IN THE SUPREME COURT OF FLORIDA

NO. SC06-210

JOHNNY SHANE KORMONDY,

Petitioner,

v.

JAMES V. CROSBY, JR.,

Secretary, Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE FOR WRIT OF HABEAS CORPUS

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COUNSEL FOR PETITIONER

ISSUE I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE TO THIS COURT THAT THE TRIAL COURT'S ORDER FAILED TO CONSIDER RECORD MITIGATION IN VIOLATION OF FARR V. STATE.

At page 16 of respondent's response to petitioner's habeas petition it is stated that this issue was raised on direct appeal and therefore should be denied. Further, respondent states at page 17 of their response the following:

> On appeal from his second penalty phase, Kormondy alleged the trial court erred when it failed to consider mitigation that was in the record and wholly unrebutted. (2PP Initial Brief at page 52,55).

Respondent's argument that this issue was raised on direct appeal is totally inaccurate, as demonstrated by Kormondy's initial brief for the second penalty phase appeal (Appendix A). Page 52 of Kormondy's initial brief begins with issue three, dealing with mitigation. The initial brief clearly argues only the evidence presented to the trial court at the second penalty phase trial.

The trial court's order, dated July 7, 1999, found no mitigation whatsoever (Appendix B). This Court found in its opinion of the second appeal, Kormondy v. State, 845 So.2d 41 (Fla. 2003): "Thus, this case is one where there are two aggravating factors and no mitigating factors"; and "Unlike

Singleton, Kormondy does not have the benefit of mitigation" Id. at p9.

However, the trial court's order for the first trial, dated October 31, 1994, had found a number of nonstatutory mitigators and had provided weight to those mitigators. Therefore, had this issue been raised on direct appeal for the second trial, this Court would have made reference to those mitigators.

Ultimately, however, the initial brief on direct appeal from the second penalty phase speaks for itself, the relevant portions of which have been attached.

Respondent does not contest in their response brief that Farr v. State, 621 So.2d 1368 (Fla. 1993), is controlling in this case. It is only argued that the issue was previously presented to this Court -- which is blatantly incorrect -- and that the mitigation for both cases is the same, which is also incorrect.

The nonstatutory mitigation presented and found in the first trial, which was not presented in the second penalty phase trial, is: That defendant had a deprived childhood; that defendant had a traumatic childhood; that defendant lost the comfort and companionship of his father; that defendant was a good employee; That defendant was drinking on the night the crime occurred; That defendant's behavior

was acceptable at trial; and that defendant had a personality disorder (Appendix B).

It is quite clear this issue was not raised on direct appeal and during the second penalty phase the trial court for the second penalty phase failed to consider these mitigating factors in violation of Farr, Supra.

ISSUE II

APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT PRESENTING MRS. MCADAMS' PRIOR DEPOSITION TESTIMONY ON DIRECT APPEAL TO THIS COURT IN ORDER TO ESTABLISH THAT THE TRIAL COURT ERRED BY NOT ALLOWING PETITIONER TO CONFRONT MRS. MCADAMS.

Petitioner will rely upon its initial petition in support of this issue.

ISSUE III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT PETIONER'S WAIVER OF MITIGATION WAS INVALID BECAUSE THE TRIAL COURT ERRED BY NOT INQUIRING OF TRIAL COUNSEL AS TO WHAT INVESTIGATION FOR MITIGATION WAS DONE AND WHAT MITIGATION WAS AVAILABLE IN VIOLATION OF KOON v. DUGGER.

At page 23 of respondent's brief, it is indicated that the petitioner has basically made the same claim in his postconviction motion, and therefore, this issue is not cognizable in a habeas. However, the respondent fails to recognize that a claim of trial counsel's failure to investigate mitigation may only be raised in a

postconviction motion, and failure of appellate counsel to raise on direct appeal an error of a trial court to inquire about investigation may only be raised in a state habeas. When both violations occur, a motion for postconviction and a state habeas are the remedies to be utilized.

Again, Kormondy does not contest the fact that Mr. Arnold questioned Mr. Kormondy about waiving mitigation. However, the dictates of Koon v. Dugger, 619 So.2d 246 (Fla. 1993):

> Accordingly, we establish the following prospective rule to be applied in such a situation. When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

While it may seem from the colloquy that Koon was met, things are not always as they appear. Respondent correctly points out in footnote 6, at page 25 of their response, that Arnold testified at the evidentiary hearing that he encouraged Kormondy to put on mitigation. Also, at the evidentiary hearing, Kormondy testified he only agreed to

waive mitigation because Arnold told him there was no reason to present mitigation at this time because the case would be remanded for to the court's consideration of premeditation.

This case is precisely why Koon requires the court to question both counsel and the defendant. If the court had asked Arnold about what mitigation his investigation uncovered, the court would have been informed that he conducted no additional investigation besides reading the previous record. Further, if the trial court had questioned Kormondy, the court would have learned that Arnold wanted to waive mitigation, not Kormondy, and Arnold convinced Kormondy to do so, based upon incorrect legal advice.

Petitioner was prejudiced by appellate counsel's failure to raise this issue on appeal, as evidenced by issue I, above.

CONCLUSION AND RELIEF SOUGHT

Petitioner prays for the following relief: That this Court grant Petitioner a new appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Respondent's Response has been furnished by hand delivery to Meredith Charbula, Office of the Attorney General, Department of Legal Affairs, The Capitol, PL01, Tallahassee, FL 32399, on August 19, 2006.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is 12 point Courier New.

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