

IN THE SUPREME COURT OF FLORIDA

JOHNNY SHANE KORMONDY,
Appellant,

vs.

CASE NO. SC96197

STATE OF FLORIDA,
Appellee.

INITIAL BRIEF OF APPELLANT

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JOHNNY SHANE KORMONDY,
Appellant,

vs.

CASE NO. SC96197

STATE OF FLORIDA,
Appellee.

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT AND TYPEFACE CERTIFICATE

This is the direct appeal of the imposition of the sentence of death for first-degree murder, which was imposed upon resentencing ordered by this Court. See Kormondy v. State, 703 So. 2d 454 (Fla. 1997). This brief has been printed in Times New Roman 14 pt. type. The record consists of nine volumes. Volumes 1-2 contain the record. Pages therein shall be cited as “V#R#”. Volumes 3-5 contain transcripts. Pages therein shall be cited as “V#T#”. The remaining four volumes are supplements that include both record and transcripts, and are labeled as Supplemental Volumes 1-4. Pages therein shall be cited as “S#P#.”

STATEMENT OF THE CASE

Appellant Johnny Shane Kormondy was tried and convicted in 1994 in the Circuit Court, First Judicial Circuit, in and for Escambia County, of first-degree murder, three counts of armed sexual battery, one count of burglary of a dwelling with assault and intent to commit theft, and one count of armed robbery.¹ The

¹ Also convicted, in separate proceedings, were co-perpetrators Curtis Buffkin and James Hazen. Both Buffkin and Hazen received life sentences. See V5T480-82 (parties stipulated as to prior convictions and life sentences of all three co-perpetrators arising from this criminal episode); see also Hazen v. State, 700 So. 2d 1207 (Fla. 1997).

criminal episode at issue occurred on or about July 11, 1993. The trial court sentenced Kormondy to death on Count I (murder), and life imprisonment with three-year minimum mandatory terms on each remaining count, each life sentence to run consecutive to Count I. On direct appeal, this Court held that the murder was not premeditated as a matter of law because the State failed to exclude the reasonable hypothesis presented in the State's own evidence that the murder resulted from an accidental firing of the victim's own handgun. See Kormondy v. State, 703 So. 2d 454, 459-60 (Fla. 1997). Because the State failed to prove premeditation, this Court further held that aggravator embracing heightened premeditation -- cold, calculated, and premeditated murder (CCP) -- is precluded from being tried on remand. See id. at 463 ("In conducting the new penalty-phase proceeding, we caution the trial court [that] [c]learly, a murder cannot be cold, calculated and premeditated without any pretense of moral or legal justification if premeditation is not established."). Though finding additional errors, this Court otherwise affirmed the judgments and sentences with the exception of the sentence of death, which it vacated and remanded with instructions for a new penalty phase proceeding in front of a new jury. See id. at 463-64.

The Hon. Joseph Q. Tarbuck presided over the new sentencing proceeding, which was held before a new jury between May 3-5, 1999. See V3T1-V5T564. The State presented only evidence that had been introduced at the first trial, with the prosecutor acknowledging before the resentencing trial that the State had no new evidence to present at least insofar as the manner in which the crime was committed. See V3T18-19.

Kormondy did not testify and presented no evidence. See V5T48-88.

The jury returned a recommendation of death by a vote of 8-4. See V2R180, V5T558. On June 30, 1999,² the trial court held a presentencing hearing, see S2R216-19, and on July 7, 1999, the trial court imposed the death sentence, see V2R202-10, V2R186-201. The written sentencing order is attached as Appendix 1-9.

A. Aggravation

The facts of the criminal episode are the same as those stated in this Court’s original opinion. See Kormondy v. State, 703 So. 2d 454 (Fla. 1997). Despite this Court’s previous order acquitting Kormondy of premeditated murder, see 703 So. 2d at 459-60, the State argued in resentencing the theory that this was a premeditated murder committed for the purpose of witness elimination, see, e.g., V5T527-28, and the trial court built its entire sentencing order on that foundation, holding that the murder was a “premeditated,” “preplanned,” “prearranged plan of witness elimination,” see V2R193-98, V2R205-09, V2R202-10, V2R189-99.

(a) Aggravators argued and found

The trial court’s written and oral pronouncement enumerated two aggravating circumstances found to have been proved, both of which were argued by the State:

1. Prior violent felony conviction³

The Defendant has previously been convicted of a felony involving the use of threat or violence, namely, the robbery of Mr. and/or Mrs. McAdams or the sexual battery of Mrs. McAdams.

V2R203, V2R188-89; and:

² Inexplicably, the supplemental record appears to contain the wrong date of the hearing, July 30, 1999. See S2R216. The correct date appears to have been June 30, 1999. See V5T560-61, V2R202-03.

³ See § 921.141(5)(b), Fla. Stat. (1993).

2. Committed during a burglary⁴

The crime for which the Defendant is to be sentenced was committed while he was engaged in or an accomplice in the commission of or an attempt to commit a crime of burglary.

V2R204, V2R190-91.

(b) Aggravators not argued or instructed but found anyway

Without enumeration, the trial court found three additional uncharged aggravating circumstances in the course of enumerating its findings as to the “committed during a burglary” aggravator and its mitigation review. None of these three aggravating circumstances were sought by the State at the charge conference, see V5T492-503, closing argument, see V5T505-09, or in its sentencing memorandum, see V2R182; and none of the three were included in the jury’s instructions, see V2R174-75, V5T546-47. Nonetheless, the findings of three uncharged aggravators were repeated throughout the sentencing order:

3. Cold, Calculated, and Premeditated:⁵

The evidence establishes beyond a reasonable doubt that the Defendant and his two accomplices, Buffkin and Hazen, entered the McAdams’ home forcibly and at gunpoint with a premeditated intent to commit robbery and burglary and, to avoid detection and arrest, eliminating the victims.

V2R204, V2R190 (Emphasis supplied).

The contention the killing of Gary McAdams was accidental is abundantly refuted by the findings referred to above. There is no evidence in the record to the effect that the killing was accidental and the record is clear that the killing was premeditated, that is, that all witnesses were to be eliminated after completion of the crimes.

V2R209, V2R198 (Emphasis supplied).

⁴ See § 921.141(5)(d), Fla. Stat. (1993).

⁵ See § 921.141(5)(i), Fla. Stat. (1993).

The evidence is conclusive that witness elimination was an intended and methodically planned component of the criminal events culminating in the execution of Mr. McAdams.

V2R205, V2R191 (Emphasis supplied).

One can reasonably conclude that the firing of the shot in the bedroom could have been solely for the purpose of creating in the minds of the accomplices in the kitchen that Buffkin had, in fact, completed his part of the prearranged elimination of both Gary and Cecilia McAdams.

V2R205-06, V2R192-93 (Emphasis supplied).

The Court finds 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.

V2R206, V2R193 (Emphasis supplied).

The Defendant's participation in the rape of Mrs. McAdams by various means and the execution style murder of Mr. McAdams...

V2R206, V2R193 (Emphasis supplied).

the evidence was overwhelming that the killing of Gary McAdams was pre-planned and that the killing was an execution inasmuch as Gary McAdams was shot in the back of the head while kneeling on the kitchen floor and that Kormondy was the executioner.

V2R208-09, V2R197 (Emphasis supplied).

...it is abundantly clear that Kormondy shot Gary McAdams in the back of the head, execution style...

V2R209, V2R198 (Emphasis supplied).

4. Dominant motive of witness elimination:⁶

The Court finds 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.

V2R206, V2R193 (Emphasis supplied).

⁶ See § 921.141(5)(e), Fla. Stat. (1993).

The evidence establishes beyond a reasonable doubt that the Defendant and his two accomplices, Buffkin and Hazen, entered the McAdams' home forcibly and at gunpoint with a premeditated intent to commit robbery and burglary and, to avoid detection and arrest, eliminating the victims.

V2R204, V2R190 (Emphasis supplied).

The evidence is conclusive that witness elimination was an intended and methodically planned component of the criminal events culminating in the execution of Mr. McAdams.

V2R205, V2R191 (Emphasis supplied).

The killing, therefore, of Gary McAdams could have served no purpose other than to avoid arrest or detection.

V2R206, V2R192 (Emphasis supplied).

5. Heinous, atrocious, or cruel:⁷

This Court concludes beyond a reasonable doubt that the conduct of the Defendant, in conjunction with his co-Defendants, towards the victims was unconscionable and pitiless and unnecessarily torturous to the victims.

V2R206, V2R194 (Emphasis supplied).

The Defendant's participation in the rape of Mrs. McAdams by various means and the execution style murder of Mr. McAdams dictate that there can be no doubt in any person's mind but that the Defendant intended to inflict a high degree of pain upon Mrs. McAdams by forcing her to submit to the multiple rapes and Defendant intended to inflict a high degree of pain and mental anguish upon Mr. McAdams who was caused to kneel in the kitchen while his wife was being assaulted time and again by the Defendants.

V2R206, V2R193 (Emphasis supplied).

There is absolutely no indication that during the entire course of the Defendant's criminal conduct did he show any conscious compassion or pity for either of the victims.

V2R206, V2R194 (Emphasis supplied).

⁷ See § 921.141(5)(h), Fla. Stat. (1993).

The terror that was coursing through the minds of Mr. and Mrs. McAdams as he knelt on the kitchen floor and as she was being raped in the bedroom must be considered.

V2R206, V2R194 (Emphasis supplied).

The vicious attacks upon the victims were within the supposed safety of the victims' own home.

V2R207, V2R194 (Emphasis supplied).

B. Mitigation

The trial court's oral and written pronouncements are to some extent self-contradictory or unclear.

(a) Statutory mitigation

The trial court neither expressly found nor rejected the statutory mitigator that Kormondy was an accomplice in the capital felony committed by co-perpetrator Curtis Buffkin and that Kormondy's participation was relatively minor. In its oral pronouncement, the trial court contradicted itself by saying it "gives [it] no weight," V2R196 (emphasis supplied), but moments later said it "is not well founded, and to this mitigating factor the Court gives little weight," V2R197 (emphasis supplied). The trial court's written order said this factor "is not well founded," V2R208, and "gives it no weight," V2R207.

(b) Nonstatutory mitigation

(1) The trial court said it gave "no weight" to the nonstatutory mitigator that because co-perpetrators Buffkin and Hazen were sentenced to life, Kormondy should be sentenced to life, see V2R198, V2R209, though the court did not expressly say the factor was rejected.

(2) The trial court said the mitigator that the killing of Gary McAdams was accidental was "unfounded." V2R198, V2R209.

(3) As to the factor that Kormondy cooperated with law enforcement officers after his capture resulting in the apprehension of the co-perpetrators, the trial court's oral pronouncement gave it "little or no weight, V2R199 (emphasis supplied), while its written findings gave it "no weight," V2R209 (emphasis supplied).

(4) As to Kormondy's good conduct during the course of the proceedings, the trial court said it "disagrees" with the suggestion that some weight be given this mitigator. V2R199, V2R209.

Kormondy timely filed a notice of appeal. See V2R217.

STATEMENT OF THE FACTS

A. Prior to the crime

On or about July 9, 1993, two days before the homicide in this case, Curtis Buffkin stole a .44-caliber pistol from the home of James Chaney, 10961 Tara Dawn Circle, Pensacola. The State introduced no evidence implicating any other person in that burglary and firearm theft. See V4T346-47.

On Saturday evening, July 11, 1993, Kormondy was home with his then-wife Valerie Kormondy, and friends Amy Bradley, James Popejoy and his wife Sandra, Curtis Buffkin, and James Hazen. See V4T349-50, V4T359. Valerie said Buffkin talked about robbing a house on Gulf Beach, and nobody heard Kormondy say a word about it. See V4T357. At around 9 p.m., Buffkin left the house with Kormondy and Hazen. See V4T350. Kormondy had a gun, presumably the one Buffkin had stolen. See V4T357, V4T360.

B. Cecilia McAdams' testimony about the criminal episode

In describing the criminal episode, Cecilia McAdams identified Buffkin as the assailant who led the assault at gunpoint. She was unable to identify the other two assailants, though she did give some testimony about their descriptions. To the

extent that her account supports inferences identifying each person and their respective actions, those inferences, read in the light most favorable to the prevailing party as required by law, are set forth below. These inferences, however, differ in some respects from details given and inferences derived from Kormondy's statements, which the State also introduced, as well as Buffkin's testimony against Hazen, which Kormondy submitted to the trial court.⁸

On Saturday night, July 11, Gary and Cecilia McAdams had been attending Woodham High School class reunion at the Scenic Hills Country Club. See V4T295. On the way home they stopped at Whataburger to get breakfast taquitos and a cup of coffee. See V4T297. Cecilia McAdams put the food down on the bar, and took off her shoes. Gary McAdams went straight to the bathroom, picked up their new puppy to take it out, and headed into the kitchen. They heard a loud knock on the door. Gary McAdams asked who it was. The response was, "It's me." See V4T300-02.

Standing at the door was Curtis Buffkin, wearing black pants and a white T-shirt, and pointing a pistol at the couple. See V4T302-03. His hands and face were not covered, and Cecilia McAdams was able to identify him. See V4T319, V4T326-27. The gun was the same .44-caliber pistol Buffkin had stolen two nights earlier from the home of James Chaney. See V4T346-47.

Buffkin ordered the couple to kneel down on the floor and put their heads down, threatening to kill them if they did not obey. See V4T303. Buffkin then led

⁸ This is the same problem noted in Kormondy v. State, 703 So. 2d 454, 456 n.1 (Fla. 1997), and Hazen v. State, 700 So. 2d 1207, 1208 n.1 (Fla. 1997), where the Court observed that the factual scenarios presented at the different trials were different, and neither record is entirely clear as to the relative locations of the perpetrators at the time of the fatal shot.

the way into the home, followed by Hazen and Kormondy. Hazen and Kormondy had their faces and hands covered so they could not be identified. See V4T319, V4T304, S2P188-89.

As Hazen and Kormondy walked through the house, they explained that they were pulling all the phone cords out and closing the blinds. See V4T304-05. One of the men asked for the couple's money and car keys. Gary McAdams tossed his money, wallet, and keys onto the floor. Cecilia McAdams' purse and keys were lying on the bar and she told them to take it. See V4T305-06.

While kneeling with her husband beside Buffkin who was holding the .44-caliber pistol on them, Cecilia McAdams heard dresser drawers being pulled out and assumed that her things were being rifled. Hazen came back to the front of the house to the kitchen and asked Gary McAdams who he thought he was going to hurt with this, meaning, she assumed, he had found Gary's handgun. See V4T307-08. Gary McAdams replied, "No one." Hazen replied to Gary McAdams, "You're right. You're not." See V4T308.

Hazen walked around behind Cecilia McAdams and rubbed Gary McAdams' gun along her hip. He said, "You have a cute ass. Come with me." See V4T308. She and her husband begged him not to do that. See V4T309. Hazen took her back into the vanity area of the master bedroom, told her to take off her clothes, made her sit on the toilet in the bathroom, and made her perform oral sex on him. She was gagging and he told her if she let it come out of her mouth one more time "he would blow my head off." See V4T310-11. Hazen told her to get up and go out into the vanity area, where she saw Kormondy by her bed going through one of her purses. See V4T311-13. Hazen asked Kormondy if he didn't want to have some of her, and he said "yes." Kormondy then raped her vaginally while Hazen continued to rape her orally at the same time. While they were doing

that, they said “it was good pussy.” See V4T313-14. Hazen ejaculated in her mouth, told her to sit up, and Hazen said, “Swallow it, Bitch.” See V4T315.

Cecilia McAdams was made to get up and walk back into the kitchen and kneel down with her husband. She took his hand and they yelled at her not to touch him. They found a beer in the refrigerator, opened it and slammed it down between Cecilia and Gary and told them to drink it. Gary McAdams asked which one, and they said “you,” and he complied. See V4T315.

Buffkin then told Cecilia McAdams to get up and go to the back of the house again, which she did. See V4T315-16. Buffkin took her to the back, touched her with the gun, and said “I don’t know what the other two did. I think you’re going to like what I’m going to do.” See V4T316. Buffkin reached around her, took a towel off the rod, made her lie down in the vanity area, and vaginally raped her. See V4T316.

Before Buffkin finished, Cecilia McAdams heard a gunshot. “I screamed Gary’s name,” she said. See V4T316-17. There was no answer. There were voices yelling out from the front, which she assumed was directed to Buffkin, the one who was with her. Buffkin threw the towel over her face. “Just right after that, there was a gunshot that went off in the bedroom ... My bedroom, the master bedroom.” She jumped up and ran out. See V4T317.

Cecilia McAdams was naked. See V4T318. “I saw my husband laying on the floor with blood coming out of the back of his head,” she said. See V4T318. She screamed loudly, tried to use the phone, but it did not work. She grabbed a towel off the chair and ran outside, where she a neighbor met her. Cecilia McAdams screamed that her husband had been shot. See V4T319, V4T238-41, V4T243-47. Moments earlier, a neighbor heard a gunshot, saw a man running across the front yard, and heard several voices hollering from the direction in which

the man turned to run. The man wore a T-shirt and had dark pants, see V4T234-36, as Buffkin had been described, see V4T302-03.

C. After the crime

Buffkin, Hazen and Kormondy were in Kormondy's home by 5 a.m., when Valerie Kormondy awoke and saw them sitting together. See V4T349-50. She went back to bed without speaking to them. About two hours later, at 7:00 a.m., Valerie Kormondy said she got a telephone call from Elaine Barnett, with whom Hazen had been visiting. Valerie Kormondy awakened Hazen and told him that Barnett wanted Hazen to go out with her. See V4T351-55. Valerie Kormondy drove Hazen in her husband's car to the Food Lion on Pine Forest Road and found a bag of jewelry in the car. See V4T355-56. Later, Valerie Kormondy confronted her husband and told him to leave. See V4T357.

D. Statements and arrest

William Long, Valerie Kormondy's cousin, allowed Kormondy to move in with him temporarily after the fight with Valerie. See V4T383. One time, Long and Kormondy were driving in Kormondy's truck when it ran out of gas. They went to a general food store, got some gas, and while paying for the gas, Long saw a \$50,000 reward bulletin regarding the McAdams case. As Long and Kormondy walked out of the store, Kormondy "said that the only way they'd ever catch the person that shot Mr. McAdams is if they were right behind us right then." See V4T384. Long said he told Kormondy he didn't want to hear anything else about it. He wanted no part of it. Kormondy seemed "pretty upset." See V4T384.

After they went home, they discussed the McAdams incident again:

Q. [BY STATE] What did he tell you that happened?

A. [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 gunpoint 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.

Q. Did he say he killed him?

A. Yes, sir, he did.

Q. Did he seem real upset when he said that?

A. Yes, sir. He was crying at the time.

Q. Could you be confused and maybe somebody – he said somebody else killed him?

A. No, sir. It's been a while and it's still pretty much in my mind today.

Q. When he told you about this sexual assault, what was your reaction first?

A. I couldn't believe he had anything to do with it.

Q. Did he tell you generally about the assault or specifically about it?

A. Just generally. He acted like he really didn't know nothing about it, you know, that it was – he had nothing to do with it. He was just the one with the gun. That's the way he made it sound to me.

Q. Did he ask you to tell or not tell anybody or –

A. He stated that I was the only one that knew, not to turn him in, and if he got caught, that I was the one that told on him.

Q. But you did?

A. Yes, sir, I did.

Q. Why did you?

A. Well, at the time when – before he moved in with me, he was living in the same – I guess you would say area as my grandparents. In the same – I mean, like, yard. And I figured if he could go that far and rob somebody he really didn't know and they ended up dead, there's nothing that he wouldn't do to get money.

Q. You planned to get the reward?

A. Well, I'm not going to lie and say it never approached my mind. It did.

Q. Who did you turn him in to?

A. I – actually, I didn't. Chris Rowbar (phonetic) turned him in.

Q. Who is he now?

A. He was a friend of mine that I had told what had happened. And he said that he would do it.

Q. Did you – after you told Mr. Rowbar, did the sheriff's office send investigators to see you?

A. Yes, sir. Two of them.

V4T388-90.

William Long met with Sheriff's Office Investigators Wendell Hall and Allen Cotton. Long agreed to go undercover, wearing a wire while meeting with Kormondy. See V4T390, V4T328-30. In that conversation, Long said, "I told him that some cops had came 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." See V4T391.

After hearing that conversation, investigators moved in to arrest Kormondy. Over Kormondy's repeated objections, the State presented four witnesses to testify in detail about Kormondy running from the officers until he was captured by a K-9 unit, after which Kormondy was taken to the sheriff's office for interrogation. See V4T338-39, V4T361-81. Rowbar and Long decided to collect the reward. See V4T392.

Investigator Cotton said after being taken into custody, Kormondy cooperated and gave two statements, one not recorded and a second recorded on

tape. Cotton said there were no discrepancies between the two statements. See V4T398-99, V5T413-19, S2P180-212. Kormondy confirmed the involvement of Buffkin and Hazen, providing information about their whereabouts (one he knew, the other he was not sure). Based upon Kormondy's cooperation, investigators had probable cause to obtain warrants for the arrests of Hazen and Buffkin. See V4T339-40, V4T397-401. Hall said Kormondy told them the gun was in Buffkin's possession when it went off accidentally. See V4T401. From the statement Kormondy gave, Cotton concluded that "I believe I know he told the truth." See V4T343.

In his recorded statement, Kormondy said he was riding around in a silver 1988 Camaro with Buffkin and Hazen. They left Kormondy's house at about 8:30 p.m. See S2P180-81. Buffkin wanted to ride around toward the Ensley area because he wanted to get some money. He was looking for a house to break into. Kormondy drove the car. See S2P181-82. Around midnight they were in the Thousand Oaks subdivision. Buffkin got out of the car first. Buffkin kept telling Hazen and Kormondy to come on, come on. See S2P183. "We went to – around the corner to some house. And Darryl was in the lead and me and James were behind, and he kept telling us to come on, come on, hurry up, and get up closer to him." See S2P184. Buffkin had a gun. See S2P184.

After they saw a car drive in to a house, Buffkin went up and knocked on the door inside the garage. "When somebody opened the door, he stuck a gun to their face and hollered." See S2P187. Hazen and Kormondy were back out by the garage door. Buffkin did not have anything covering his face and may not have had anything covering his hands, either. See S2P188. Kormondy and Hazen were masked, and Kormondy had socks on his hands. See S2P188-89. When they got inside the door, Buffkin hollered at the people, "Telling them to stay on the floor

and they won't get hurt. If they move or don't do what he says, he'll blow their heads off." See S2P190, S2P210. Kormondy went to the living room and Hazen went down the hall. Hazen was putting jewelry in a bag, and Hazen found a gun in the bedroom in the dresser. See S2P190-91. Then Hazen and Kormondy went back into the kitchen area. Buffkin handed Kormondy a gun and Hazen told the woman to come back with him. Hazen went into the back bedroom. Buffkin also went into the back bedroom. Kormondy stayed in the kitchen area with the man. See S2P193-94.

Kormondy walked into the back bathroom and saw the female naked sitting on the toilet and Hazen standing directly in front of her. She was performing oral sex on Hazen. Kormondy said when he saw that, he turned around and went back into the kitchen and that's when Buffkin handed him a gun. Kormondy did not identify the gun. See S2P195-96. Buffkin walked into the back bedroom. They were back there about 5 or 10 minutes. See S2P196-97. Then they brought her back up front, naked, and made her kneel down in front of the man. "James said I ain't through with her yet." See S2P198. Buffkin then took the gun from Kormondy, but again he did not say which gun it was; he just knew it was the same one Buffkin had given him earlier. He believed Hazen still had the gun Hazen had found in the back bedroom. See S2P199-200. At this point, Buffkin had a gun and Hazen apparently still had a gun. Hazen took the woman back to the back bedroom again. See S2P200.

Kormondy stepped over into the dining room area by the bar and Buffkin "Tells the man to put his head between his knees, to put his legs up around the – by his head, up on his head." See S2P201. Buffkin told the man to do that and the man was kinda skittish. Buffkin then started bumping the man in the head with the end of the barrel of the gun. It was a punch-type stroke, Kormondy said. "He just

kind of, like, bumped him in his head.” See S2P202. Then, “The gun went off.” See S2P202, S2P210-211. The man fell backwards and Buffkin hollered, “Let’s go, let’s go.” See S2P203. Kormondy said he was the first one out the door, followed by Buffkin. Buffkin hollered that James wasn’t coming out so Buffkin turned, went back into the house, and about 30 or 45 seconds later both of them emerged. They went back to Kormondy’s car and drove off. See S2P204. Kormondy drove, heading to his house on Pine Forest Road. See S2P204-05.

Back at Kormondy’s house, Hazen and Buffkin were on the couch and chair going through the bag of stolen goods while Kormondy was in the dining room looking out the window, scared. He believed the others still had the guns on them. They stayed at the house until the next morning. Hazen left before Kormondy awoke. See S2P205-06.

Kormondy said that during the incident he “heard one of them say give him a beer, drink a beer.” See S2P207. It was a green bottle. Kormondy denied ever assaulting the female victim. See S2P208. Kormondy denied killing the male victim also. See S2P208. Later that evening, Kormondy said Buffkin “Said I didn’t-- didn’t really mean for it to go off, didn’t mean for the gun to go off.” See S2P211.

Buffkin is an escaped inmate or prisoner from Camp V, and Hazen is from Oklahoma. See S2P212.

E. Gun and forensic evidence

When Buffkin was captured in North Carolina around July 20, 1993, he still had in his possession the pistol he had stolen from James Chaney on July 9 and used to lead the assault on the McAdams house on July 11. See V4T346-47. Buffkin’s 44-Special Charter Arms revolver, while used to lead the criminal episode, was not the weapon that killed McAdams. See V5T463, V5T478-79.

Around January 1990, Gary McAdams got a Smith & Wesson model 10 .38-Special revolver with a four-inch barrel in a trade with friend, Lyn Hart. Hart received a smaller pistol in exchange. See V5T421-26. Hart had no idea if Gary McAdams maintained the .38 Special during the years before the homicide, and no evidence was presented to show that McAdams still possessed the gun, or that if he did, that it was in good working condition at the time of the homicide. See V5T427-28.

Edard William Love, Jr, a firearm and tool mark examiner, determined that the bullet that killed Gary McAdams was a .38-caliber bullet, which could have been fired from a .357-caliber Magnum revolver or a .38-Special caliber revolver. The types of revolvers that could have fired the fatal shot included makers like Taurus, Ruger, and Smith & Wesson, including Smith & Wesson's model 10, 4-inch barrel. See V5T462-63. Smith & Wesson makes 36 or more models of that type of weapon. See V5T467-68. Love, however, could not determine if the bullet and the fragments he examined were fired a specific model 10 Smith & Wesson firearm. He also could not testify that the fatal bullet was fired from any specific Smith & Wesson model .38-caliber firearm. See V5T473. The alleged murder weapon was never recovered, and Love never examined the firearm that he was told may have been used in this case. See V5T475. There was no way for Love to determine whether or not the firearm used to commit the murder was in good working condition. He never had an opportunity to match the fired bullet with any particular firearm. See V5T475-76.

Beyond the kitchen area in the carpet on the floor of the McAdams home was an apparent bullet hole and black powder. Crime scene investigator Robert A. Taylor cut the carpet and the pad out, below which was a concrete surface. See V4T263-64. Fragments taken from the floor came from a .44-caliber lead bullet,

Love said, but they were too damaged to further identify. See V5T464. Based on the fragments, the weapon that fired the .44 -caliber bullet had been either in contact with or near the carpet at the time it discharged. Based on the way the .44-caliber weapon operates, Love opined that the gun could not have been fired accidentally into the floor. See V5T465. However, he did not say he had actually examined and test-fired .44-caliber weapon in evidence.

Love said a Smith & Wesson model 10 can fire two ways. It is a revolver on which one can either cock the hammer and pull the trigger, which would take 3-5 pounds to fire, or one can simply pull the trigger (called double action because it both cocks and fires), which would take between 10-12 pounds of pressure. The .44-caliber weapon also fires the same way. See V5T466. If the .44-caliber weapon is not cocked, it would take 10-12 pounds of pressure to fire by pulling the trigger. If a Smith & Wesson model 10 in reasonably good condition was taken and poked and slammed against a rail while not being cocked, it would not go off. If it were thrown across the room at a wall, providing nothing was broken in the process, it should not go off. If a person was poked in the back of the head with a .38-caliber pistol that wasn't cocked, it would not go off the gun was in reasonably good condition. See V5T467.

Crime scene investigator Taylor testified that the bedroom had been ransacked. See V4T265. He found blood splatters on the laundry room or pantry wall, and on the refrigerator. It indicated "low impact on the victim," meaning the person may not have been standing. See V4T267-68. No weapons were recovered at the scene. He found evidence of no more than one gunshot in the kitchen area. See V4T273.

Police recovered a dress in the bedroom, see V4T274, and two socks in the kitchen, one near the stove and one near the breakfast counter, see V5T447-49.

Police also recovered fibers from Kormondy's car. See V5T435-37. Eight fibers found in the car were consistent with the dress Cecilia McAdams wore. See V5T449-52. One fiber was found in the front driver's seat, one in the front driver's floor, three in the front passenger seat, one in the front passenger floor, and two in the rear seat. See V5T453. However, the State's expert could not say that the fibers found in the car were from the dress. See V5T456.

An autopsy performed by Dr. Fenner McConnell⁹ determined that Gary McAdams suffered wounds or trauma caused by a "bullet that penetrated the left part of the brain, the cerebral hemisphere -- left cerebral hemisphere along its length -- most of its length, creating a laceration of the brain parenchyma caused hemorrhage into the adjacent parenchyma. It caused hemorrhage over the surface of the brain and it caused extensive destruction of the parenchyma; that is the substance of the brain." See V4T290-91. Death would have been irreversible. The cause of death was a bullet entering his brain. See V4T291-92. It was a contact wound, meaning the barrel was at his head. See V4T292. Gary McAdams had a blood alcohol level of .023. Various alcohol readings indicated that he had just drunk some alcohol prior to his death, probably the equivalent of one beer. See V4T293-94. Dr. McConnell gave no evidence about what kind of weapon caused the fatal bullet wound.

F. Victim impact evidence

The State presented three witnesses to the jury to give detailed victim impact evidence. That evidence is summarized infra in Issue VI.

⁹ Dr. McConnell did not testify live in the resentencing. Instead, a portion of his prior testimony from Kormondy's first trial was read to the jury. See V4T279-84.

G. Post-jury evidence portraying Buffkin as the leader

Transcripts of portions of the Buffkin trial, held June 27 - June 29, 1994, were made part of the record in Kormondy's resentencing. See S1P53-54-57, S2P221-S3P406. So, too, was the transcript of Hazen's own testimony at Hazen's trial. See S4P409-72. Both were relied on in Kormondy's sentencing argument presented to the judge. See V2R234-26.

(a) Buffkin's trial

The State's theory of the criminal episode emphatically portrayed Buffkin as the leader, and the others as the followers. "Curtis Buffkin [] led a home invasion," the State argued to the jury. See S3P373. "There is undoubtedly no question in this case that their home was invaded by the defendant [Buffkin] leading the way..." S3P376. The State kept referring to Kormondy and Hazen as Buffkin's "troops," see S3P390-91, and "accomplices," see S3P273, S3P380. In Buffkin's trial, as in Kormondy's resentencing trial, Cecilia McAdams testified as to Buffkin's leadership role. She identified Buffkin as being the one who led the attack, coming into the house with a gun, ordering the couple to get down on the floor with their heads down, and threatening to kill them. See S2P233-35, See S2P257. Buffkin "had a gun. He told us he would kill us." See S2P236. Cecilia said after she was orally and vaginally raped by two of the assailants (neither of whom she could positively identify because they were masked), Buffkin is the one who told her to go back into the vanity area to have sex. Buffkin was the one with her at the time she heard the gunshot. See S2P249-51. The third assailant to enter the house, she said, was the second one who committed sexual battery on her, suggesting that Kormondy was the third person into the house. See S2P265.

Valerie Kormondy also testified, as she did in Kormondy's resentencing trial, that Buffkin, and nobody else, spoke about a plan to rob a house on Gulf Beach

Highway. See S2P304-05. Rather than a premeditated plan to kill, the State argued to jurors that Valerie's testimony proved the three men left Kormondy's home "to commit a robbery on Saturday night with a gun." See S3P382.

To emphasize Buffkin's leadership role, and to diminish the relative roles of Kormondy and Hazen, the State argued as follows:

Now, the Defense would say that this defendant's role [Buffkin] in these horrible events, serious of events was different than the others. He' not saying that other than the fact that Mr. Buffkin broke in their house with a gun, robbed them at gunpoint and raped his wife, that he was otherwise a fairly nice fellow. What he is saying to you is that his role [Buffkin's] was qualitatively different enough to let him off of murder. And I agree with him in part.

Curtis Buffkin's role was different than the other two. He was the ring leader. That's the difference. He was the one that got to carry the gun. He was the boss. Who chose him to carry the gun? Who elected him to do it? He had the gun, not them. Who got to walk up unmasked where he could be identified later if there were any witnesses left? Curtis Buffkin. Who got to knock on the door? Curtis Buffkin. Anyone have a gun at his head to do it? Anyone push him through the door?

The defendant was qualitatively different because he was the ring leader. He had the gun. He stuck it in their face. He told them he was going to kill them and it was loaded.

Now, what more--what more can be said? Can one genuinely believe that it was not foreseeable in this case that this defendant, who took total command of his cohorts and had total command of the fate and lives of the McAdams', didn't intend that lethal force, didn't foresee that lethal force would be used? You put a gun to a man and a wife's head in their own home and while repeatedly raping the wife, you don't intend that anything will happen bad to them? Am I missing something here? Am I missing something?

The leader in this case took command of the situation and kept command of the situation, and that's Curtis Buffkin. He's not a machine. He's a human being. He makes choices. And he made choices in this case. He chose to enter that house. He chose to rob those people. And he could have stopped when he had the valuables, when he had the gun. He had their wallets and the purse and the car keys. He could have stopped, but he didn't. He kept on going.

And people that do things generally intend to do what they say they will do. People are responsible for the consequences of their actions. That is not a foreign thought. People who choose to take

certain courses of action are responsible for it. The foundation of morality and the law is based on that – choice. The choice to stop. He had the gun. He had total command. He had total control. And he continued to go on and on and on. He continued to mete out efficiently, thoroughly and effectively the violence as necessary and as desired on the McAdams'. And that he did.

S3P386-88. The State further argued that Buffkin did not cover his face or his hands, as opposed to Kormondy and Hazen, because

[Buffkin] knew Gary Lane McAdams would probably never be able to identify him. He didn't have to worry about details, because he was the leader. The others worried about the details." See S3P392-93. "There's no doubt the defendant in this case [Buffkin] was the leader of the three men who entered a person's home armed with a pistol ready, willing and able to take life. And life was taken. It no longer exists for Gary Lane McAdams. He's [Buffkin] responsible for the consequences of that burglary of that injury in that home, and you shall so find.

S3P393.

(b) Hazen's trial

Hazen's testimony was introduced into this record. Hazen met Buffkin for the first time on the night of the crime, and knew that Buffkin already had been in trouble with the law. See S4P411-15. Hazen said he, Kormondy, and Buffkin bought some crack that evening, and Kormondy smoked it, alone, around 6 p.m. See S4P416-17. Later that evening, the three went out to buy more crack cocaine, which Kormondy smoked with an unnamed fourth individual. See S4P418-20. The men brought Hazen back to Kormondy's house and left him there. See S4P420-25.

Hazen said he was sitting outside of Kormondy's house for close to an hour when the crime must have occurred. Buffkin and Kormondy pulled up in Kormondy's car, and he heard Buffkin – not Kormondy – confess to the killing. "Darrell comes around the car first and I hear him. He stops by the front and he says well, if I didn't do it like that, I was going to have to shoot him anyhow." See

S4P428. Kormondy “just kind of looked at him and kind of like well, whatever. You know, kind of looked of, whatever. He just – it wasn’t on him, you know ... Shane was scared and Darrell was – was emotional like he was just freaked out.”

See S4P428.

SUMMARY OF ARGUMENT

I. The death sentence constitutes disproportional punishment given that the leader, Curtis Buffkin, got a life sentence; the lead and most vicious rapist, James Hazen, also got a life sentence; facts about the killing itself are unclear at best; and this Court already found that death may have been caused by an unpremeditated, accidental firing of the weapon. See Hazen v. State. The death penalty violates both the federal and state constitutions on its face and as applied because of systemic problems that make it unworkable and because the punishment in this case is disproportional after taking the actions and sentences of the co-perpetrators into account. See Callins v. Collins. Even the minimal proportionality analysis required by the federal constitution is an impediment to the death penalty under these facts where none of the perpetrators was proved to have the intent to kill. See Tison v. Arizona.

II. In the total absence of new relevant evidence about the circumstances of the crime, the State actively and repeatedly, over objection, sought to relitigate the theory repudiated in this Court's first decision, i.e., proof that the murder was premeditated motivated by witness elimination. The trial court followed suit, in apparent total disregard for this Court's order. The proceedings and the order exceeded this Court's mandate, violated state and federal law principles of law of the case, res judicata, collateral estoppel, double jeopardy, issue preclusion; and violated the rights to a fair trial, due process, and the protection against cruel and/or unusual punishment. See Hoffman v. Jones; Ashe v. Swenson; United States v. Watts; Bullington v. Missouri. The finding of aggravators not even sought, tried, or instructed is reversible error. See Apprendi v. New Jersey; Hamilton v. State; Cannady v. State.

III. The trial court's findings as to mitigation defied this Court's mandate, violated numerous principles of Florida law, rejected mitigation on unsupported findings, rejected un rebutted mitigation, and made self-contradictory statements about findings and weight. See Trease v. State. The State's successful effort to mislead the trial court about the scope of the mitigation offer was unethical, prosecutorial misconduct. See Craig v. State.

IV. The State presented four witnesses to give elaborate, detailed testimony in its case-in-chief about Kormondy's capture by a K-9 unit on July 19, 1993, more than a week after the crime. Kormondy repeatedly objected, arguing that since the guilt issue already had been decided, the evidence was irrelevant to any aggravator, cumulative, and unduly prejudicial. The trial court overruled the objections, permitting the jury to hear this cumulative, unduly prejudicial, inadmissible evidence. The court's rulings harmfully infected the jury's consideration and necessarily undermined the reliability of the entire proceeding. See Bowles v. State; Bolin v. State; Kormondy v. State; Hitchcock v. State; Castro v. State,

V. Kormondy was denied his right to fully cross-examine the State's key witness about her ability/inability to identify and distinguish the perpetrators, a crucial fact regarding the relative culpability of the three men. See Olden v. Kentucky; United States v. Owens; Delaware v. Van Arsdall; Davis v. Alaska; California v. Green; Chambers v. Mississippi; Freber v. State.

VI. Three witnesses gave an accumulation of improper anecdotal victim impact evidence that included stories dating back to the victim's childhood, the victim's family's history of illness, and other testimony prohibited by statutory and constitutional law. The accumulation of victim impact became a feature of the penalty phase, fundamentally and inappropriately skewing the jury's recommendation. See Sexton v. State; Hitchcock v. State; Finney v. State.

VII. Neither the indictment nor any other pleading filed before the resentencing in this case provided Kormondy or the jury notice as to which aggravators the State was seeking to prove, despite a request that such notice be provided. Two aggravators were argued by counsel. The trial court instructed the jury on two aggravators. The jury reported no specific findings as to the aggravators. The jury was not instructed that it must find, beyond a reasonable doubt, that the aggravators were of sufficient weight to impose the death penalty, and the jury reported no such finding. The trial court found five aggravators, including three that had not been argued or instructed. These factors individually and in combination render imposition of the death sentence in this case a violation of Kormondy's rights to due process and to his protection against cruel and/or unusual punishment. See Apprendi v. New Jersey; State v. Harbaugh; Espinosa v. Florida; Lambrix v. Singletary.

ARGUMENT

- I. WHETHER THE DEATH PENALTY IS CONSTITUTIONAL, AND WHETHER IT WAS DISPROPORTIONAL PUNISHMENT AS APPLIED GIVEN THAT THE LEADER, CURTIS BUFFKIN, GOT A LIFE SENTENCE; THE LEAD AND MOST VICIOUS RAPIST, JAMES HAZEN, ALSO GOT A LIFE SENTENCE; AND DEATH MAY HAVE BEEN CAUSED BY AN UNPREMEDITATED, ACCIDENTAL FIRING OF THE WEAPON

The death penalty violates both the federal and state constitutions on its face and as applied because of systemic problems that make it unworkable and because the punishment in this case is disproportional after taking the actions and sentences of the co-perpetrators into account. See U.S. Const. amends. VIII, XIV; art. I, §§ 2, 9, 17, Fla. Const.

A. The death sentence is unconstitutional because of inherent systemic problems in review and practice.

The death penalty is unconstitutional, particularly when considering the irreconcilable paradox noted in Callins v. Collins, 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting from denial of certiorari) (conflict between constitutional commands requiring jury discretion to consider all mitigation, and against arbitrariness), and the inordinate delays inherent in the system, see, e.g., Lackey v. Texas, 115 S. Ct. 1421 (1995) (Stevens, J., dissenting from denial of certiorari). Moreover, this Court has not reviewed the Callins and Lackey rationales under the Florida Constitution. It should find the death penalty unconstitutional.

B. The death sentence constitutes disproportional punishment given that the leader, Curtis Buffkin, got a life sentence; the lead and most vicious rapist, James Hazen, also got a life sentence; facts about the killing itself are unclear at best; and this Court already found that death may have been caused by an unpremeditated, accidental firing of the weapon.

Before launching into an analysis, this Court first should understand the extraordinary complexity, conflicts, and lack of clarity arising from the unique circumstances of this case. This Court has before it:

- < The opinion from the first Kormondy trial in which the Court ruled as a matter of law that the murder was not premeditated;
- < The facts of the crime presented in the resentencing proceeding, which were identical in all material respects to those of the original trial;
- < Testimony of some State witnesses from the Buffkin trial;
- < The closing arguments of counsel presented to the jury in Buffkin’s trial;
- < Hazen’s own testimony from Hazen’s trial; and
- < This Court’s opinion in Hazen, which announced factual and legal findings in Hazen’s trial based in large part on the testimony of Curtis Buffkin, who did not testify against Kormondy in either of Kormondy’s proceedings.

To some degree the facts give rise to clearly supportable inferences. But material variances cloud some of the most critical facts, as the Court noted in its prior opinions arising out of this crime. Compare Kormondy, 703 So. 2d at 457 n.1, with Hazen, 700 So. 2d at 1208 n.1.

1. Inferences for the State

The material facts, taken in the light most favorable to the State, show without doubt that Curtis Buffkin was the leader of this criminal episode. Buffkin obtained a .44-caliber pistol two days before the homicide, and used that gun to lead the break-in. Buffkin was a prison escapee at the time he led the crime. Buffkin initiated the assault at gunpoint. Only Buffkin did not seem to care about his identity becoming known to the victims. Buffkin was the one who shouted commands to the victims. Buffkin was the one who threatened to blow off the victims’ heads if they did not follow his orders. The State acknowledged Buffkin’s leadership role in closing argument, see V5T531, and argued to jurors in Buffkin’s trial that “Curtis Buffkin’s role was different than the other two. He was the ring leader.” See S3P387. See also V5T531. Despite Buffkin’s self-serving testimony in Hazen’s trial, this Court found the evidence in that record established that Buffkin was a “prime instigator.” See Hazen, 700 So. 2d at 1214.

Hazen – like Kormondy – was not the leader. Instead, as the State argued, Kormondy was one of Buffkin’s “troops” or “accomplices.” See S3P390-91, S3P273, S3P380. But Hazen – unlike Kormondy and Buffkin – was the lead rapist. Hazen is the one who initiated the sexual batteries on Cecilia McAdams. Hazen is the one who ordered Cecilia McAdams into the vanity area at gunpoint. Hazen is the one who forced her to disrobe. Hazen is the one who ordered her to perform oral sex or else get her head blown off. Hazen is the one who ejaculated in her mouth told her to “Swallow it, Bitch.”

All three participated equally in robbing the possessions of Gary and Cecilia McAdams. All three committed sexual batteries upon Cecilia McAdams. Even the trial court found “that Kormondy participated in the burglary, robbery, and sexual batteries to the same extent as did his two accomplices.” See S2R197, S2R209.

While one of the men (Buffkin, according to Cecilia McAdams) was raping Cecilia McAdams in the bedroom, the others were in the kitchen with Gary McAdams. Though identity was disputed, there is evidence that it was Kormondy who held a gun (probably a Smith & Wesson .38-caliber revolver) to the head of Gary McAdams, bumping him with the end of the barrel of the gun when the weapon discharged. Shortly thereafter a second shot was fired into the floor of another room by the third man to rape Cecilia McAdams. But, as this Court already ruled in Kormondy’s first appeal, the State failed to prove that Kormondy fired the fatal shot intentionally, with premeditation, because the evidence was consistent with evidence presented in the State’s own case that the shooting was an accident. The State presented no new evidence in the present proceeding in that regard.

2. Irreconcilable problems

Much of the lack of clarity regarding the circumstances of the crime arises from testimony in Hazen's trial, as this Court reported it and relied upon it. Hazen had denied any complicity, and Hazen could not be identified by Cecilia McAdams. The State needed Buffkin, whom Cecilia McAdams had identified, to prosecute and condemn Hazen. See Hazen, 700 So. 2d at 1211-12. To save his own neck and assist the State in getting Hazen, Buffkin had both the reason and opportunity to inculcate Kormondy and Hazen as much as possible, which he did, stating material facts contradicted by Cecilia McAdams own testimony in both this resentencing trial as well as in Hazen's trial.

Specifically, this Court reported that Buffkin testified Buffkin was unarmed in the kitchen with Kormondy and Gary McAdams when Gary McAdams was shot, thus placing Buffkin in a perfect position to see what Kormondy was doing and to implicate Kormondy as much as possible. See Hazen, 700 So. 2d at 1213-14. But Buffkin could not have witnessed the killing according to Cecilia McAdams, because she said that when Gary McAdams was shot, Buffkin – the only one she could positively identify – was raping her in the bedroom, armed with a gun (probably the .44-caliber Smith & Wesson revolver he previously had stolen), at the time.

Nonetheless, this Court in Hazen found Buffkin to be more culpable than Hazen because, in part, "Buffkin admits that he was near Kormondy when the fatal shot was fired. Therefore, he was in a far better position than was Hazen to prevent the shooting." See Hazen, 700 So. 2d at 1214. Contrary to what the Court found in Hazen, the testimony in this record shows that Hazen must have been more culpable than Buffkin because Hazen – not Buffkin – was in the better position to witness and possibly prevent an accidental or intentional killing.

Another problem is that Buffkin could not have fired a shot in the bedroom or hallway to signal the death of Cecilia McAdams – the core of the State’s repudiated theory against Kormondy – according to this Court’s report of Buffkin’s testimony in the Hazen trial. Also, this Court reported that Buffkin testified at Hazen’s trial that Kormondy had talked about doing a burglary, saying “we both mentioned about hitting a house.” See Hazen at 1212. But the testimony in this record established that only Buffkin mentioned anything planning a break-in, and Kormondy did not say a word about it. See V4T357.

Despite Hazen’s denials, his leadership role in the sexual batteries, and Buffkin’s problematic testimony, this Court found the death sentence would be disproportional punishment for Hazen, reasoning as follows:

It is clear from Buffkin's own testimony that he and Kormondy were the instigators of this criminal episode. Further, the trial judge expressly found that Hazen was a “follower.” Under these facts, Buffkin was assuredly more culpable than Hazen. Indeed, Buffkin was not sure “if [Hazen] even knew what was going on.” At the McAdams' home, Buffkin carried the gun, tapped on the door, and was the first to enter the home. Hazen, on the other hand, was the last to enter the home.

Once inside the home, the events proceeded as “[Buffkin] and Kormondy had talked about it.” Specifically, “[Buffkin] just basically told [Kormondy] when we enter the house just pull the phone cords and shut the curtains and stuff like that and so that’s basically what happened.” Finally, Buffkin admits that he was near Kormondy when the fatal shot was fired. Therefore, he was in a far better position than was Hazen to prevent the shooting. In sum, it is simply impossible to say that Hazen was as culpable as Buffkin.

In Witt v. State, 342 So. 2d 497, 500 (Fla.1977), we made clear that a codefendant's life sentence was a factor that had to be considered when sentencing Witt. There, though, we proceeded to allow disparate sentences for appellant Witt and codefendant Tillman.

We explained that “five psychiatrists who examined Tillman indicated Tillman had a severe mental or emotional disturbance and was subject to domination by Witt. Witt's dominance was enhanced by his age of thirty years, compared to Tillman's age of eighteen.” Id. at 501. Tillman was the follower and Witt was the leader. We found no obstacle to Witt receiving the death penalty and Tillman receiving a

life sentence because Witt clearly dominated the criminal episode. Hazen, though, did not play a dominant role in this case. In fact, the evidence clearly establishes that Buffkin was a prime instigator and was more culpable than Hazen. In Slater, we held that the less culpable, non-triggerman defendant cannot receive a death sentence when the more culpable, triggerman defendant receives a life sentence. Slater, 316 So. 2d at 542. We find that this reasoning holds true even when two non-triggermen are involved if one of the defendants is a prime instigator and the other is not. Therefore, Buffkin's life sentence precludes a death sentence for Hazen.

Hazen, 700 So. 2d at 1214.

3. Co-perpetrator proportionality analysis

Under these cloudy circumstances, this Court cannot be satisfied drawing any clear conclusions about what actually transpired to cause the death of Gary McAdams. But the record does clearly show that Kormondy did not initiate the break-in or the sexual assaults, as even the State agreed. See V5T531. Kormondy tried to prevent himself from being identified, undermining whatever motive to kill had been alleged. As a matter of law, the murder was not a premeditated murder motivated by witness elimination because the homicide may well have been accidental. Kormondy was not a prison escapee or otherwise under a sentence of imprisonment at the time of the crimes, as Buffkin was. Buffkin, the leader, got life, as did Hazen, the lead rapist.

The only fact that possibly could be used to aggravate Kormondy's culpability over that of Hazen and Buffkin is that Kormondy was the one who unpremeditatedly fired the shot, quite possibly by accident, during the commission of a crime for which the others were equally if not more culpable. Under this Court's doctrine of proportionality, the issue becomes whether that one fact makes Kormondy so much more legally and morally culpable than Hazen and Buffkin as make Kormondy suffer the pain of death by execution while the others are allowed to live?

Proportionality review is constitutionally required. See Art. I, §§ 9, 17, Fla. Const.; Tillman v. State, 591 So. 2d 167 (Fla. 1991). Recently, in Almeida v. State, 748 So. 2d 922, 943 (Fla. 1999), this Court made clear that the

inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of **both** (1) the most aggravated, **and** (2) the least mitigated of murders.

(Emphases supplied) (footnote omitted). Proportionality “is not merely a comparison between the number of aggravating and mitigating factors.” Larkins v. State, 739 So. 2d 90, 93 (Fla. 1999) (citing Porter v. State, 564 So. 2d 1060 (1990)); Tillman, 591 So. 2d at 169; see generally Ken Driggs, “The Most Aggravated and Least Mitigated Murders”: Capital Proportionality Review in Florida, 11 St. Thomas L. Rev. 207 (1999).

This Court has done proportionality review in scores of capital sentence cases, far too numerous to list fully here, in which an issue arose regarding the complicity of co-perpetrators and their similar or different degrees of culpability and punishment.

One factor the Court looks to is whether the co-perpetrators were convicted of the same or lesser offenses arising from the same crime. See, e.g., Puccio v. State, 701 So. 2d 858 (Fla. 1997) (reversing death sentence where Puccio and others personally murdered the victim with multiple knife wounds and beatings, but co-perpetrators were sentenced to lesser punishments on equal or lesser convictions); Hazen; Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) (reversing for life where Scott and co-perpetrator robbed victim, and beat him twice; Scott intentionally ran over victim with a car, causing death; both men were involved in all aspects of the robbery, kidnapping, and beatings; and co-perpetrator got life sentence). Here, all three defendants were convicted of the same number and

magnitude of offenses arising from the McAdams crime, yet both Hazen and Buffkin got life sentences

Another factor the Court looks to is whether the defendant under sentence of death was the leader or dominant force behind the crime. If culpability was roughly equal, or if a co-perpetrator got a lesser sentence even though that person could have been the dominant force, this Court has found the death sentence to be disproportional. See, e.g., Ray (reversing for life where co-perpetrator Hall was the dominant player who got life sentence); Fernandez v. State, 730 So. 2d 277 (Fla. 1999) (reversing for life sentence where Fernandez was one of five co-perpetrators in robbery/murder but was not the dominant force, and two others who were equally culpable got life); Puccio (reversing for life where plot to murder the victim was launched by co-perpetrator Alice Willis, who got 40-year sentence, and Kaufman, who delivered coup de grâce with weighted baseball bat, got 30-year sentence); Hazen; Curtis v. State, 685 So. 2d 1234 (Fla. 1996) (reversing for life where evidence showed co-perpetrator was first into store to commit armed robbery; both Curtis and co-perpetrator fired shots but co-perpetrator's shot was fatal; and co-perpetrator got life); Parker v. State, 643 So. 2d 1032 (Fla. 1994) (reversing for life sentence per jury recommendation in triple homicide in part because evidence about respective roles of co-perpetrators was in conflict, and some evidence suggested co-perpetrator Groover was dominant force); Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) (reversing for life where Scott was the actual killer by intentionally running over victim in car; and co-perpetrator, who was equally involved in other aspects of the robbery, kidnapping, and multiple beatings, got life). As demonstrated above, Buffkin unquestionably was the leader, the dominant force behind this crime. The fact that Kormondy may have been the one to fire the weapon does not make him the leader or dominant force of the homicide

where the evidence failed to establish as a matter of law that there was an intent or plan to kill in the first place and the killing may have been an accident.

A related factor this Court looks to is whether the death-sentenced individual personally carried out an intent to kill by inflicting or directly contributing to the victim's cause of death. In some cases this has been referred to as the so-called "triggerman." When that fact is not clearly established, or when death may have resulted unintentionally, accidentally, or reflexively, this Court many times has found the death sentence to be disproportional. See Ray v. State, 755 So. 2d 604 (Fla. 2000) (holding death sentence disproportional where, despite State's claim that Ray was the shooter, evidence also showed that co-perpetrator Hall may have fired fatal shot in shootout with law officer; Ray and Hall both men actively participated in planning the robbery, in executing the robbery, and in stealing the getaway car; and Hall got life); Hazen v. State, 700 So. 2d 1207 (Fla. 1997); Terry v. State, 668 So. 2d 954 (Fla. 1996) (reversing for life where Terry was the actual shooter and killer in armed robbery but "the circumstances surrounding the actual shooting are unclear"; some evidence supported defense theory that it could have been a "robbery gone bad"; this Court "simply cannot conclusively determine on the record before us what actually transpired immediately prior to the victim being shot"; and both aggravators arose from circumstances of the one fatal episode in which another victim also was assaulted but survived); Parker v. State, 643 So. 2d 1032 (Fla.1994) (reversing for life sentence after noting conflict in evidence about which co-perpetrator played which role in killing three victims); Jackson (Douglas) v. State, 599 So. 2d 103 (Fla. 1992) (reversing for life sentence per jury recommendation in five homicides based in part on evidence that both Jackson and co-perpetrator Livingston committed the actual killings but Livingston got life sentence); Jackson (Clinton) v. State, 575 So. 2d 181 (Fla. 1991) (reversing for life

where murder was not premeditated as a matter of law because it could have been a reflexive killing during robbery gone bad); Slater v. State, 316 So. 2d 539 (Fla.1975) (reversing for life sentence in armed robbery where the co-perpetrator who fired the weapon got a life sentence); accord Cherry v. State, 544 So. 2d 184, 188 (Fla. 1989) (reversing for life sentence in one of two killings where no co-perpetrator was implicated because “We cannot conclude that death is proportionate punishment when the victim dies of a heart attack during a felony in the absence of any deliberate attempt to cause the heart attack.”).

Another factor the Court sometimes refers to is whether the record established that differently sentenced defendants had substantially different criminal histories. In this case, the record establishes that Buffkin was an escaped inmate at the time the offenses occurred. See S2P212, S4P415. The record also establishes that Hazen admitted to having twice before been convicted of felonies or crimes involving dishonesty. See S4P438. 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. As mentioned above, Buffkin, Hazen and Kormondy equally shared that “prior” violent felony criminal history. Moreover, as stated in Terry v. State, 668 So. 2d 954 (Fla. 1996), the contemporaneous crimes, which the trial court found to constitute the prior violent felony aggravator, are not as weighty as evidence of independent, prior crimes, for which no evidence was presented. Thus, there is nothing to suggest Kormondy had a worse record compelling him to pay higher price.

4. Tison proportionality analysis

Even the minimal proportionality analysis required by the federal constitution is an impediment to the death penalty under these facts. See Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982); Fernandez v. State, 730

So. 2d 277 (Fla. 1999); Jackson (Clinton)v. State, 575 So. 2d 181 (Fla. 1991).

That line of authority provides that where an intentional murder is committed during a first-degree felony murder, the death penalty can be imposed on an individual who did not personally commit the intentional murder provided that the accused was a major participant in the crime and his state of mind amounted to reckless indifference to human life. In Tison, the Court upheld a death sentence where the murders were clearly and unequivocally intentional murders committed by persons whose intent to kill was obviously known to the Tison brothers who did not personally do the killing. In contrast, Jackson is a case where the Court reversed a death sentence under Tison because the record did not establish an intent to kill by any of the participants in the felony, regardless of which one personally committed the homicide, and even though there was strong suspicion that the defendant was in fact the shooter.

5. Conclusion

Nobody questions the traumatic nature and consequences of this criminal episode. Nonetheless, legal principles – not emotion – must prevail. Applying the aforementioned rules of law set forth by this Court should compel the Court to vacate the death sentence and remand for imposition of a sentence of life imprisonment, to be served with his other five consecutive life sentences arising from this criminal episode. Cf. Buford v. State, 570 So. 2d 923, 925 (Fla. 1990) (Ehrlich, J., concurring in reversing death penalty for life sentence, saying (“Because the crimes for which defendant was convicted were truly horrible, it would be altogether just and fitting if the trial judge did in fact order all of the sentences imposed on defendant to be served consecutively. Society would thus have very little to fear that defendant would again trod the streets of our country.”)).

II. WHETHER THE ENTIRE RESENTENCING TRIAL AND ORDER VIOLATED THIS COURT'S MANDATE FROM THE FIRST APPEAL; VIOLATED ALL PRINCIPLES OF LAW PROTECTING AN ACCUSED FROM HAVING AN ULTIMATE FACT ALREADY DECIDED IN HIS FAVOR FROM BEING RELITIGATED AGAINST HIM; AND VIOLATED HIS RIGHTS BY FINDING AGGRAVATORS THAT HAD NOT BEEN TRIED OR ARGUED

The State put on no new evidence in the resentencing to shed new light on the circumstances of the crime. The State relied on the same physical and scientific evidence. The State relied on the same eyewitnesses, who gave the same testimony. The State relied on the same expert and forensic testimony. Yet, from the very beginning of the proceedings on remand from this Court, the State actively and repeatedly, over objection, sought to relitigate its repudiated proof of guilt, i.e., proof that the murder was premeditated motivated by witness elimination. The trial court followed suit, in apparent total disregard for this Court's order. The proceedings and the order exceeded this Court's mandate, violated state and federal law principles of law of the case, res judicata, collateral estoppel, double jeopardy, issue preclusion; and violated the rights to a fair trial, due process, and the protection against cruel and/or unusual punishment. See U.S. Const. amends. V, VI, VIII, XIV; art. I, §§ 2, 9, 16, 17, Fla. Const.

The State's theory of the crime has been perhaps the single most pivotal part of this case. The State's guilt and penalty theory from the very beginning has been that this murder was a premeditated killing motivated by witness elimination. That theory embodies ultimate facts that had to be presented to the fact finders in the guilt and penalty phases, and had to be established beyond a reasonable doubt within the bounds of the circumstantial evidence rule. In the initial appeal, Kormondy attacked the ultimate facts underlying the State's theory as unsupported by evidence, argued that the trial court erred in even submitting that theory to the

jury, and argued that the related aggravators were therefore also unfounded. Kormondy's discussion of the State's unproved theory consumed most of Kormondy's oral argument in the first appeal.

After due consideration, this Court agreed with Kormondy that the State had insufficient proof to support its theory. See Kormondy v. State, 703 So. 2d 454, 459-60 (Fla. 1997). The Court further held that "In conducting the new penalty-phase proceeding, we caution the trial court [that] [c]learly, a murder cannot be cold, calculated and premeditated without any pretense of moral or legal justification if premeditation is not established." Id. at 463.¹⁰

Nonetheless, the State persisted in making its legally repudiated theory the core of the resentencing, and was permitted, over repeated objection, to introduce evidence and make arguments in support of that theory. See V3T6-9, V3T19, V4T225, V4T247-50, V4T279-82, V4T306-07, V5T421-26, V5T512-13, V5T527-32, V2R238. Then the trial court openly defied this Court's mandate, many times finding the murder to be a cold, calculated, and premeditated murder motivated by the desire to eliminate witnesses:

The evidence establishes beyond a reasonable doubt that the Defendant and his two accomplices, Buffkin and Hazen, entered the McAdams' home forcibly and at gunpoint with a premeditated intent to commit robbery and burglary and, to avoid detection and arrest, eliminating the victims.

V2R204, V2R190.

The contention the killing of Gary McAdams was accidental is abundantly refuted by the findings referred to above. There is no evidence in the record to the effect that the killing was accidental and

¹⁰ This Court did not directly address the witness elimination aggravator. But under the present facts, witness elimination and premeditation are inextricably intertwined, and the latter cannot exist without the former. Undoubtedly, that is why the State did not even seek the witness elimination aggravator.

the record is clear that the killing was premeditated, that is, that all witnesses were to be eliminated after completion of the crimes.

V2R209, V2R198.

The evidence is conclusive that witness elimination was an intended and methodically planned component of the criminal events culminating in the execution of Mr. McAdams.

V2R205, V2R191.

One can reasonably conclude that the firing of the shot in the bedroom could have been solely for the purpose of creating in the minds of the accomplices in the kitchen that Buffkin had, in fact, completed his part of the prearranged elimination of both Gary and Cecilia McAdams.

V2R205-06, V2R192-93.

The Court finds 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.

V2R206, V2R193.

The Defendant's participation in the rape of Mrs. McAdams by various means and the execution style murder of Mr. McAdams...

V2R206, V2R193.

the evidence was overwhelming that the killing of Gary McAdams was pre-planned and that the killing was an execution inasmuch as Gary McAdams was shot in the back of the head while kneeling on the kitchen floor and that Kormondy was the executioner.

V2R208-09, V2R197.

...it is abundantly clear that Kormondy shot Gary McAdams in the back of the head, execution style...

V2R209, V2R198.

The evidence is conclusive that witness elimination was an intended and methodically planned component of the criminal events culminating in the execution of Mr. McAdams.

V2R205, V2R191.

The killing, therefore, of Gary McAdams could have served no purpose other than to avoid arrest or detection.

V2R206, V2R192.

These findings openly reject both the letter and the spirit of this Court's prior decision in this case.

A. This Court's mandate and the law of the case precluded relitigation of premeditation motivated by witness elimination

The fact that the murder was not premeditated beyond a reasonable doubt as a matter of law necessarily precludes the theory and finding that the murder was, beyond a reasonable doubt, a premeditated murder motivated by the dominant motive to eliminate witnesses. It is legally and logically impossible for an unintended murder to have been motivated by the intent to kill. It is especially impossible on these facts, where the State and the trial court unambiguously linked premeditation to that motive and had no other theory to support premeditation. The witness elimination theory also was purely speculative and wholly unsupported by testimony.¹¹ Kormondy even went so far as to move to exclude the theory and evidence thereon pretrial, but the court rejected those motions. See V1R149-57, V1R162-63, V3T9-13.

Moreover, witness elimination has been rejected on even more egregious facts. See, e.g., Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (the Court found as insufficient evidence that Livingston shot the clerk, shot at another witness, and said afterward "now I'm going to get the one in the back [of the store]."); Thompson v. State, 647 So. 2d 824, 827 (Fla. 1994) (the defendant shot and killed a store clerk with a single gunshot to the head in an armed robbery, but the State's key eyewitness had turned her head just before the shot, thereby

¹¹ The dissent in the first Kormondy opinion relied on the purported motive evidence as proof of premeditation, see Kormondy, 703 So. 2d at 464 (Grimes, J., dissenting), but the this Court found no merit in that position.

establishing reasonable doubt because nobody knew exactly what had happened in that moment); Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992) (rejecting witness elimination where the victim actually knew the defendant, Geralds knew he could be identified if victim survived burglary and armed robbery, and he knew before crime that victim's husband would not be there); Perry v. State, 522 So. 2d 817 (Fla. 1988) (Perry strangled woman who knew him in armed robbery, but some evidence showed reasonable hypothesis he may have panicked or blacked out during the murder). The trial court's finding is, again, unsupportable.

Nowhere in the trial court's order does it even acknowledge this Court's admonition not to rely on the State's repudiated theory. Nowhere does the trial court detail any evidence about the circumstances of the crime that had not been presented (and rejected) in the initial proceedings. The trial court simply rejected that holding out of hand. No state court has the authority to ignore or overrule Florida Supreme Court precedent. See, e.g., Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). That is especially true when the precedent is law of the case, as it clearly is here.

This Court has long held that a capital resentencing is a completely new proceeding, and that certain principles like law of the case, res judicata, and double jeopardy, in some instances, may be limited in the capital resentencing context. See Preston v. State, 607 So. 2d 404 (Fla. 1992). Nonetheless, Preston does not apply to the law of the case problem on the present facts. In Preston, the trial court adjudicated Preston guilty of first degree murder both by premeditation and felony murder. This Court affirmed on both theories of guilt; affirmed the aggravators of prior violent felony (robbery), HAC, and committed during a felony; vacated the CCP finding; and affirmed the death sentence. See Preston v. State, 444 So. 2d 939, 941, 943-44 (Fla. 1984), vacated in part on other grounds, 564 So. 2d 120

(Fla. 1990). In resentencing after subsequent proceedings, the trial court again imposed the death sentence. This time, the trial court did not find CCP; it did again find HAC; it changed the during a felony aggravator to committed during a kidnapping; and it added the witness elimination and pecuniary gain aggravators. On appeal, this Court addressed double jeopardy, res judicata, and law of the case, rejecting Preston's claim that the resentencing court was limited to the aggravators found in the first sentencing. However, the Court did so by specifically noting that it had not tied the trial court's hands in the remand order:

FN2. We also reject Preston's argument with respect to this claim that the resentencing court exceeded this Court's mandate. This Court did not address or in any way limit the scope of the aggravating factors to be considered on resentencing.

Preston, 607 So. 2d at 409 n.2.

Precisely the opposite occurred here, because in Kormondy this Court gave specific instructions to restrict the trial court's discretion on remand:

In conducting the new penalty-phase proceeding, we caution the trial court on two points. Clearly, a murder cannot be cold, calculated and premeditated without any pretense of moral or legal justification if premeditation is not established. [FN6]

FN6. In view of our disposition of Kormondy's first penalty-phase issue, we need not determine whether the trial judge's finding of this statutory aggravating factor was harmless beyond a reasonable doubt.

Kormondy v. State, 703 So. 2d 454, 63-64 (Fla. 1997) (emphasis supplied). Surely the Court intended for its instruction to be obeyed; not ignored, undermined, or otherwise defeated through some artifice or pretext constructed by the trial court. Moreover, nowhere did the trial court suggest that any intervening law or decision justified an extraordinary exception to the law of the case doctrine.

No exception would apply here anyway, in part because there has been no material change in law or fact. To the contrary, this Court expressly reaffirmed the applicable law after issuing the Kormondy decision. See Miller v. State, 25 Fla. L.

Weekly S649 (Fla. Aug. 31, 2000). Additionally, it would be grossly unfair in violation of due process to revisit the guilt theory in this resentencing. The guilt theory was not – and should not have been – under consideration, and Kormondy had no notice or reason to believe he would again have to defend himself against the State’s theory of guilt.

Kormondy had every reason to believe that issue was foreclosed by this Court’s prior decision, so he put on no evidence to rebut the State’s theory of premeditated murder motivated by witness elimination. Had he known the issue was not settled, Kormondy might have put on evidence, such as an expert on handguns; he might have testified himself; or he might have called Hazen or Buffkin to testify. Certainly the State’s contention that forensic evidence proves Buffkin’s gunshot was intentional was ripe for rebuttal. For example, Buffkin may have accidentally tripped and fired a shot into the floor from his knees while fleeing from the bedroom. Or he might have fired intentionally to intimidate Mrs. McAdams or to warn her not to follow the perpetrators to their car to prevent their identification. The trouble with the State’s theory is that it is wholly speculative. This is precisely the same problem the State had the first time around, when on similar arguments, this Court agreed with Kormondy that the State’s speculative theory did not rebut the reasonable hypothesis of innocence – presented in the State’s own evidence – of premeditated murder motivated by witness elimination. This is “déjà vu all over again.” Yogi Berra, Bartlett’s Familiar Quotations 755 (16th ed. 1992).

B. Double jeopardy, collateral estoppel, and issue preclusion barred relitigation of premeditation motivated by witness elimination

Double jeopardy requires, at a minimum, that when an appellate court reverses based on insufficient evidence of the theory of prosecution because the prosecutor failed to adequately rebut the accused’s hypothesis of innocence, that

finding equates to an acquittal for which no retrial is permitted. See Burks v. United States, 437 U.S. 1 (1978). The collateral estoppel component of double jeopardy provides that “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” Ashe v. Swenson, 397 U.S. 436, 443 (1970). Thus, an acquittal of a theory of offense under facts where an acquittal could only mean the prosecution failed to prove beyond a reasonable doubt an ultimate fact – in that case identity – the accused could not be tried again where the prosecution had the same burden to prove the same ultimate fact. See id. Issue preclusion is similarly defined. See Gentile v. Bauder, 718 So. 2d 781, 783 (Fla. 1998) (“Under Florida law, collateral estoppel, or issue preclusion, applies when ‘the identical issue has been litigated between the same parties or their privies.’ Stogniew v. McQueen, 656 So. 2d 917, 919 (Fla. 1995); Mobil Oil Corp. v. Shevin, 354 So. 2d 372, 374 (Fla.1977).”).

These limitations do not apply when the prior acquittal did not determine an ultimate issue again being litigated in the subsequent trial, and did not involve the same high burden of proof. See Dowling v. United States, 493 U.S. 342 (1990). In Dowling, the government was permitted to introduce evidence of a robbery for which Dowling had been acquitted to establish by a lower standard of proof in a subsequent trial for a different crime, that he may have been the one who committed the earlier similar offense, thereby suggesting he committed the instant offense. The Court reasoned that (1) Dowling had not established that the ultimate fact of identity had been the basis of acquittal of the prior offense, see 493 U.S. at 350; and (2) the government’s burden of proof for admission of the identity evidence was lower in the subsequent trial (a mere probability) than it had been for the prior trial (beyond a reasonable doubt), see 493 U.S. at 349-50. United States

v. Watts, 519 U.S. 148 (1997), applied Dowling to hold that a fact arising from an acquitted count can be found against the accused in a noncapital sentencing because, as in Dowling, a lower burden of proof applied in non-capital sentencing, and it was not clear that the jury acquitted Watts of the relevant ultimate fact when it acquitted of that count. In the present situation, the acquitted ultimate fact that the State reargued was precisely the issue decided in the first appeal, and the highest legal burden, beyond a reasonable doubt, applied in the resentencing phase.

Cases in the capital sentencing arena do not dictate a different result. Bullington v. Missouri, 451 U.S. 430 (1981), specifically set the double jeopardy standard in capital sentencing cases where the State fails to prove its case in a prior trial, holding that a sentencing jury's decision to impose life precludes a death sentence in subsequent proceedings. The Court reaffirmed that rule in Arizona v. Rumsey, 467 U.S. 203 (1984), where it held that a sentencing judge's decision to impose a life sentence, even if based on the judge's erroneous statutory interpretation, constituted an "acquittal" for double jeopardy purposes, thus barring death in subsequent proceedings. But, double jeopardy is not a bar where the prior proceeding did not result in an "acquittal" of the death penalty but merely the sentencer's erroneous rejection of one of two aggravating circumstances and the sentencer imposed death anyway. See Poland v. Arizona, 476 U.S. 147 (1986).¹²

¹² The extension of Dowling in Watts, and the limitation of Bullington to noncapital cases, see Monge v. California, 524 U.S. 721 (1998), now have been cast into doubt by Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), which held that due process in jury proceedings requires ultimate sentencing facts be charged, tried, and proved to a jury beyond a reasonable doubt.

The “clean slate” rule discussed in those cases already has been held to prohibit a resentencing court from finding previously rejected ultimate facts that amounted to an acquittal of a charged theory of prosecution:

the “clean slate” rationale recognized in [North Carolina v.] Pearce [995 U.S. 711 (1969)] is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case.

Bullington, 451 U.S. at 443 (emphases supplied).

The double jeopardy and collateral estoppel analyses discussed in Preston are unavailing. Neither Preston not Poland, on which Preston relied, dealt with a prior acquittal of an ultimate fact in a guilt trial where that same fact was an ultimate fact in a later penalty trial for the same offense. Premeditation to kill is an ultimate fact that must be proved beyond and to the exclusion of every reasonable doubt. It is a necessary and lesser constituent part of the “heightened premeditation” aggravator, see e.g., Kormondy, 703 So. 2d at 463, and is an essential component of the State’s witness elimination theory as applied in this case, which also must be proved beyond a reasonable doubt. Here, this Court’s decision in Kormondy acquitted Kormondy of first-degree premeditated murder because the Court found the evidence insufficient as a matter of law.

A court-mandated prior acquittal of an ultimate fact – an acquittal of an entire theory of prosecution – is much like prior acquittals in Ashe, Bullington, and Rumsey. It is also analogous to a reasonable jury recommendation of life, to which this Court has applied the U.S. Constitution and the Florida Constitution to preclude exposure to the death penalty in a new trial or resentencing. See Keen v. State, 25 Fla. L. Weekly S754 (Fla. 2000); Barrett v. State, 649 So. 2d 219 (Fla. 1994); Wright v. State, 586 So. 2d 1024 (Fla. 1991).

C. Res judicata barred relitigation of premeditation motivated by witness elimination

This Court recently defined res judicata (a.k.a. “res adjudicata”):

Res judicata, translated from te Latin, means “mater adjudged.” See Blacks’s Law Dictionary 1305 (6th ed. 1990). The doctrine of res judicata provides that a final judgment on the merits is conclusive of the rights of the parties and constitutes a bar to a subsequent action or suit involving the same cause of action or subject matter. See ICC Chemical Corp. v. Freeman, 640 So. 2d 92, 93 (Fla. 3d DCA 1994). The idea underlying res judicata is that something has already been decided, the petitioner has had his day in court, and, for purposes of judicial economy, it generally will not be reexamined in any court (except for appeals by right). See Rooney v. State, 699 So. 2d 1027 (Fla. 5th DCA 1997).

Denson v. State, No. SC00-224, slip op. at 4 n.4 (Fla. Nov. 14, 2000). This Court previously elaborated on the doctrine as follows:

The doctrine of res judicata is an obvious rule of expediency and justice. As such it is a part of the legal systems of all civilized nations. The legal precept comprehended within the phrase 'res judicata' may be briefly defined as the doctrine that an existing final judgment or decree rendered upon the merits, and without fraud or collusion, by a court of competent jurisdiction, upon a matter within its jurisdiction, is conclusive of the rights of the parties and of their privies, in all other actions or suits, in the same, or in any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue in the first suit. Res judicata means that the judgment of a court of competent jurisdiction directly rendered upon a particular issue, as plea, a bar, or as evidence, is conclusive, between the same parties, upon the same matter, when directly again brought in question in another controversy between the same litigants or their privies.

The doctrine of res judicata (nemo debet bis vexari si constet curiae quod sit pro una et eadem causa) not only puts an end to strife, but produces certainty as to individual rights and gives a dignity and respect to judicial proceedings that would otherwise be interminable so long as the litigants were possessed of means to prolong their controversies.

United States Gypsum Co. v. Columbia Casualty Co., 124 Fla. 633, 637, 169 So. 532, 534 (Fla. 1936). This Court spelled out the elements as follows:

'When the cause of action is the same, in order to make a matter res judicata there must be concurrence of the following conditions: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made.'

Coral Realty Co. v. Peacock Holding Co., 103 Fla. 916, 920-21, 138 So. 622, 624 (Fla. 1931) (quoting Gray v. Gray, 91 Fla. 103, 106, 107 So. 261, 262 (Fla. 1926); see generally Black's Law Dictionary 1305-06 (6th ed.).

Without question these requisite standards have been met here. The issue of premeditation motivated by witness elimination was fully litigated between the same parties, and decided adversely to the State, in the first case. The issue should never have been revisited in the resentencing.

D. The finding of aggravators not even sought, tried, or instructed is reversible error

This Court should recognize that trial court's reliance on the uncharged, untried, uninstructed aggravating circumstances in its analysis of other findings was pure pretext to avoid this Court's mandate and the rules of law. Alternatively, this Court may choose to view the sentencing order as independently finding three uncharged, untried, uninstructed aggravators, including those barred by the aforementioned principles. If so, the sentencing order is invalid irrespective of all other errors.

In Hamilton v. State, 678 So. 2d 1228, 1232 (Fla. 1996), and Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993), the Court indicated it would neither find, nor permit a trial court to find, aggravators that the State did not timely seek and that the trial court did not instruct. Cf. Craig v. State, 685 So. 2d 1224, 1230 (Fla. 1996) (error for judge to consider uncharged aggravators when judge was bound to jury's life recommendation rendered in absence of those aggravators).

The first and only time that Kormondy knew uncharged, untried, uninstructed aggravators would be used against him was when the trial court sentenced him to die in the resentencing. He had no notice or opportunity to present witnesses. The jury had no occasion to find or weigh those aggravators because the aggravators

had not been charged, tried, or instructed. There was no notice or opportunity for the defense to argue against the uncharged, untried, uninstructed aggravators in closing argument, its sentencing memorandum, or at the pre-sentencing hearing. At a minimum, the CCP aggravator already had been precluded by this Court. Moreover, each of these aggravators were subject to debate, and unlike proof of a prior violent felony against a second victim arising from the same crime, each was contestable, fact-based, and not readily apparent as a matter of law.

Therefore, any finding or reliance on these uncharged, untried, uninstructed, aggravating circumstances defies due process, the right to a fair trial, and the protection against cruel and/or unusual punishment. See U.S. Const. amends. V, VI, VIII, XIV; art. I, §§ 2, 9, 16, 17, Fla. Const.; Apprendi v. New Jersey, 120 S. Ct. 2348 (2000); Hamilton v. State, 678 So. 2d 1228, 1232 (Fla. 1996); Craig v. State, 685 So. 2d 1224, 1230 (Fla. 1996); Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993).

E. The multiplicity of errors that pervaded the resentencing cannot be harmless beyond a reasonable doubt

The problem in this case is of the State's own making. The State apparently locked itself into a theory before the first trial began against the first co-perpetrator. The State became convinced that this was a premeditated murder, the product of a pre-formed conspiracy among the defendants to kill any witnesses to the crimes they would commit upon breaking into the house. But the State has never been able to prove its theory. As a result, the State has had to accept less than it hoped for in both Buffkin's and Hazen's cases. Now it is trying to salvage that unproved theory against Kormondy by taking his life.

The State from the onset pursued a theory that this Court rejected as insufficiently proved. The State presented evidence throughout the proceeding to

support its case, and argued the premeditation/witness elimination theory to the jury in closing. See V5T313, V5T524, V5T326-29. Finally, the trial court's order is rife with its rejection of this Court's earlier decision in Kormondy. The fact that the improper and unsupported findings physically appear in the trial court's rationale supporting a different aggravator and belittling the mitigation makes no difference. The trial court's intent is transparent, and the weight it gave to improper findings is monumental. The errors individually and combined cannot be deemed harmless beyond a reasonable doubt. See Goodwin v. State, 751 So. 2d 537 (Fla. 1999).

Accordingly, this Court should vacate the sentence and remand for a life sentence, or alternatively, remand for a new sentencing heard by a different judge.

III. **WHETHER THE TRIAL COURT REVERSIBLY ERRED WITH RESPECT TO ITS MITIGATION FINDINGS BECAUSE THE TRIAL COURT DEFIED THIS COURT'S MANDATE, COMMITTED LEGAL AND FACTUAL ERRORS, AND CONTRADICTED ITSELF, CAUSING CONFUSION AND UNRELIABILITY**

The trial court's findings as to mitigation defied this Court's mandate, violated numerous principles of Florida law, rejected mitigation on unsupported findings, rejected unrebutted mitigation, and made self-contradictory statements about findings and weight. In sum, the order exceeded this Court's mandate, violated state and federal law principles of law of the case, res judicata, collateral estoppel, double jeopardy, issue preclusion; and violated the rights to a fair trial, due process, and the protection against cruel and/or unusual punishment. See U.S. Const. amends. V, VI, VIII, XIV; art. I, §§ 2, 9, 16, 17, Fla. Const.

A. The findings rejecting mitigation were based on the trial court's rejection of this Court's mandate

As argued in Issue II, the trial court's order repeatedly exceeded this Court's mandate and violated numerous principles of Florida law. Appellant realleges and adopts that argument here. Those same errors permeated the trial court's

mitigation findings, which relied heavily on the repudiated theory that the murder was a premeditated killing to eliminate witnesses.

For instance, the trial court found “the evidence was overwhelming that the killing of Gary McAdams was pre-planned and that the killing was an execution inasmuch as Gary McAdams was shot in the back of the head while kneeling on the kitchen floor and that Kormondy was the executioner.” V2R208-09, V2R197. Accordingly, the court gave “no weight” to the mitigator that the others were equally culpable in the crime, finding “it is abundantly clear that Kormondy shot Gary McAdams in the back of the head, execution style, as he knelt on the kitchen floor while McAdams pled that his wife not be hurt.” See V2R209, V2R198.

The trial court then rejected the mitigator that the killing may have been accidental, finding “The contention the killing of Gary McAdams was accidental is abundantly refuted by the findings referred to above. There is no evidence in the record to the effect that the killing was accidental and the record is clear that the killing was premeditated, that is, that all witnesses were to be eliminated after completion of the crimes.” See V2R209, V2R198.

For the same reasons stated in Issue II, these findings are invalid because they openly reject the very essence of this Court’s prior decision. Even though the trial court has some discretion to reject mitigation, that authority does not extend to violating the letter and spirit of this Court’s mandate and principles of law of the case, res judicata, collateral estoppel, double jeopardy, issue preclusion, a fair trial, due process, and the protection against cruel and/or unusual punishment.

B. The trial court’s weighing is internally inconsistent, unclear, and unreliable

The trial court neither found nor rejected the statutory mitigator that Kormondy was an accomplice in the capital felony committed by co-perpetrator

Curtis Buffkin and that Kormondy's participation was relatively minor. In its oral pronouncement, the trial court contradicted itself by saying it "gives [it] no weight," V2R196 (emphasis supplied), but moments later said it "is not well founded, and to this mitigating factor the Court gives little weight," V2R197 (emphasis supplied). The trial court's written order said this factor "is not well founded," V2R208, and "gives it no weight," V2R207. As to Kormondy's cooperation with law enforcement officers after his capture, the trial court's oral pronouncement gave it "little or no weight, V2R199 (emphasis supplied), while its written findings gave it "no weight," V2R209 (emphasis supplied).

This Court recently said that a trial court has discretion to make the confusing determination of giving a mitigating circumstance "little or no weight." Trease v. State, 25 Fla. L. Weekly S622 (Fla. Aug. 17, 2000). Appellant strongly disagrees and asks this Court to reconsider. A sentencing order that lacks clarity cannot properly be reviewed, and subjects the entire process to the arbitrariness prohibited by due process and the protection against cruel and/or unusual punishment. See U.S. Const. amends. XIII, XIV; art. I, §§ 9, 17, Fla. Const.; see, e.g., Parker v. Dugger, 498 U.S. 308 (1991).

Alternatively, assuming that Trease properly states the law, the trial court went well beyond what even Trease permits by contradicting itself in the order. A mitigator must be found or rejected; it cannot be neither, and it cannot be both. Likewise, weight must be given or denied; it cannot be both. This too causes uncertainly, unreliability, and arbitrariness in violation of minimal constitutional requirements. See U.S. Const. amends. XIII, XIV; art. I, §§ 9, 17, Fla. Const.; see, e.g., Parker v. Dugger, 498 U.S. 308 (1991).

C. The trial court erroneously rejected un rebutted mitigation by failing to recognize valid mitigation and by distorting the mitigation as result of the prosecutor's misleading argument

A trial court's mitigation determination concerning the relative culpability of the co-perpetrators in a first-degree murder case must be rejected when not supported by competent substantial evidence. *See, e.g., Puccio v. State*, 701 So. 2d 858 (Fla. 1997); *Scott v. Dugger*, 604 So. 2d 465 (Fla.1992). For whatever reason, the trial court rejected this Court's first opinion in making its findings on resentencing. The trial court disregarded the irreconcilable conflicts. The trial court ignored and disregarded un rebutted mitigating facts. The trial court relied on precisely the same kind of speculations to make its findings that this Court rejected as unproved in the first appeal in rejecting the State's theory that the murder was a premeditated killing to eliminate a witness. Furthermore, no deference is due to credibility determinations by the trial court because none of the three co-perpetrators personally testified about the circumstances before either the jury or the judge in this resentencing. At bottom, the record in this case does not contain competent substantial evidence to make Kormondy so much more culpable than Buffkin and Hazen as to warrant the death sentence or to warrant the rejection of the co-perpetrator's relative culpability, especially in light of the fact that this Court already rejected the very heart of the trial court's reasoning in the first appeal.

In his sentencing memorandum to the trial court, Kormondy offered in mitigation that he had cooperated with police after his arrest, voluntarily confessing and giving evidence leading to the apprehension of his codefendants. This evidence was wholly un rebutted, and in fact was stated and supported by the State's own witnesses, especially investigator Cotton. *See* V4T339-40, V4T343, V4T397-401.

Kormondy also offered as mitigation that he had exhibited good conduct during the course of the resentencing. This, too, was un rebutted. For example, during pre-sentencing proceedings of July 1, 1998, the following took place:

MR. EDGAR [For the State]: I have one matter if I could interrupt. Why isn't the defendant in shackles? He's a convicted first degree murder rapist, robber, and burglar, and he's not in shackles. Why is that?

THE COURT: Do you want to ask court security?

MR. EDGAR: They don't know.

THE COURT: Counsel, I can't tell you. I didn't observe him when he came in. I was listening to the argument of Counsel. I don't know if he's in shackles or not. I'm taking your word for it that he's not. I can't answer your question. I don't know. I don't control that aspect of the court.

MR. EDGAR: Security, is the defendant in shackles?

SECURITY OFFICER: He is not. I would add at this point, although he's begun this morning to develop an attitude where I'm beginning to feel that it's necessary, at this point, he has not reached the level where I can justify to my supervisor that he have that. But should he continue to continue the way he's going right now, I expect to recommend to my supervisor soon an escalating level of restraint for Mr. Kormondy.

MR. EDGAR: Is that the criteria, basically you observe and you document?

SECURITY OFFICER: Yes, only as necessary.

MR. EDGAR: Thank you.

THE COURT: Does that answer your question, Counsel?

MR. EDGAR: Yes, sir.

MR. DAVIS [FOR THE DEFENSE]: Judge, I would like the record to reflect and make it perfectly clear that I've been observing Mr. Kormondy ever since he entered the courtroom. He has not exhibited any sign that he is in contempt of these proceedings. He has not given any indication, at least to me, that he poses a threat to anyone in this courtroom. Certainly, my observations of him show that his demeanor has been appropriate for these proceedings. I don't want any confusion, if the State is trying to make some type of record for a later proceeding.

MR. EDGAR: Well, that's gratuitous, Your Honor, because Counsel has had his back to the defendant for quite some time.

THE COURT: Anything else?

MR. EDGAR: No, Your Honor.

S1P119-21. Not only was there no need to shackle Kormondy, there was never at any time in these proceedings any question raised, or any challenge brought, regarding Mr. Kormondy's behavior.

Yet in its order as to both factors, the trial court stated its findings as follows:

c. Defense claims that Kormondy cooperated with law enforcement officers resulting in the apprehension of the co-

Defendants. The alleged cooperation came about after Kormondy confided in Will Long that Kormondy had shot Gary McAdams. Then the alleged cooperation takes form of Kormondy telling law enforcement that he had little or no involvement in the crimes, that he did not shoot Gary McAdams, and that he did not rape Cecilia McAdams, all of which are contrary to the credible evidence alluded to above.

d. Defense claims that Kormondy's conduct during the course of the penalty phase should be given some weight. This Court disagrees inasmuch as the good conduct is brought about by the presence of ample security to assure that Kormondy's conduct during the trial would be acceptable.

V2R199, V2R209.

Trease held in part that a trial court has discretion to reject mitigation in its entirety. Appellant strongly disagrees and asks this Court to reconsider its decision. That unprecedented holding violates an accused's state and federal constitutional right to have mitigation weighed against aggravation, no matter how minimal that mitigation may appear to be. See, e.g., Williams v. Taylor, 592 U.S. 362, n.4 (2000) (reversing death sentence because of failure to investigate and weigh mitigation such as character evidence of a "respected CPA in the community, [which] could have been quite important to the jury").

Even if Trease correctly states the law, the trial court's findings cannot be accepted. The trial court twisted the post-arrest cooperation mitigator into something it was not, just so the court could justify rejecting it. Instead of correctly considering whether Kormondy had cooperated with officers after his arrest, the trial court turned the offer of mitigation into whether Kormondy had consistently cooperated with officers from the moment the crime occurred, leading up to and including his arrest and post-arrest interrogation on July 19, 1993, eight days after the crime occurred. See also Issue IV, supra. The trial court repeatedly was invited by the State to pervert the mitigation in this fashion, and the trial court did so despite defense counsel's numerous statements to the contrary. See V4T227,

V4T334-35, V4T376-79, V5T488-89, V4T378. At the very least, that was an abuse of discretion.

Moreover, the State's successful effort to mislead the trial court about the scope of the mitigation offer was unethical, prosecutorial misconduct. As this Court has held,

The actions of the prosecutor also violated other established rules of conduct which recognize that our adversary system of justice has its limitations in the prosecution of criminal cases, and especially capital cases. The resolution of such cases is not a game where the prosecution can declare, "It's for me to know and for you to find out." Long ago, the United States Supreme Court made clear the standard we should apply in situations like this:

The [government] Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful [result] as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935). The Oath of Admission to the Florida Bar states, in part, that an attorney "will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law." Rules of the Supreme Court, 145 Fla. 763, 797 (Fla. 1941).

Craig v. State, 685 So. 2d 1224, 1229 (Fla. 1996).

The trial court's rejection of the good behavior mitigator is further flawed because the presence of ample security does not rebut the mitigating fact presented and supported by the record, where not even security officers thought Kormondy needed to be restrained, and no complaint was ever made about his behavior.

Moreover, this Court must presume that ample security exists in every courtroom for every capital proceeding, so the court's reasoning necessarily would apply to every case irrespective of the facts. Again that is an abuse – if not an abdication – of discretion.

For the reasons stated above, this Court should vacate the sentence and remand for a life sentence or a new sentencing order to be issued in compliance with law.

IV. **WHETHER THE TRIAL COURT ERRED BY ALLOWING THE STATE TO PRESENT IRRELEVANT, CUMULATIVE, UNDULY PREJUDICIAL, COLLATERAL CRIME, NONSTATUTORY AGGRAVATION EVIDENCE ABOUT KORMONDY'S CAPTURE BY A K-9 UNIT MORE THAN A WEEK AFTER THE CRIME TOOK PLACE**

The State presented four witnesses to give elaborate, detailed testimony in its case-in-chief about Kormondy's capture by a K-9 unit on July 19, 1993, more than a week after the crime. Kormondy repeatedly objected, arguing that since the guilt issue already had been decided, the evidence was irrelevant to any aggravator, cumulative, and unduly prejudicial. The trial court overruled the objections, permitting the jury to hear this cumulative, unduly prejudicial, inadmissible evidence. The court's rulings harmfully infected the jury's consideration and necessarily undermined the reliability of the entire proceeding, thereby violating state law and Kormondy's constitutional rights to due process, a fair trial, and to the protection against cruel and/or unusual punishment. See U.S. Const. amends. VI, XIII, XIV; art. I, §§ 6, 9, 17, Fla. Const.

A. Four witnesses testified over objection as to the same irrelevant and unduly prejudicial fact of Kormondy's arrest

1. Investigator Cotton

In the direct examination of Investigator Cotton, the State asked Cotton to describe the circumstances of Kormondy's arrest, which occurred more than a

week after the crime. Kormondy objected. See V4T334. The defense argued that the State is “doing nothing more than retrying the guilt phase of this trial. There’s nothing that Mr. Cotton’s testifying to is relevant to the aggravators in this case.” See V4T334. The State argued that the evidence is relevant to the mitigator mentioned by the defense attorney regarding cooperation of law enforcement because this evidence would show that he was not entirely cooperating. The court overruled the defense’s objection. See V4T334-36. Cotton then testified about the assistance Long gave in apprehending Kormondy.

Cotton said he asked Long to meet Kormondy under surveillance. The two met at a cabinet shop. Cotton was with a narcotics officer because the narcotics officer has expertise in electronic surveillance. See V4T336-37. Long said the police had been by to see him and after a brief conversation, “Mr. Kormondy said, I’m out of here.” See V4T337. Officers followed Kormondy and in an attempt to take him into custody but Kormondy fled, losing officers in the chase. A K-9 unit was called out and the K-9 unit located Kormondy who was then taken into custody. Kormondy resisted “[b]y running,” Cotton said. See V4T338.

2. Deputy Michael J. Steele

Deputy Michael J. Steele was called to testify for the State at V4T361. He was the one who had assisted Cotton in surveilling Kormondy on July 19, 1993. See V4T362. Kormondy objected to Steele’s testimony, saying it was not relevant to any aggravator. See V4T363. The State said it was evidence of flight concerning the mitigator “the defendant has introduced during all these proceedings of cooperation.” The State also conceded that it was going to be the same testimony that Cotton gave, prompting Kormondy to further object as cumulative. See V4T363-64. The trial court overruled the objection. See V4T364.

Steele testified in great detail about the car chase that took place, describing each street and each turn the vehicles took. See V4T364-65. Steele described damage done to a vehicle in the chase, and the State introduced photographic evidence to document the damage. See V4T365-66. Steele said when Kormondy fled on foot, a foot chase ensued. Eventually a K-9 unit was called out, led by Susie Rogers. See V4T366-68. After Kormondy was apprehended, officers did not find a firearm in his vehicle. See V4T369.

3. Deputy Terry L. Kilgore

Deputy Terry L. Kilgore was called to testify for the State at V4T369. Kormondy objected to Kilgore's testimony on the same basis as Steele's testimony and Cotton's testimony. See V4T369-71. The State said Kilgore would testify to one thing that Cotton and Steele did not testify to, that Kilgore is the one who yelled for Kormondy to halt. See V4T370-72. The trial court overruled the objection and permitted Kilgore to testify. See V4T372.

Kilgore testified that during the chase, he jumped out of a vehicle. Kormondy was jumping over a fence then Kilgore yelled out. "I said, Stop, sheriff's office. And when he jumped the fence, I jumped after him and started to grab him. And some dogs came around and tried to bite me, and I kind of stopped and kicked at the dogs. And when I turned around, Mr. Kormondy was gone." See V4T373. The dogs who bit him were not police dogs. See V4T374. Kilgore was about ten or twelve feet away from Kormondy when he yelled out to him to stop. See V4T374-75.

4. K-9 handler Susan M. Rogers-Scott

K-9 handler Susan M. Rogers-Scott was called to testify by the State at V4T376. Kormondy objected for many of the same reasons as with Steele, Kilgore, and Cotton. See V4T377. The objection also stated that this was

evidence of flight, a non-charged offense, and that it was not relevant because it was before the arrest, whereas the mitigator sought by Kormondy was for his cooperation after his arrest. See V4T376-79. The trial court overruled the objection. See V4T378.

Rogers-Scott testified that she was a K-9 handler called out to assist in locating Kormondy on July 19, 1993. See V4T379. She led a dog on a yard-to-yard search, finally picking up a scent around the fourth or fifth yard. See V4T379-80. Located in the area was a shed and two small mobile home camper-type shells. The dog worked its way into the shed and located Kormondy in the corner. See V4T380. Rogers-Scott advised Kormondy to come out. She called back the dog. See V4T380. Kormondy emerged. Officers handcuffed him and transported him without further incident, she said. See V4T380-81.

B. The evidence was cumulative, unduly prejudicial, and irrelevant to describe the crime or support any statutory aggravator at issue

The only issue in the State's case in chief in this resentencing proceeding was whether sufficient aggravating circumstances existed to make Kormondy death-eligible. Guilt already had been settled by this Court in the first appeal. Nonetheless, the State, over repeated objection, was permitted to inundate the jury with facts that shed no light whatsoever on either the crime that took place or the statutory aggravators available to the State. The trial court's rulings defied clearly settled law. See, e.g., Bowles v. State, 716 So. 2d 769 (Fla. 1998) (evidence that victim was a homosexual and that defendant had evinced a dislike or hatred of homosexuals was irrelevant and unduly prejudicial in sentencing capital proceeding); Bolin v. State, 736 So. 2d 1160, 1166-67 (Fla. 1999) (reversing where evidence of newspaper reports was not relevant to a material fact in issue because those news reports had not been discussed by defense); Kormondy v. State, 703

So. 2d 454, 463 (Fla. 1996) (reversing where evidence of later-formed threat was irrelevant, inadmissible, and harmful); Hitchcock v. State, 673 So. 2d 859 (Fla. 1996) (evidence regarding alleged pedophilia was irrelevant and overly prejudicial in resentencing); Castro v. State, 547 So. 2d 111 (Fla. 1989) (introduction of evidence that Castro had tied up different person and threatened to stab him several days prior to the victim was irrelevant and unduly prejudicial for penalty purposes); Maggard v. State, 399 So. 2d 973 (Fla.1981) (reversing where evidence of nonstatutory aggravation was irrelevant and inadmissible).

By having four witnesses testify in great detail about an irrelevant single event, the State was permitted to make Kormondy's inadmissible arrest episode an unduly prejudicial feature of the penalty phase. Making any act other than the murder a feature of the penalty phase – especially when it involves uncharged collateral criminal conduct – is reversible error. See Hitchcock v. State, 673 So. 2d 859 (Fla. 1996) (reversing where introduction of uncharged act not part of murder was made feature of penalty phase).

C. This was nothing more than impermissible nonstatutory aggravation

In some respects, what occurred here is another example of the State's overreaching and overzealous prosecution of this case, much like the reversible error in Kormondy's first appeal. This Court held that the trial court reversibly erred by permitting the State to adduce irrelevant and inadmissible evidence of a statement Kormondy made, long after his capture, describing an intent to commit a future violent act. See Kormondy v. State, 703 So. 2d 454, 463 (Fla. 1996).

The State was permitted to do much the same thing here by presenting irrelevant evidence about Kormondy's attempt to elude capture eight days after the crime, in a proceeding where guilt was not in issue. The State effectively gave the cosentencers an abundance of evidence of the uncharged, unconvicted offenses of

resisting arrest and escape, as well as evidence of potential future dangerousness, which is precisely what this Court said was error in the first trial. See also Gerald v. State, 601 So. 2d 1157, 1163 (Fla. 1992) (permitting the prosecution to question Dana Wilson regarding Gerald's prior nonviolent felonies was reversible nonstatutory aggravation); Derrick v. State, 581 So. 2d 31 (Fla. 1991) (reversing where testimony that accused would kill again was inadmissible nonstatutory aggravation); Colina v. State, 570 So. 2d 929 (Fla. 1990) (lack of remorse was improper to consider); Garron v. State, 528 So. 2d 353 (Fla. 1988) (permitting prosecutor to raise during cross-examination of defendant's sister that defendant had allegedly killed someone, which was never charged or convicted, was reversible penalty phase error); Robinson v. State, 487 So. 2d 1040, 1042 (Fla.1986) (finding prejudicial the State's use of uncharged crimes to undermine the credibility of the defendant's character witness); Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983) (lack of remorse was improper to consider); Maggard v. State, 399 So. 2d 973 (Fla.1981) (reversing where evidence of nonstatutory aggravation was irrelevant and inadmissible).

D. The State had nothing to rebut in its case-in-chief

The State offered as justification for admitting the evidence that it was rebutting the defense's theory of cooperation with law enforcement. However, as demonstrated in Issue III C, supra, that is a misleading distortion of the mitigator that Kormondy was considering arguing to the jury. At no time had Kormondy adduced testimony that he cooperated with officers before his arrest. At no time had Kormondy suggested to jurors that he would make such a mitigation claim. Instead, time and again Kormondy advised the State and the trial court that the mitigator went to cooperation after his arrest, leading directly to the capture of Buffkin and Hazen. See V4T227, V4T334-35, V4T376-79, V5T488-89, V4T378.

If the State could, under any circumstances, argue a valid right to anticipatory rebuttal, these circumstances certainly did not warrant it.

This again is reminiscent of the first appeal of this cause where the State argued alternative hypothesis of anticipatory rebuttal for its introduction of a later formed threat. This Court rejected that claim. “In the alternative, the State argues that the testimony is relevant to rebut the mitigation evidence indicating that Kormondy was ‘impulsive’ and could not ‘think things out.’ This assertion is meritless in our view because, in the way the Statement was presented by the state, it became another nonstatutory aggravating factor.” Kormondy v. State, 703 So. 2d 454, 463 (Fla. 1996). The same is true here.

Other case law strongly supports Kormondy. In reversing a death sentence in Bolin v. State, 736 So. 2d 1160, 1166-67 (Fla. 1999), this Court rejected the State’s attempt to legitimize introduction of inadmissible, irrelevant evidence as an offer of anticipatory rebuttal of a potential defense closing argument. The Court noted that the defense had not yet made that argument, and in fact never made the argument for which rebuttal was offered, and the evidence was not relevant to a material fact in issue. That is precisely the same as occurred here.

In Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986), the Court rejected the State’s anticipatory rebuttal argument under similar circumstances, holding the error to be great enough to warrant reversal in post-conviction proceedings:

[P]etitioner argues that his appellate counsel neglected to argue that the trial court had erred in allowing the state to present evidence rebutting the existence of a statutory mitigating circumstance before the defense had presented any evidence of such factor and in the face of defense counsel's stated intention not to rely on or present evidence on the statutory mitigating factor in question. We find that there was ineffectiveness of counsel on this one point regarding sentencing....

In arguing that the trial court's action was clearly erroneous and prejudicial so as to require appellate counsel to raise it on appeal, petitioner relies on Maggard v. State, 399 So. 2d 973 (Fla.1981), cert.

denied, 454 U.S. 1059, 102 S. Ct. 610, 70 L. Ed.2d 598 (1982). In Maggard, this Court held that the trial court had erred in allowing the state to present evidence of past criminal activity (not falling within the definitions of any statutory aggravating circumstances) to rebut the existence of the mitigating factor of lack of prior criminal record, where the defense had expressly waived any reliance on lack of prior record and had affirmatively represented to the court that it would not attempt to show such mitigating factor. The error was found to be of such magnitude that the sentence of death was vacated with directions to hold a new sentencing hearing with a new jury. The Court said:

Mitigating factors are for the defendant's benefit, and the State should not be allowed to present damaging evidence against the defendant to rebut a mitigating circumstance that the defendant expressly concedes does not exist. Furthermore, the jury should not be advised of the defendant's waiver. In instructing the jury, the court should exclude the waived mitigating circumstance from the list of mitigating circumstances read to the jury, and neither the state nor the defendant should be allowed to argue to the jury the existence or the nonexistence of such mitigating circumstance.

399 So. 2d at 978.

On appeal, the present case was in a posture very similar to Maggard. **At trial, the court had permitted the state to present defendant's juvenile arrest record to the jury in its sentencing phase case-in-chief, including descriptions of the conduct leading to the arrests.** Defense counsel had moved to exclude such evidence, representing to the court that the defendant would not seek to rely on the lack of a criminal record as a mitigating factor. Thus the question of the propriety of the state's anticipatory rebuttal was raised before the trial court and was available for argument on appeal. While appellate counsel challenged the death sentence and the sentencing procedure on numerous grounds, he did not argue that the trial court had erred in allowing anticipatory rebuttal.

Petitioner has identified a specific act or omission of appellate counsel as having been a serious and substantial deficiency. The extant legal principle announced in Maggard, which was decided before the time for submitting briefs and argument in petitioner's case, provided a clear basis for a compelling appellate argument. **The erroneous permitting of anticipatory rebuttal by the state directed at a statutory mitigating factor reliance upon which had been waived by the defense in effect allowed the state to present improper nonstatutory circumstances in aggravation. It undermined the defendant's main theory and strategy of defense at sentencing: i.e., the attempt to show that the defendant was suffering extreme mental and emotional disturbance and had impaired capacity. The error enabled the state to undercut that defense by depicting the**

defendant as an experienced criminal in a way not sanctioned by our capital felony sentencing law.

This Court's review of the propriety of death sentences and the proceedings in which they are imposed “is no substitute for the careful, partisan scrutiny of a zealous advocate.” Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). We find that there was a substantial omission by appellate counsel and resulting prejudice to the appellate process sufficient to undermine confidence in the outcome.

Fitzpatrick, 490 So. 2d at 939-40 (emphases supplied).

As in Fitzpatrick, the State, with the aid of the trial court, was permitted both to undermine the defense’s mitigation theory even before the theory had been presented and argued, and to present a substantial amount of nonstatutory aggravation evidence to irrevocably taint the cosentencers.

E. The errors cannot be harmless

The trial court’s decisions permitted the State to taint the jury with irrelevant, cumulative, unduly prejudicial, collateral crime, nonstatutory aggravation evidence. The cumulative nature of the evidence caused the jury to view the erroneously introduced evidence as a feature of the penalty phase. The errors must have contributed to the jury’s deliberations, especially given that there were only two aggravators properly before the jury to consider, and in light of the heavy mitigation of the lesser punishment imposed on the equally or more culpable co-perpetrators. See Goodwin v. State, 751 So. 2d 537 (Fla. 1999). The sentence should be vacated and the cause remanded for a new jury sentencing.

V. WHETHER KORMONDY WAS DENIED HIS RIGHT TO CROSS-EXAMINE AND CONFRONT STATE WITNESS CECILIA MCADAMS CONCERNING HER ABILITY TO IDENTIFY AND DISTINGUISH THE PERPETRATORS

On cross-examination by defense counsel, Cecilia McAdams was testifying about the identify of the perpetrators when Kormondy’s counsel asked:

Q. Okay. The -- with regards to the individual who last took you back to the bedroom, you indicated a few minutes ago, when you were testifying, that you thought the voice was the same as the first person. (Buffkin) Isn't it really true that you don't really know which one it was?

A. No, sir. I feel very confident that I do know which one it was.

Q. Do you remember back in March the 29th of 1994 when these cases first got started?

A. Yes, sir.

Q. And Mr. Edgar and several other attorneys were present when they took your deposition?

A. Yes, sir.

Q. Do you recall if -- at that time, if you were asked with regard to the identity of the person who took you back?

MR. EDGAR: Your Honor, I object.

THE COURT: I sustain. Do not answer the question.

V4T326-27.

All capital defendants have the statutory, procedural, and constitutional right to cross-examine and confront their accusers with great latitude, especially about crucial matters such as an eyewitness' ability to identify and distinguish the perpetrators. See U.S. Const. amends. VI, XIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.; Olden v. Kentucky, 488 U.S. 227 (1988) United States v. Owens, 484 U.S. 554 (1988); Delaware v. Van Arsdall, 475 U.S. 673 (1986); Davis v. Alaska, 415 U.S. 308 (1974); California v. Green, 399 U.S. 149 (1970). Freber v. State, 366 So. 2d 426 (Fla. 1978); § 90.608, Fla. Stat. (1993). Denial of this right also denies due process of law. See, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973).

That right was denied in this case when the trial court abruptly cut off defense counsel's cross-examination. Kormondy had the right to challenge Cecilia McAdams' identification as to which of the perpetrators had been the last to take her to the back bedroom. The issue concerns the relative culpability of the three men, a crucial factor that lies at the heart of these proceedings. The State cannot demonstrate harmless error under these circumstances. See Goodwin v. State, 751

So. 2d 537 (Fla. 1999). This Court should vacate the sentence and reverse for a new jury resentencing proceeding.

VI. WHETHER THE INTRODUCTION OF COMPOUND VICTIM IMPACT EVIDENCE, MUCH OF WHICH WAS INADMISSIBLE, WAS FUNDAMENTAL ERROR THAT UNDERMINED THE RELIABILITY OF THE JURY'S RECOMMENDATION

A. **Three witnesses gave an accumulation of improper anecdotal victim impact evidence that included stories dating back to the victim's childhood, the victim's family's history of illness, and other testimony prohibited by statutory and constitutional law**

1. Cecilia McAdams

Following her description of the crime, Cecilia McAdams launched into a lengthy account of purported victim impact testimony. Part of her testimony described an incident about food that her husband once took out of the freezer:

One afternoon, Gary had come home from work and he was telling me about this elderly lady that had come to him for a loan, and he was not able to do it. And he felt really bad for her, so he was going to the freezer and he was getting food out to take to her the next day because he was worried that she didn't have anything to eat.

V4T323.

She was asked to tell a story about a car repossession:

In the early years of Gary's career at the bank, he was a collector for the loan department, and part of his job was to collect slow payments and also any repossessions that might need to be done. In this particular instance, he had a customer that had not paid his car payment in several months so he went to the golf course where the gentleman was playing golf with some friends and repossessed his car. Many years later, Gary was called and asked to speak on this gentleman's behalf because it was his one-year anniversary as a minister in his church. And at two o'clock on a Sunday afternoon, Gary got – Gary went inside, put on his coat and tie and his suit, and he went and spoke in front of his congregation.

V4T324-25.

Cecilia McAdams said her husband was well-liked at work, he was involved in sports in the athletic department, he was involved in clubs and charitable events,

and his own family said “he was their strength. He was all of our strength.” See V4T325. He had “very much” of an impact on the community and work and his own family. See V4T325.

Q. [BY STATE] Mrs. McAdams, I’d like to ask you about your husband and the impact that this has had upon your life and that of the community and the people that you knew he worked with. Your husband was a banker?

A. Yes, sir. He was.

Q. And you worked at the bank, too?

A. Yes, sir.

Q. I know that now you have no husband. You are not married; is that right?

A. That’s correct.

Q. And I know that this must be a great loss to you.

A. Yes, sir.

Q. Tell us about the loss of the people that y’all knew and worked with. How many people were at Gary McAdams’ – signed the book at his funeral?

A. A thousand people.

Q. A thousand people. Would you say that everybody that went there got a chance to sign the book?

A. No, sir.

Q. He was well-liked, wasn’t he?

A. Very much so, yes, sir.

Q. Very much missed?

A. Yes.

Q. Would you describe him as a leader or a follower?

A. He’s definitely a leader.

Q. People looked up to him and seek his advice out?

A. Yes, sir.

V4T321-23.

2. Gloria McAdams

Gloria McAdams, the mother of Gary McAdams, was called to testify mostly about Gary's childhood. She said Gary was born July 25, 1954. She has two other children, Terri, a little sister, and Tommy, her baby. Her husband passed away in 1994 with lung cancer. See V5T409.

She said Gary was not a typical child:

From the time that Gary was born and got up to crawling, he was different. He was – we could tell that he was different in just the way that he did things as he was growing up. Even into grammar school, he was different. He was a special-type child. Very special to us, of course.

....

Gary was very open. Gary is a very caring person, even from childhood on up into his adult years. He was very caring for other people. He was just the strength of our family, really. And even before he graduated high school, he was just there for everybody.

....

... He got along well with his brother and sister. As a matter of fact, he took Terri out there on her first date...

....

Tommy is an adopted child. We got Tommy when he was a baby.

....

He was given to us from another family, and Gary could have been jealous but he wasn't. Terri could have been jealous, but she wasn't. They just took Tommy, you know. We all took him, and, of course, he's our child.

V5T410-11.

She said Tommy had a very serious accident when a car hit him and his leg was amputated below the knee. Gary helped him through that. See V5T411.

Gary went to college, the only child in her family or in her husband's family who got a degree. He was working on his Master's. See V5T411. Gary was never the kind of child to do anything wrong, or he would let his mother and dad find out. He never gave them a minute's problem. See V5T411.

Gloria McAdams had breast cancer and moved to Alabama before Gary died. During her treatments, Gary would call two or three times a day. See V5T412.

She and her husband asked Gary's advice in everything, business, banking, and they trusted him very much. See V5T411.

When asked what the impact of his loss is on the family, she said

Very much so. Very much so. Our family won't ever be a family again because we don't have him. Every time I walk in my kitchen, I see his first garden. Because he was a photographer, he took pictures, and he didn't take just any kind of a picture. But this was his first garden, a tomato and a pepper, and he took those for his mother because he knew – he loved me and I had taught him to garden, and he knew that I would hang those where I could see them. That's what I see every morning when I walk into the kitchen to get my first coffee, is his garden.

V5T412-13.

3. Kay P. Pavlock

Kay P. Pavlock had known Gary McAdams since 1965 and is a former neighbor. See V5T439-40.

My first impression of Gary was that he was a very caring person.... I had a two-year-old daughter, or a three-year-old daughter at the time, and she was smaller than other children in the neighborhood, and they would all be running around playing. And Gary recognized that she was little and was being left out of the play so he put her on his shoulders and made her the queen. So whenever they were all playing together, my daughter was queen. And he nicknamed her Lucy, which she keeps to this day.

V5T440-41.

She described Gary as a leader, a unique person, an outstanding young man all of his life. See V5T441. His death “was horrendous for” Mrs. McAdams. “It was devastation. Just words don't – can't express.” See V5T441.

B. Much of the victim impact testimony was inadmissible

The admission of victim impact testimony is subject to various state and federal statutory and constitutional limitations. See U.S. Const. amends. VI, VIII, XIV; art. I §§ 6, 9, 16, 17, Fla. Const.; § 921.141(7), Fla. Stat. (1993); see, e.g., Sexton v. State, 25 Fla. L. Weekly S818, S821 (Fla. Oct. 12, 2000) (“Although the United States Supreme Court and this Court have ruled that victim impact testimony is admissible, such testimony has specific limits”; thus holding that testimony of victim’s aunt relating to the death of a person not the victim in this case was erroneously admitted because aunt did not limit her testimony to murder victim Joel Good’s “uniqueness as an individual human being and the resultant loss to the community's members”); Windom v. State, 656 So. 2d 432, 438 (Fla.1995) (holding that under section 921.141(7) testimony “about the effect on children in the community other than the victim's two sons was erroneously admitted because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death”).

Much of this anecdotal evidence was inadmissible under these standards. For example: Cecilia McAdams’ story about Gary one time giving a person food from his freezer; her story about Gary speaking to a congregation about a man whose car he had repossessed; whether she had remarried; the discussion by Gloria McAdams of the loss of her husband from cancer long before the homicide, and about her own bout with breast cancer; the way Gary McAdams behaved as a child decades earlier; his helping his sister to go on a date; his childhood relationship with an adopted brother; his brother’s car accident; and stories about his garden; Kay Pavlock’s description of Gary as a child; and the way Gary acted toward Pavlock’s child.

C. The accumulation of victim impact became a feature of the penalty phase, fundamentally and inappropriately skewing the jury’s recommendation

Appellant acknowledges that the victim impact evidence was introduced by the State without objection, and therefore normally would be procedurally barred from attack on appeal. However, this Court has acknowledged that such claims are cognizable on appeal if fundamental error is alleged. See Sexton v. State, 25 Fla. L. Weekly S818, S821 (Oct. 12, 2000) (“The failure to contemporaneously object to a comment on the basis that it constitutes improper victim testimony renders the claim procedurally barred absent fundamental error”).

The present extraordinary circumstances do rise to the level of fundamental error. This jury heard three persons – including one non-family member – give prolonged, detailed anecdotal testimony that created a whole, collateral melodrama of its own in this resentencing proceeding. Under analogous circumstances, this Court has said it is error to put on so much prejudicial collateral evidence that it is likely to confuse the jury or place undue focus on circumstances other than those of the homicide and the offender, undermining the reliability of the recommendation. See Hitchcock v. State, 673 So. 2d 859 (Fla. 1996) (reversing where evidence of collateral victim describing Hitchcock’s pedophilia became a feature in penalty phase); Finney v. State, 660 So. 2d 674 (Fla. 1995) (cautioning that undue prejudice may result when substantial amount of testimony of victims in penalty trials is introduced).

This case really highlights the problem that could be created by overwhelming victim impact evidence. Courts and jurors have no business deciding the relative value of one’s life, and the relative impact of one’s death, especially when determining an individual’s punishment. Appellant asks this Court to reconsider its decision in Windom as to the constitutionality of the victim impact statute. Appellant further asks this Court to find the application of that statute in

this case violated Kormondy's constitutional rights to a fair sentencing, due process, and his protection against arbitrary, cruel and/or unusual punishment.

VII. IMPOSITION OF THE DEATH SENTENCE IN THE ABSENCE OF NOTICE OF THE AGGRAVATORS SOUGHT OR FOUND, OR OF JURY FINDINGS OF THE AGGRAVATORS AND DEATH ELIGIBILITY, OFFENDS DUE PROCESS AND THE PROTECTION AGAINST CRUEL AND/OR UNUSUAL PUNISHMENT UNDER APPRENDI

Neither the indictment nor any other pleading filed before the resentencing in this case provided Kormondy or the jury notice as to which aggravators the State was seeking to prove, despite a request that such notice be provided. See V1R98. Two aggravators were argued by counsel. The trial court instructed the jury on those two aggravators. The jury reported no specific findings as to the aggravators. The jury was not instructed that it must find by some burden, no less beyond a reasonable doubt, that the aggravators were of sufficient weight to impose the death penalty; and the jury reported no such finding. The trial court found five aggravators, including three that had not been argued or instructed. The trial court did not state a finding by any burden, no less beyond a reasonable doubt, that the aggravators were of sufficient weight to warrant the death sentence. These factors individually and in combination render imposition of the death sentence in this case a fundamental violation of Kormondy's rights to due process and to his protection against cruel and/or unusual punishment. See U.S. Const. amends. XIII, XIV; art. I, §§ 9, 17, Fla. Const.; Apprendi v. New Jersey, 120 S. Ct. 2348 (2000); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984).

The United States Supreme Court recently held that due process requires that a jury be apprised of all statutory elements on which the State relies to increase an individual's punishment, and the jury must find each of those elements proved beyond a reasonable doubt:

The question whether Appendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.

Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed.2d 311 (1999), construing a federal statute. We there noted that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” Id., at 243, n.6, 119 S. Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Appendi, 120 S. Ct. at 2355. Appendi should compel this Court to reevaluate the role of the jury in Florida capital sentencing, and to apply Appendi’s due process requirements to capital sentencing.

Under Florida law, statutory aggravating circumstances actually define which crimes are potential death penalty cases. See, e.g., State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). Each aggravating circumstance is comprised of separate and distinct elements under Florida law, and each element must be found by the cosentencers to have been proved beyond a reasonable doubt. See e.g., Jackson (Andrea) v. State, 648 So. 2d 85 (Fla. 1994). Likewise, Florida law establishes that a conviction of first-degree murder is not the determinant to make a person eligible for the death penalty. Instead, sentencers must find at least one aggravating circumstance proved beyond a reasonable doubt before determining that a defendant is eligible for the death penalty. The sentencers then must determine whether the aggravators are of sufficient weight to warrant a death sentence. If so, the sentencers then must weigh the aggravating circumstances against all mitigation reasonably believed to have been found to reach the ultimate issue of whether life imprisonment or death should be imposed.

Essential facts defined by statute are elements of an offense that must be individually instructed to the finders of fact, and must be proved to them beyond a reasonable doubt. See, e.g., In re Winship, 397 U.S. 358 (1970); State v.

Harbaugh, 754 So. 2d 691 (Fla. 2000). Apprendi applied the same principle to punishment determinations that involve juries as factfinders, holding that all statutory elements on which the State relies to punish an individual must be presented to those juries, and the juries must find each of those elements proved beyond a reasonable doubt to satisfy due process, precisely the same as with elements of an offense. There is no principled reason why similar requirements should not apply to each aspect of death sentence determinations in Florida, in which juries play a pivotal role in finding facts, applying the law to those facts, and making ultimate recommendations that require great weight.

The New Jersey statutory mechanism found unconstitutional in Apprendi is remarkably similar to the capital sentencing scheme in Florida. Apprendi concerned the interplay of four statutes. (1) The first statute, N.J. Stat. Ann. § 2C:39-4(a) (West 1995), defined the elements of the underlying offense of possession of a firearm for an unlawful purpose. (2) The second statute, N.J. Stat. Ann. § 2C:43-6(a)(2) (West 1995), established that the offense is punishable by imprisonment for “between five years and 10 years.” (3) The third statute, N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000), defined additional elements required for punishment of possession of a firearm for an unlawful purpose when committed as a “hate crime.” (4) The fourth statute, N.J. Stat. Ann. § 2C:43-7(a)(3) (West Supp. 2000), extended the authorized additional punishment for offenses to which the hate crime statute applied. See Apprendi, 120 S. Ct. at 2351. Each statute is independent, yet the statutes must operate together to authorize Apprendi’s punishment. The Court held that under the due process clause, all essential findings separately required by both the underlying offense statute and the statute defining the elements of punishment had to be charged, tried, and proved to the jury beyond a reasonable doubt.

Florida's capital sentencing scheme also requires the interplay of four statutes. (1) Section 782.04(1)(a), Fla. Stat. (1993), defines the capital crime of

first-degree murder, and the only elements it contains are those necessary to establish premeditated or felony first-degree murder. (2) Section 782.04(1)(b), Fla. Stat. (1993), provides that when the elements of section 782.04(1)(a) have been proved, the requirements of section 921.141, Fla. Stat. (1993), apply. (3) Section 775.082(1) establishes the penalty for first-degree murder as life imprisonment, or death if the elements of section 921.141 are satisfied. (4) Section 921.141(5) sets forth the essential facts that cosentencers must consider, find proved beyond a reasonable doubt, and weigh in reaching a recommended verdict and sentence. Each statute is independent, yet the statutes must operate together to authorize Kormondy's punishment.

In each sentencing scheme, separate provisions of law define elements of proof required for guilt, and the elements of proof required to impose the maximum authorized punishment. Each scheme requires the interplay of distinct provisions of law to reach the ultimate punishment determination. There is no material distinction between the operation of the two statutory schemes, except, of course, that the New Jersey scheme in Apprendi was not as gravely punitive as the death penalty statutory scheme at issue here.

The rationale employed by the Court in Apprendi fits here as well. Proof of each element of an aggravating circumstance is often "hotly disputed," just as the bias issue for sentencing in Apprendi. See Apprendi, 120 S. Ct. at 2354-55. The three aggravators found by the judge despite the fact that they were not sought – CCP, witness elimination, and HAC – each involve a perpetrator's mental state, facts peculiarly within the exclusive province of the jury when a jury is a fact-finder and cosentencer, as here. See Apprendi, 120 S. Ct. at 2364 (noting that a defendant's intent in committing a crime, relied upon in sentencing, is as close as one might hope to come to a core criminal offense "element."). All of the aggravators in this case, including those instructed and not instructed, directly relate to the offense itself, as opposed to proof of a conviction of an unrelated crime

committed at a different time. See Apprendi, 120 S. Ct. 2366.¹³ The different punishments available due to the finding of essential sentencing facts is another consideration the Court found compelling to warrant the strict application of due process to punishment determinations. See Apprendi, 120 S. Ct. at 2354.

An additional violation of Apprendi is the fact that the jury's verdict in support of death was only by a vote of eight to four. In Johnson v. Louisiana, 406 U.S. 356 (1972), the Court upheld a system whereby verdicts in serious felonies must be by at least nine votes out of twelve. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court upheld verdicts of 10-2 and 11-1 in non-capital felonies. In Burch v. Louisiana, 441 U.S. 130 (1979), the Court held that a six person jury must be unanimous. The Court took pains to note that Apodaca was a non-capital case. See Burch, 441 U.S. at 136. The U.S. Supreme Court has not specifically reached the issue of whether a unanimous verdict is required in a capital case. However, it has never upheld a verdict of less than nine to three, even in a non-capital case. Florida law requires unanimity in a capital case. See, e.g., Williams v. State, 438 So. 2d 781 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956). Given that aggravating circumstances are essential elements that must be instructed and proved beyond a reasonable doubt, and that a jury must find beyond a reasonable doubt that death is warranted before ever reaching the weight of mitigation, under Apprendi a death verdict of eight to four violates due process and the protection against cruel and/or unusual punishment guaranteed by the United States and Florida Constitutions.

The indictment in this case is also defective pursuant to Apprendi. The indictment contains no mention of any aggravating factors or of any allegation that

¹³ Even to the extent that a prior conviction might be excluded under Almendarez-Torres v. United States, 523 U.S. 224 (1998), the Apprendi opinion contains a strong suggestion that Almendarez-Torres might have been wrongly decided and may be overruled. See Apprendi, 120 S. Ct. at 2378-80 (Thomas, J., concurring).

the aggravating factors are sufficiently weighty to call for the death penalty. State v. Harbaugh, 754 So. 2d 691 (Fla. 2000), is instructive. The Court found that when potentially harmful punishment-related facts are alleged in a charging document, the defendant's due process rights are protected by bifurcating the proceeding and withholding the presentation of the sentence-related charges and facts until the guilt determination is made. Harbaugh recognizes that punishment-related facts must be charged, presented to a jury, and proved beyond a reasonable doubt, in a separate punishment determination proceeding. That rule also is consistent with State v. Overfelt, 457 So. 2d 1385 (Fla. 1984):

The district court held, and we agree, "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So. 2d at 948. See also Hough v. State, 448 So. 2d 628 (Fla. 5th DCA 1984); Smith v. State, 445 So. 2d 1050 (Fla. 1st DCA 1984); Streeter v. State, 416 So. 2d 1203 (Fla. 3^d DCA 1982); Bell v. State, 394 So. 2d 570 (Fla. 5th DCA 1981). But see Tindall v. State, 443 So. 2d 362 (Fla. 5th DCA 1983). The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

Overfelt, 457 So. 2d at 1387; see also Bryant v. State, 744 So. 2d 1225 (Fla. 4th DCA 1999); Gibbs v. State, 623 So. 2d 551 (Fla. 4th DCA 1993); Peck v. State, 425 So. 2d 664 (Fla. 2nd DCA 1983).

Apprendi acknowledged that the due process jury finding-requirement applicable to non-capital punishment determinations has not been held to apply to judge-only capital sentencing schemes:

Finally, this 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, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990); id., at 709-714, 110 S. Ct. 3047 (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.” Almendarez-Torres, 523 U.S., at 257, n. 2, 118 S.Ct. 1219 (SCALIA, J., dissenting) (emphasis deleted).

See also Jones, 526 U.S., at 250-251, 119 S.Ct. 1215; post, at 2379-2380 (THOMAS, J., concurring).

Apprendi, 120 S. Ct. at 2366.

There is logic in Apprendi's distinction of Walton. The heart of Apprendi is the jury's role and responsibility in determining whether contested essential facts have been proved beyond a reasonable doubt to satisfy statutory legal requirements for guilt and punishment. When a jury is not even involved in the fact-finding process, as in Arizona's capital sentencing scheme construed in Walton, there is no need to consider whether and to what extent jury instructions, jury burdens, and jury findings come in to play. Thus, the Court's decision in Walton, as understood in Almendarez-Torres and Apprendi, applies to judge-only sentencing jurisdictions, if it fact Walton is still good law.¹⁴

¹⁴ It should also be noted that while a majority in Apprendi suggested that Walton was distinguishable, four justices strongly suggested that Walton in fact had been overruled, see Apprendi, 120 S. Ct. at 2387-89 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Breyer and Kennedy, JJ.), and a fifth Justice expressly

The limitation of Walton acknowledged in Apprendi necessarily means Walton does not apply to Florida's sentencing scheme, where a jury plays a pivotal role in the life-or-death determination.

Walton attempted to harmonize the Court's decision with its prior approval of Florida's sentencing scheme, but that rationale is no longer valid. See Lambrix v. Singletary, 520 U.S. 518 (1997); Espinosa v. Florida, 505 U.S. 1079 (1992). In Walton, the Court said Arizona's judge-only sentencing scheme is like Florida's sentencing scheme because in both states the judge is the sentencer. The only distinction, the Court found, was that in Florida the judge first gets nonbinding input from the jury, with no findings of fact, thereby providing virtually no assistance to the judge:

The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Walton, 497 U.S. at 648.

However, the Court subsequently discarded that distinguishing analysis of Florida law in Espinosa, where the Court reconsidered Florida's sentencing scheme and determined that Florida actually uses two sentencers, both of whom must properly find facts and apply the law:

Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971, 108 S. Ct. 1249, 99 L. Ed. 2d 447 (1988); Grossman v. State, 525 So. 2d 833, 839, n. 1 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989).

left the door open to overruling Walton on another day, see Apprendi, 120 S. Ct. at 2380 (Thomas, J., concurring).

Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

Espinosa, 505 U.S. at 1081-82 (emphasis supplied). The Court underscored that distinction of Florida law in Lambrix, where the Court explained that “In Espinosa, we determined that the Florida capital jury is, in an important respect, a cosentencer with the judge.” Lambrix, 520 U.S. at 528. Lambrix then applied that understanding of Florida law to clarify that in a state where a jury and a judge share responsibility for the death determination, both must consider only lawfully introduced facts, lawfully enacted aggravating circumstances, and lawful aggravation instructions. That rule, the Court said, was a new rule of law not in existence at the time Walton was decided. See Lambrix, 520 U.S. at 529.

Thus, Walton does not control the issue under Florida’s three-phase, cosentencing capital sentencing scheme. Rather, in a State where the jury equally shares with the judge the responsibility of determining death eligibility by finding facts and weighing statutorily defined aggravating and mitigating circumstances, the State constitutionally must fully advise the defendant and the jury of the sentencing factors, the elements, and the burdens associated therewith. See Apprendi.

Accordingly, due process requires at a minimum:

- < The State must provide notice of the aggravating circumstances in the charging document;
- < The State must withhold those alleged circumstances until a jury validly determines guilt of capital murder beyond a reasonable doubt;
- < After guilt is determined, the sentencing court must instruct the jury as to the elements of all contested aggravating circumstances, each of which must be proved beyond a reasonable doubt;
- < The sentencing court must instruct the jury to find beyond a reasonable doubt that the defendant is death-eligible;
- < The sentencing court must instruct the jury to find, beyond a reasonable doubt after weighing the mitigators, that death is the appropriate punishment;

- < The sentencing court must require the jury to make specific written findings and present those findings to the court and the parties; and
- < The sentencing court must instruct the jury that its findings have to be unanimous.

Because these requirements were not satisfied, the resentencing procedure in this case was fundamentally flawed. The death sentence should be vacated and the cause remand for a new jury sentencing.

CONCLUSION

This Court should vacate the sentence and remand for imposition of a life sentence. Alternatively, this Court should vacate the sentence and remand for a new jury sentencing before a new judge.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing initial brief of appellant has been furnished by delivery to Curtis French, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this _____ day of _____, 2000.

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STATE OF FLORIDA,
Appellee.

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