperly suggests to "the jury that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring).

Sympathy is an aspect of the defendant's character that must be considered by the jury during penalty deliberations:

> The capital defendant's constitutional right to present and have the jury consider mitigating evidence during the capital phase of the trial is very broad. The Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

The sentencer must give "individualized" consideration to the mitigating circumstances surrounding the defendant and the crime, Brown, 479 U.S. at 541; Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddings, 455 U.S. at 114. See also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).

Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to, the defendant in normal human terms. A long line of Supreme court cases shows that a capital defendant has a constitutional right to make, and have the jury consider, just such an appeal.

In Gregg v. Georgia, 428 U.S. 153 (1976), the Court upheld the Georgia sentencing scheme which allowed jurors to consider mercy in deciding whether to impose the penalty of death. Id. at 203. The Court stated that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.!! Id. at 199.

In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Court struck down mandatory death sentences as incompatible with the required individualized treatment of defendants. A plurality of the Court stated that mandatory death penalties treated defendants "not as uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." Id. at 304. The Court held that "the fundamental respect for humanity underlying the Eight Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. The Court explained that mitigating evidence is allowed during the sentencing phase of capital trial in order to provide for the consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind." Id.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court reviewed a sentencing judge's refusal to consider evidence of a

defendant's troubled family background and emotional problems. In reversing the imposition of the death penalty, the Court held that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 113-14 (emphasis in original). The Court stated that although the system of capital punishment should be "consistent and principled," it must also be "humane and sensible to the uniqueness of the individual." Id. at 110.

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Court held that an attempt to shift sentencing responsibility from the jury to an appellate court was unconstitutional, in part, because the appellate court is ill equipped to consider "the mercy plea [which] is made directly to the jury." Id. at 330-31. The Court explained that appellate courts are unable to "confront and examine the individuality of the defendant" because "[w]hatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." Id.

In Skipper V. South Carolina, 476 U.S. 1 (1986), the trial court had precluded the defendant from introducing evidence of his good behavior while in prison awaiting trial. The Court held that the petitioner had a constitutional right to introduce the evidence, even though the evidence did not relate to his culpability for the crime. Id. at 4-5. The Court found that excluding the evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Id. at 8.

"Mercy," "humane" treatment, "compassion," and consideration of the unique "humanity" of the defendant, which have all be affirmed as relevant considerations in the penalty phase of a capital case, all inevitably involve sympathy or are sufficiently intertwined with sympathy that they cannot be parsed without significant risk of confusion in the mind of a reasonable juror. Webster's Third International Dictionary (Unabridged ed. 1966) describes "mercy" as "a compassion or forbearance shown to an offender," and "a kindly refraining from inflicting punishment or pain, often a refraining brought about by a genuinely felt compassion and sympathy." Id. at 1413 (emphasis added). The word "humane" similarly is defined as "marked by compassion, sympathy, or consideration for other human beings." Id. at 1100 (emphasis added). Webster's definition of "compassion" is a "deep feeling for and understanding of

misery or suffering," and it specifically states that "sympathy" is a synonym of compassion. Id. at 462. Furthermore, it defines "compassionate" as "marked by . . . a ready inclination to pity, sympathy, or tenderness." Id (emphasis added).

Without placing an undue technical emphasis on definitions, it seems to us that sympathy is likely to be perceived by a reasonable juror as an essential or important ingredient of, if not a synonym for, "mercy," "humane" treatment, "compassion," and a full "individualized" consideration of the "humanity" of the defendant and his "character." . . . [I]f a juror is precluded from responding with sympathy to the defendant's mitigating evidence of his own unique humanness, then there is an unconstitutional danger that his counsel's plea for mercy and compassion will fall on deaf ears.

Here, the petitioner did offer mitigating evidence about his background and character. Petitioner's father testified that petitioner was a "happy-go-lucky guy" who was "friendly with everybody." The father also testified that, unlike other people in the neighborhood, petitioner avoided violence and fighting; that he (the father) was in the penitentiary during the petitioner's early childhood; that petitioner was the product of a broken home: and that petitioner only lived with him from about age 14 to 19. Although the father admitted that petitioner once was involved in an altercation at school, he suggested that it was a result of the difficulties of attending a school with forced bussing. Record, vol. V, at 667-82.

Petitioner's counsel, in his closing argument, then relied on this testimony to argue that petitioner's youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. In so doing, defense counsel appealed directly to the jury's sense of compassion, understanding, and sympathy, and asked the jury to show "kindness" to his client as a result of his background. Record, vol. V, at 708-723.

. . . [There is] an impermissible risk that the jury did not fully consider these mitigating factors in making its sentencing decision.

. . .

As we discussed above, sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character.

Parks v. Brown, 860 F.2d at 1554-57. On April 25, 1989, the

United States Supreme Court granted a writ of certiorari in order to review the decision in Parks. See Saffle v. Parks, ___ Cr.L. (cert. granted April 25, 1988).

The remarks by the prosecutor during voir dire coupled with the court's instruction may have served to constrain the jury in their evaluation of mitigating factors. Under Mills v. Maryland, 108 S. Ct. 1860 (1978), the question is whether reasonable jurors may have understood what they were told as precluding consideration of mercy or sympathy towards Mr. Koon. Certainly, here reasonable jurors could have understood the instructions as precluding them from allowing the natural tendencies of human sympathy from entering into their determination of whether any aspect of Mr. Koon's character required the imposition of a sentence other than death.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Koon. Counsel's failure to litigate this claim was a failure to zealously represent Mr. Koon. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Koon's death sentence. Certainly, California v. Brown, Mills, and Parks v. Brown are new cases but they merely expound upon the old principles of Lockett and Eddings. Thus, these cases are unquestionably retroactive as the Tenth Circuit Court of Appeals has noted the State of Oklahoma conceded. Coleman v. Saffle, supra, slip op. at 30. Soon the United States Supreme Court will address this very issue in its review of Parks. Certainly Mr. Koon execution must be stayed pending the decision in Parks,

The error here undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Koon. For each of the reasons discussed above the Court should vacate Mr. Koon's

unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Koon's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Lockett, Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire V. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel onlv had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Koon of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwrisht, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM X

THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. KOON'S DEATH SENTENCE WAS THUS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Mr. Koon's sentencing trial was erroneously instructed on the vote necessary to recommend a sentence of death or life. As decisions of this Court have made clear, the law of Florida is not that a majority vote is necessary for the recommendation of a life sentence; rather, a six-six vote, in addition to a seven-five or greater majority vote, is sufficient for the recommendation of life. Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983). However, Mr. Koon's jury throughout the proceedings was erroneously informed that, even to recommend a life sentence, its verdict must be by a majority vote. These erroneous instructions are also the type of misleading information condemned by Caldwell v. Mississippi, 105 S. Ct. 2633 (1985) and Mann v. Dugger, 844 F.2d 1444 (11th Cir. 1988)(en banc), in that they "create a misleading picture of the jury's role." Caldwell at 2646 (O'Connor, J., concurring). As in Caldwell, the instructions here fundamentally undermined the reliability of the sentencing determination, for they created the risk that the death sentence was imposed in spite of factors calling for a less severe punishment, in violation of the most fundamental requirements of the eighth amendment.

There can be no question that the jury charged with deciding whether Mr. Koon should live or die was erroneously instructed. At the penalty phase, the trial court informed the jury that,

> In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury. The fact that the determination of whether a majority of you recommend a sentence of death or a sentence

> of life imprisonment in this case can be reached by a single ballot, should not influence you to act hastily or without due regard to the gravity of these proceedgins. Before you ballot, you should carefully weigh, sift, and consider the evidence, and all of it, realizing that human life is at state, and bring to bear your best judgment in reaching your advisory sentence.
>
> If a majority of a jury determines that the defendant should be sentenced to death, your advisory sentence will be, and there is a blank space to indicate, a majority of the jury, by a vote of blank, advise and recommend to the Court that it impose the death penalty upon Raymond Leon Koon,
>
> On the other hand, if by six or more votes, the jury determines that the defendant should not be sentenced to death, your advisory entence will be: The jury advises and recommends to the Court that is impose a sentence of life imprisonment upon Raymond Leon Koon without possibility of parole for 25 years.
>
> These forms have been prepared for you, and at this time you will retire to the jury room to consider your recommendations. When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreman and returned to the Court.

(R. 1113-1114). The trial court then immediately allowed the jury to retire for its sentencing deliberations.

The trial court's erroneous instructions regarding the jury vote "create[d] a misleading picture of the jury's role." Caldwell, supra, at 2646 (O'Connor, J., concurring). This "misleading picture" may very well have diminished the importance the individual jurors placed on their "recommended" sentence. Caldwell, susra; Mann v. Dugger, supra. In any case, the jury's deliberations, its application of law to facts, its very weighing process, remain untrustworthy. The results of this sentencing proceeding are not reliable.

Mr. Koon's jury was erroneously instructed. Although the record reflects that the slimmest majority of the jurors recommended death, it is entirely possible that a six-to-six vote -- i.e., a life recommendation -- was reached at some point during deliberations only to be abandoned on the basis of the

trial court's erroneous instructions. It is clear that the final instruction regarding the jury's vote, particularly when combined with the reinforcement previously received from the judge misled the jury, and gave them the erroneous impression that they could not return a valid sentencing verdict if they were tied six to six. Jurors so instructed could quite logically believe that a tied jury was a hung jury. Such a mistaken belief could lead a vacillating juror to change his or her vote from life to death in order to avoid this eventuality.

In any event, it is the erroneous instruction itself that violated Mr. Koon's fifth, sixth, eighth, and fourteenth amendment rights. Mr. Koon may well have been sentenced to die because his jury was misinformed and misled. Such a procedure creates the substantial risk that a death sentence was imposed in spite of factors calling for a less severe punishment. Lockett v. Ohio, 438 U.S. *586, 605* (1978). Wrongly telling the jury that it had to reach a majority verdict "interject[ed] irrelevant considerations into the fact finding process, diverting the jury's attention from the central issue" of whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). The erroneous instruction may have encouraged Mr. Koon's jury to reach a death verdict for an impermissible reason -- its incorrect belief that a majority verdict was required. The erroneous instruction thus "introduce[d] a level of uncertainty and unreliability into the [sentencing] process that cannot be tolerated in a capital case." Id. at 643.

Because these instructions and comments, in their entirety, "create[d] a misleading picture of the jury's role," Caldwell at 2646, Mr. Koon need not show prejudice. The instructions and comments misled the jury, diminished the jury's sense of responsibility, injected arbitrary and capricious factors into the sentencing process, and undermined the reliability of that process.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Koon. For each of the reasons discussed above the Court should vacate Mr. Koon's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Koon's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of eighth amendment jurisprudence. See Lockett, Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Koon of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM XI

THE PROSECUTION IN THE COURSE OF THE PROCEEDINGS IMPROPERLY ASSERTED THAT MERCY TOWARDS MR. KOON WAS NOT A PROPER CONSIDERATION AND THAT THE LEGISLATURE INTENDED THAT HE BE EXECUTED.

It is clear at Mr. Koon's trial that the prosecution's strategy was to convince the jurors that they were not free to be merciful. The jurors were forced to promise to give up their own personal feelings about whether a death sentence was appropriate. They were told that they could not consider any sympathy they may have for Mr. Koon. They were told a higher body than they, the legislature dictated this and thus the legislature was responsible for the death recommendation. As explained and argued by the State, the jurors were left without choice and had to recommend death or violate their promise to be the conscience of the community.

The State misrepresented the law and committed fundamental error. In Wilson V. Kemp, 777 F.2d 621, 624 (11th Cir. 1985), it was explained statements of prosecutors, which may mislead the jury into believing personal feelings of mercy must be case aside, violate fifth amendment principles:

> The clear impact of the [prosecutor's closing] is that a sense of mercy should not dissuade one from punishing criminals to the maximum extent possible. This position on mercy is diametrically opposed to the Georgia death penalty statute, which directs that "the jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant." O.C.G.A. Section 17-10-2(c)(Michie 1982). Thus, as we held in Drake, the content of the [prosecutor's closing] is "fundamentally opposed to current death penalty jurisprudence." 762 F.2d at 1460. Indeed, the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976)(striking down North Carolina's mandatory death penalty statute for the reason, inter alia, that it failed "to allow the particularized consideration of relevant aspects of the character and record of each

> convicted defendant before the imposition upon him of a sentence of death"); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)(striking down Ohio's death penalty statute, which allowed consideration only of certain mitigating circumstances, on the grounds that the sentencer may not "be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death")(emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The [prosecutor's closing] in strongly suggesting otherwise, misrepresents this important legal principle.

Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985)

In addition, the prosecutor's statements in voir dire and the penalty closing improperly diminished the jury's sense of responsibility for its recommendation. The prosecutor in essence argued: What can you do, your hands have been tied by the legislature. The legislature intends that a death recommendation must be returned. You must honor that request, even if it is not your own personal belief that mercy should not be afforded Mr. Koon. This type of argument is improper under Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). It shifted the responsibility from the jurors to the legislature.

Caldwell teaches that, given comments such as those provided by the judge and prosecutor to Mr. Koon's capital jury, the state must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646.

The eighth amendment errors in this case denied Mr. Koon his rights to an individualized and reliable capital sentencing determination. Under no construction can it be said that the statements at issue had "no effect" on the jury's sentencing verdict. Caldwell, 105 S. Ct. at 2646; Mann v. Dugger, supra. The comments and instructions assuredly had an effect. Caldwell, supra; Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987)(en banc).

Moreover, the comments "serve[d] to pervert the jury's deliberations concerning the ultimate question of whether ~~in fact~~ [Raymond Koon should be sentenced to die]." ~~Smith v. Murray~~, 106 S. Ct. 2661, 2668 (1986). No bar exists to the Court's consideration of this claim under these circumstances. ~~See Smith~~ v. Murray, 106 S. Ct. at 2668. Relief is proper.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Koon. For each of the reasons discussed above the Court should vacate Mr. Koon's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Koon's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of eighth amendement jurisprudence. See Lockett, Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwrisht, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Koon of the appellate reversal to which he was constitutionally

entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CONCLUSION AND RELIEF SOUGHT

Claims I, II, III, IV, V, VI, VII, VIII, IX, X ans XI set out above, all involve, inter alia, ineffective assistance of appellate counsel, as well as fundamental error. The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the expert professional . . . assistance . . procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v, Morrison, 106 S. Ct. 2574, 2588 (1986); United States v. Cronic, 466 U.S.S 648, 657 n.20 (1984); see also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been "effective". Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (1981).

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by an appellate attorney's deficiencies:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role that advocate to discover and highlight possible error and to present it to the court, both in writing and orally,

> in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will recieve adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief that our confidence in the correctness and fairness of the result has been undermined.

Wilson v. Wainwrisht, 474 So. 2d 1162, 1165 (Fla. 1985). "The basic requirement of due process," therefore, 'is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bouds of the law." Id. at 1164 (emphasis supplied).

Appellate counsel here failed to act as an advocate for his client. As in Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987), there simply was no reason here for counsel to fail to urge meritorious claims for relief. Counsel ineffectively and through ignorance of the facts and law simply failed to urge them on direct appeal. As in Matire, Mr. Koon is entitled to relief. See also, Wilson v. Wainwrisht, supra; Johnson V. Wainwright, supra. The "adversarial testing process" failed during Mr. Koon's direct appeal -- because counsel failed. Matire at 1438, citing Strickland v. Washington, 466 U.S. 668, 690 (1984).

To prevail on his claim of ineffective assistance of appellate counsel Mr. Koon must show: 1) deficient performance, and 2) prejudice. Matire, 811 F.2d at 1435; Wilson, supra. As the foregoing discussion illustrates, Mr. Koon has.

There are also presented as independent claims raising matters of fundamental error and/or are predicated upon significant changes in the law. Because the forgoing claims present substantial constitional questions which go to the heart of the fundamental fairness and reliability of Mr. Koon's capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. At this time,

a stay of execution, and a remand to an appropriate trial level tribunal for the requisite findings on contested evidentiary issues of fact -- including ~~inter alia~~ appellate counsel's deficient performance, -- should be ordered. The relief sought herein should be granted.

WHEREFORE, Raymond Koon through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction and sentence of death. He also prays that the Court stay his execution on the basis of, and in order to fully determine, the significant claims herein presented. Since this action also presents question of fact, Mr. Koon urges that the Court relinquish jurisdiction to the trial court, or assign the case to an appropriate authority, for the resolution of the evidentiary factual question attendant to his claims, including inter alia, questions regarding counsel's deficient performance and prejudice.

Mr. Koon urges that the Court grant him habeas corpus relief, or alternatively, a new appeal, for all the reasons set forth herein, and that the Court grant all other and further relief which the Court may deem just and proper.

RESPECTFULLY SUBMITTED,

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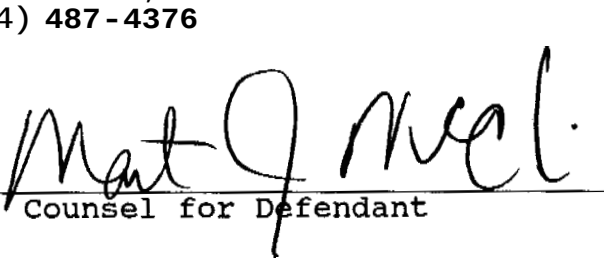
By: 
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by first class, U. S. Mail, postage prepaid to the Office of the Attorney General, Park Trammel Building, 1313 Tampa Street, Tampa, Florida 33602, this 31st day of May, 1989.

Matt J. Neal
Attorney