IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,639

LLOYD CHASE ALLEN,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
SIXTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MONROE COUNTY

REPLY BRIEF OF APPELLANT

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I

THE TRIAL COURT'S ERROR IN ADMITTING, IN GUILT/INNOCENCE PHASE OF TRIAL, UNDULY PREJUDICIAL PHOTOGRAPH OF VICTIM CUDDLING GRANDCHILD IN HER LAP, AS WELL AS OTHER VICTIM IMPACT EVIDENCE AND PROSECUTORIAL ARGUMENT THEREON, VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL, UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§2, 9, 16, 17 AND 22 OF THE STATE CONSTITUTION.

Appellee answers that: (1) the defense failed properly to object to evidence regarding Cribbs' grandchildren; (2) evidence regarding Cribbs' grandchildren was relevant to the guilt/innocence phase; and (3) the picture of Cribbs' grandchild, published by the prosecutor in the sentencing phase, was probative of the stolen ring.

Defense counsel objected the first time Cribbs' grandchildren were mentioned, during the direct examination of her son Ogier John, on the basis of relevancy. (T. 146). Defense counsel objected again the first time the next witness, Cribbs' stepson William Cribbs, referred to Cribbs' grandchildren. (T. 163). When the state sought to introduce the photograph which depicted Dortha Cribbs' grandchild sitting on her lap, defense counsel immediately objected as follows:

> MR. HOOPER: The picture of the ring, you can't help but notice it includes -- you will please notice that the picture of Dortha Cribbs wearing the ring includes a small baby. I guess a grandchild she is holding. I think that has a prejudicial impact to the jury and it would far outweigh any evidentiary value. There was testimony she had the horseshoe ring with her when she went and there was testimony that it was not fond at the scene. I don't think we need a picture of her cuddling up to a grandchild.
>
> * * *
>
> MR. HOOPER: If Your Honor is considering allowing these photographs into evidence, I would suggest that would be redacted, the part of the hand and the ring would be cut out. We have witnesses that would testify there were photographs of him in the camera and photographs of him. We don't need pictures of a grandchild to prove it. We can cover up the part that shows up the ring.

(T. 153-154).

These contemporaneous and specific objections were sufficient to preserve this issue for review by this Court. The basis for the objection -- relevancy -- was appropriate at the time this evidence was admitted, during the first phase of the trial. Defense counsel's motion to redact the baby from the photograph -- a motion not addressed by the prosecutor, the trial court or appellee -- should have been granted.

Appellee avers that Ogier Johns' and William Cribbs' testimony regarding, as well as the photograph depicting Dortha Cribbs' grandchild were relevant because Cribbs was expected to return to Ohio in time for the grandchild's birthday. (A.B. 49-51). Neither the date of Cribbs' anticipated return nor the basis for knowledge of those witnesses to her anticipated return date was connected with any fact in issue. Ms. Cribbs' body was discovered five days before she was expected back in Ohio and her relatives were immediately notified of this discovery. This case is thus easily distinguishable from those cited by appellee for the proposition that evidence regarding a decedent's family member may be relevant. *Megill v. State*, 231 So. 2d 539 (Fla. 3d DCA 1970) (evidence regarding decedent's child admissible where defendant had threatened to kill both decedent and child, had attempted to kill child, and child was witness to killing); *Scott v. State*, 256 So. 2d 19 (Fla. 4th DCA 1971) (testimony of mother to establish decedent's identity admissible where testimony was essential link in chain of custody of decedent's clothing, and testimony regarding closed knife found in pocket of clothing refuted self-defense).

Finally, appellee avers that the prosecutor's publication of the photograph to the sentencing jury and his reference to the baby in the photograph ("you saw the picture of [the ring] with her and the small child" (T. 130)) were permissible as intended to identify the ring and not the baby. But the trial court had previously entered a judgment of acquittal for theft of the ring (T. 527, 533); the ring was thus irrelevant to any sentencing issue. Publication of the photograph during the

sentencing phase of the trial was plainly intended to do nothing but inflame the sympathy of the jury for the victim and her survivors, just before deliberation over penalty.

II

THE TRIAL COURT ERRED IN ACCEPTING THE DEFENDANT'S WAIVER OF MITIGATION EVIDENCE, WHERE DEFENSE COUNSEL HAD NEVER PERFORMED ANY INVESTIGATION INTO THE PRESENCE OF MITIGATING EVIDENCE, AND CONSEQUENTLY THERE EXISTS NO RECORD SHOWING OF MITIGATION EVIDENCE, IN VIOLATION OF *KOON V. DUGGER*, 619 SO. 2D 246 (FLA. 1993), AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION.

(A) Appellee answers that *Koon* does not apply to a *pro se* defendant; that because appellant represented himself at the penalty phase of his trial, his waiver of mitigation at the penalty phase was not subject to the rule of *Koon*.

Appellant replies that the defendant was represented by counsel from the time of his arraignment until he waived mitigation just prior to commencement of the penalty phase, during which time counsel had the duty to investigate mitigation. The *Koon* rule thus applied to Mr. Allen.

(B) Appellee answers that the defendant's pre-trial execution of an affidavit, prepared by counsel, and purporting to relieve counsel of the duty of investigating mitigation was effective to extinguish this duty and to obviate the need for a *Koon* inquiry.

Appellant replies that counsel did not relieve himself of the *Koon* duty of investigation by inducing his client to sign a waiver of his right to effective assistance of counsel where, as here, the purported waiver was executed off-the-record, and without the knowledge or advice of the trial court.

(C) Appellee answers that if appellant was represented by counsel for the purpose of the *Koon* rule, counsel satisfied the requirements of the rule.

Appellant replies that counsel did no investigation whatsoever into mitigation

evidence and did not therefore communicate to the defendant the evidence that could have been presented on his behalf at the penalty phase of the trial. Counsel's asserted advice to the defendant what mitigation means in general cannot substitute for an investigation into the defendant's life history for particular mitigating evidence, a record recitation to the defendant what that evidence is, and a record confirmation by the defendant that he understands the particular evidence that he has chosen to waive.

(D) Appellee further suggests that the trial court's determination of the defendant's competency to proceed to trial and his competency to waive counsel established his competency to waive mitigation, without the requirement of a *Koon* inquiry, and that the failure to make a *Koon* inquiry was harmless under these circumstances.

Appellant replies that the competency evaluation and *Faretta* inquiry cannot substitute for a *Koon* inquiry, particularly under the circumstances of this case, where the determination of the defendant's competency to waive counsel and competency to proceed to trial were made solely on the basis of the defendant's unsubstantiated and unfounded assertions about his life history.

(E) Appellee answers that *Koon* does not apply because it is a prospective rule which issued after the defendant was sentenced to death.

Appellant replies that it was only the revised opinion in *Koon*, denying rehearing, which issued after sentencing. The original decision in *Koon* issued nine months prior to trial. Because the *Koon* test for the validity of the defendant's waiver of mitigation was in no way revised in the opinion denying rehearing, the original decision was binding on the trial court.

(A) The Defendant Was Represented By Counsel Until Commencement Of The Penalty Phase Of The Trial. Counsel Had A Duty To Investigate And Communicate Mitigation Evidence To The Defendant Before Withdrawing From The Case.

Appellee relies on *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988) and *Pettit v.*

State, 591 So. 2d 618 (Fla. 1990) for the proposition that a *pro se* defendant may waive mitigation evidence in the penalty phase of a capital case, and may waive counsel for the purpose of waiving mitigation. (A.B. 54). Neither *Hamblen* nor *Pettit* says that a defendant can waive counsel for the purpose of waiving mitigation, as neither case gives any indication why counsel had been waived below.[1] And while it is true that *Hamblen* and *Pettit* permit a defendant to waive mitigation, *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993), which was decided after *Hamblen* and *Pettit*, imposed a constraint on the exercise of that right. Under *Koon*, before a defendant can waive mitigation, the trial court must determine, upon a record recitation of the mitigating evidence that could have been presented, that the waiver is knowing, intelligent and voluntary.

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[1] Appellee also cites *Godinez v. Moran*, 509 U.S. ___, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) which does involve a defendant who had waived counsel for the purpose of waiving mitigation. 113 S.Ct. at 1683. The United States Supreme Court held that, so long as the defendant was competent to proceed to trial, he was competent to waive counsel for this purpose. The Court expressly noted, however, that a determination of the defendant's competency was different from a determination of the validity of a waiver:

> "In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary . . ."

Godinez does not therefore preclude a state court from crafting, as did this Court in *Koon*, a test for the validity of a waiver of constitutional rights that is more rigorous than a test for competency to proceed.

Since *Hamblen* was decided, this Court has construed Article I, §17 of the Florida Constitution of 1968 as more expansive and protective than its federal counterpart. In *Tillman v. State*, 591 So. 2d 167 (1991), noting Article I, §17 prohibits "cruel *or* unusual punishment", and the Eighth Amendment "cruel *and* unusual punishment," this Court concluded that the use of the term "or" in the state prohibition indicated that *alternatives* were intended; that is, that a punishment may be either cruel or unusual, but need not be both to contravene the state provision. Furthermore, "unusual" was construed to forbid the imposition of the death penalty in a case similar to one in which the death penalty had not been imposed. *Id.* at 169. Since *Tillman*, in *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), this Court declared the primacy of the state constitution, particularly in protecting individual liberties in the context of a criminal case. See Harry Lee Anstead, "Florida's Constitution: A Still View From The Middle," Twenty Five Years and Counting: A Symposium on the Florida Constitution of 1968, 18 NOVA L. REV. 1273 (Winter, 1994). *Tillman* and *Traylor* thus provide a state constitutional basis -- to promote reliable and proportional sentences -- for the prophylactic rule of *Koon*.

Appellee argues that *Koon*, because it was an appeal from the denial of a Rule 3.850 motion alleging counsel's ineffectiveness in failing to investigate mitigation, applies only to counselled defendants. Appellee misperceives the purpose of *Koon*. *Koon* seeks first to establish a test for validity of the mitigation waiver and second to establish the respective roles of defense counsel and the trial court in ensuring the validity of the waiver. Appellee's contention that only a counselled defendant's waiver need be valid is wrong. If anything, heightened solicitude is required for the validity of a *pro se* defendant's waiver of constitutional rights.[2]

In any case, Mr. Allen was represented by counsel, from the time of his arraignment on April 14, 1992, until just prior to commencement of the penalty phase, February 13, 1993. (R. 16-17; T. 659-661, 674). Defense counsel had a duty, under *Koon*, to investigate mitigation evidence and communicate it to the defendant prior to his withdrawal from representation.

In *Koon*, this court found that trial counsel had not been ineffective, because he had

> "*investigated potential mitigating evidence before trial.* He reviewed the 1982 psychiatric reports and talked with [the psychiatrist] who had ordered the EEG, CT Scan of the brain and psychological testing] regarding guilt and penalty phase issues. In addition, (trial counsel) knew about Koon's family history, his background, and his chronic alcoholism. [Trial counsel] talked with Koon about presenting penalty phase witnesses." (emphasis supplied).

In *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991), trial counsel informed the court, in seeking a continuance after the jury's guilty verdict, that he had not yet

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[2] See, e.g., *Enrique v. State*, 408 So. 2d 635 (Fla. 3d DCA 1981), *rev. denied*, 418 So. 2d 1280 (Fla. 1982) (waiver of jury trial not knowing and intelligent, despite existence of written waiver, where defendant was counselless, there was no adequate record inquiry by the court, and no indication that defendant had elsewhere obtained information necessary for intelligent waiver); compare with *Dumas v. State*, 439 So. 2d 246 (Fla. 3d DCA 1983) (where defendant was represented by counsel at time of execution of written waiver of jury trial, presumption arises that counsel advised defendant of his constitutional right and consequences of its relinquishment); see also *Porterfield v. State*, 522 So. 2d 483 (Fla. 1st DCA 1988) (*pro se* defendant's failure to object contemporaneously to improper prosecutorial comments in closing argument did not constitute waiver of this issue on appeal).

prepared for the penalty phase.[3] In fact, in contrast with trial counsel in this case, Blanco's trial counsel made some efforts to investigate mitigation evidence prior to the penalty phase. He prepared a witness list for the penalty phase, during trial on the guilt phase, and, during a recess in the guilt phase, attempted to contact these witnesses, to no avail. During the interval before the penalty phase, counsel contacted Blanco's brother. 943 F.2d at 1500-1501. 943 F. 2d at 1500. The Eleventh Circuit Court of Appeal noted that:

> "[t]he ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsel's eagerness to latch onto Blanco's statements that he did not want any witnesses called. Indeed, this case points up an additional *danger of waiting after a guilty verdict to prepare a case in mitigation after death penalty*. Attorneys risk that both they and their clients will mentally throw in the towel and lose the willpower to prepare a convincing case in favor of a life sentence." (emphasis supplied).

943 F. 2d at 1503 (emphasis supplied).

In *Deaton v. Dugger*, 19 Fla. L. Weekly S97 (Fla. Oct. 7, 1993), this Court affirmed the trial court's finding that trial counsel was ineffective, based in part upon this testimony by trial counsel in post-conviction proceedings:

> Q: In terms of preparing for trial *in advance of conviction*, what did you do to prepare for the penalty phase?
>
> [TRIAL COUNSEL]: Very little . . . (e.s.)

Defense counsel's omission to make any investigation during the ten months prior to trial constituted a dereliction of his duty under *Koon, Deaton* and *Blanco*.[4]

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[3] In fact, in contrast with trial counsel in this case, Blanco's trial counsel made some efforts to investigate mitigation evidence prior to the penalty phase. He prepared a witness list for the penalty phase, during trial on the guilt phase, and, during a recess in the guilt phase, attempted to contact these witnesses, to no avail. During the interval before the penalty phase, counsel contacted Blanco's brother. 943 F.2d at 1500-1501.

[4] Where ineffective assistance of counsel is plain on the face of the record, a remand on this basis on direct appeal is warranted. *Owen v. State*, 560 So. 2d 207, 212 (Fla. 1990); *McKinney v. State*, 579 So. 2d 80, 85 (Fla. 1991) (Overton, dissenting); *Combs v. State*, 403 So. 2d 418, 422 (Fla. 1981).

Appellee attempts to distinguish, for the purpose of the *Koon* rule, between an attorney who does no pretrial investigation and stands mute at the penalty phase, as was claimed in *Koon*; and one who does no investigation and withdraws just prior to the penalty phase, as happened here. The distinction is untenable. The *Koon* rule was devised to address the problem of the "volunteer": the capital murder defendant who chooses death over life in prison. *Koon* endeavors to ensure that a defendant who makes that choice -- and waives the panoply of constitutional rights implicated in that choice -- makes it with his eyes wide open.[5] Appellee's construction of *Koon*, as applying only to those volunteers who wish to retain but to muzzle counsel at sentencing, must be rejected: otherwise would-be volunteers would invariably discharge counsel in order to exercise an unknowing waiver of mitigation. Although *Hamblen* allows the volunteer to keep the sentencer ignorant of mitigating evidence; *Koon* ensures that the volunteer does not himself remain ignorant of such evidence, before choosing to waive its representation. Thus, although a defendant may waive the presentation of mitigation, he cannot waive a *Koon* inquiry, any more than he could waive a *Boykin*[6] or a *Faretta*[7] inquiry.

Mr. Allen's case demonstrates the efficacy of the *Koon* rule to ensure the validity of a mitigation waiver. Upon being advised of mitigating evidence in his own life, uncovered upon cursory investigation while his appeal was pending, Mr. Allen elected to present such evidence to a sentencing jury and to fight, through counsel, in an adversary hearing, for his life. See Reply to Appellee's Response to Motion to Relinquish Jurisdiction.

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[5] In fact, many volunteers vacillate between seeking execution and resisting it, and most eventually decide to resist execution. Welsh S. White, *The Death Penalty in The Eighties: An Examination Of The Modern System Of Capital Punishment*, (UNIVERSITY OF MICHIGAN PRESS: ANN ARBOR) 1990, pp. 141-157.

[6] *Boykin v. Alabama*, 395 U.S. 238 (1969).

[7] *Faretta v. California*, 422 U.S. 806 (1975).

(B) The Defendant's Extra-Record Execution Of An Affidavit Purporting To Relieve Counsel Of The *Koon* Duty Of Investigation Is Ineffectual As A Waiver Of Mitigation Or As A Waiver Of Counsel.

Appellee invokes Mr. Allen's pretrial execution of an affidavit purporting to waive mitigation and to waive penalty phase counsel to justify trial counsel's failure to investigate mitigation. (A.B. 56-57). This affidavit, executed two months before trial, was prepared by trial counsel, whom it purported to immunize from any dereliction in connection with penalty phase representation. (R. 188-189). The trial court was not made aware of this affidavit until the sentencing hearing, and never advised the defendant regarding the rights sought to be waived therein. The only person, other than trial counsel, who advised the defendant regarding this matter was Mark Jones. Although appellee has characterized him as "independent counsel" (A.B. 57), Mr. Jones was in fact an assistant public defender, in trial counsel's office. (T. 803). Trial counsel additionally provided the defendant with a manual about mitigation, to assist him in deciding whether to seek death. (T. 803-804).

It is appellee's position that the defendant's pretrial opportunity to consult with trial counsel's associate and to read a mitigation manual, without any colloquy or advice of rights from the trial court, and without any investigation into mitigation, sufficed to waive appellant's rights to effective assistance of penalty phase counsel and to present mitigation. (A.B. 56-58).

"Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461. A defendant's waiver of mitigation evidence is not knowing, intelligent and voluntary unless potential evidence has been investigated and communicated on the record to the defendant. *Koon*. Because there was no investigation or record recitation of mitigation prior to Mr. Allen's execution of the affidavit, the affidavit "waiver" is no more valid than the in-court "waiver" two months later.

Similarly, a knowing and intelligent waiver of the right to counsel cannot be

effected without a warning from the trial court; an extra-record warning from counsel is not a constitutionally adequate substitute. *Hendricks v. Zenon*, 993 F.2d 664, 670 (9th Cir. 1993).

Furthermore, counsel could not, prior to his withdrawal from the case, secure the defendant's consent to ineffective penalty phase representation, without the knowledge or advice of the trial court. Although a defendant *can* waive the right to have counsel perform effectively, this waiver must be knowing, intelligent and voluntary, on the record, and after colloquy with the trial court. *People v. Escarrega*, 186 Cal.App.3d 379, 230 Cal.Rptr. 638 (1986).

Finally, the defendant could not be simultaneously represented by counsel, for the first phase of the trial, and *pro se* for the second phase of the trial; a defendant is not entitled to hybrid representation. *Tait v. State*, 387 So. 2d 338 (Fla. 1980). Because at the time of the defendant's clandestine execution of the extra-record affidavit, he was represented by counsel in connection with the first phase, counsel had the duty to represent him in connection with the second phase of the trial. Counsel's duty under *Koon* to investigate mitigation evidence was therefore not extinguished by the defendant's execution of the "waiver" affidavit.

(C) Trial Counsel Conducted No Investigation Whatsoever Into Mitigation.

Appellee insists that, notwithstanding the absence of a record recitation by counsel and record confirmation by the defendant, defense counsel had in fact investigated and communicated available mitigation evidence to the defendant. Therefore, the failure to conduct a *Koon* inquiry was harmless.

The record reflects that no mitigation investigation was conducted by defense counsel. Counsel admitted as much in open court:

> "I don't have any mitigating factors to prevent simply because -- he does not have the attitude or spirit of uncooperativeness but he refused to provide me with mitigating factors. He also repeatedly requested I not plead for life in his case. . .

(T. 801).

> "He refused to present me with any information, which would enable me to provide non-statutory mitigating factors to the court."

(T. 804).[8] Corroborative of defense counsel's admission is the record in this case, which is devoid of any indication that counsel expended any time or any money investigating potential mitigation. (R. 1-244).[9,10]

Appellee points out that the trial court believed that counsel had investigated

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[8] The defendant's refusal to cooperate does not justify counsel's dereliction. *Koon*, *Blanco* and *Deaton* are all directed to the "volunteer", the defendant who does not cooperate in investigating mitigation because he has chosen to waive its presentation. Counsel can investigate under these circumstances, by acquiring birth, death, and marriage certificates; school, medical military and prison records; and interviewing family, friends, teachers, physicians or jailers identified in such records. See Motion To Relinquish Jurisdiction. In *Deaton*, this Court found counsel to be ineffective in part on the basis of his failure to obtain documents as a source of mitigation evidence on behalf of a defendant who had announced his intention to waive its presentation:

> "Q: Now in terms of documentation, records such as the hospital reports or divorce records or any of those HRS files . . .
>
> Were you aware that documents such as that may be admissible even if its hearsay at the penalty phase?
>
> A: Yes.
>
> Q: Was there any reason why you didn't try and locate any of those documents prior to trial?
>
> A: No, no reason.

19 Fla. L. Weekly at 599. See also *Hardwick v. Dugger*, 19 Fla. L. Weekly S433 (Fla. Sept. 8, 1994) (In finding that counsel had not been ineffective, this Court noted "[D]espite an uncooperative client who . . . ordered counsel to present no mitigation evidence at the penalty phase, trial counsel took extensive depositions, interviewed a number of witnesses, obtained a psychiatric evaluation by a mental health expert,and conducted an examination of Hardwick's background.").

[9] The record reflects that defense counsel sought and received $150.00, 10 months before trial, to be paid to "Dr. Bill Williams for consultation as a confidential defense expert." (R. 22). There is no indication what kind of expert this doctor is, or what, if anything, he did for the defendant, other than to schedule an appointment to see him.

[10] Trial counsel's consistent policy to defer to the defendant's avowed intention to waive mitigation is likewise reflected in the absence in the record of *any* defense motions or requests for jury instructions pertinent to sentencing.

mitigation and was prepared to present it:

> [THE COURT]: "You further understand there may be mitigating circumstances which [defense counsel] could present in your behalf and, in fact, I believe he is prepared to do so if you allow him to do that."

(T. 713). In view of defense counsel's admission in open court that he had not investigated mitigation; and the corroborative absence of any evidence of investigation in the record; it is plain that the trial court was wrong.

Appellee suggests that defense counsel's having loaned Mr. Allen a mitigation manual was an adequate substitute for a *Koon* investigation. (A.B. 57). This is absurd: there is no comparison between knowing what categories of events and conditions may be mitigating; and knowing what evidence from one's own life is available to establish those events and conditions. In any case, there is no record indication that the defendant, who dropped out of school in the eighth grade, had read or understood his lawyer's manual.

In short, there is no indication in the record that trial counsel made any effort to discover any evidence that could be mitigating in any way. There is every indication that trial counsel did nothing in regard to mitigation -- other than to prepare the affidavit purporting to waive his duty to investigate it -- and instead "eager[ly] latched on to the defendant's statements that he did not want any evidence presented." *Blanco*, 943 F.2d at 1503.

(D) The Trial Court's Conduct Of The Competency Hearing And The *Faretta* Inquiry Cannot Substitute For A *Koon* Inquiry Particularly Where, As Here, The Determination Of The Defendant's Competency To Proceed And Competency To Waive Counsel Were Made Solely On The Basis Of His Unsubstantiated And Untrue Assertions About His Life History.

Appellee cites *Godinez v. Moran*, *supra*, for the proposition that the competency evaluation sufficed to ensure the validity of the defendant's waiver of mitigation. *Godinez* does not support that proposition. *Godinez* expressly distinguishes between the standard of competency to waive constitutional rights and the procedural requirements for the waiver of constitutional rights: the focus of a

competency hearing is the defendant's *ability to understand* the proceedings; the focus of a waiver hearing is the defendant's *actual understanding* of the significance and consequences of a particular decision. 113 S.Ct. at 1687-1688. Thus, the trial court's determination of the defendant's competency to proceed did not obviate the need separately to determine, under the procedures set forth in *Koon*, the validity of the defendant's waiver of the constitutional right to present mitigation.

Appellee nevertheless exhorts this Court to rely on both the *Faretta* inquiry and the competency evaluation for evidence that Mr. Allen was so resourceful and intelligent that the validity of his mitigation waiver may be presumed without regard to the prophylactic rule of *Koon*.

In support of this position, appellee recites the following "facts" asserted by Mr. Allen during the *Faretta* inquiry into his training, experience and ability to represent himself:

> (1) He had taken numerous college courses;
>
> (2) He had been a law librarian in six penitentiaries, and head librarian in three of these, in which capacity he had prepared appeals for and obtained the release of many inmates;
>
> (3) He had been offered employment as a legal researcher in the firm of Leon Jaworski, at a fee of $80.00 an hour;
>
> (4) He has an IQ of between 135 and 138.

(A.B. 58-59).

As is set forth in the motion to relinquish jurisdiction and reply to response to motion to relinquish, these assertions are unfounded:

> (1) School, military and prison records do not reflect that the defendant, who dropped out of school in the eighth grade, ever enrolled in any college courses;
>
> (2) Prison records do not reflect the defendant's employment within or as head of any prison law libraries and do not reflect his representation of any inmates;
>
> (3) The law firm of Leon Jaworski denies having offered the defendant employment as a legal researcher;
>
> (4) Test administered in 1969 and 1975 reflect that the

defendant's IQ is 98.

Similarly, appellee relies upon the trial court's determination of the defendant's competency, which was based in part upon the defendant's unsubstantiated assertions during evaluation, that:

> (1) Neither he nor any member of his immediate family is an alcoholic;
>
> (2) He is not a substance abuser; and
>
> (3) His mother and father were "decent and appropriate in their parenting."

(A.B. 68-69, S.R. 915, 921-923). However, review of the relinquishment pleadings reveals that:

> (1) The defendant, his father, and his three brothers are severe and chronic alcoholics. His brothers have been in and out of treatment programs for many years. The defendant has been diagnosed as a binge drinker, who becomes grossly intoxicated for days at a time, during which he experiences blackouts.[11]
>
> (2) The defendant has been diagnosed and treated for drug abuse.
>
> (3) The defendant's father, an alcoholic who became violent when drunk, savagely beat his wife and children on a regular basis; his mother could not meet his most basic physical and emotional needs.

Thus, the *Koon* violation compromised the *Faretta* inquiry and the competency hearing, as well as the sentencing hearing itself (See Issue III). A defendant who had previously announced his desire to die misrepresented his competency to represent himself, his competency to proceed and his eligibility for death. Appellee's

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[11] A Shipley Hartford scale intellectual functioning test, administered to the defendant while he was incarcerated at the Kansas Department of Corrections State Reception and Diagnostic Center, noted a wide discrepancy between his vocabulary and his conceptual IQs, suggestive of an inability to use abstract reasoning and suggestive of organicity, a protocol "often associated with people who have used drugs and alcohol for a long period of time." See Reply to Appellee's Response to Defendant's Motion To Relinquish Jurisdiction. Although the evaluating psychologist found that the defendant's responses to the Bender-Gestalt test were not "suggestive of organic impairment or neurological dysfunction," (S.R. 921-923) the Bender-Gestalt test has been criticized for its inability to rule out organic brain pathology, Lezak, Muriel, *Neuropsychological Assessment*, Second Edition, (N.Y.: OXFORD UNIVERSITY PRESS), p. 393.

reliance upon these same misrepresentations to show the harmlessness of the *Koon* error is misplaced.

Finally, appellee suggests that the trial court's having found mitigating factors, as set forth in its sentencing order, rendered the *Koon* violation harmless. (A.B. 63-65). In particular, appellee notes that the trial court found these two nonstatutory mitigating factors, on the basis of the PSI and the competency evaluations: (1) the divorce of Mr. Allen's parents when he was fourteen; and (2) Mr. Allen's service as a marine in the Viet Nam War.

Appellee's position that these findings rendered the *Koon* violation harmless is somewhat inconsistent with its position as cross-appellant that the trial court erred in having found these factors. Cross-appellant avers that, in the absence of any evidence that either his parents' divorce or his military service traumatized Mr. Allen in any way, these factors are not in any meaningful sense mitigating. Clearly, a mitigation investigation might have unearthed evidence that his family's rupture or his artillery detail in the Viet Nam War produced consequences that have some bearing upon the offense. Thus, the trial court's finding of two factors which appellee itself has characterized as entirely devoid of mitigating impact did not obviate the requirement of a *Koon* inquiry.

(E) The Original Decision In *Koon* Issued Nine Months Prior To Trial. The Revised Opinion, Which Issued Twenty-Two Days After Sentencing, Denied The Motion For Rehearing And In No Way Modified The Original Decision's Procedures For Ensuring The Validity Of A Mitigation Waiver. Therefore, The Original Decision In *Koon* Was Binding On The Trial Court.

The state answers that the *Koon* rule does not apply to this case because this Court characterized the rule as prospective only, and the revised opinion issued on March 25, 1993, twenty-two days after sentencing in this case. The requirements of the *Koon* rule were first announced on June 4, 1992, nine months prior to sentencing in this case. The revised opinion did not alter those requirements in any way. The trial court could not ignore the requirements of the *Koon* rule pending disposition of the motion for rehearing, where, as here, the only revision in the

subsequent opinion denying rehearing concerned another matter entirely. *People v. Brooks*, 527 So. 2d 436 (Ill. App. 1st Dist. 1988).

In *Brooks*, an opinion pertinent to voir dire procedure [*People v. Zehr* (1984) 103 Ill.2d 472, 83 Ill. Dec. 1128, 469 N.E.2d 1062] was issued prior to the subject trial, and a petition for rehearing was pending during the course of that trial. A revised opinion, denying the petition for rehearing, issued after the trial, and did not modify in any manner that portion of the original opinion which pertained to voir dire. The state's position that the trial court was not bound to follow the voir dire procedure announced in the original opinion until modification on denial of rehearing was rejected by the *Brooks* court:

> The State essentially argues that the trial court was not required to apply the law as set forth in *Zehr* at the time of the defendant's trial because a petition for rehearing had been filed, and the opinion was subsequently modified on September 28, 1984. As a result, the modified opinion of the court as set forth in *Zehr* superseded and vacated the rule of law concerning voir dire set forth in the opinion issued by the court on July 3l, 1984. *We find no merit in the State's argument.* (e.s.)

The court explained:

> In the present case, the opinion in *Zehr* was filed on March 23, 1984. The opinion was later modified upon the denial of a petition for rehearing and refiled on September 28, 1983. While a modification of an opinion following a rehearing does supersede and vacate the earlier opinion [citation omitted], this did not occur here. *Rather, the petition for rehearing was denied, and the modification concerned a matter completely unrelated to the voir dire issue originally addressed* by the supreme court in the July 31, 1994, Zehr opinion. Therefore, the modification of the unrelated issue did not supersede and vacate that portion of *Zehr* dealing with voir dire. As a result, the law as set forth in *Zehr* on July 31 was clearly applicable to the voir dire proceeding in defendant's case. (e.s.)

527 N.E. 2d at 438-39. See *White v. State*, 195 So. 479 (Miss. 1940) ("[W]hile a petition for a rehearing does not vacate or annul the judgment, it does, if seasonably filed, serve to suspend it from the date of the filing thereof, while the denial of such petition or motion for rehearing leaves the judgment in full force as of the time of its rendition."). See also *Key v. State*, 19 Fla. L. Weekly D1302 (Fla.

1st DCA June 23, 1994) ("The effective date of our *Key III* decision was September 22, 1992, the date appearing on the face of the decision, not the date upon which we denied rehearing or issued our mandate.").[12]

In *Koon*, as in *Brooks*, the motion for rehearing was denied, and the modification (which consisted simply of a discussion of an intervening decision, *Espinosa v. Florida*,[13] and its effect on the HAC jury instruction) was entirely unrelated to the procedures to be followed when a volunteer waives his right to present mitigating evidence. The *Koon decision* was unchanged, as was its legal basis. Therefore, the trial court was bound to follow it in the conduct of a trial occurring nine months after it issued.

Finally, federal and state principles of equal protection, as set forth respectively in *Griffith v. Kentucky*, 479 U.S. 314, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987), and *Smith v. State*, 598 So.2d 1064 (Fla. 1992) compel application of *Koon* to the defendant in this case. Appellee's assertion that the *Koon* rule was not applied to the defendant in that case is incorrect. This court found that *Koon* was

> "not a situation in which counsel 'latched onto' the defendant's instruction and failed to investigate penalty phase matter. [Counsel] investigated potential mitigating evidence before trial, he reviewed the 1982 psychiatric reports and talked with [a psychiatrist who had evaluated the defendant on the basis of a EEG, a CT Scan of the brain and psychological testing]. In

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[12] As Judge Padovano has explained, the effective date of a decision, for the purpose of its precedential value, is the date it was issued, so long as the actual disposition of the case is not modified on rehearing:

> "The decision of an appellate court is the actual disposition of the case, whereas an appellate opinion is a written explanation, given in some instances to explain the disposition. The effective date of an appellate decision is the date appearing on the face of the decision, even though most decisions do not actually become final until after the time has expired for filing a motion for rehearing. Finality is a distinct concept relating only to the right to enforce an appellate decision. For all other purposes, the date appearing on the decision is the effective date."

Padovano, Florida Appellate Practice, §14.7.

[13] 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 854 (1992).

> addition, [counsel] knew about Koon's family history, his background, and his chronic alcoholism. [Counsel] testified that he talked with Koon about presenting penalty phase witnesses. Although [counsel] did not present penalty phase testimony, he argued the existence of mitigating factors based upon testimony presented in the guilt phase. [Counsel] argued that Koon lacked the capacity to conform his conduct to law due to his intoxication; that Koon was a good father, a good provider, and a hard worker; and that Koon was generous towards his friends. *Under these facts, we find no error* in [counsel's] following Koon's instruction not to present evidence in the penalty phase."

Because the rule of *Koon* was thus applied to Koon himself, principles of fairness and equal treatment, under the state and federal constitutions, require that *Koon* apply to Mr. Allen. *Griffith*, 107 S.Ct. at 713; *Smith*, 598 So. 2d at 1065.

III

> THE TRIAL COURT ERRED IN PERMITTING THE DEFENDANT TO MAKE UNSWORN AND UNSUPPORTED DENIALS OF APPLICABLE MITIGATING FACTORS, BEFORE THE SENTENCING JURY, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION.

Appellee answers that the defendant did not make unfounded and unsubstantiated factual assertions in denial of mitigation, to the sentencing jury; that all he did was to argue to the jury that the evidence presented failed to establish the existence of mitigating factors. Appellee further answers that even if the defendant argued facts not in evidence, in order to secure a sentence of death, he should be estopped from claiming error on this basis, because he invited the error.

This is what the defendant said to the sentencing jury:

> A lot of people, it has amazed me, if convicted of something or bad things happen in their life -- I had a bad childhood or this happened. Ladies and gentlemen, I was raised right. I was raised real right. The values that was instilled in me at the time, which I no longer have at this time, are probably the same values that each and every one of you received. I can't stand here and say I had a bad home.
>
> Well, what else? How many people, how many times have you heard I have an alcohol problem? Ladies and gentlemen, I don't

> have an alcohol problem. A man in my business can't get drunk. My job, I steal the money and try and get away. A drunk thief is the worst thing in the world. I refuse to let alcohol become a problem.
>
> Now, we have dope fiends and crack and heroin, you name it. Everyone wants to say if he had not been a dope fiend -- I am sorry. Ladies and gentlemen, I am not a dope fiend. So we can't use that for an excuse.[14]

(T. 739-740). The state's answer that this passage merely argues an absence of mitigating evidence in the record is sophistry. There is a difference between arguing the existence of a negative fact, that is, a fact that is susceptible of proof but contains the word "not" in its description, and arguing that a fact is unproven. The defendant argued for the existence of three negative facts that are susceptible of proof -- he is not an alcoholic; he is not a drug addict; he is not from a dysfunctional family. This is different from arguing that there was no evidence that he is an alcoholic, or a drug addict or from a dysfunctional family. Although the latter argument is permissible, as constituting a comment on an absence of evidence; the former argument is not, as constituting a comment on matters which are susceptible of proof but were not in evidence.

Similarly disingenuous is the state's contention that there is no difference between waiving the presentation of mitigation, which is permissible under *Hamblen*, and affirmatively denying its existence, as happened here. There is a difference, in the mind of the sentencer, between a defendant's affirmative assertion that he is an unmitigated criminal and his omission to present evidence in mitigation.

The state also submits that the defendant's argument to the jury, though unsworn and unsubstantiated, was an admission pursuant to §90.803(18)(a) and, as such, was properly considered as evidence by the sentencer. (A.B. 72). A

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[14] There was no evidence to support these assertions and they are in fact untrue. See Motion to Relinquish Jurisdiction.

defendant's admission, if properly introduced into evidence, may be considered by a fact-finder. But this admission was never introduced into evidence; it was merely the subject of closing argument, which is not evidence at trial. *Jacob v. State*, 546 So. 2d 113, 115 (Fla. 3d DCA 1989); *Whitted v. State*, 362 So. 2d 668, 673 (Fla. 1978).

Finally, appellee complains that the defendant invited this error: he deliberately misled the sentencer, and should not be able to profit from this error by a reversal of sentence. The invited error doctrine has no application in a case like this. Ordinarily, the goal of a trial is to seek the truth. This goal is achieved through the operation of the adversarial system, which assumes the participation of self-interested litigants. The system is governed by rules of procedure that are intended to ensure against falsehoods. In the ordinary case, the procedural rules are implemented by the adversaries themselves who seek each other's compliance with the rules, thereby reducing the overall incidence of self-interested falsehoods. The procedural rules are fortified by conventions like the invited error doctrine, which penalizes a party who, in spite of his adversary's efforts, violates the rules in order to advance his cause. The doctrine thus serves to deter the ordinary litigant from misconduct that may subvert the truth.

This was not an ordinary case. The defendant was not self-interested; he was self-destructive. Because the state also sought the defendant's destruction, it did not invoke procedural rules to ensure against his falsehoods, which in this case inured to the benefit of the state. In this context, the invited error doctrine does not fulfill its purpose to deter violation of the procedural rules. No one, including the state, can seriously suggest that Mr. Allen deliberately misled the sentencer in order to create reversible error in the imposition of his death sentence, so that he could profit by a resentencing. From the moment of his conviction, the defendant did

everything he could to secure a death sentence: he moved to proceed *pro se*; he waived mitigation; he asked the sentencing jury and the trial judge for a death sentence; and he affirmatively denied the existence of specific mitigating circumstances.[15]

It was because of the *Koon* violation (see Issue II) that the trial court was unaware that the defendant's denials of mitigating circumstances were false. As noted in Issue II, one of the rights sought to be secured by the *Koon* rule is the right to effective assistance of counsel, by investigating and communicating potential mitigation evidence in order to ensure the validity of its waiver. As the Supreme Court explained in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), a defendant's right to effective assistance of counsel is essential to preserve the truth-seeking function of an adversarial system of criminal justice:

> The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975).[16] It is that

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[15] In addition, Mr. Allen attempted to persuade the trial court to permit the prosecution to argue to the jury the applicability of these aggravating factors: the capital felony was committed to avoid arrest; and the capital felony was committed in a cold, calculated and premeditated manner. (T. 701-702). In fact, the defendant said that he also would like to argue in support of these aggravating circumstances. (T. 704). The trial court declined to permit either party to argue in support of these aggravators, as there clearly was no evidence of these circumstances at trial. (T. 702, 706).

[16] See also *Polk County v. Dodson*, 454 U.S. 312, 318, 102 S.Ct. 445, 449, 70 L.Ed.2d 509 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness"); *Gardner v. Florida*, 430 U.S. 349, 360, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977) (plurality opinion) ("Our belief that debate between adversaries is often essential to the truth-seeking function of

> "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564 (1981). Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S., at 343, 100 S.Ct., at 1715.
>
> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 743, 87 S.Ct. 1396, 1299, 18 L.Ed.2d 493 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors -- the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (10th Cir), *cert. denied sub nom. Sielaff v. Williams*, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975).

There was no meaningful adversarial testing in this case because the defendant wanted the same thing as the state. The breakdown of the adversarial system derailed the truth-seeking function of the capital sentencing hearing, with the result that the sentence is not constitutionally reliable. Adherence to the rule of *Koon* would have prevented this result. Had defense counsel investigated and made a record recitation of the mitigating evidence in the defendant's life, the trial court would have known that the defendant's denials of disease states (that are in fact characterized by denial) were false.

Even without this knowledge, however, the trial court had a duty to ensure the integrity of the fact-finding function of a capital sentencing proceeding by restraining the defendant from making factual assertions to the sentencing jury that were not

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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").

supported by the evidence.[17] (I.B., p. 42). And the prosecutor had a duty to ensure the integrity of the proceeding by objecting to the unsupported, inculpatory interjections of an avowedly suicidal *pro se* defendant. See Rules of Professional Conduct, Rule 4-3.8, comment ("A prosecutor has the responsibilities of a minister of justice and not simply that of an advocate."). Instead, defense counsel, the prosecutor and the trial judge all just sat back and watched the defendant dig his own grave without any apparent concern for whether he truly deserved to die.

Appellee's answer that "the defendant invited this error" is just another way of saying "well, he dug his own grave." This is no answer. "The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law." *Hamblen*, 527 So. 2d at 804. Because the propriety of the defendant's sentence has not been established according to law, it must be vacated.

IV

THE TRIAL COURT ERRED IN FINDING, AS AN AGGRAVATING FACTOR, THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN, WHERE THE TRIAL COURT HAD ENTERED A JUDGMENT OF ACQUITTAL FOR ROBBERY OF THE VICTIM'S CASH AND WHERE THE THEFT OF THE VICTIM'S CAR WAS FOR THE PURPOSE OF ESCAPE, IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS, THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ARTICLE I §§2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, AND

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[17] For example, the defendant had attempted to tell the sentencing jury that he had previously been in six penitentiaries, each time for non-violent convictions. (T. 733-734). The trial court *sua sponte* ordered the defendant to refrain from arguing his criminal history, because there was no evidence of this history before the jury; and the defendant immediately acceded to this order. (T. 734-736). The trial court made no similar effort to preclude the defendant from arguing his denials of specific nonstatutory mitigators; nor did the state make any objections to this argument.

§921.141(5)(F), F.S.A. (1993).

Appellee answers that the state established the defendant's motive to murder for pecuniary gain, because there was no evidence in the record that the defendant had any *other* motive for the killing. Appellee is wrong. The circumstances surrounding the offense are as consistent with some other motive as with pecuniary gain. The defendant and Dortha Cribbs left Bunnell, where she received the $4,100 in cash, at noon on November 12, and drove nine-and-a-half hours to Summerland Key. (T. 271-272). Cribbs was killed sometime between 8:30 a.m. and 1:00 p.m. on November 13th. (T. 383, 240). If the defendant's only motive for murder was to take her cash, her ring, and her car, it is difficult to imagine why he would have driven to Summerland Key for this purpose. On the other hand, it is easy to imagine that reasons other than pecuniary gain arose between the time the couple left Bunnell and Dortha Cribbs' death. For example, she may have learned the defendant's status as an escapee from work release, and have threatened to turn him in. Alternatively, the intimate relationship between Cribbs and Allen may have given rise to some motive for her murder. Where, as here, proof of pecuniary gain is supplied by inference from circumstances consistent with a reasonable hypothesis of motive other than pecuniary gain, that aggravator has not been established beyond a reasonable doubt. *Simmons v. State*, 419 So. 2d 316 (Fla. 1982).

Even were there no other conceivable motivation, the trial court's entry of a judgment of acquittal for robbery of the cash and theft of the ring precludes a finding of pecuniary gain under the circumstances of this case. Ms. Cribbs' rifled purse was found next to her body; her cash, her ring and car were gone. The trial court entered a judgment of acquittal for robbery of the cash, on the basis that the evidence did not establish that the murder was connected with the taking; and a judgment of acquittal for theft of the ring. Under these circumstances, if the murder

was committed for pecuniary gain, i.e. if the killing was integral to the taking, then the taking had to be a robbery, i.e. the killing was connected with the taking. Because the taking was not a robbery, the murder was not integral to the taking, and the taking had to be an afterthought.

Appellee's real complaint is that the trial court erred in finding insufficient evidence that force was employed in connection with the taking. Appellee may be right about this, but even the egregiously erroneous entry of a judgment of acquittal has a preclusive effect for double jeopardy purposes, "for any aspect of the count." *Sanabria v. United States*, 437 U.S. 70, 98 S.Ct. 2170, 2181, 57 L.Ed.2d 43 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 1354, 51 L.Ed.2d 642 (1977); *Fong Foo v. United States*, 369 U.S. 141, 82 S.Ct. 671, 71 L.Ed.2d 629 (1962).

For the same reason, the state may not rely upon the missing ring to establish pecuniary gain. The trial court entered a judgment of acquittal for theft of the ring. (T. 527, 533). If the defendant did not take the ring for the purpose of the theft charge; then the murder could not be an integral step in the taking of the ring.

Finally, the state cites *Lambrix v. State*, 494 So. 2d 1143 (Fla. 1986) for the proposition that the taking of the car, for which the defendant was convicted, can alone support the finding of this aggravator. In *Lambrix*, the defendant not only took, but also, *kept* the victim's car until his arrest. *Lambrix* is thus easily distinguishable from *Scull v. State*, 533 So. 2d 1137 (Fla. 1988), *cert. denied*, 490 U.S. 1037 (1989); and *Peek v. State*, 395 So. 2d 492 (Fla. 1981) in which this court held that where, as here, the taking of a victim's car is to facilitate escape rather than to improve the defendant's financial position, it cannot support a finding of pecuniary gain.

V

THE TRIAL COURT ERRED IN FINDING IN AGGRAVATION THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL, WHERE THE ENTIRE BASIS FOR THAT FINDING WAS THE TESTIMONY OF MEDICAL EXAMINER NELMS TO HIS "GUESS" THAT THE VICTIM WAS CONSCIOUS FOR FIFTEEN MINUTES AFTER THE FATAL STABBING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, §§2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, AND §921.141(5)(H), F.S.A. (1993).

Appellee answers that the following exchange -- consisting of Nelms' assent to a question which assertedly recapitulated his previous testimony -- evidences Nelms' opinion that Cribbs was "probably" conscious for ten to fifteen minutes after the stabbing:

> Q. Just to recapitulate your testimony so we all have it straight. Is it your testimony that Dortha Cribbs was probably bound by her hands and feet when she was stabbed in her left neck causing her to bleed to death between 15 to 30 minutes and for approximately 10 to 15 minutes of that time she was conscious?
>
> A. Yes.

(T. 423-424). Appellee's characterization of the above exchange is false.

Dr. Nelms testified that he could only *guess* how long Ms. Cribbs was conscious after the stabbing:

> Q. How long would she have been awake while she was bleeding to death?
>
> A. Well, probably the thing that would determine when she was no longer awake is when [stock] intervened. She may fainted as a result of the shock, but not as a [] result of the blockage of that one branch of the artery.
>
> Q. Approximately how long do you think it would have taken her to lose consciousness from shock or loss of blood?
>
> A. It's just a guess, but I would estimate fairly close to the 15 minutes.

(T. 422).

Dr. Nelms testified that Ms. Cribbs was *probably bound* by her hands and feet at the time of the fatal stabbing:

> Q. If the victim had not had her hand and legs tied at the time the fatal wound was delivered, would you expect to see any defensive wounds?
>
> A. I would expect to see defensive wounds, yes.
>
> Q. Can you tell me what defensive wounds are?
>
> Q. It's where you try to defend yourself usually by reflex you throw your hands up and try to grab the weapon or at least shield that part of the body that you think that the weapon is headed toward you. You do that without thinking if you have an opportunity to.
>
> Q. Did you find any defensive wounds on Dortha Cribbs.
>
> A. None.
>
> Q. As a result of your knowledge, your training, your experience in this field, coupled with your observations of the body, do you have an opinion as to whether or not Dortha Cribbs was tied by the hands and feet when the fatal stab wound were delivered?
>
> A. In my opinion she was tied when the fatal stab wound was delivered. I can't look at the wounds and tell you the time or sequence, it is just based on common sense. Had she been stabbed and not tied she would have been moving around. She probably would have been running all over the house because she had time to and there would have been blood everywhere, instead of one little pool of blood where she was laying.

(T. 422-423).

The question purporting to "recapitulate" Dr. Nelms' testimony begins immediately after Nelms' last-cited answer regarding Cribbs' having probably been bound at the time of the stabbing. Clearly, the adverb "probably" in the "recapitulation question" was intended to modify only the first clause in that question -- regarding Cribbs' having been bound at the time of the stabbing. The word "probably" did not modify the last clause in the "recapitulation question" -- regarding Cribbs' duration of consciousness. Dr. Nelms never expressed any greater

degree of certainty than his "guess" regarding Cribbs' duration of consciousness. This utter lack of certainty by an expert witness deprives his testimony of any probative value whatsoever. *Southern Utilities Co. v. Murdock*, 99 Fla. 1986, 1091, 128 So. 430, 432 (1930) ("The judgment of an expert must be more than a guess.").

The state cites *Davis v. State*, 604 So. 2d 794, 797 (Fla. 1992), in which a HAC finding was affirmed where based in part upon medical evidence that "[t]he victim could have been conscious for thirty to sixty minutes before her death." 604 So.2d at 797. The quoted language is that of the court, not the medical expert. There is no indication what language the expert used, nor the basis for his opinion. But the Court pointed out that there was substantial non-expert evidence in the record of the victim's duration of consciousness, as well as other evidence that the murder was heinous, atrocious and cruel:

> Other evidence leads to the inference that the victim struggled with her assailant. A witness testified that Davis had scratches on his face the day after the murder and that Davis said that an old lady scratched him. Further, the victim suffered stab wounds to her adam's apple and upper chest, suggesting that she was stabbed while she was standing up or struggling.

In this case, by way of contrast, there was no evidence whatsoever, other than Dr. Nelms' incompetent testimony, regarding the victim's duration of consciousness. Furthermore, duration of consciousness was the sole basis upon which the trial court relied, and the primary basis argued by the prosecutor, in support of the aggravating factor of heinous, atrocious and cruel.

The state also cites *Delap v. State*, 440 So. 2d 1242, 1253-5 (Fla. 1983) for the proposition that where an expert's opinion is that an occurrence "could" or "might have" or "probably did" cause death, and not that it did cause death "within a reasonable medical certainty," it is nonetheless admissible, but its weight is a matter for the fact-finder. The *Delap* court explained that, although the state must

prove cause of death beyond a reasonable doubt, "this does not mean that every link in the chain of evidence must be so proved." The court does not disclose the language used or the basis for the opinion actually given by the expert, or the other evidence introduced to show cause of death.

In this case, the expert's "opinion" was concededly a guess. This opinion was the only evidence of Cribbs' duration of consciousness. Cribbs' duration of consciousness was the only fact relied upon by the trial judge to find the HAC factor, which the state had the burden to prove beyond a reasonable doubt. See *Brown v. State*, 19 Fla. L. Weekly S261 (Fla. May 12, 1994) (state did not establish HAC factor beyond a reasonable doubt where evidence showed only that victim had been stabbed three times and none of the wounds would have been immediately fatal). While it is true that an expert's opinion need not be phrased in terms of "reasonable medical certainty," where, as here, it is admittedly based on sheer speculation, it cannot support the finding of an aggravating circumstance.

VI

THE PROSECUTOR'S COMMENTS TO THE JURY, DURING THE PENALTY PHASE, THAT ONLY A SENTENCE OF DEATH WOULD PREVENT THIS DEFENDANT, WHO HAD PREVIOUSLY ESCAPED FROM A WORK RELEASE FACILITY, FROM KILLING SOMEONE ELSE CONSTITUTED IMPROPER ARGUMENT OF A NONSTATUTORY AGGRAVATING FACTOR, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, §§2, 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION AND §921.141, F.S.A. (1993).

Appellee answers that the defendant's waiver of mitigation evidence, whether or not it was valid, does not preclude the conduct of meaningful proportionality review by this Court. Appellee cites *Tillman v. State*, 591 So. 2d 167 (Fla. 1991) for the proposition that proportionality review requires that there be record evidence about the offense, but not about the offender; and *Hamblen v. State*, 527 So. 2d 800 (Fla. 1987) for the proposition that a waiver of mitigation does not preclude

proportionality review.

Appellant replies that Article I, §17 of the Florida Constitution of 1968, a provision never considered by the *Hamblen* Court, mandates comparative proportionality review by this Court. This review entails comparison of both aggravating and mitigating circumstances in a subject case with other reported capital cases, to determine whether the death penalty in the subject case is disproportionate. This comparison cannot be made in the absence of record evidence of mitigating circumstances in the subject case.

In *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), this Court declared the primacy of the state constitution over its federal counterpart, because the former is potentially more expansive and protective than the latter. This Court provided a list of factors to be relied upon in construing a state constitutional provision, under the principle of primacy, including *inter alia*, the express language of the provision and existing state law. 596 So. 2d at 963.

In *Tillman v. State*, 591 So. 2d 167 (Fla. 1991), this Court noted that the express language of Article I, §17 differs from that of its federal counterpart: the former prohibits "cruel or unusual punishment," the latter "cruel and unusual punishment." 591 So. 2d at 169, n. 2. Because in Florida, a punishment need be only cruel or unusual but not both to contravene the prohibition, the state constitutional provision is more protective and expansive than its federal counterpart. See *Allen v. State*, 636 So. 2d 494, 497 n. 5 (Fla. 1994).

Consistent with the primacy principle enunciated in *Traylor*, this Court has given independent meaning to the state constitution's prohibition of "unusual" punishments, holding that Article I, §17 embodies a proportionality principle that may render unconstitutional the application of a legislatively-authorized punishment in a particular case. See *Tillman*, 591 So. 2d at 169 (citing Article I, §17 as one

basis for proportionality review of capital cases); and *Allen*, 636 So. 2d at 497 (imposition of death sentence upon 15 year-old disproportionate because unusual). Proportionality review in death penalty cases also derives from Article I, §9, because "death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties." *Tillman*, 591 So. 2d at 169. Finally, proportionality review is based on this court's mandatory and exclusive jurisdiction over death penalty appeals. Article V, §3(b)(1). The purpose of this "special grant of jurisdiction" is to foster uniformity in death penalty law. *Tillman*, 591 So. 2d at 170. Thus, although comparative proportionality review is not required by the Eighth Amendment to the United States Constitution, *Pulley v. Harris,* 465 U.S. 37, 44 (1984); it is required by Article I, §17, Article I,§9 and Article V, §3(b)(1) of the Florida Constitution.

Contrary to appellee's contention, this Court has construed mandated comparative proportionality review to require a comparison of both aggravating *and* mitigating circumstances in a subject case with other similar cases. In *Kramer v. State*, 619 So. 2d 274, 276 (Fla. 1993), this court noted that:

> In *Tillman v. State*, 591 So. 2d 167 (Fla. 1991), we explained that the purpose of the doctrine of proportionality is to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution, among other reasons. While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional, *see id.* at 168-69, we nevertheless are required to weigh the nature and quality of those factors as compared with other similar reported death appeals.

This review ensures that the death penalty is reserved not only for the most aggravated, but also for the least mitigated of offenders. *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973). And indeed this Court has on numerous occasions found a death sentence disproportionate because of mitigating circumstances comparable to those relied on in other cases to set aside a death sentence. See, e.g., *Songer v.*

State, 544 So. 2d 1010 (Fla. 1989); *Smalley v. State*, 546 So. 2d 720 (Fla. 1989); *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990); *Klokoc v. State*, 589 So. 2d 219 (Fla. 1991); *Clark v. State*, 609 So. 2d 513 (Fla. 1992).

Traylor, *Tillman*, and *Kramer* were all decided in the years following *Hamblen*. This Court has not previously addressed the question whether *Hamblen*, which was based solely on federal constitutional grounds, violates the Florida Constitution. Appellant submits that a defendant's waiver of mitigation evidence violates the Florida Constitution by precluding this court from the conduct of comparative proportionality review as mandated by Article I, §§9 and 17 and Article V, §3(b)(i).

CROSS-APPEAL

THE TRIAL COURT DID NOT ERR IN FINDING MITIGATING CIRCUMSTANCES.

In the context of the death penalty, the trial court must consider, 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, 604-05, 98 S.Ct. 2958, 2964-65, 57 L.Ed.2d 973 (1978). Furthermore,

> "[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 . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." (e.s.)

Eddings v. Oklahoma, 455 U.S. 104, 114-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982). The trial court is required affirmatively to show that "all *possible* mitigation has been considered and it is error to fail to do so." *Farr v. State,* 621 So. 2d 1368, 1371 (Fla. 1993) (Harding, J. concurring) (emphasis in original). This requirement applies "with no less force when a defendant argues in favor of the

death penalty." *Id.* at 1369. The decision whether to find and what weight to give a particular mitigating circumstance is a question of fact that is within the province of the trial court; the court's findings in this regard are presumed to be correct and will not be reversed merely because an appellant reaches a different conclusion. *Lucas v. State*, 613 So. 2d 408, 410 (Fla. 1993); *Sireci v. State*, 587 So. 2d 450 (Fla. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992).

This court has previously found childhood trauma and service in the Viet Nam War to be mitigating factors. *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990); *Masterson v. State*, 516 So. 2d 256, 258 (Fla. 1987). This court has held that mitigating circumstances may be found on the basis of statements made upon psychological evaluation or in PSIs, particularly in a case like this, where the defendant has waived the presentation of mitigation. *Farr*, 621 So. 2d at 1370. The trial court's findings of mitigating circumstances in this case are thus supported by the record.

That said, there can be no question that the paucity of mitigation found by the trial court is attributable to the *Koon* violation in this case. (Issue II). Because the defendant was permitted to waive mitigation evidence, without defense counsel's having conducted a mitigation investigation, and without the trial court's conduct of an inquiry to ensure the validity of this waiver, almost nothing was known by the sentencer about the defendant's character and life history. A mitigation investigation would have added weight and mass to those mitigating factors found by the trial court. As is set forth in the relinquishment pleadings, the divorce of the defendant's parents was preceded by years of savage domestic abuse: the defendant and his mother were brutally beaten on a regular basis by the defendant's father, a violent alcoholic. See e.g. *Herrera v. Department of Health and Rehabilitative Services*, 19 Fla. L. Weekly D351 (Fla. 3d DCA, February 15, 1994)

(evidence that child's parents engaged in physical altercations in his presence, and had severe substance abuse problem constitutes competent and substantial evidence of behavior likely to cause child's physical, mental and emotional health to be significantly impaired). Similarly, an investigation into the defendant's service as a marine in the Viet Nam War might disclose evidence of trauma incurred during the course of his artillery detail there. Cross-appellant's complaint that there was insufficient evidence of trauma from these two events to support the mitigating factors found by the trial court is best addressed through remand for resentencing.

CONCLUSION

Based on the cases and authorities cited herein, the appellant respectfully requests this Honorable Court to reverse the judgment and sentence of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33125, this 3 day of November, 1994.

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