

phase of trial, the jury recommended a sentence of death. On December 23, 1985, Judge Hayes followed the jury's recommendation and imposed a sentence of death. In his written sentence stating his reasons for imposing the death sentence, Judge Hayes found four aggravating circumstances: (1) Koon was previously convicted of a felony involving the use or threat of violence to the person; (2) the felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; (3) the felony was especially heinous, atrocious or cruel; and (4) the felony as a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The trial court found no mitigating circumstances.

On August 20, 1987, this Court affirmed the judgment and sentence of death. Koon v. State, 513 So.2d 1253 (Fla. 1987). The issues raised by Koon in his direct appeal are **as** follows:

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

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

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

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

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

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

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

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

ISSUE IX. RAY KOON SHOULD NOT BE DENIED GAIN TIME BECAUSE OF **HIS** ALLEGED NONPAYMENT OF COURT COSTS IMPOSED PURSUANT TO SECTION 27,3455 (10) OF THE FLORIDA STATUTES.

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

A request by Koon for clemency was apparently denied when Governor Bob Martinez signed a death warrant in Koon's case on May 1, 1989. The warrant was in effect from noon on Thursday, July 6, 1989, until noon on Thursday, July 13, 1989.

On or about May 31, 1989, the defendant filed an emergency motion to vacate judgment and sentence pursuant to Rule 3.850, **Florida Rules of Criminal Procedure**, and a consolidated emergency application for stay of execution and special request to amend and supplement. **The** following claims were presented in the 3,850 Motion:

I. THE APPLICATION OF RULE 3,851 TO MR. KOON'S CASE WILL VIOLATE, AND THE PRESENT WARRANT HAS VIOLATED, HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW AND DENIED HIM HIS RIGHTS TO REASONABLE ACCESS TO THE COURTS.

II. THE EXTENSIVE PARTICIPATION OF FEDERAL AGENTS IN MR. KOON'S PROSECUTION FOR THIS OFFENSE IN STATE COURT AFTER THEY HAD SUCCESSFULLY PROSECUTED HIM FOR THE SAME OFFENSE IN FEDERAL COURT VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY AND MR. KOON'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

III. MR. KOON'S SIXTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE HIS COUNSEL HAD A CONFLICT OF INTEREST.

IV. MR. KOON WAS BOTH DENIED HIS RIGHT TO SELF REPRESENTATION IN VIOLATION OF THE SIXTH AMENDMENT AND FORCED TO REPRESENT HIMSELF WITHOUT PROPER INQUIRY INTO HIS ABILITY TO DO SO.

V. MR. KOON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE HE STOOD A CRIMINAL TRIAL ALTHOUGH HE WAS NOT LEGALLY COMPETENT, AND

COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY ALLOWING AN INCOMPETENT CLIENT TO STAND TRIAL.

VI. THE INTENSE SECURITY MEASURES UNDERTAKEN DURING MR. KOON'S TRIAL BY COURT OFFICERS IN **THE** PRESENCE OF THE JURY ABROGATED THE PRESUMPTION OF INNOCENCE, DILUTED THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT, AND INJECTED MISLEADING AND UNCONSTITUTIONAL FACTORS INTO THE TRIAL AND SENTENCING PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. FURTHER, COUNSEL'S FAILURE TO OBJECT OR BRING THE PROBLEM TO THE ATTENTION OF THE COURT WAS INEFFECTIVE ASSISTANCE OF COUNSEL WHICH VIOLATED THE SIXTH AND EIGHTH AMENDMENTS.

VII. THE TRIAL COURT'S FAILURE TO GRANT A CHANGE OF VENUE DEPRIVED MR. KOON OF HIS RIGHT TO TRIAL BEFORE A FAIR AND IMPARTIAL JURY, IN VIOLATION OF **THE** SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, MR. KOON ASSERTED HIS RIGHT TO A CHANGE OF VENUE AND NEVER VALIDLY WAIVED THAT RIGHT, AND TRIAL COUNSEL FAILED TO EFFECTIVELY LITIGATE THESE MATTERS,

VIII. MR. KOON WAS DEPRIVED OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEYS' FAILURE **TO** ADEQUATELY INVESTIGATE, DEVELOP, AND PRESENT AMPLY AVAILABLE EVIDENCE IN SUPPORT OF A VOLUNTARY INTOXICATION DEFENSE.

IX. RAYMOND KOON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, **IN** VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

X. THE STATE'S WITHHOLDING OF MATERIAL, EXCULPATORY EVIDENCE VIOLATED MR. KOON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XI. MR. KOON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE

THE MENTAL HEALTH EXPERTS WHO SAW HIM PRIOR TO TRIAL DID NOT CONDUCT A CONSTITUTIONALLY ADEQUATE EVALUATION, BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE AND PROVIDE THE EXPERT WITH THE NECESSARY BACKGROUND INFORMATION. **AS** A RESULT AT TRIAL MR. KOON WAS INCOMPETENT AND DENIED A COMPETENCY HEARING. MR. KOON WAS ALSO DEPRIVED OF A CONSTITUTIONALLY ADEQUATE MENTAL HEALTH EVALUATION AT THE PENALTY PHASE.

XII. RAYMOND KOON WAS DENIED **THE** EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN COUNSEL FAILED TO OBTAIN THE ASSISTANCE OF A MENTAL HEALTH EXPERT.

XIII. RAYMOND KOON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

XIV. 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. 784 (1975), LOCKETT V. OHIO, 438 U.S. 586 (1978), AND MILLS V. MARYLAND, 108 S.CT. 1860 (1988).

XV. 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. CARTWRIEHT, 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.

XVI. THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. KOON'S CASE IN VIOLATION OF THE EIGHTH AN 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.

XVII. 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.

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

XIX. 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.

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

XXI. MR. KOON'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY 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. JR. KOON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE.

XXII. FAILURE TO INSTRUCT THE JURY OF THE NON-STATUTORY MITIGATING CIRCUMSTANCES OF DISPARATE TREATMENT VIOLATED MR. KOON'S RIGHTS UNDER THE EIGHTH **AND** FOURTEENTH AMENDMENTS.

XXIII. 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.

XXIV. 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.

XXV. THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. KOON'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION,

XXVI. 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.

XXVII. MR. KOON WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS WHEN INADMISSIBLE HEARSAY TESTIMONY WAS PRESENTED AT TRIAL.

XXVIII. MR. KOON WAS NOT PRESENT AT CRITICAL STAGES OF THE PROCEEDINGS AGAINST HIM RESULTING IN THE DEPRIVATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A stay was **entered** and an evidentiary hearing **was** held in the circuit court on December 5th and 6th, 1989. At the close of the **hearing**, the trial court denied the **motion for post-conviction relief**. An appeal from that denial is currently pending **before** this Court, **raising** the following **claims**:

ISSUE I - WHETHER MR. KOON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS, BECAUSE HIS TRIAL COUNSEL ABDICATED HIS PROFESSIONAL RESPONSIBILITIES

BY FAILING TO PURSUE OBVIOUS MENTAL HEALTH DEFENSES AND MITIGATION IN ALL PHASES OF THE TRIAL.

ISSUE II - WHETHER RAYMOND KOON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL WHEN TRIAL COUNSEL FAILED TO DEVELOP AND PRESENT TESTIMONY OF MR. KOON'S IMPOVERISHED CHILDHOOD, HIS MILITARY SERVICE, HIS DEBILITATING ALCOHOLISM AND OTHER NONSTATUTORY MITIGATION.

ISSUE III - WHETHER MR. KOON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE HE STOOD A CRIMINAL TRIAL ALTHOUGH HE WAS NOT LEGALLY COMPETENT, AND COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY ALLOWING AN INCOMPETENT CLIENT TO STAND TRIAL.

ISSUE IV - WHETHER MR. KOON'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE DENIED WHEN TRIAL COUNSEL ABDICATED HIS PROFESSIONAL ROLE TO HIS CLIENT WITHOUT THE REQUIRED FARETTA SAFEGUARDS.

ISSUE V - WHETHER MR. KOON WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE INVESTIGATION, PREPARATION, AND PRESENTATION OF THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

ISSUE VI - WHETHER MR. KOON WAS NOT PRESENT AT CRITICAL STAGES OF THE PROCEEDINGS AGAINST HIM RESULTING IN THE DEPRIVATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE THIS CLAIM.

ISSUE VII -- WHETHER 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, AND TO THE EXTENT HE FAILED TO OBJECT TRIAL COUNSEL ACTED INEFFECTIVELY.

ISSUE VIII - WHETHER THE INTENSE SECURITY MEASURES UNDERTAKEN DURING MR. KOON'S TRIAL BY COURT OFFICERS IN THE PRESENCE OF THE JURY ABROGATED THE PRESUMPTION OF INNOCENCE, DILUTED THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT, AND INJECTED MISLEADING AND UNCONSTITUTIONAL FACTORS INTO THE TRIAL AND SENTENCING PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. FURTHER COUNSEL'S FAILURE TO OBJECT OR BRING THE PROBLEM TO THE ATTENTION OF THE COURT WAS INEFFECTIVE ASSISTANCE OF COUNSEL WHICH VIOLATED THE SIXTH AND EIGHTH AMENDMENTS.

ISSUE IX - WHETHER MR. KOON'S SIXTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE HIS COUNSEL HAD A CONFLICT OF INTEREST.

ISSUE X - WHETHER THE EXTENSION PARTICIPATION OF FEDERAL AGENTS IN MR. KOON'S PROSECUTION FOR THIS OFFENSE IN STATE COURT AFTER THEY HAD SUCCESSFULLY PROSECUTED HIM FOR THE SAME OFFENSE IN FEDERAL COURT VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY AND MR. KOON'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

ISSUE XI - WHETHER THE TRIAL COURT'S FAILURE TO GRANT A CHANGE OF VENUE DEPRIVED MR. KOON OF HIS RIGHT TO TRIAL BEFORE A FAIR AND IMPARTIAL JURY, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. MR. KOON ASSERTED HIS RIGHT TO A CHANGE OF VENUE AND NEVER VALIDLY WAIVED THAT RIGHT, AND TRIAL COUNSEL FAILED TO EFFECTIVELY LITIGATE THESE MATTERS.

ISSUE XII - WHETHER THE APPLICATION OF RULE 3.851 TO MR. KOON'S CASE VIOLATED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW AND DENIED HIM HIS RIGHTS TO REASONABLE ACCESS TO THE COURTS.

ISSUE XIII - WHETHER THE FAILURE TO INSTRUCT THE JURY OF THE NONSTATUTORY MITIGATING CIRCUMSTANCE OF DISPARATE TREATMENT VIOLATED MR. KOON'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

ISSUE XIV - WHETHER **THE** FLORIDA SUPREME COURT HAS INTERPRETED "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AND "COLD, CALCULATED AND PREMEDITATE" IN AN UNCONSTITUTIONALLY OVERBROAD MANNER, AND **THE** JURY INSTRUCTIONS IN THIS CASE FAILED TO ADEQUATELY CHANNEL THE JURY'S DISCRETION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

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

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

ISSUE XVII - WHETHER 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.

ISSUE XVIII - WHETHER MR. KOON'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE THIS ISSUE.

ISSUE XIX - WHETHER THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. KOON'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. COUNSEL INEFFECTIVELY FAILED TO LITIGATE THIS ISSUE.

ISSUE XX - WHETHER THE PROSECUTION IN THE COURSE OF THE PROCEEDINGS IMPROPERLY ASSERTED THAT MERCY AND SYMPATHY TOWARDS MR. KOON WAS NOT A PROPER CONSIDERATION AND THAT THE LEGISLATURE INTENDED THAT HE BE EXECUTED. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE,

ISSUE XXI - WHETHER **THE** SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. KOON OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE.

ISSUE XXII - WHETHER THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST **BE** MADE BY A MAJORITY OF THE JURY MATERIAL 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 IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE.

II.

Facts

The State of Florida will rely on the Florida Supreme Court opinion (cited at Koon v. State, 513 So.2d 1253 (Fla. 1987)) for a statement of the facts:

Pursuant to information supplied by two witnesses, Joseph **Dino** and Charles Williams, Ray Koon was arrested and indicted on federal counterfeiting charges in 1979. His trial never took place because by the scheduled trial date, Joseph Dino had been murdered and Charles Williams refused to testify.. Ray Koon and his nephew, J. L. Koon, were eventually charged with the murder of Dino. The nephew pled guilty to the charge and subsequently testified against his uncle. According to J. L. Koon, he and Ray had stopped at a country store after a day of drinking, working and hunting. Ray dialed Dino's home and had J. L. use a false name to set up a business meeting with **Dino** for later that evening. They then drove to Ray's home, put a shotgun in the trunk, and met Dino in the parking lot of a lounge, Ray and Dino became involved in a fist fight in which Dino was severely beaten. The Koons then placed

Dino in their vehicle and drove out of town. At one point they stopped near a canal where Ray took the shotgun out and ordered Dino into the trunk. When Dino refused to get into the trunk, the three continued driving across the state at high rates of speed. When Dino asked if he was going to be killed, Ray said they might rough him up a bit but would not kill him. On a deserted road near Naples, Ray took the shotgun and walked Dino into the woods. J. L. heard a gunshot. When J. L. accosted his uncle by a small lake in which Dino's body was partially submerged, Ray told him not to worry about Dino because he had "watched his head explode" and that dead men couldn't tell any lies. Two other witnesses also testified that Koon told them he had killed Dino.

III.

Argument

Your respondent does not contest the jurisdiction of this Honorable Court to entertain a petition for a writ of habeas corpus where such petition presents cognizable matters. However, the instant habeas petition prepared on behalf of the defendant by the capital collateral representative consists entirely of matters which this Honorable Court will not consider on habeas review. The instant petition for writ of habeas corpus is, as was the petition filed in Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987), "almost entirely a repetition of the issues raised in the Rule 3,850 proceeding." By including these types of claims within his petition for writ of habeas corpus, "collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." Blanco v. Wainwright, 507

So.2d at 1384. With respect to the issues properly raised under Rule 3.850, petitioner's remedy is not the instant habeas petition, but rather is a direct appeal from the denial of the Rule 3.850 motion. This Honorable Court need not nor should not "replough this ground once again." Ibid.

With respect to each of the issues raised in this habeas petition, petitioner gratuitously asserts that appellate counsel **was** ineffective for failing to raise the issues on direct appeal. In McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983), this Court held that "[h]abeas corpus should not be used **as** a vehicle for presenting issues which should have been raised at trial and on appeal", citing Hargrave v. Wainwright, 388 So.2d 1021 (Fla. 1980), and State ex rel. Copeland v. Mayo, 87 So.2d 501 (Fla. 1956). In McCrae, this Court specifically opined that:

. . . **Allegations of** ineffective appellate counsel therefore should not be allowed to serve **as** a means **as** circumventing the rule that habeas corpus proceedings do not provide a second or substitute **appeal**. (text at 870)

This type of admonition has been consistently **followed** by this Honorable Court and this Court has specifically admonished the office of the capital collateral counsel "that habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in Rule 3.850 proceedings." White v. Dugger, 511 So.2d 554 (Fla. 1987), citing Blanco, supra, and Copeland v.

Wainwright, 505 So.2d 425 (Fla. 1987). Thus, to the extent that petitioner is again asking this Court to exercise its jurisdiction over issues not legally cognizable on habeas review, this Court should decline to do so.

Your respondent declines to address the merits of substantive claims asserted in this habeas petition **as** all of these claims, could have been or should have been asserted on direct appeal and urges this Court to continue to enforce its procedural default policy; otherwise, appeal will follow appeal and there will be no finality in capital litigation. cf. Johnson v. State, 536 So.2d 1009 (Fla. 1988) (the credibility of the criminal justice system depends upon both fairness and finality).

Thus, petitioner's application for habeas relief should **be** denied for reasons of procedural default or because the claim was previously raised and determined on direct appeal. In Harris v. Reed, 489 U.S. ___, 109 S.Ct. 1083, 103 L.Ed.2d 308 (1989), the Supreme Court **held** that where, a state court was ambiguous in its ruling denying relief on both procedural and substantive grounds, the federal habeas courts should reach the merits:

Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. (44 Cr.L. 3122-23).

The court added in footnote 12:

. . . Additionally, the dissent's fear, post, p.11-12 and n.6, that our holding will submerge courts in a flood of improper prisoner petitions is unrealistic: a state court that wishes to rely on a procedural bar rule in a one-line pro forma order can easily write that "relief is denied for reasons of procedural default."

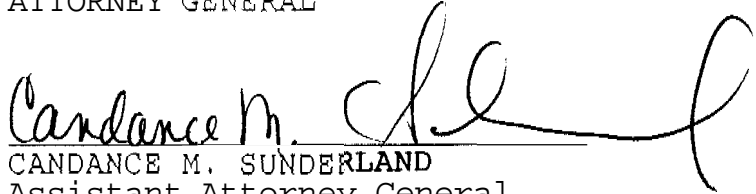
If, however, this Honorable Court should determine that a review of the merits of any of these claims is necessary, Respondent respectfully requests the opportunity to file a supplemental response.

CONCLUSION

Based on the **foregoing** reasons, this Honorable Court should deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a **true** and correct **copy** of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral **Representative**, 1533 South Monroe Street, Tallahassee, Florida 32301, **this 4th day of November, 1991.**


OF COUNSEL RESPONDENT.