

IN THE SUPREME COURT OF FLORIDA

JOHNNY SHANE KORMONDY,

Appellant,

vs.

CASE NO. SC96197

STATE OF FLORIDA,

Appellee.

-----/

ON APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT, IN AND
FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

For convenience to this Court, the State will cite to the record in a manner similar to that used by the Appellant, i.e., to the clerk's record on appeal as "R," to the transcripts of the proceedings as "T," and to the supplemental record as "SR," with the appropriate volume number as required by Fla. R. App. P. 9.210 (b) (3).

STATEMENT OF THE CASE

The State cannot accept Kormondy's statement of the case, his interpretation of this Court's previous opinion in this case, or his interpretation and characterization of the trial court's sentencing order.

The State agrees that Kormondy was tried and convicted in 1994 for first degree murder, three counts of sexual battery, one count of burglary of a dwelling with assault and intent to commit theft, and one count of armed robbery. The State agrees that Kormondy was sentenced to death for the murder. The State also agrees that co-defendants Curtis Buffkin and James Hazen were convicted in separate proceedings and have received life sentences. As will be discussed in more detail later, Buffkin negotiated a plea in exchange for a life sentence while his jury was deliberating at the guilt phase, while Hazen was convicted (in part based on Buffkin's testimony) and originally sentenced

to death. Hazen's death sentence, however, was vacated on appeal on the ground that it was disproportionate to Buffkin's life sentence. Hazen v. State, 700 So.2d 1207 (Fla. 1997).

On Kormondy's direct appeal, this Court, by a 4-3 majority, concluded that although there was some evidence consistent with premeditation, the evidence failed to "exclude" a reasonable hypothesis that the shooting was accidental; this Court unanimously agreed, however, that the evidence was sufficient to support a conviction for felony murder.¹ On the latter basis, Kormondy's first degree murder conviction was affirmed on direct appeal. Kormondy v. State, 703 So.2d 454 (Fla. 1997). This Court vacated the death sentence and remanded for resentencing because it found harmful error in the admission of testimony about Kormondy's threat to kill Cecilia McAdams (the surviving victim in this case) if he were released from prison. Id. at 460-63. In the final paragraph of the Court's opinion, this Court cautioned the trial court that "a murder cannot be cold, calculated and premeditated without any pretense of moral or

¹ The evidence consistent with premeditation was summarized by then Justice Grimes' in his concurring opinion, joined by Justices Harding and Wells. 703 So.2d at 464.

legal justification if premeditation is not established." Id.
at 463.²

The State agrees that Judge Tarbuck presided over the resentencing proceedings. The State disagrees that the prosecutor acknowledged before the presentation of evidence that he had no new evidence to present, as Kormondy asserts. Initial Brief at 2. On the contrary, although the prosecutor did state that he had no new evidence as to the HAC aggravator (3T 18-19), as to the avoid-arrest/witness-elimination aggravator, the prosecutor stated: "I don't believe, Your Honor, that at this point the State should be foreclosed from offering the facts that would support that" (3T 12).

The State agrees that Kormondy did not testify or present evidence in mitigation to the jury. However, Kormondy did present "evidence" to the trial court, in the form of transcripts of testimony from the Hazen trial, which Kormondy attached to his sentencing memorandum (2R 234, 2SR 218, 4SR 409-

² The State cannot agree with Kormondy's insistence that this Court found that "the murder was not premeditated as a *matter of law*," or that the trial court was precluded from finding on resentencing that the murder was premeditated. Initial Brief Appellant at 2. In the State's view, finding that the evidence fails to exclude a theory that the murder was not premeditated is not the same as finding that the murder is not premeditated as a "matter of law," and the State therefore does not read this Court's opinion as precluding a finding of premeditation at resentencing, if sufficient evidence of such were presented.

472). In addition, portions of the transcript of the Buffkin trial, including closing arguments and testimony from Cecilia McAdams and other witnesses, were, as Kormondy states in his brief (p. 9), "submitted to the trial court." (2SR 221-319, 3SR 320-406).³ Moreover, Kormondy argued four non-statutory mitigators in his sentencing memorandum: (a) his two co-defendants were sentenced to life imprisonment rather than death; (b) he did not intend that Mr. McAdams be killed; (c) he confessed and his cooperation with police resulted in the apprehension of the two codefendants; and (d) he behaved himself during the court proceedings (2R 233-34). In addition, Kormondy argued that his statement to police established the statutory mitigator that the capital felony was committed by another and Kormondy's participation was relatively minor (2R 234).

The State agrees that the resentencing jury recommended death by a vote of 8-4 (same as the original jury), that the trial court held a presentence hearing, and that the trial court thereafter imposed the death sentence by written order dated July 7, 1999.

³ Kormondy's appellate counsel deemed these and other documents sufficiently important that he moved to supplement the appellate record to include them (1SR 1-10). Moreover, he explicitly relies on the Buffkin and Hazen transcripts in his Statement of Facts. Initial Brief of Appellant at pp 21-24.

The State does not agree that the testimony and evidence are "the same" as presented previously, as Kormondy asserts. Initial Brief at 3. Nor does the State agree that the trial court found the CCP aggravator. The State does agree that the trial court's findings include all the elements of the HAC and avoid-arrest/witness-elimination aggravators. In addition, the trial court found the aggravators of prior violent felony convictions (for robbery and sexual battery) and murder committed during a burglary. The State does not agree that the trial court's findings as to mitigation are contradictory or unclear. The State will respond more specifically to Kormondy's various criticisms of the trial court's sentencing order in its argument.

STATEMENT OF THE FACTS

The State will offer its own statement of the facts. In the State's view, the relative locations of the three codefendants during the criminal episode and particularly at the time of the shooting are clearly established by the evidence presented in this case. Moreover, to the extent that evidence from the trials of the two co-defendants may be considered, the State would note that except for Kormondy's own self-serving statement to the police (which contradicted earlier statements to a friend), the evidence in all three cases, although inconsistent

in some other respects, consistently establishes that Kormondy was the person who shot and killed Mr. McAdams with Mr. McAdams' own gun.

By stipulation, it was established that Curtis Buffkin stole a .44 caliber pistol (State's exhibit 28) a couple of days before the instant murder/robbery, that Buffkin carried this gun into the victims' home, and that it was in Buffkin's possession nine days after the murder when he was arrested in North Carolina (4T 346-47).

Cecilia McAdams testified that on the evening of July 10, 1993 she and her husband Gary McAdams had attended her twentieth year high school class reunion (4T 295). She wore a new green silk dress (4T 295). They stopped on the way home from the reunion to pick up some fast food, and arrived home shortly after 12:30 a.m. (4T 297). They pulled into their garage, but left the door open because they had a new puppy they needed to let out (4T 298). They entered their house by way of the kitchen, dropping their food on the counter as Mr. McAdams went to the bathroom to get the puppy (4T 298-300). When he got back to the kitchen, there was a "loud knock" on the door (4T 301). Mr. McAdams asked who was there. Someone answered, "It's me." Thinking it was a neighbor, Mr. McAdams opened the door, only to be confronted by Curtis Buffkin standing with his arm out

pointing a pistol at the McAdams (4T 302-03).⁴ Mrs. McAdams testified that Buffkin told she and her husband to "kneel down on the floor and to put our heads down" (4T 303). They were so stunned they just stood there until Buffkin told them to get down and put their heads down or "he would kill us" (4T 304)(emphasis supplied). They did as they were told (4T 304). As they did, two other person entered the room (4T 304). Mrs. McAdams testified that she was afraid and that she had knelt down because she was afraid she would be killed (4T 304-05). The intruders went around closing blinds and pulling out all the phone cords; Mrs. McAdams did not look up, however, because she thought that if she looked at their faces she and her husband would be killed (4T 305). Mrs. McAdams testified that, when the intruders demanded money and car keys, Mr. McAdams took out his wallet and keys and threw them on the floor (4T 305). Mrs. McAdams' purse and keys were lying on the bar; she told them to take them, because she was afraid she would be killed if she did not cooperate (4T 305-06).

Mrs. McAdams testified that she heard noises from the back of the house that sounded like drawers being pulled out (4T

⁴ Mrs. McAdams did not name Buffkin, but testified that the person depicted in State's exhibit 16 was the person standing at the door with the gun (4T 303). Sheriff's investigator Allen Cotton testified that State's 16 is a photograph of Curtis Buffkin (4T 332).

307). Shortly, one of the intruders--not Curtis Buffkin (4T 309)--returned to the kitchen with Mr. McAdams' handgun and asked him who he thought he was going to hurt with this (4T 308).⁵ Her husband answered, "no one," and the intruder said: "You're right. You're not." At this point, this intruder rubbed the gun along Mrs. McAdams' hip, told her she had "a cute ass," and ordered her to come with him (4T 308). She and her husband both "begged" the intruder "not to do this" (4T 309). Ignoring their pleas, the intruder took her to the master bedroom (4T 309). He ordered Mrs. McAdams remove all her clothing, sat her on the toilet in the bathroom, and forced her to perform oral sex on him (4T 310). When she gagged--apparently more than once--the assailant told her if she let his penis come out of her mouth one more time, he would blow her head off (4T 311). Then he took her from the bathroom into the adjacent vanity area of the master bedroom, from where she saw a thinner, taller intruder, having long, mousy, stringy brown hair going through one of her purses (4T 312).⁶ Mrs. McAdams was then sexually assaulted by both of these intruders, the first

⁵ Mrs. McAdams testified that her husband owned only this one gun and that she never saw it again after this criminal episode (4T 308).

⁶ The only one of the three co-defendants having long, stringy, mousy brown hair was Kormondy. See State's Exhibits 15, 16 and 17.

continuing to rape her orally while the second raped her vaginally (4T 313-14). Mrs. McAdams was told she was "good pussy" (4T 314). The one performing oral sex ejaculated into her mouth and ordered her to "Swallow it, Bitch" (4T 315). Then she was returned to the kitchen and forced to kneel down, still naked, next to her husband (4T 315). She tried to reach out to take his hand, but "they" yelled at her and told her not to touch him (4T 315). One of them got a beer out of the refrigerator, "slammed" it down between the couple and ordered Mr. McAdams to drink it (4T 315).

At this point, Buffkin took Mrs. McAdams back to the bedroom, touched her with his gun, and told her: "I don't know what the other two did. I think you're going to like what I'm going to do" (4T 316). He made her lie down and raped her vaginally (4T 316). Before he was finished, however, she heard a gunshot and screamed her husband's name (4T 317). Buffkin threw a towel over her face; just afterwards, a gun fired in her bedroom (4T 317). She jumped up and ran to the front of her house, where she saw her husband lying on the floor with blood coming out the back of his head (4T 317-18). Except for being on his back instead of on his knees, he was in the same place she had last seen him (4T 318). She screamed and went outside, clad only in a towel (4T 318-19). She met her neighbor coming

across the yard and told him Mr. McAdams had been shot (4T 319).

Mrs. McAdams testified that two of the intruders had worn socks on their hands, but not Buffkin (4T 319). She did not leave any socks on her kitchen counter, and neither she nor her husband had eaten any of the food they had bought on the way home (4T 320). She and her husband had done everything they had been asked to do by the intruders (4T 325-26). Although she was never able to identify Kormondy as one of the intruders (because she was never able to see his full face), she did recognize some similar characteristics and features, including height, weight and hair (4T 327). She was positive that the last intruder to sexually assault her was the person who had confronted them at the door with the gun in his hand (i.e., the person she had identified as Buffkin) (4T 326). She was never able to identify Hazen (4T 327).

Charlotte and Buddy Cole lived next door to the McAdams (4T 234). Mrs. Cole testified that she heard the McAdams return at 1:30 a.m. (4T 235). She heard the garage door go up, but did not hear it go back down (4T 235-36). Mrs. Cole was lying in bed fully dressed because she was planning to leave for Alabama at 4:00 a.m. (4T 235). Fifteen minutes or so after she heard the McAdams' garage door open, Mrs. Cole heard a "loud

explosion" (4T 236). She jumped up and ran to the front door; looking out through a window, she saw a man running across her yard (4T 236). Thinking someone was going to break into one of their vehicles, she told her husband to get up (4T 238). They both went back to the front door, when they heard screaming (4T 238). It was "a horrible, horrible scream;" it sounded like an animal (4T 238). Looking in the direction of the scream, they realized it was Cecilia McAdams, standing at the end of her garage, wrapped in a towel (4T 239). Mr. Cole went to her; Mrs. McAdams was screaming hysterically, "They've shot Gary. They've shot Gary" (4T 239, 246). Mr. Cole told his wife to call the police (4T 252). Later, Mrs. McAdams was brought over to the Cole's house, in shock, saying over and over, "I don't understand why they did this. We did everything that they asked us to do. . . . Why did they have to kill Gary? . . . I cannot live without Gary." (4T 240).

Various witnesses described the crime scene. There were two non-matching socks in the kitchen, one near the stove and one on the breakfast counter along with some fast food that someone had taken a couple of bites out of (4T 256, 447). The telephone lines had all been pulled out (4T 265). The master bedroom had been ransacked, with numerous drawers opened and things scattered about the room (4T 265). In the floor of the master

bedroom was a bullet hole and black powder on the carpet (4T 262). The bullet was collected from under the carpet (4T 263). Police also collected a green dress from the dressing area adjacent to the bedroom (4T 264). On the kitchen floor lay Mr. McAdam's body (4T 262). Police collected three small lead fragments from the kitchen floor near the victim's head (4T 265-66).⁷ From the lowness of the blood spatter patterns, it appeared that the victim had not been standing when shot (4T 267, 278). Police found no weapons in the house (4T 268). They did find a pair of handgun grips (4T 268).

The former testimony of Dr. McConnell (now deceased), who conducted the autopsy on July 11, 1993, was read to the jury (4T 286 et seq). He testified that the gunshot wound that killed Mr. McAdams was a contact wound, meaning:

The barrel was sealed against the contour of the skull, and I know this because there was only powder that was blown into the wound and there was no powder around the wound. Had the barrel been away from the head, it would have caused stippling and gunpowder around the wound, and it had none of that. It was *firmly pushed against the head at the time of the discharge of the bullet.*

(4T 292)(emphasis supplied). Dr. McConnell also testified that the victim had ingested alcohol shortly before his death (the victim was still in the "absorption phase")(4T 293).

⁷ During the autopsy, a deformed bullet was removed from the brain of Mr. McAdams (4T 270-71).

Kormondy's ex-wife Valerie testified that Kormondy, James Hazen and Curtis Buffkin had left her home together at 9:00 p.m. July 10, 1993 (4T 348-50). Before they left, she had heard Buffkin talking about robbing a house on Gulf Beach Highway (4T 357). She also saw that Kormondy had a gun (4T 357).⁸ She next saw the trio sitting in her living room at 5:00 a.m. the next morning (4T 350). At 7:00 a.m., she got a call from Hazen's family and she took Hazen to meet them, driving Kormondy's car (4T 354-55). While in the car, she discovered a bag of jewelry (4T 356). When she returned, she told Kormondy and Buffkin to leave (4T 357).

After being kicked out of the house by his wife, Kormondy went to stay with her cousin William Long (4T 383). While at a store together, they saw a bulletin posted behind a cash register offering a reward for information leading to the arrest and conviction of the person or persons responsible for the murder of Gary McAdams (4T 383-84). As they were walking away from the store, Kormondy told Long "they only way they'd ever catch the person that shot Mr. McAdams is if they were right

⁸ Another person in the house that evening, James Popejoy, also saw Kormondy in possession of a firearm (4T 360).

behind us right then" (4T 384).⁹ Later, Kormondy elaborated, telling Long:

He said that him and the other two gentlemen went up to the house. One of them knocked on the door. When the man opened the door, they rushed him. And it's a little vague between there. He just told me that he did not have anything to do with raping Mrs. McAdams, that he had the gun and that he was holding Mr. McAdams in the kitchen at gun point while they were raping Mrs. McAdams. And that Mr. McAdams tried to get up. When he did, he said he went to poke him with the barrel of the gun and the gun went off. He said it was an accident.

(4T 388).

Thereafter, Long agreed to "wear a wire" for the police and talked to Kormondy at the cabinet shop where Kormondy worked (4T 390). According to Long:

I told him that some cops had come by my house, and they were asking me about the murder and this, that and the other. And I asked him if he had told anybody else about him killing the dude. And he said, Man, I don't know what you're talking about, or something, and I said, Look, they know something. I said, I'm leaving town. And he said, Well, I'm leaving town, too. . . . He got in [his truck] and ran out, got out.

(4T 391).¹⁰

⁹ On hearing this, Long told Kormondy "[j]ust to stop it;" he wanted no part of it and did not want to hear anything else (4T 384).

¹⁰ Long also testified that when he had told Kormondy that the police had been asking questions, Kormondy wanted to know if Long had told them anything (4T 393).

Police had been nearby when Long talked to Kormondy on this occasion, and pursued Kormondy when he left (4T 364). They tried to pull him over; Kormondy stopped, but sped off when the police exited their vehicles (4T 365). Kormondy abandoned his vehicle a short distance away and attempted to flee on foot (4T 366). Officer Kilgore got within "two feet" of him, in a backyard, just as Kormondy was jumping over a fence; however, Kilgore had to stop to kick off some dogs that were trying to bite him, and when he turned around, Kormondy was gone (4T 373, 375). Police search dogs were brought in, and they found Kormondy hiding in a shed four to five backyards away (4T 379-80). Kormondy was arrested without further incident (4T 380).

Kormondy gave two oral statements to police, the second of which was recorded (4T 398). Sheriff's investigator Wendy Hall testified that there was "no discrepancy" between Kormondy's two statements (4T 398).

In the recorded statement, Kormondy stated that in the early evening hours of July 10, 1993, he and Buffkin and Hazen were riding around in Kormondy's Camaro (2SR 179-80). Kormondy was driving (2SR 182). They were looking for money and first searched for someone who owed Kormondy money for his truck (2SR 181). This search was unsuccessful, so they drove toward the "Ensley" area, so Buffkin could look for a house to break into

as a way to get money (2SR 181-82). They ended up at the McAdams' subdivision around "midnightish" (2SR 182). Kormondy parked the car, and the three exited, with Buffkin leading (2SR 183-84). Buffkin had a gun (2SR 184). They saw a car turn into a driveway and go into the garage (2SR 186-87). After the occupants went in the house, the trio entered the garage and Buffkin knocked on the door (2SR 185-87). Buffkin had "nothing on his face," but Kormondy and Hazen had clothing over their heads and socks on their hands (2SR 188-89). When someone opened the door, Buffkin "stuck a gun to their face and hollered" (2SR 187), telling them to stay on the floor and they won't get hurt, but warning them that "if they move or don't do what he says, he'll blow their heads off" (2SR 190). Kormondy stated that he went to the living room and Hazen went "down the hall," but then "they" hollered for him to come back; Kormondy went "back there" and "they" gave him a bag (2SR 190).¹¹ While Kormondy held the bag, Hazen was stuffing it with jewelry (2SR 191). Hazen also found a gun in the bedroom dresser (2SR 191). Kormondy described the bedroom as probably the master bedroom, as it had a bathroom in it (2SR 192). When they were through, they returned to the kitchen area (2SR 192). Then Hazen took

¹¹ Kormondy did not explain who was guarding the victims at this point.

the woman into the back bedroom (2SR 193-94). Kormondy stated that at some point he also went to the bedroom and saw the woman sitting on the toilet, naked, with Hazen standing in front of her (2SR 194). Although he claimed not to be able to see Hazen's penis, from "what it looked like" (2SR 196), "She was giving him head" (2SR 195). When he saw this, Kormondy turned around and walked back to the kitchen (2SR 196). At this point, Buffkin gave him a gun (2SR 196).¹² Kormondy held this gun on the male victim, while Buffkin went to the bedroom (2SR 197). Five or ten minutes later, Buffkin and Hazen brought the woman back to the kitchen (2SR 197-98). She was still naked (2SR 198). They forced her to kneel next to her husband (2SR 198). Then, according to Kormondy, Hazen said "I ain't through with her yet" (2SR 198). Buffkin retrieved the gun he had given Kormondy earlier, while Hazen still had the gun he had found in the bedroom (2SR 199-200). Hazen took the woman back to the bedroom (2SR 200). Kormondy stated that he stepped over to the bar in the dining room, while Buffkin told the man "to put his head between his knees" (2SR 201). According to Kormondy, the

¹² Initially, Kormondy stated that Buffkin had given him the gun when he and Hazen had first returned to the kitchen with the bag of jewelry (2SR 193). Then he recalled that Buffkin had given him the gun only after Kormondy had come back from his second trip to the bedroom; he said: "[W]e got turned around in there, I guess. I got too far ahead" (2SR 196).

man was "kind of leery and skittish," and Buffkin "started bumping him in his head" with the end of the barrel, saying: "Do what I say, do what I say" (2SR 201-02, 210-11). As he did so, the "gun went off" (2SR 202). Kormondy was not "actually looking at the man" when the gun went off, but he saw Buffkin punching him with the gun, and he saw the man fall backwards (2SR 203). Kormondy stated that he was the first man out the door, followed by Buffkin; when Hazen did not immediately exit the house, Buffkin went back inside for him (2SR 203-03). Kormondy ran to the car. When the others arrived, they drove away, returning to Kormondy's house (2SR 204-05).

Kormondy told police that he did not assault the female victim "at all. . . . No way, shape or form," because he wouldn't want anyone to "do that to my wife" (2SR 208). He also denied killing the male victim, insisting the Buffkin was the one who had a gun to the victim's head when it went off (2SR 209). Kormondy stated that, when they got back to the house, Buffkin said he didn't really mean for the gun to go off (2SR 211). He did not, however, act like he was sorry for what had happened, being in fact calm and relaxed (2SR 211).

Finally, Kormondy admitted that they had been in the same neighborhood the night before, trying unsuccessfully to break into an unoccupied house (2SR 213).

Lyn Hart testified that he was a friend of Gary McAdams, and had traded to him a .38 caliber Smith & Wesson Model 10 revolver with a four inch barrel (5T 421). Hart testified that when he traded the gun to Mr. McAdams, it had "standard wood Smith & Wesson grips" just like State's Exhibit 27 (the grips recovered from the McAdams residence) (5T 426). Hart testified that Mr. McAdams had replaced the original grips with rubber ones soon after the trade (5T 426). The pistol was in working condition when Hart traded it to Mr. McAdams in January of 1990 (5T 427).

Firearms examiner Edward Love testified that the bullet recovered from Mr. McAdams' brain was a .38 caliber fired from either a .357 Magnum or a .38 special like Smith & Wesson, Taurus, Ruger, etc. (5T 462-63). The bullet could not have been fired from Buffkin's .44 special Charter Arms revolver (5T 463). The bullet recovered from the floor of the McAdams bedroom, however, was definitely .44 caliber and could have been fired from Buffkin's gun, although the bullet was too damaged to make a positive identification to that particular .44 caliber gun (5T 464). Love testified that this bullet had been fired in contact or near contact with the carpet (5T 465). He testified that he had examined Buffkin's .44 firearm and had determined that it could not have been fired accidentally (5T 465).

Love testified that he was familiar with .38 caliber Smith & Wesson model 10's with four inch barrels (5T 465-66), and that there were two ways to fire such a weapon:

[Y]ou can either cock the hammer and then pull the trigger, at which point it will take somewhere around three to five pounds to fire it, the pressure on the trigger, or you can simply pull the trigger in what they call double action and it will both cock and fire the firearm. In that case, normally it will take somewhere in the vicinity of 10 to 12 pounds or so, double action, pressure to fire it.

(5T 466). Love testified that a Smith & Wesson model 10 in reasonably good condition, if not cocked, would not go off if one were to "slam it up against this rail;" in fact, unless the gun were broken in the process, it would not go off even if it were thrown "across the room at that wall" (5T 467).¹³ An uncocked model 10 would not "go off" if all one did was poke someone in the back of the head with it (5T 467).¹⁴ Although Love was unable to examine the condition of the McAdams' .38

¹³ At Kormondy's original trial, by comparison, Love was asked only if the gun could go off accidentally if "dropped," he was not asked what might happen if it were "slammed" against a railing or thrown clear across the room. See Transcript, case no. 84,709 at pp. 1314-16.

¹⁴By contrast, at Kormondy's original trial, Love testified only that it would be "unlikely" that an uncocked model 10 would go off if someone was poking another in the head. Transcript, case no. 84,709 at p. 1315.

because it was never recovered, it clearly worked well enough to expend a projectile into the victim's brain (5T 476).

Testimony was presented from two crime lab witnesses establishing that green silk fibers swept from the two front seats and the back seat of Kormondy's Camaro were microscopically identical to the silk fibers of Cecilia McAdams' new green silk dress she had worn the night of the murder (4T 274, 5T 429 et seq, 449 et seq).

The parties stipulated that all three defendants had been convicted of three sexual batteries, armed robbery and armed burglary (5T 480). They also stipulated that Hazen and Buffkin were serving life sentences (5T 480-81). Following these stipulations, both sides rested (5T 481).

The Buffkin and Hazen Partial Transcripts in this Record

As noted in Kormondy's brief (Initial Brief at 21), portions of the Buffkin and Hazen trial transcripts were made part of this record and relied on by Kormondy in his sentencing argument to the judge.¹⁵

¹⁵ As the State noted previously in this brief, the testimony and evidence in the resentencing are not "the same" as presented at the original trial, and this is but one example. Buffkin's trial counsel testified at Kormondy's original sentencing (Transcript, case no. 84,709, pp. 1794-1808), but no transcripts from either Buffkin's or Hazen's trial or sentencing proceedings were submitted to the trial court or made part of the record of the initial trial proceedings. Moreover, appellate counsel in the original appeal complained about the trial court's

(A) In Buffkin's trial, as in the instant resentencing, Cecilia McAdams positively identified Buffkin as the one in the bedroom raping her when her husband was shot, after she had been sexually assaulted previously by the other two (2SR 245-48, 249-51, 255, 265). She also testified that the pistol that Buffkin was holding was not her husband's (2SR 263, 266). She readily acknowledged that Buffkin was not only armed, but bigger and stronger than she, and there was nothing she could have done to keep Buffkin from shooting her (2SR 269). When she heard the shot from the front part of the house, she was sure her husband had been shot; at that point, Buffkin could have shot her but he did not (5T 269-70).

As Kormondy notes in his brief (Initial Brief at 22), the prosecutor did attempt to emphasize Buffkin's leadership role in his argument to the jury. The prosecutor did not, however, and could not, under the evidence, urge that Buffkin himself had shot anyone. On the contrary, the evidence clearly showed that

consideration of any part of the records of either of the codefendant's trials not explicitly made a part of the record in Kormondy's case, Initial brief of Appellant, case no. 84,709, at p. 89 (fn. 18), and this Court agreed that the trial court had no business relying on extra-record facts, even extra-record facts contained in the records of co-defendants. Kormondy v. State, 703 So.2d at 463-64. Since portions of the co-defendants' trials have been made part of the record in the instant case, these portions are not "extra-record" and, having been relied upon by both trial and appellate counsel, were properly considered by the trial court in the resentencing.

Buffkin had refused to shoot Mrs. McAdams when given the clear opportunity to do so. Buffkin's counsel emphasized this in his initial and concluding argument, from which Kormondy fails to quote. The State will.

In his initial argument to the jury, Buffkin's counsel noted that the three defendants had been carried to the McAdams' house in Kormondy's car, that Kormondy had been driving, and that the proceeds of the robbery/burglary had been in Kormondy's car the next day (3SR 395-96).¹⁶ Moreover, since the other two had been masked while Buffkin had not been, defense counsel argued that, rather than being a ringleader, Buffkin had actually been "the fall guy" (3SR 360).¹⁷ Defense counsel noted that one of the other two had initiated the sexual battery of Mrs. McAdams, that one of the other two had shot Mr. McAdams, and that nothing had prevented Buffkin from shooting Mrs. McAdams (3SR 362-65).

After the prosecutor argued, defense counsel returned to his theme in reply, arguing:

You can judge the intent of Curtis Buffkin, but the fact that there were not two deaths in that

¹⁶ Kormondy's wife had testified at Buffkin's trial that neither Buffkin nor Hazen even had a car (2SR 300).

¹⁷ Buffkin's trial attorney testified at Kormondy's original sentencing that Buffkin was borderline mentally retarded, with an IQ between 65 and 72 (Transcript, case no. 84,709 at 1798). By contrast, according to Dr. Larson, Kormondy has average intelligence (Transcript, case no. 84,709 at 1572).

conscious moment of reflection with the defenseless Cecilia McAdams on the floor in the vanity area, in that conscious moment of reflection, fortunately Curtis Buffkin finally made the right decision, because he had no intention that anyone would die. And he showed to you what his intent was. He certainly showed that his intent was not that anyone die. In that conscious moment of reflection, he jumped up and he ran.

You know, I asked Cecilia McAdams, you may remember it, it may have been my very last question that I asked of her, was there any doubt that he could have killed her, and I feel confident there's no doubt in your mind that he could have killed her. . . .

He heard the gunshot and everybody knew full well what had happened when that gunshot went off, and he left and he spared the life of Cecilia McAdams. . . .

(3SR 402-03).

(B) From Hazen's trial, only his testimony was introduced into this record. Hazen claimed not to have been in the McAdams' house at all. Although acknowledging that he had ridden off in Kormondy's car with Kormondy and Buffkin, he testified that they had picked up a fourth person Hazen did not know and could not name (4SR 459-60) and that, after driving around until past midnight, Hazen got tired and demanded that Kormondy take him home (4SR 418-23). They returned to Kormondy's home to drop Hazen off, telling him if he was "too scared to play, you know, stay home" (4SR 424-25). The door was locked and, rather than wake up Kormondy's wife and the baby, Hazen just sat on the porch and waited until Kormondy and the

others returned (4SR 1059). When the others returned, he was still on the porch (4SR 427).

Hazen testified that Buffkin's testimony that he (Hazen) had participated in the McAdams' robbery/murder was not true (4SR 468). However, Hazen testified that, if he *had* participated, "it would have been done a lot different" (4SR 469). Asked if the difference would have been that he would have killed Mrs. McAdams, Hazen testified: "If I would have been there, that's what would have . . . happened, yes" (4SR 470). If he had been a participant, Hazen testified, he would have made sure she was dead; "that's what would have to have happened, yes" (4SR 470).

SUMMARY OF THE ARGUMENT

There are seven issues presented on this appeal:

1. Kormony's death sentence is not disproportionate. Two innocent persons were accosted at gunpoint in their own home by three intruders and repeatedly threatened with death; their home was ransacked; they were robbed of money and valuables; the wife was raped vaginally and orally at the same time by two of the intruders while the husband was prevented at gunpoint from interfering, his pleas ignored; the husband was taunted, forced to drink beer and to watch his wife paraded around naked in front of three strangers after having been raped by two of them;

and finally, Kormondy shot the husband in the head from point blank range while the wife was being raped by the third intruder. As the actual killer, Kormondy was more culpable than his two co-defendants, one of whom we know specifically declined to kill when the opportunity arose. Although Kormondy claimed the shooting was an accident, there was evidence to the contrary. Moreover, even if the shooting was not fully premeditated, the circumstances demonstrate Kormondy's reckless indifference to human life; even under his own theory of how the shooting occurred, Kormondy was punching the unarmed, cooperative and unresisting husband in the head with a loaded pistol. In view of the substantial aggravation and minimal mitigation, death is a proportionate sentence for murder committed during a home invasion robbery of a couple who are repeatedly threatened with death, the wife repeatedly raped, and the husband shot in the head.

2. The trial court's sentencing order includes specific findings of two aggravators, prior violent felony (the contemporaneously committed robbery and sexual batteries) and murder committed during a burglary. Kormondy does not dispute these two findings. In the course of setting out its findings as to these two aggravators, however, the trial court in effect found additional aggravators not presented to the jury. This,

the trial court may do under this Court's precedent. Moreover, this Court on appeal may consider all aggravators established by the record even if not found by the trial court. The State disagrees that the trial court found the CCP aggravator; the trial court certainly did not specifically enumerate CCP as one of the aggravators it found, and the order simply does not include findings of the elements of CCP. Thus, its order cannot reasonably be construed as having found CCP. The State does agree that the trial court's findings include all the necessary elements of the HAC and witness elimination aggravators. Kormondy does not even dispute the sufficiency of the evidence to support HAC and the aggravator clearly applies in view of the psychological and sexual abuse administered to the victims by the defendants, including Kormondy. The State contends that the witness elimination aggravator is also supported by the evidence presented in this hearing. Kormondy's constitutional arguments against finding this aggravator on resentencing were not preserved on appeal and, moreover, are meritless. But even if the witness elimination aggravator was found in error, the error is harmless in view of the strong remaining aggravators and the minimal mitigation.

3. The trial court did not err in rejecting Kormondy's proposed mitigation. Kormondy's participation in this crime was

not minor; his death sentence is not disproportionate to that of his two co-defendants; the killing, if accidental in any sense of that word, was not the kind of "accident" as would be mitigating, given Kormondy's demonstrated reckless disregard for human life; and his cooperation and good behavior was not true cooperation and good behavior at resentencing, but only that forced upon him by the circumstances.

4. The trial court properly allowed the State to present evidence in rebuttal of Kormondy's proposed mitigator of cooperation with police that defense counsel had raised in opening statement. The circumstances leading up to the arrest were highly relevant to any evaluation of the true nature of and motivation for his alleged "cooperation" with police after arrest.

5. Having failed to make a proffer of what testimony he wished to elicit, Kormondy failed to preserve for appellate review of any alleged improper restriction his cross-examination of Mrs. McAdams.

6. Kormondy did not object to any victim impact evidence at trial and has failed to demonstrate fundamental error on appeal.

7. By its own explicit terms, the recent United States Supreme Court decision of Apprendi v. New Jersey is inapplicable to Florida's death penalty sentencing procedures.

ARGUMENT

I.

KORMONDY'S DEATH SENTENCE FOR THE AGGRAVATED
FIRST-DEGREE MURDER OF GARY McADAMS IS NOT
DISPROPORTIONATE TO THE LIFE SENTENCES
RECEIVED BY HIS TWO CO-DEFENDANTS

Although conceding that there is "evidence" that Kormondy was the one who was holding the murder weapon to the head of Gary McAdams "when the weapon discharged" (Initial Brief at 30), Kormondy argues that his death sentence is disproportionate to the life sentences his two co-defendants ended up with.¹⁸ In essence, he argues that Buffkin was the "leader" of this criminal episode, that Hazen was the "most vicious rapist," and that the shooting by Kormondy was "accidental." He asks this Court to consider evidence from Kormondy's original trial as set forth by this Court in its previous opinion in this case, the facts of the crime as presented in the resentencing proceeding in the circuit court and reported in the record on this appeal,

¹⁸ Kormondy also argues, briefly, that the death penalty is unconstitutional, based on two dissenting opinions (one each from former Justice Blackmun and Justice Stevens of the United States Supreme Court) from the denials of certiorari in Callins v. Collins, 114 S.Ct. 1127 (1994) and Lackey v. Texas, 115 S.Ct. 1421 (1995). The denial of certiorari, of course, is not precedent for anything, and a lone dissenting opinion from such denial has, if possible, even less precedential value. Further, it is not at all clear to the State just what Kormondy's Constitutional argument is. The State would simply rely on consistent precedent from this Court rejecting Constitutional attacks on Florida's death penalty system.

those portions of the testimony and closing arguments from the Hazen and Buffkin trials introduced into the record in this case and reported in the record on this appeal, and other "facts" from the Hazen trial as reported this Court's opinion in Hazen v. State, supra. Kormondy does not ask this Court to consider the actual record on appeal in the Hazen case or in the original trial/sentencing proceedings in this case.

Preliminarily, the State would observe, first, that although it seems akin to putting the cart before the horse to address proportionality before addressing Kormondy's complaints about the trial judge's sentencing order and findings therein, the State will address the issues in the same order as presented by Kormondy. Second, although in its previous opinion in this case this Court cautioned the trial court to base its sentencing findings as to aggravation and mitigation strictly on the record in this case, without reference to or reliance upon the records in the co-defendant's cases (except, presumably, to the extent that all or portions of such records were explicitly made a part of this record), it would seem to the State that in conducting its proportionality review this Court may not be so restricted. Kormondy himself apparently believes this to be the case, as he relies on testimony from the Hazen trial not specifically made a part of this record, albeit only to the extent that such

testimony was discussed and interpreted in this Court's Hazen opinion. The State would suggest that, in conducting its proportionality review, this Court rightfully may take judicial notice of pertinent testimony presented in a codefendant's case where such records are in the custody of this Court, without being limited in its analysis only to such portions of the codefendant's records as the defendant himself chooses to present and make a part of this record.¹⁹ If the State is incorrect in this regard, perhaps this Court could clarify this issue for the benefit of the bench and bar.

Kormondy argues that "material variances" between the testimony in the Kormondy record and that presented at Hazen's trial "cloud" the facts, although it seems from his argument that all that is "cloudy" is the relative culpability of Hazen versus Buffkin.²⁰ Regardless of any "variances" between this

¹⁹ Although co-defendants' life sentences may be argued and considered in mitigation, the trial court does not itself conduct a proportionality review, as that task is reserved to this Court, which reviews this issue de novo. Thus, it is not at all clear to the State that, during the sentencing proceedings, it would have the right to introduce into the trial record such records from co-defendant's cases as would bear only on the issue of proportionality, rather than proof of statutory aggravation or rebuttal of mitigation.

²⁰ For example, Kormondy notes that this Court found in Hazen that Buffkin was more culpable in part because (according to Buffkin's testimony) Buffkin was with Kormondy when the fatal shot was fired, while the undisputed testimony in this case puts Hazen with Kormondy at the time of the shooting, making,

record and the Hazen record, the record in both cases clearly establishes that Kormondy was the triggerman. Furthermore, even if Kormondy did not mean to shoot when he did but was "merely" punching an unarmed victim in the head with a cocked and loaded .38 pistol when it just "went off"-literally blowing his brains out (precisely what these defendants had been threatening to do from the outset)-Kormondy's conduct shows such reckless indifference to human life as to warrant harsher punishment for him as compared to his codefendants, neither of whom actually killed anyone.²¹ The State will address Kormondy's various arguments seriatim.

1. Inferences for the State (Initial Brief of Appellant at pp 29-31). Relying in large part on this Court's Hazen opinion, Kormondy states that the facts taken in the light most favorable to the State show "without doubt" that Buffkin was "the" leader of this criminal episode. However, while it is true, as

according to Kormondy, Hazen more culpable than Buffkin. Initial Brief of Appellant at 31-32.

²¹ As the prosecutor argued: "No, it would take 10 to 12 pounds of trigger pull if it wasn't cocked to fire it. That's no accident. And if it was cocked, you've got to wonder what in the world is a person thinking when they're cocking a gun at a man's head while his partners are raping his wife in his home and threatening to kill them all. There was no sign of struggle. There was [sic] no defensive wounds. There was no evidence that [the] McAdams did anything but comply with every sorted [sic] wish of these defendants." (5T 527-28).

Kormondy states, that this Court said in Hazen that "Buffkin was a prime instigator," 700 So.2d at 1214, this Court never said he was *the* prime instigator; in fact, this Court had earlier in its opinion stated that it was "clear" that Buffkin *and* Kormondy "were *the* instigators of this criminal episode." Ibid. Hazen, by contrast, had been expressly found by the trial court to be a "follower," a conclusion with which this Court agreed. This Court never characterized Kormondy as a follower, and the evidence does not show that he was. Kormondy had a gun in his possession just before the group left *his* house the night of the murder, in *his* car, which *Kormondy* was driving. By his own admission, they had tried unsuccessfully to break into a house the evening before. By his own admission, on this night they first sought *Kormondy's* friend, who owed *Kormondy* money, before giving up on that means of obtaining money and deciding instead to commit a burglary. Furthermore, the proceeds of the burglary ended up in *Kormondy's* possession, in *his* car.²² Finally, evidence presented at Kormondy's original trial indicates that Kormondy has average intelligence, while Buffkin is borderline retarded with an IQ in the 65-72 range. Kormondy's significantly greater intelligence counsels against any

²² In the Buffkin trial, Kormondy's former wife testified that neither Buffkin nor Hazen even had a car (2SR 300).

conclusion that Buffkin was the "leader" while Kormondy was a mere follower.

Moreover, regardless of whose idea the robbery/burglary was, the fact remains that Kormondy alone actually killed anyone. Kormondy suggests that there may be some question about this, noting that "identity was disputed." Initial Brief of Appellant at 30. The only dispute about identity, however, comes from Kormondy's own self-serving statement to police in which he named Buffkin as the shooter. However, while Kormondy's statement to police may generally serve as a reasonably accurate description of the crime, his attempt to portray Buffkin as the shooter has several problems, the first being that it is directly contrary to Kormondy's previous statement to Long, in which Kormondy admitted being the shooter. Another problem is that, according to his statement to police, Mr. McAdams would be shot with a .44, when it is crystal clear that he was shot with a .38.²³ A third problem with Kormondy's statement is that

²³ Kormondy told police that Hazen, who Kormondy insisted was in the back room at the time of the shooting, still had the victim's gun (2SR 199-200). Since all the evidence indicates that there were only two guns in the house at that time, that would mean that Buffkin shot the victim with the .44. But the expert testimony was conclusive that the victim was not shot with the .44, but with a .38. It should be noted that Kormondy's aunt had raised Hazen, that Kormondy and Hazen had been close friends for years, called each other "cousins" and considered themselves as members of the same "family" (4SR 410-12). Thus, if Kormondy had wanted to absolve himself of any

Kormondy emphatically denied having raped Mrs. McAdams when her testimony is clear that all three of the intruders raped her. Finally, Kormondy's statement puts Buffkin in the kitchen with him and Mr. McAdams when the shooting occurred instead of where Mrs. McAdams explicitly put Buffkin, which is in the bedroom with her.²⁴ Kormondy's attempt to persuade police that Buffkin was the shooter is totally inconsistent with all the other evidence, is lacking credibility, and is obviously a self-serving attempt to minimize his own culpability relative to that of his co-defendants.²⁵ Such attempts are routine and should be viewed with skepticism; indeed, a presumption of unreliability attaches to statements of one co-defendant implicating another.

responsibility for the shooting, he had the choice of blaming either (a) Hazen, a friend so close he was like family or (b) Buffkin, about whom Kormondy knew only that he was an escaped prisoner (2R 212). The reasonable inference is that Kormondy named Buffkin as the shooter not because he was, but because, of the three, Buffkin was the one Kormondy had the least reason to protect.

²⁴ This Court noted in footnote 1 its Hazen opinion that, although at Kormondy's trial Mrs. McAdams "had identified Buffkin as the rapist in the back room when the fatal shot was fired," at Hazen's trial, "she was not so specific." A review of the Hazen transcript shows that Mrs. McAdams was never asked, by either party, to identify the rapist in the back room with her. Transcript, case no. 86,645, particularly at pp. 596-98. Mrs. McAdams herself has never been less than sure who was in the back room with her.

²⁵ The trial court found that "each Defendant was trying to minimize his part in the crimes" (2R 207).

San Martin v. State, 717 So.2d 462, 468 (Fla. 1998) (citing Gonzalez v. State, 700 So.2d 1217, 1218 (Fla. 1997) and Franqui v. State, 699 So.2d 1332, 1335-36 (Fla. 1997)). See Lee v. Illinois, 476 U.S. 530, 544-45 (1986) ("a reality of the criminal process [is] that once partners in a crime recognize that the "jig is up," they tend to lose any identity of interest and immediately become antagonists, rather than accomplices."). The record clearly supports the trial judges' finding that Kormondy was the triggerman (2R 204).

Finally, Kormondy argues here that "this Court already ruled" in the first appeal in this case that "the State failed to prove that Kormondy fired the fatal shot intentionally, with premeditation," and that "the State" presented no new evidence in the present proceeding in that regard. Initial Brief of Appellant at 30-31. However, new evidence was presented, some of it by the defense, and was considered by the judge. Although the State is of the view that Kormondy's death sentence is proportionate whether or not the killing was premeditated, the State disagrees that the evidence before the trial court is now insufficient to support a finding of premeditation. The State's argument on the question of premeditation is set out in its argument as to Issue II, post, and is incorporated by specific reference here.

2. Irreconcilable problems (Initial Brief of Appellant at pp. 31-33). Kormondy's "irreconcilable problems" seem mainly to arise from Buffkin's testimony at Hazen's trial and this Court's reliance on that testimony to vacate Hazen's death sentence. Kormondy seems to be suggesting that this Court's decision in Hazen weighing the relative culpability of Hazen versus Buffkin was erroneous. The State is not sure why such an argument might benefit Kormondy. If one believes Buffkin, Kormondy is the shooter. If one does not believe Buffkin, Kormondy is still the shooter. Furthermore, under any version of events, the shooter in the bedroom shot into the floor at near contact range, instead of into Mrs. McAdam's brain at point blank range. If, as the State contends, it was a signal, then it was, no matter whether it was Buffkin or Hazen giving the signal. In any event, the evidence clearly shows that Kormondy, and not Buffkin or Hazen, was the defendant who shot and killed Mr. McAdams.

3 & 4. Co-perpetrator proportionality analysis and Tison proportionality analysis (combined). (Initial Brief of Appellant at pp. 33-38). Kormondy argues that the only possible justification for giving Kormondy a more severe sentence than his co-defendants is that he shot and killed Mr. McAdams. Otherwise, he contends, his co-defendants were equally if not more culpable. He contends that, because the shooting of Mr.

McAdams was "possibly by accident," the fact that Kormondy was the triggerman, standing alone, fails to justify a more severe sentence for him than for his codefendants. He notes that all three of the defendants were convicted of the same crimes, argues that just because Kormondy "may" have been the one who actually killed Mr. McAdams does not make Kormondy the "leader" or "dominant force," and argues that Buffkin and Hazen had a worse criminal history than Kormondy.

As for the comparative criminal history of these three defendants, Kormondy argues that "the record" establishes that Buffkin was an escaped inmate at the time of the murder and that Hazen admitted to having twice before been convicted of felonies or crimes involving dishonesty. Initial Brief of Appellant at 37. By contrast, Kormondy argues, the "only proof of Kormondy's prior criminal history offered by the State was his commission of the contemporaneous felonies in this single criminal episode," which history all three of the defendants shared. Ibid. The State agrees in general that, in deciding the issue of proportionality as between co-defendants, their comparative criminal histories might well be a relevant consideration. In Demps v. State, 395 So.2d 501, 503-04 (Fla. 1981), for example, Demps' more serious criminal history is what distinguished him from his two life-sentenced accomplices, one of whom was the

actual killer. See also, Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989) ("We conclude that Demps' prior criminal record was sufficient to justify imposing a more serious penalty."). However, the State is troubled by Kormondy's argument in this case. First of all, as Kormondy's appellate counsel knows, except to the extent that the defendant's criminal history might be statutorily aggravating, the State may not present evidence of a defendant's general criminal history if a defendant waives the mitigator of no significant criminal history, as Kormondy did (1R 113). Maggard v. State, 399 So.2d 973, 977-78 (Fla. 1981). Nor did Kormondy at resentencing contend that his criminal history was less serious than that of his codefendants, which might at least have authorized the State to present its own rebuttal evidence. Instead, Kormondy submitted into the record portions of the records in the Buffkin and Hazen cases, from which he has now for the first time on appeal cherry-picked references to Buffkin's and Hazen's prior records and compared them to the absence in this resentencing of any evidence of Kormondy's own criminal history. This hardly seems fair to the State, or to be a valid way analyzing the relative culpabilities of the various defendants.²⁶ If this Court is of a mind to

²⁶ This Court previously conducted a proportionality review in the Hazen case without the benefit of a sentencing proceeding in the Buffkin case. Although we know from evidence presented

consider such arguments, then in the future the State should be given the opportunity to present proportionality evidence to the trial court including demonstrating that the defendant has a more serious criminal record than his non-death sentenced codefendants.²⁷

in Kormondy's first sentencing proceeding that Buffkin is borderline mentally retarded, we know little else about his mental condition. Had there been a Buffkin sentencing proceeding, we might have learned that Buffkin had serious mental health problems, or a seriously abused childhood, or something else which would have justified or even compelled a life sentence for him despite strong aggravation. Compare Witt v. State, 342 So.2d 497, 500 (Fla. 1997)(affirming Witt's death sentence where codefendant Tillman, who got life, had a severe mental or emotional disturbance). Because of the difficulty in evaluating comparative culpability when one co-defendant avoids a sentencing hearing, and the minimal likelihood that the State would offer a plea to the more culpable defendant, this Court should reject claims of disparate sentencing when a codefendant's lesser sentence was the result of a plea agreement or prosecutorial discretion. Kight v. State, case no. SC95208, decided January 18, 2001. This Court would still, of course, conduct a general proportionality review of the defendant's sentence.

²⁷ The State would just suggest in addition that it is one thing to set aside a defendant's death sentence on proportionality grounds when that defendant is clearly less culpable than a codefendant who got a life sentence, which was the situation in Slater v. State, 316 So.2d 539, 542 (Fla. 1975). It is another matter altogether to set aside an otherwise amply justified death sentence just because a relatively equally culpable co-defendant somehow managed to avoid a death sentence. In this case, Buffkin was allowed to avoid a death sentence only because the State was concerned that the jury was not going to convict him of first degree murder (his attorney had emphasized to the jury that Buffkin had made a conscious decision *not* to shoot Mrs. McAdams, and the jury had sent a written question to the judge about second degree murder during its deliberations) and also needed a witness to put Hazen

Secondly, however, Kormondy ignores evidence presented at his original sentencing, from his own mental health expert, that Kormondy had been in trouble with the law from an early age, committing batteries, thefts, criminal mischief and so forth. Transcript, case no. 84,709 at p. 1718. Dr. Larson testified that Kormondy was thereafter placed in a "Dart" program; he escaped from that and was arrested for "multiple burglaries and thefts;" he was placed on community control and then violated that by committing another spree of burglaries and was placed in a restitution center; he then went on another crime spree committing burglaries and thefts and was sent to prison. Transcript, case no. 84,709 at pp. 1720-22. In addition, Kormondy's PSI from the original sentencing shows an extensive criminal history, including numerous burglaries, vehicle thefts, battery, resisting arrest with violence and possession of controlled substances. Record, case no. 84,709 at pp. 460-62. In light of these matters contained within the record of Kormondy's original sentencing proceedings, of which Kormondy's appellate counsel Chet Kaufman cannot be ignorant (Mr. Kaufman

in the McAdams house, as Hazen denied being there and Mrs. McAdams could not identify him. Compare Larzalere v. State, 676 So.2d 394 (1996)(Larzalere's death sentence upheld even though person who actually administered deadly blow was acquitted). In any event, regardless of the relative culpability of Hazen vs. Buffkin, Kormondy is the actual killer and is clearly more culpable than either.

represented Kormondy on appeal from the original conviction and sentence, too), it is disingenuous of Kormondy now to make a comparative proportionality argument based on an obviously invalid assumption that Kormondy has committed no crimes but those arising out of the incident in which Mr. McAdams was murdered. Kormondy's claim that his criminal history is less serious than that of his two co-defendants should be rejected.

The State does not quite understand Kormondy's argument that the record "clearly show[s] that Kormondy did not initiate the break-in or sexual assaults." Initial Brief of Appellant at 33. It is true that Kormondy was not the first of the three into the McAdams' house. However, as discussed previously, he was one of the "instigators" of this crime, having retrieved a gun, furnished the car and driven the others to the scene.²⁸ Moreover, while Kormondy may not have been the first of the intruders to sexually assault Mrs. McAdams, it is clear from the

²⁸ In addition, if we are permitted to consider the evidence presented in the other two cases when arguing the issue of proportionality, then it must be noted that Buffkin testified in the Hazen trial that, prior to the McAdams robbery, he and Kormondy had committed the burglary during which they together stole the .44 caliber gun used in the McAdams burglary. Buffkin also testified that after the first burglary, he and Kormondy planned next to rob an *occupied* house, because "you get more money . . . [if] there's going to be somebody in there." Transcript, case no. 84,645 at pp 913-16. It was easier to steal money, Buffkin testified, than to steal "things" and then try to get money for them. Ibid.

testimony that, despite Kormondy's own denials, all three of the intruders, including Kormondy, sexually assaulted Mrs. McAdams.

In addition to being one of the "instigators" of the home invasion, and one of the persons who sexually assaulted Mrs. McAdams, Kormondy is the one who actually killed Mr. McAdams. In response to Kormondy's contention that the issue is whether this "one fact" makes him "so much" more culpable than Hazen and Buffkin as to warrant a death sentence for him while the others are "allowed to live," the State would note that this "one fact" is what makes this a murder case. Kormondy's two co-defendants are serving a life sentence for a murder that Kormondy himself actually committed; the State does not think it unreasonable to penalize the actual killer more severely, especially where the only other armed defendant explicitly declined to shoot the remaining victim despite having the clear opportunity to do so.²⁹

²⁹ In its Hazen opinion, this Court explicitly held that Buffkin was more culpable than Hazen. In light of that holding, it would seem that, as to comparative proportionality between codefendants, all the State need do is demonstrate that Kormondy is more culpable than Buffkin. That is easy: (1) Kormondy shot and killed Mr. McAdams, while Buffkin chose not to kill Mrs. McAdams when he clearly had the chance; (2) Buffkin testified for the State in the Hazen case, while Kormondy refused to do so despite having been given use immunity as to such testimony (Transcript, case no. 84,645 at pp. 900-902; (3) Kormondy has an average IQ while Buffkin is borderline retarded; (4) Kormondy's prior criminal record is more serious than Buffkin's.

Finally, Kormondy argues that the shooting was unpremeditated and was committed "quite possibly by accident." As the State will more fully discuss in its argument as to the next issue (the trial court's findings in aggravation), it is the State's contention that Kormondy and the others entered the McAdams home intending to eliminate all witnesses before they left. Even if Kormondy did not mean to shoot when he did, the evidence shows that he meant to at some point. After all, these defendants made a conscious decision to burglarize an *occupied* residence (despite the greater likelihood that innocent people would be hurt), threatened repeatedly to "blow" the victims' "brains out," and then Kormondy carried out that very threat.³⁰

Moreover, a murder does not have to be premeditated to warrant the death penalty. A death sentence is authorized for

³⁰In addition, both Kormondy and Hazen were upset afterwards that Buffkin failed to kill Mrs. McAdams when he had the chance. As noted previously, Hazen testified in his trial that, if he had been there, he would have made sure Mrs. McAdams was dead. Furthermore, although the State does not suggest that the trial court could have considered this in making its findings in aggravation, in the context of proportionality review the State would note that testimony was presented at Kormondy's first sentencing establishing that Kormondy had stated he would murder Mrs. McAdams if he could somehow get out of jail. These statements by Hazen and Kormondy, showing as they do their vehement displeasure that Mrs. McAdams survived, strongly suggest that witness elimination was planned but Buffkin simply refused to carry out his part of the plan.

first degree felony murder and this Court has often upheld death sentences in felony murder cases. See, e.g., Jones v. State, 748 So.2d 1012 (Fla. 1999); Finney v. State, 660 So.2d 674 (Fla. 1995); Mungin v. State, 689 So.2d 1026 (Fla. 1995). If Kormondy did not specifically intend to fire the gun, he certainly was acting with reckless disregard for Mr. McAdams' life when he was punching him in the head with the barrel of a loaded gun. See Tison v. Arizona, 481 U.S. 137, 157-58, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)(surveying state felony-murder laws and finding societal consensus that combination of factors may justify death sentence even without a specific intent to kill; concluding that, under Constitution, "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result."). ³¹

³¹The Court elaborated, 481 U.S. at 157: "A narrow focus on the question of whether or not a given defendant 'intended to kill,' however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all -- those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty -- those that are the result of provocation. On the other hand, some

This is a highly aggravated murder. Two innocent persons were subjected to their worst nightmare--accosted at gunpoint in their own home by three strangers; repeatedly threatened with death; their home ransacked; robbed of their money and valuables; the wife raped vaginally and orally at the same time by two of these strangers while the husband was prevented at gunpoint from interfering, his pleas ignored; the husband taunted and forced to watch his wife paraded around naked in front of him and the three strangers; and then the husband shot at point blank range in the head while the wife was being raped for the third time. Although the State still believes that all three defendants deserve death, Kormondy, as the actual killer, deserves it the most. His death sentence is not disproportionate to the life sentences received by his co-defendants. Jennings v. State, 718 So.2d 144 (Fla. 1998)(disparate sentence claim rejected where trial judge had concluded that Jennings was the actual killer and thus more

nonintentional murderers may be among the most dangerous and inhumane of all -- the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.' Indeed, it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders."

culpable than his co-defendant Graves-despite fact that State had argued at Graves' trial that Graves was the "leader"). His death sentence also is not disproportionate to sentences imposed in similar cases generally. Jones v. State, 748 So.2d 1012 (Fla. 1999)(death penalty affirmed where aggravators included murder committed during robbery, prior violent felony, murder was HAC; avoid arrest aggravator harmless even if improperly found); Shellito v. State, 701 So.2d 837 (Fla. 1997)(death penalty proportionate for 19 year old defendant of low average intelligence where aggravators were murder during commission of robbery and prior violent felony aggravator established by proof of three subsequently committed robberies); Geralds v. State, 674 So.2d 96 (Fla. 1996) (death sentence proportionate when two aggravators weighed against one statutory and three nonstatutory mitigators); Finney v. State, 660 So.2d 674 (Fla. 1995) (death penalty for conviction for first degree felony murder with robbery as underlying felony was proportionately warranted); Hunter v. State, 660 So.2d 244 (Fla. 1995) (death penalty warranted where there were two aggravators -- prior violent felony conviction and capital felony committed during a robbery -- and ten nonstatutory mitigators); Gamble v. State, 659 So.2d 242 (Fla. 1995) (death sentence proportionate where there were two aggravators, one statutory mitigator and several

nonstatutory mitigators); Hayes v. State, 581 So.2d 121 (Fla. 1991) (two aggravating factors weighed against mitigators of low age, low intelligence, learning disability and deprive environment); Freeman v. State, 563 So.2d 73 (Fla. 1990) (two aggravators weighed against low intelligence and abused childhood); Kight v. State, 512 So.2d 922 (Fla. 1987) (two aggravators-murder committed during robbery and prior violent felony-versus evidence of mental retardation and deprived childhood).³²

5. Conclusion. Especially in view of the minimal mitigation established by Kormondy, there is no merit to his contention that a death sentence is disproportionate punishment for someone who plans and carries out a home invasion armed robbery of a

³² The cases cited by Kormondy (Initial Brief of Appellant, at pp 36-37) are inapposite. In Ray v. State, 755 So.2d 604 (Fla. 2000) it simply could not be determined who fired the fatal shot. Moreover, this Court found that the death sentence would be disproportionate even if Ray were shown to be the killer, in view of Ray's low IQ and his dominance by co-defendant Hall. In Terry v. State, 668 So.2d 954 (Fla. 1996), this Court concluded that the State had proved only one valid aggravator. Moreover, Terry did not invade anyone's home or rape anyone. Both Parker v. State, 643 So.2d 1032 (Fla. 1994) and Jackson v. State, 599 So.2d 103 (Fla. 1992) are jury override cases. In Jackson v. State, 575 So.2d 181 (Fla. 1991), there was no evidence that the defendant personally had ever even possessed a gun, much less fired it. In Slater v. State, 316 So.2d 539 (Fla. 1975), the actual shooter, who was much older than Slater, got life, while the much younger Slater, who shot no one, got death. Finally, in Cherry v. State, 544 So.2d 184 (Fla. 1989), no one shot anyone, the victim simply died of a heart attack during a robbery.

couple who are repeatedly threatened with death, who joins his two co-defendants in raping the wife, and who then shoots the husband in the head from point-blank range. Kormondy's death sentence amply furthers all the valid penological justifications for a death sentence: retribution, deterrence and incapacitation. See Conner v. State, 251 Ga. 113, 303 SE2d 266 (1983)(identifying valid penological justifications for capital punishment). It is a proportionate sentence.

II.

THE TRIAL COURT'S FINDINGS IN AGGRAVATION ARE NOT ERRONEOUS FOR ANY REASON ALLEGED

In its sentencing order, the trial court explicitly found two statutory aggravating circumstances: prior violent felony convictions (essentially, the robbery and sexual battery committed in the same criminal episode as the instant murder); and the murder was committed during a burglary (2R 203-04). Kormondy makes no complaints whatever about these two aggravators. However, in his Statement of the case, he asserts that, in the course of enumerating its findings as to the "committed during a burglary aggravator," the trial court found "three additional uncharged aggravating circumstances." Initial Brief of Appellant at 4. These three "uncharged" aggravators found by the court, Kormondy asserts, were CCP, witness elimination and HAC. Initial Brief of Appellant at pp. 4-6. In

his second issue on appeal, Kormondy complains about the alleged CCP and witness elimination findings, contending that they are in disregard of this Court's "mandate" as set out in its opinion in the first appeal, contrary to the "law of the case," and violate principles of double jeopardy and collateral estoppel. In addition, he contends that all three "findings" are improper because they were not sought by the State or given in instruction to the jury.

The State's position is, first, that the trial court may find aggravating circumstances supported by the evidence, whether or not specifically contended for by the State or given in instruction to the jury. The lack of jury instruction is the only complaint Kormondy makes about the alleged HAC finding, and the evidence clearly supports a conclusion that this murder was HAC. Secondly, the trial court simply did not find the CCP aggravator, so it really does not matter if, as Kormondy contends, this Court's prior opinion mandates the rejection of CCP at resentencing. However, under ample precedent, a resentencing is a completely new proceeding, and the trial court may find aggravators not presented at the first sentencing, or find aggravators that were presented at the original sentencing but not found, or find aggravators that were rejected on the first appeal as insufficiently supported by the evidence, or

reject mitigation that was found at the original sentencing. Third, there is no double jeopardy or collateral estoppel bar to finding the witness elimination aggravator on resentencing and the evidence now supports that aggravator; moreover, even if it does not, in view of the strong aggravation and minimal mitigation present in this case, any error in finding the witness elimination aggravator is harmless.

1. *The trial court's findings in aggravation.* As noted above, the trial court explicitly found the prior violent felony aggravator and the committed during a burglary aggravator. In the course of setting out its findings as to the latter, the trial court found all the elements of the witness elimination and HAC aggravators.³³ The State will not quarrel with Kormondy's claim that these are in essence findings of additional statutory aggravators, even though they are incorporated into the court's findings as to the commission of a burglary aggravator. If, as the State contends, the evidence supports these aggravators, this Court could consider them in

³³The court found that "the evidence overwhelmingly supports a prearranged plan of witness elimination, and that the dominant and only motive for the killing of Gary McAdams was to avoid arrest or detection" (2SR 206). In addition, the court found that Kormondy's conduct "towards the victims was unconscionable and pitiless and unnecessarily torturous to the victims" (2SR 206).

aggravation even if the trial court had not found them, in accordance with this Court's "responsibility to review the entire record in death penalty cases and the well-established appellate rule that all evidence and matters appearing in the record should be considered which support the trial court's decision." Echols v. State, 484 So.2d 568, 576-77 (Fla. 1986).

The State disagrees with Kormondy's assertion that the trial court found the CCP aggravator. The court certainly did not explicitly find the aggravator, and nowhere in the court's findings regarding the two statutory aggravators the court did explicitly make any determination that this murder was "committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification." Section 921.141(5)(i), Fla. Stat. (1999). Absent such language, the State does not understand how it can be said that the court found the CCP aggravator.

2. *The HAC aggravator.* Kormondy's only complaint about this aggravator is that the jury was not instructed on it. This argument is meritless. A trial judge can find aggravators not submitted to the jury. Hoffman v. State, 474 So.2d 1178 (Fla. 1985); White v. State, 403 So.2d 331 (Fla. 1981). Furthermore, as noted above, this Court can consider aggravators established by the evidence even if not found by the trial court. Echols,

supra.³⁴ Kormondy does not even suggest that the evidence is insufficient to establish HAC, or that there is any other bar to its consideration. Nor could he, as the evidence amply demonstrates that this murder was heinous, atrocious or cruel. Although Mr. McAdams was killed by a single gunshot wound to the head, the commission of murder was in this case clearly accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily tortuous to the victim. Buenoano v. State, 527 So.2d 194, 199 (Fla. 1988). Mr. McAdams was accosted in his home by armed intruders, who repeatedly threatened him with death, forced him to drink beer, forced him to squat on his hands and knees while his wife was raped, and forced him to watch as his wife was paraded around naked in front of three strangers; then he was shot while being punched repeatedly in the head with his own gun. “Undoubtedly, [Mr. McAdams] suffered great fear and terror during the events leading up to [his] murder.” Preston v. State, 607 So.2d 404, 410 (Fla. 1992). This Court’s precedent supports a finding of

³⁴ Kormondy’s reliance on Hamilton v. State, 678 So.2d 1228, 1232 (Fla. 1996) and Cannady v. State, 620 So.2d 165, 170 (Fla. 1993) is misplaced. Neither of those cases overruled Echols. In those cases, this Court merely held that, when it determined on appeal that *none* of the aggravators found by the trial court was valid, it would not uphold a death sentence on the basis of an aggravator not presented to or found by the trial court.

HAC in this case. Cook v. State, 542 So.2d 964 (Fla. 1989) (HAC proper where victim is tortured either physically or emotionally by the killer); Banks v. State, 700 So.2d 363 (Fla. 1997) (HAC proper where victim sexually assaulted before being killed by single gunshot to head).³⁵ And this is so even though some of the predicate acts leading up to Mr. McAdams' death were committed by Kormondy's co-defendants. Henyard v. State, *supra* note 35 (co-defendant raped and taunted surviving victim); Cave v. State, 476 So.2d 180 (1985) (HAC properly found where co-defendants had raped the victim).

2. *The witness elimination aggravator.* Kormondy contends the trial court defied this Court's "mandate" in finding the CCP and witness elimination aggravators. As noted previously, the State does not agree that the trial judge's findings can reasonably be construed as including a finding of CCP. Nor does the State agree that this Court's previous opinion contains any

³⁵ Although in this case, the murder victim was not the one who was sexually assaulted, his wife was and it is clear that Mr. McAdams knew it. The assault on and humiliation of his wife certainly contributed to the fear and emotional trauma Mr. McAdams suffered during this episode. See Pooler v. State, 704 So.2d 1375, 1378 (Fla. 1997) (fact that victim saw defendant shoot her brother contributed to her own fear); Henyard v. State, 689 So.2d 239, 254 (Fla. 1996) (HAC properly found for the murder of two children "based upon the entire sequence of events, including the fear and emotional trauma they suffered during the episode culminating in their deaths," including seeing their mother being raped).

sort of "mandate" against finding CCP on resentencing. This Court vacated Kormondy's death sentence on the ground that non-statutory aggravating evidence was presented. Although this Court cautioned the trial court that on resentencing a CCP finding would be inappropriate if "premeditation is not established," the Court did not strike the CCP aggravator, or preclude the submission of additional evidence as to premeditation on resentencing, or preclude a finding of CCP on resentencing. 703 So.2d at 463. It is well settled that when a case is remanded for new sentencing proceedings, the resentencing is allowed "to proceed in every respect as an entirely new proceeding." Wike v. State, 698 So.2d 817, 821 (Fla. 1997). Thus, on resentencing, the trial court may find aggravating circumstances not found at the original sentencing, Rose v. State, 461 So.2d 84, 87 (Fla. 1984) or reject mitigation that was found at the original sentencing, Thompson v. State, 619 So.2d 261, 267 (Fla. 1993); King v. Dugger, 555 So.2d 355, 358-59 (Fla. 1990). In fact, this Court has expressly held that its rejection of an aggravator on appeal for insufficiency of evidence does not preclude the introduction of new evidence on resentencing and a new finding of that same aggravator. Mann v. State, 453 So.2d 784, 785-86 (Fla. 1984). That is, where the State fails to present sufficient evidence in support of an

aggravator at the original sentencing, it may "remed[y] this omission on resentencing." Ibid. In short, the "clean slate" rule applies to resentencing proceedings. Preston v. State, 607 So.2d 404, 408 (Fla. 1992). In the prior appeal in this case, this Court was surely aware of this precedent. Furthermore, if this Court had meant to "preclude" a finding of CCP or any other aggravator on remand, it could have done so explicitly. The very language of the opinion, however, contemplates a new sentencing hearing with new evidence. Furthermore, the trial judge did *not* find CCP on resentencing, and this Court did not even mention the witness elimination aggravator in its previous opinion. Thus, even if this Court did mean to preclude CCP on the second go around, it seems clear that this Court did not issue a "mandate" against finding witness elimination, and the question now should be whether or not sufficient evidence was presented at the resentencing hearing to support the trial judge's findings, not whether sufficient evidence existed at the original sentencing proceedings to support witness elimination.

However, besides arguing the meaning of this Court's previous opinion, Kormondy makes constitutional arguments, contending that finding an aggravator involving premeditation is foreclosed on resentencing by principles of double jeopardy and collateral estoppel. Kormondy fails to demonstrate, however,

that these constitutional arguments were raised below, and the State is unable to find that they were. Thus, his constitutional arguments are not preserved for appeal and are procedurally barred.

Even if not barred, however, they are meritless. Kormondy's double jeopardy argument has been explicitly rejected by this Court. In Preston, this Court addressed and rejected just such argument, relying on such cases as Bullington v. Missouri, 451 U.S. 430 (1981) and Poland v. Arizona, 476 U.S. 147 (1986). As noted in Preston, a capital sentencing is not a "set of mini trials on the existence of each aggravating circumstance." 607 So.2d. at 408. The rejection of a particular aggravator is not an "acquittal" of that circumstance for double jeopardy purposes and does not foreclose its consideration on resentencing. Ibid.

Kormondy's collateral estoppel argument is based on Ashe v. Swenson, 397 U.S. 436 (1970). Under this argument, the point is not that aggravation was rejected in the original sentencing, but that Kormondy was in effect "acquitted" of the crime of premeditated murder; therefore, he argues lack of premeditation is an issue of "ultimate fact" that has been determined by a valid, final judgment and cannot be relitigated at any future proceedings. Strictly speaking, of course, Kormondy was not acquitted of anything; his conviction for first degree murder

was upheld on appeal. More importantly, however, is that Ashe v. Swenson involved reprosecutions; Kormondy can cite no case in which the collateral estoppel rationale of Ashe has been applied to sentencing proceedings, even capital sentencing proceedings. The rule in this State is that, a resentencing being in all respects an entirely new proceeding on a clean slate, the State may present additional evidence in support of an aggravator on resentencing.

Kormondy does not even argue that the evidence is insufficient to support the witness elimination aggravator except to say that the evidence is the same as was presented in the original trial, and the law of the case doctrine should apply. But the evidence, while largely the same, is not quite. Love did not testify at the original trial that the murder weapon would not have gone off accidentally if it had been slammed against a metal rail or even thrown across the room. Moreover, there was no evidence presented at the original sentencing that Hazen had said that he would have made sure that Mrs. McAdams was dead if he had been there. In fact, evidence consistent with premeditation was presented previously; this Court merely held that it did not "exclude" an accidental shooting. However, the evidence presented at resentencing is sufficient to satisfy the circumstantial evidence standard of

review set out in this Court's recent decision in Miller v. State, 25 Fla. L. Weekly S649 (Fla. Aug. 31, 2000). Under that standard of review, the test on appeal is not whether the appellate court is itself convinced that the evidence excludes all reasonable hypotheses of innocence, but only whether there is substantial, competent evidence inconsistent with innocence. As set out in Miller, the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the factfinder to determine, and where there is substantial, competent evidence to support the factfinder's decision, this Court will not reverse. The State is not required to rebut conclusively every possible variation of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events.

Kormondy contends the gun went off accidentally. However, the testimony of the firearms examiner is inconsistent with such contention. He said that a gun like Mr. McAdams owned, in reasonably good working order and not cocked, would not go off accidentally simply by poking someone in the head with it; on the contrary, it would not go off even if thrown clear across the room or slammed up against a metal barrier. It is true that, because Kormondy disposed of the gun, Love could not

examine it. However, the person who traded the gun to Mr. McAdams three years earlier testified that it was in good working order when he gave it to Mr. McAdams. Mr. McAdams was a high-ranking officer of a bank, who owned only this one gun, which he occasionally used for target practice. Guns generally remain in good working order for a long time, and there is no indication that Mr. McAdams is the kind of person who would have modified his gun to give it a hair trigger or otherwise have abused it. Absent any evidence to the contrary, there is absolutely no reason to assume that Mr. McAdams' gun was not in reasonably good working order at the time of the murder.

Moreover, Mr. McAdams was shot at point-blank range; the testimony of the medical examiner was that the gun was pressed "firmly" to Mr. McAdams' skull. We know that Mr. McAdams was unarmed and that Mr. and Mrs. McAdams did everything the intruders told them to. We know that the McAdams had been repeatedly threatened with having their brains blown out. We know that Hazen was upset that Mrs. McAdams wasn't killed and that if he had been in the bedroom with her she would have died. And we know that Kormondy lied to police about not having raped Mrs. McAdams and that he lied about Buffkin having shot Mr. McAdams. There simply is no reason to credit his statement to police that the shooting was an accident, and it strains reason

to think that such a shooting was an "accident." Moreover, even if Kormondy did not mean to shoot when he did, he and the others planned to kill the McAdams before they left. There is no other rational explanation for Buffkin having shot into the floor after Mr. McAdams was shot except to convince his cohorts that their plan to eliminate witnesses had been carried out, or for Hazen's testimony that he would have made sure she was dead if he had been in the bedroom with Buffkin.

Competent, substantial evidence supports this aggravator. The State does not think the trial court erred in finding that this murder was a planned witness elimination. Should this Court disagree, however, the error is harmless in light of the strong (and uncontested) remaining aggravation and the minimal mitigation. Jones v. State, 748 So.2d 1012, 1027 (Fla. 1999)(any error in finding witness elimination would be harmless in view of three other valid aggravating circumstances, including murder during a kidnapping and robbery, prior violent felony, and HAC).

Kormondy has not demonstrated reversible error as to the trial court's findings in aggravation.

III.

THE TRIAL COURT COMMITTED NO REVERSIBLE
ERROR AS TO ITS FINDINGS REGARDING
MITIGATION

The trial court addressed in its sentencing order one proposed statutory mitigator and three proposed nonstatutory mitigators.

1. *The proposed mitigator that Kormondy was an accomplice in the capital felony committed by Buffkin and that Kormondy's participation was minor.* Insofar as the State can tell, Kormondy is not challenging the trial court's rejection of this statutory mitigator. The evidence fully supports the trial court's rejection of this mitigator, as the evidence establishes that Kormondy, not Buffkin, actually committed the capital felony. The State relies on its full discussion of this matter set forth previously.

2. *Kormondy's death sentence is disproportionate to his co-defendant's life sentences.* Kormondy's argument as to this finding is the same as he makes in Issue I. The State relies on its argument as to that issue. As the State argued there, Kormondy's death sentence is not disproportionate to the life sentences received by his co-defendants.

3. *The killing was accidental.* This too has been discussed previously. The trial court did not err in rejecting this mitigator as the killing was not an accident. Moreover, even if the killing was not premeditated, "accidentally" shooting an unarmed, helpless victim at point blank range in the head while

taunting him and punching him in the head with the barrel of a cocked, loaded gun while his wife is being raped during a home invasion robbery is not the kind of "accident" that reasonable persons would find mitigating. And if rejecting such a proposed mitigator was error, it was harmless.

4. *Kormondy cooperated with police.* First of all, he did so only after police hunted him down with dogs. Second, his cooperation consisted of trying to blame another for the murder and denying all involvement in the sexual battery of Mrs. McAdams. Rejecting this mitigator was well within the discretion given to the trial court. Trease v. State, 25 Fla. L. Weekly S622 (Fla. Aug. 17, 2000).

5. *Kormondy behaved himself during the resentencing proceedings.* As the trial court noted, he had little choice in view the presence of ample security to assure his good conduct.

Competent, substantial evidence supports the trial court's findings in mitigation. Mansfield v. State, 758 So.2d 636 (Fla. 2000). The trial court did not err, or at least err reversibly, in rejecting this proposed mitigation. Miller v. State, 25 Fla. L. Weekly S649 (Fla. Aug. 31, 2000).

IV.

THE TRIAL COURT PROPERLY ALLOWED THE STATE
TO PRESENT EVIDENCE RELEVANT TO KORMONDY'S

PROPOSED MITIGATOR OF COOPERATION WITH
POLICE

Kormondy argues here that the State "was permitted to inundate the jury" with "elaborate" testimony about his capture, making his "inadmissible arrest episode" a "feature" of the penalty phase. Initial Brief of Appellant at pp. 59, 63. The State does not agree that it "inundated" the jury with testimony about his capture or that it was irrelevant.

First of all, the testimony at issue is contained in less than 15 pages of transcript out of almost 250 pages of testimony.³⁶ This is hardly an "inundation." Second, Kormondy concedes that this evidence was offered to rebut his mitigation of cooperation with law enforcement. He contends, however, that his mitigator only went to his cooperation "after his arrest," and also contends that the State may not rebut a mitigator before it is presented.

If Kormondy is suggesting that the State may not present testimony in rebuttal until after the defense presents testimony in mitigation, the State would be in a quandary here, because Kormondy never presented evidence. The State does not agree, however, that a defendant should be able to argue mitigation

³⁶ 4T 336-38, 364-68, 373-75, 379-81

based on the State's evidence without giving the State a chance to rebut that claimed mitigation. In this case, Kormondy may not have presented evidence, but he sure presented his theory of cooperation in mitigation at the outset of the hearing, by way of defense counsel's opening statement, before any testimony was presented. After informing the jury that its job would be to weigh aggravators against mitigators, defense counsel set out Kormondy's proposed mitigation, including cooperation with police:

What you're going to find out during the course of this trial, this hearing, is that after Johnny Shane Kormondy was arrested, he and only he immediately commenced to cooperate with law enforcement. Without his cooperation, without his testimony, the law enforcement would not have captured Buffkin and Hazen. Mr. Kormondy gave them that information, that evidence and that's how they captured them. Another mitigator that you will find is

(4TR 227). In light of this clear statement, Kormondy cannot reasonably claim that the State could not present evidence to rebut this claim that he had cooperated with police.

Kormondy contends that in any event the State's rebuttal was improper because it went to his lack of cooperation *before* his arrest while his proposed mitigator only went to his cooperation with police *after* his arrest. However, as the prosecutor stated at the hearing, in response to this same objection: "That's like saying the Japanese cooperated in 1946. They didn't do much

cooperating before then" (4TR 378). In the prosecutor's view, cooperation with police only after fleeing and having to be hunted down with dogs was not real cooperation.

Whether or not the jury would agree with this assessment, the jury was entitled to hear the complete the story surrounding the issue of Kormondy's cooperation with police before making its own assessment; Kormondy had no right to present misleading and incomplete evidence on this issue. Bolin v. State, 736 So.2d 1160, 1166-67 (Fla. 1999) and Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986), relied on by Kormondy, are inapposite, as in each of those cases the State had presented evidence in anticipatory rebuttal of potential mitigators that were never presented or argued. (Indeed, in Fitzpatrick, defense counsel had expressly disclaimed reliance on the mitigator the State sought to rebut.)

In the State's view, Kormondy has failed to demonstrate that the trial court abused its discretion in admitting this testimony. Ray v. State, 755 So.2d 604 (Fla. 2000). Should this Court disagree, however, any error was harmless. The testimony was relatively minimal in the context of the entire sentencing hearing. Moreover, nothing in this evidence precluded Kormondy from arguing to the jury and to the trial court that his cooperation following his arrest was mitigating.

Finally, in view of the fact that Kormondy's alleged cooperation following his arrest consisted primarily of attempting to take some of the heat off himself by minimizing his own culpability (denying he raped Mrs. McAdams or shot anyone) and blaming another for the shooting he committed, this proposed mitigator is minuscule indeed, with or without consideration of the true motivation for his cooperation (once he recognized that the "jig" was up for him, Lee v. Illinois, supra, he simply resolved not to "go down" alone).

V.

BECAUSE KORMONDY FAILED TO MAKE A PROFFER OF THE TESTIMONY HE SOUGHT TO ELICIT ON CROSS-EXAMINATION OF MRS. McADAMS, THIS ISSUE IS NOT PRESERVED FOR REVIEW

Kormondy argues here that the trial court erred in sustaining a state's objection to a question defense counsel asked of Mrs. McAdams on cross-examination. Kormondy contends that the State bears the burden of proving that this error was harmless. However, Kormondy failed to proffer the testimony he sought to elicit from Mrs. McAdams, and the State has no idea what testimony defense counsel wanted to elicit. Absent a proffer, the State has no way of arguing either lack or error or lack of harm. It is well settled, however, that, having failed to demonstrate the relevancy of the sought-after testimony by way of proffer, Kormondy cannot now claim error. Trease v.

State, 25 Fla. L. Weekly S622 (Fla. 2000); Goodwin v. State, 751 So.2d 537, 544 (Fla. 1999); Norton v. State, 709 So.2d 87 (fn. 8)(Fla. 1997).

VI.

VICTIM IMPACT EVIDENCE WAS PROPERLY ADMITTED

Three witnesses gave victim impact testimony in this case: Cecilia McAdams (Gary McAdams' wife); Gloria McAdams (Gary McAdams' mother); and Kay P. Pavlock (a long-time friend and former neighbor of Gary McAdams). There was no objection to any of this testimony, as Kormondy acknowledges. Initial Brief of Appellant at 74. Thus, this claim is procedurally barred in the absence of fundamental error. Sexton v. State, 25 Fla. L. Weekly S818, S821 (Fla. Oct. 12, 2000). Kormondy attempts to argue that there was such a vast quantity of inadmissible victim impact evidence that its admission was fundamental error. In fact, however, the sum total of victim impact evidence was not vast, comprising some 13 pages of transcript. Any possible inadmissible portion has to be minuscule. Moreover, in the State's view, little if any was objectionable. Cecilia McAdams was of course an eyewitness to the crime and testified about it. Kormondy does not contend that any of her eyewitness testimony about the crime was impermissible victim impact evidence. As for the testimony he does complain about, none of it included

any statutorily forbidden “[c]haracterizations [or] opinions about the crime, the defendant, [or] the appropriate sentence.” Section 921.141(7), Fla. Stat. (1999). Testimony about Gary McAdams and what kind of person he was were properly admitted, as was testimony about the impact of his death on his family. Bonifay v. State, 680 So.2d 413, 419-20 (Fla. 1996). The State does not see anything which does not fit within these parameters, but if some small portion of the testimony was outside that permitted under law, then it did not rise to the level of fundamental error in light of the strong aggravation and minimal mitigation in this case. Alston v. State, 723 So.2d 148, 160 (Fla. 1998). Absent such fundamental error, this issue is not preserved for review and no reversible error occurred.

VII.

THE RECENT UNITED STATES SUPREME COURT DECISION IN APPRENDI v. NEW JERSEY IS INAPPLICABLE TO CAPITAL SENTENCING

Kormondy argues that Florida’s death penalty procedures providing for sentencing, ultimately, by a trial judge who makes findings in aggravation and mitigation and imposes a life or death sentence based upon those findings as set forth by written order, are invalid, citing Apprendi v. New Jersey, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Kormondy fails to show how this issue has been preserved for appeal by timely objection below.

The State would contend that, absent such showing, this claim is procedurally barred.

Moreover, it is meritless. Kormondy acknowledges that the Apprendi majority specifically rejected the suggestion that its holding would affect the Court's precedent upholding judge sentencing in capital cases, including Walton v. Arizona, which explicitly approved judge sentencing in capital cases and rejected any requirement of jury sentencing in capital cases. Initial Brief of Appellant at 78. As he acknowledges, the Apprendi Court stated:

Finally, the Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649 (1990); id., at 709-714 (Stevens, J., dissenting). For reasons we have explained, the capital cases are not controlling:

"Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge. [cit]

147 L.Ed.2d at 459. Kormondy argues, however, that comparison to Arizona's death penalty procedure is invalid because in Florida capital cases the jury is co-sentencer, in contrast to Arizona capital cases, in which the "jury is not even involved in the fact-finding process." Initial Brief of Appellant at 82.

The State does not follow this argument. If a pure judge-sentencing procedure is constitutionally acceptable, then it defies logic that a procedure calling for judge-sentencing following a non-binding jury recommendation would somehow be invalid, especially where, as in Florida, the jury is given explicit instructions to consider only such aggravating circumstances as have been defined for them and which the jury finds to exist beyond a reasonable doubt. In this case, as in all death penalty cases, the jury was instructed to render an advisory sentence based upon its determination as to whether sufficient aggravating circumstances exist to outweigh any mitigating circumstances and which may justify the imposition of a death sentence; further, the jury was explicitly instructed that it could consider only such aggravating circumstances as it found beyond a reasonable doubt. Obviously, if the jury had found none to exist beyond a reasonable doubt, then, under the court's explicit instructions, the jury could not have found that the death penalty was justified. By recommending a death

sentence, the jury had to have found at least one statutory aggravating circumstance, which is all that is required to render a defendant death eligible under the statute.

Apprendi holds only that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 147 L.Ed.2d at 455. The State does not agree with Kormondy’s suggestion that aggravating factors do in fact increase the penalty for murder beyond the statutory maximum; Florida law provides that the punishment for a capital felony is life imprisonment or death. Section 775.082, Fla. Stat. 1999.³⁷ Even if Apprendi is somehow applicable, however, which the State disputes, its requirements are satisfied. In this case, aggravating factors were submitted

³⁷ It is true that, in Florida, a death sentence may be imposed only if one or more aggravating factors is found, but that is true of any death penalty scheme in any state having a death sentence. If Florida’s death penalty procedures for this reason run afoul of Apprendi, then so must the death penalty procedures in every state having non-jury sentencing. Apprendi itself, however, tells us that such is not the case. The State would note that the Delaware Supreme Court has rejected an Apprendi challenge to its capital punishment procedures. State v. Weeks, 2000 WL 1694002 (Del. November 9, 2000).

to a jury, which found at least one aggravating factor *beyond a reasonable doubt*.³⁸

Arguments that the Constitution requires a jury to impose a sentence of death or make the necessary findings in aggravation have been repeatedly rejected by the United States Supreme Court. Walton v. Arizona, *supra*; Clemons v. Mississippi, 494 U.S. 738 (1990); Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Proffitt v. Florida, 428 U.S. 242 (1976). Florida's sentencing procedures are not fundamentally unfair, and there is no merit to this claim.

CONCLUSION

For all of the foregoing reasons, Kormondy's death sentence should be affirmed.

Respectfully submitted,

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ATTORNEY GENERAL

³⁸ Nothing in Apprendi requires that this determination must be unanimous. In fact, even the determination of guilt need not be unanimous. Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972). Nor is there is any requirement that jurors identify or agree unanimously on a particular theory of liability. Schad v. Arizona, 501 U.S. 624 (1991).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Chet Kaufman, Assistant Public Defender, Office of the Public Defender, Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida 32301, this 23rd day of February, 2001.

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CERTIFICATE OF COMPLIANCE

This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

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