IN THE SUPREME COURT OF FLORIDA

JOHNNY SHANE KORMONDY,

Appellant,

vs. CASE NO. SC96197

STATE OF FLORIDA,

Appellee.

______________________________/

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

REPLY TO THE STATEMENTS OF THE CASE AND FACTS 1

A. THE STATE'S CLAIM THAT THE MURDER COULD BE COLD, CALCULATED, AND PREMEDITATED AS A MATTER OF LAW, DESPITE THIS COURT'S PRIOR CONTRARY HOLDING, IS UNSUPPORTED IN FACT, LOGIC AND LAW 1

B. THE STATE'S ASSERTION THAT THE RECORD HAD CHANGED, AND THAT SUCH A CHANGE PERMITTED THE TRIAL COURT TO DEFY THIS COURT'S MANDATE, IS PREDICATED ON MATERIAL NOT IN THIS RECORD, PROCEDURALLY DEFAULTED, AND TOTALLY MERITLESS . 3

REPLY ARGUMENT 5

I. THE STATE'S PROPORTIONALITY ARGUMENT IS LARGELY BASED ON NONRECORD MATERIAL, CONFLICTS WITH SETTLED LAW, AND RELIES ON DISTINGUISHABLE CASES 5

A. **The State has poisoned the well, overreaching outside of this record** 5

B. **The State's argument requires unprincipled overruling of settled precedent** 12

C. **The State's argument and law are inapt** 12

II. THE STATE'S ARGUMENTS ARE MERITLESS AND DESTROY ALL SENSE OF FAIRNESS 13

IV. THE STATE CONTINUES TO MISLEAD WITH ITS GROSS MISCHARACTERIZATION OF THE MITIGATOR 14

V. THE STATE'S ARGUMENT PLACES FORM OVER SUBSTANCE BECAUSE NO PROFFER WAS NEEDED ON THIS RECORD 16

VII. FUNDAMENTAL ERROR IS PROPERLY PRESENTED UNDER

TABLE OF CONTENTS

PAGE(S)

APPRENDI'S HOLDING THAT EVERY FACT ESSENTIAL TO THE INFLICTION OF THE PUNISHMENT MUST BE CHARGED, TRIED, AND FOUND BY JURORS TO HAVE BEEN PROVED BEYOND A REASONABLE DOUBT 17

A. There is no procedural bar to fundamental error claims 17

B. The State's argument misperceives the core holding of Apprendi 18

C. No precedent compels a departure from Apprendi 27

CONCLUSION 32

CERTIFICATE OF SERVICE AND CERTIFICATE OF TYPEFACE

TABLE OF AUTHORITIES

PAGE(S)

U.S. SUPREME COURT CASES

Almendarez -Torres v. United States

523 U.S. 224 (1998) 21

Apprendi v. New Jersey

120 S. Ct. 2348 (2000) 17,18,21,27,28,29,30,32

Bradley v. State

26 Fla. L. Weekly S136 (Fla. March 1, 2001) 7,8

Chapman v. California

386 U.S. 18 (1967) 16

Espinosa v. Florida

505 U.S. 1079 (1992) 28

Hildwin v. Florida

490 U.S. 638 (1989) 30, 31

House v. Mayo

324 U.S. 42 (1945) 31

Jones v. United States

526 U.S. 227 (1999) 21

Kormondy v. State

703 So. 2d 454 (Fla. 1997) 10

Lambrix v. Singletary

520 U.S. 518 (1997) 28,29

TABLE OF AUTHORITIES

PAGE(S)

MacMillan v. Pennsylvania

477 U.S. 79 (1986) 21,30

McCloud v. Florida

No. 006289 (U.S. Jan. 8, 2001) 19

Mitchell v. United States

526 U.S. 314 (1999) 10

Moran v. Burbine

475 U.S. 412 (1986) 32

Richardson v. United States

526 U.S. 813 (1999) 26,27

Romano v. Oklahoma

512 U.S. 1 (1994) 26

Schad v. Arizona

501 U.S. 624 (1991) 25,26

Sochor v. Florida

504 U.S. 527 (1992) 28

Walton v. Arizona

497 U.S. 639 (1990) 18,28,29

Weeks v. Delaware

121 S. Ct. 476 (2001) 31

TABLE OF AUTHORITIES

PAGE(S)

FLORIDA CASES

Abichandani v. Related Homes of Tampa, Inc.
696 So. 2d 802 (Fla. 2d DCA 1997) 4

Atlas Land Corp. v. Norman
116 Fla. 800, 156 So. 885 (1934) 6,7

Bradley v. State
26 Fla. L. Weekly S136 (Fla. March 1, 2001) 7

Department of Legal Affairs v. District Court of Appeal, 5th District
434 So. 2d 310 (Fla. 1983) 31

Fenlon v. State
594 So. 2d 292 (Fla. 1992) 14

Goodwin v. State
751 So. 2d 537 (Fla. 1999) 16

Haliburton v. State
514 So. 2d 1088 (Fla. 1987) 32

Harrison v. State
149 Fla. 365, 5 So. 2d 703 (Fla. 1942) 17

Hazen v. State
700 So. 2d 1207 (Fla. 1997) 12

Heggs v. State
759 So. 2d 620 (Fla. 2000) 19

TABLE OF AUTHORITIES

PAGE(S)

Jackson v. State
575 So. 2d 181 (Fla. 1991) 6

Jones v. State
92 So. 2d 261 (Fla. 1956) 32

Johnson v. State
616 So. 2d 1 (Fla. 1993) 18

Kessler v. State
752 So. 2d 545 (Fla. 2000) 5

Kirland v. State
684 So. 2d 732 (Fla. 1996) 2

Kight v. State
26 Fla. L. Weekly S49 (Fla. Jan. 18, 2001) 12

Kormondy v. State
703 So. 2d 454 (Fla. 1997) 1,2

Maggard v. State
399 So. 2d 973 (Fla. 1981) 9

Matthews v. Matthews
133 So. 91 (Fla. 2d DCA 1961) 7

Maddox v. State
760 So. 2d 89 (Fla. 2000) 17

McCloud v. State
23 Fla. L. Weekly D2469 (Fla. 5th DCA Nov.6, 1998) 19,20

TABLE OF AUTHORITIES

PAGE(S)

McCloud v. State

741 So. 2d at 512 (Fla. 1999),

24 Fla. L. Weekly D153 (Fla. 5th DCA Jan. 19, 1999) 19,20,21

McNish v. State

47 Fla. 69, 36 So. 176 (1904) 7

Merritt v. State

523 So. 2d 573 (Fla. 1988) 14

Miller v. State

770 So. 2d 1144 (Fla. 2000) 2

Mills v. Moore

26 Fla. L. Weekly S242 (Fla. April 12, 2001) 27,28,29,31

Slater v. State

316 So. 2d 539 (Fla. 1975) 12

Smith v. State

537 So. 2d 982 (Fla. 1989) 22

Standard Jury Instructions in Criminal Cases

690 So. 2d 1263 (Fla. 1996) 23

Traylor v. State

596 So. 957 (Fla. 1992) 32

TABLE OF AUTHORITIES

PAGE(S)

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 6,16,32

U.S. Const. amend. VI 6,16,32

U.S. Const. amend. VIII 6,16,32

U.S. Const. amend. XIV 6,16,32

Art. I, § 9, Fla. Const. 6,12,16,32

Art. I, § 10, Fla. Const. 6,12,16,32

Art. I, § 16, Fla. Const. 6,12,16,32

Art. I, § 17, Fla. Const. 6,12,16,32

Art. I, §11, Fla. Const. (1885) 32

STATUTES AND RULES

§ 921.0011(7) Fla. Stat. (1995) 19

§ 921.0014(1) Fla. Stat. (1995). 19

§ 843.01, Fla. Stat. (1993). 16

§ 843.02, Fla. Stat. (1993). 16

OTHER AUTHORITIES

State v. Weeks
761 A.2d 804 (Del. 2000) 28

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______________________________/

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Citations to the record shall be as in the initial brief. Page citations to the initial brief shall be "IB#" and to the answer brief shall be "AB#." To the extent Appellant does not hereafter reply, he relies on the arguments in the initial brief.

REPLY TO STATEMENTS OF THE CASE AND FACTS

A. THE STATE'S CLAIM THAT THE MURDER COULD BE COLD, CALCULATED, AND PREMEDITATED AS A MATTER OF LAW, DESPITE THIS COURT'S PRIOR CONTRARY HOLDING, IS UNSUPPORTED IN FACT, LOGIC AND LAW

In a footnote the State baldly makes the unsupported and unsupportable assertion underlying the entire answer brief: "In the State's view, finding that the evidence fails to exclude a theory that the murder was not premeditated <u>is not the same</u> as finding that the murder is not premeditated as a 'matter of law,' and the State therefore does not read this Court's opinion [in <u>Kormondy v. State</u>, 703 So. 2d 454 (Fla. 1997)] as precluding a finding of premeditation at resentencing, if sufficient evidence of such were presented." AB 2-3 n.2.

First, the State's view is flatly contradicted by settled precedent:

> The State's case was based upon circumstantial evidence. Kirkland moved for a judgment of acquittal at the conclusion of the State's case. The trial court denied Kirkland's motion. We have stated that such a motion should be granted unless the State can 'present

> evidence from which the jury can exclude every reasonable hypothesis except that of guilt.' State v. Law, 559 So.2d 187, 188 (Fla. 1989). We find that the circumstantial evidence in this case 'is not inconsistent with any reasonable exculpatory hypothesis as to the existence of premeditation.' Hall v. State, 403 So.2d 1319, 1321 (Fla. 1981). Indeed, a review of the record forces us to conclude, **as a matter of law**, that the State failed to prove premeditation to the exclusion of all other reasonable conclusions. 'Where the State's proof fails to exclude a reasonable hypotheses [sic] that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained.' Hoefert v. State, 617 So.2d 1046, 1048 (Fla. 1993).

Kirkland v. State, 684 So. 2d 732, 734 (Fla. 1996) (emphasis supplied).

Moreover, this Court's decision must be a matter of "law" and not "fact" because this Court in its appellate function does not make findings of fact. It was a legal ruling on a legal standard, one that apparently will never satisfy the Attorney General. See Miller v. State, 770 So. 2d 1144, 1148-49 (Fla. 2000) (rejecting another State plea to overrule the circumstantial evidence rule).

Second, the State ignores the fact that in the Kormondy opinion, this Court went even further than finding the murder not to have been premeditated as a matter of law. This Court expressly instructed the trial court not to find the CCP aggravator on remand because the murder – necessarily and as a matter of law – had failed to satisfy the "premeditated" element of the aggravator. See Kormondy v. State, 703 So. 2d 454, 463 (Fla. 1997) ("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.").

The importance of the State's unsupported assertion is critical. The State's presentation, the judge's pivotal rulings, and the sentencing order itself, were entirely predicated on the underlying assumption that this Court's mandate could be disregarded, and the resentencing court was free to find premeditation.

B. THE STATE'S ASSERTION THAT THE RECORD HAD CHANGED, AND THAT SUCH A CHANGE PERMITTED THE TRIAL COURT TO DEFY THIS COURT'S MANDATE, IS PREDICATED ON MATERIAL NOT IN THIS RECORD, PROCEDURALLY DEFAULTED, AND TOTALLY MERITLESS

The State suggests there was "new evidence" in the resentencing upon which the trial court had grounds to defy this Court's mandate and overrule the law of the case with respect to whether the murder had been premeditated beyond a reasonable doubt. See AB3-4, AB18-20 nn.13-15, AB33. In support of that assertion, the State points to the phrasing of two answers by one witness, see AB18-19 nn.13-14; and to slender excerpts of the coperpetrators' proceedings introduced by Kormondy, see AB19-20 n.15. The State's assertion is meritless.

First, the State relies on the trial transcript of the first Kormondy trial, see AB18 nn.13-14, AB53, to demonstrate the so-called change in testimony of firearms expert Edard William Love, Jr. However, the transcript of Love's testimony at the first trial was neither introduced into the resentencing, nor made part of the appellate record in this proceeding. See infra at p.11.

Second, Love did no new testing for the resentencing, issued no new reports for the resentencing, and had nothing to add that he had not already testified to in Kormondy's first trial. Love may or may not have casually rephrased a couple of answers, but nothing more. The State at resentencing did not assert to the judge, or have Love testify either in or out of the jury's presence, that Love's evidence was in any way a substantive change from his prior testimony. Therefore, the trial court had no opportunity to rule that there was different evidence upon which it could rely to find premeditation, free from the constraints of this Court's mandate. If there had been a material change, surely defense counsel was aware of the prior testimony and would have impeached Love with the prior testimony. If the State wanted to urge that this was a material change in testimony, at the very least it

should have made that assertion on the record in the trial court. The State waived any opportunity it might have had to preserve this assertion. Moreover, the State does not even contend that the judge in any way relied on new evidence in rendering its sentencing order to make a finding different from what the judge found in the first proceeding.

Third, much of the transcript on which the State has so heavily relied to demonstrate a change in the record, see AB19-22, AB39-40, was argument – not evidence. Almost every reference to the "transcripts" made by the State in its answer brief was to jury argument counsel presented in Buffkin's trial. See AB20-21, 39-40. For example, the State claims that Buffkin "refused" or "declined" to shoot Mrs. McAdams, see AB20-21, 39-40, yet the source of this "proof" is Buffkin's counsel's argument in the Buffkin trial. Argument made part of the record is not substantive "evidence" to prove any fact about the crime, and can be relied on solely as proof of what counsel argued. "[A]llegations by and argument of counsel are no substitute for properly introduced evidence." Abichandani v. Related Homes of Tampa, Inc., 696 So. 2d 802, 803 (Fla. 2d DCA 1997).

The State's only references to actual "evidence" from the other proceedings were to Cecilia McAdams' testimony in Buffkin's trial, which the State does not even contend was different from what she said in Kormondy's resentencing, see AB20; and to Hazen's testimony at Hazen's trial, in which he totally denied participating in the criminal episode, see AB 22-23. The only probative thing Hazen said was exculpatory of Kormondy's level of participation, saying that Buffkin admitted to being the shooter. See S4P428.

In other words, there was absolutely no new evidence, no substantive change in testimony, and no argument presented by the State at resentencing, of a material change in the record inuring to the State's benefit. Even if the trial court had the

opportunity and authority to ignore the law of the case and this Court's prior ruling – which it did not have – the trial court had no new evidence on which to rely.

REPLY ARGUMENT

I. THE STATE'S PROPORTIONALITY ARGUMENT IS LARGELY BASED ON NONRECORD MATERIAL, CONFLICTS WITH SETTLED LAW, AND RELIES ON DISTINGUISHABLE CASES

A. The State has poisoned the well, overreaching outside of this record

The State's answer brief is infected by flagrant and improper reliance on alleged facts not in this record. See infra at pp.8-12. Appellant timely moved to strike the brief for that reason on April 10, 2001, and this Court denied that motion on April 23, 2001. The State poisoned the well by placing before this Court matters the Court should not consider. Appellant has been blind-sided by the State, with this Court's acquiescence, resulting in irreversible prejudice should this case be decided adversely to Kormondy. Appellant does not believe it is possible for this Court to decide the case fairly against Kormondy in the present posture, given all the nonrecord facts to which this Court has been and continues to be exposed. This is a case of not being able to "unring the bell": Justices, like jurors, heard this bell ring loud and clear, and it would be completely unrealistic to expect them to simply ignore it. Cf. Kessler v. State, 752 So. 2d 545, 551 (Fla. 2000) (recognizing that a reasonable juror judging a case could "unring th[e] bell" after just having heard inadmissible prejudicial pretrial publicity). Furthermore, the Court has permitted the State to inject wholly new issues into this appeal without ever establishing a predicate to do so in the trial court or timely filing an authorized cross-appeal. This entire appellate process has become patently unfair to Kormondy and violates his rights to a full and fair appeal, to confrontation, due process, and to his protection against cruel and/or unusual punishment. See U.S.

Const. amends. V, VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

An abundance of this Court's own precedent substantiates the rule that an appellate court is bound to look at only those facts properly in the record. For example, in Jackson v. State, 575 So. 2d 181 (Fla. 1991), this Court did a proportionality review of Clinton Lamar Jackson's death sentence, aware that the co-perpetrator's death sentence had been upheld and that evidence in the co-perpetrator's case was damning against Clinton. However, this Court refused to apply facts reported from the co-perpetrator's trial, holding that "this Court decides cases solely based on the record under review. We must blind ourselves to facts not presented in this record." 575 So. 2d at 193. In Atlas Land Corp. v. Norman, 116 Fla. 800, 156 So.885 (1934), this Court refused to allow a party to submit on appeal the trial court record of an ancillary proceeding, holding:

> The rule has been declared in this state to the effect that a court in deciding one case should not undertake judicial notice of what may be contained in the record of another and distinct case, unless it be brought to the attention of the court by being made a part of the record in the case under consideration. See cases cited at page 24, vol. 8, Encyclopedic Digest of Florida Reports.
>
> The circuit court, whether sitting as a court of law or as a court of equity, is a court of record. As such, its judgments or decrees are to be supported, as well as tested, by what its record in the particular case may show, not by what its records at large may disclose. This is necessarily so because, if the rule were otherwise, the correctness of a particular judgment or decree when brought in question on an appeal to an appellate court might be made to depend on some secret knowledge of the judge or chancellor which, as to the parties on the appeal, might amount to a matter in pais in so far as the record of the cause being considered on the appeal is concerned. See Bouguille v. Dede, 9 La. Ann. 292, where the Supreme Court of Louisiana held that an appellate court should not consult nor take judicial notice of the contents of a record not made a part of the record of the case being appealed by being made a part of such record at the hearing or trial in the court of first instance.
>
> Cases must be made up before the court of first instance, and the facts upon which they are based brought up properly in the record of the case being appealed; otherwise a right might be affected by a record previously covered by the dust of the ages, instead of having the controversy respecting it determined upon the record made up in

> the court of first instance in order to arrive at the judgment or decree being appealed from. Cumberland Telephone & Telegraph Co. v. St. Louis, I. M. & S. R. Co., 117 La. 199, 41 So. 492. A court should not be required nor permitted to browse amongst its own records with the view of relieving litigants from trouble and expense, where the object of the inquiry is to arrive at its own particular judgment in whole or in part on an extraneous record not introduced into the record of the case being considered, nor made a part of the record of the pending case by some positive reference to it set forth in an affirmative order of the judge designed to incorporate by reference such extraneous record before the court as a part of its own records in the case being heard. Bouguille v. Dede, supra.
>
> The court in which a cause is pending will take judicial notice of all its own records in such cause and of the proceedings relating thereto. But orders and other proceedings which do not properly belong to the record of a case being considered by a court must be proved or in some way directly brought into the record of the pending case by some order of the court referring to and adopting the outside records or proceedings as part of its own record, in order that an appellate court may, in the event of an appeal, know the exact nature, character, scope, and extent of the matters upon which the court below arrived at the decision appealed from and carried on the record to the appellate court. See 1 Jones Commentaries on Evidence (2d Ed.) pages 762-770, and cases cited.

Atlas Land Corp., 116 Fla. at 801-04, 156 So. at 886-87. See also McNish v. State, 47 Fla. 69, 36 So. 176 (1904) (appellate court in criminal appeal may judicially notice its own records "as far as they appertain to the case at hand, but will not take notice, in deciding one case, of what may be contained in the record of another and distinct case," unless it was made part of the trial court record of the case now on appeal); Matthews v. Matthews, 133 So. 2d 91, 96-97 (Fla. 2d DCA 1961) (applying Atlas Land Corp. to bar judicial notice of ancillary record because the "interested party" did not do its "duty [] to bring the record to the judicial notice of the trial judge in the manner required by law").

Appellant knows of no precedent to the contrary. Nonetheless, the State raised in its response to Appellant's motion to strike the dictum in Bradley v. State, 26 Fla. L. Weekly S136 (Fla. March 1, 2001), as evidence that this Court has gone outside the record to look at a co-perpetrator's record to do a proportionality

analysis. The truth, however, is that the record of Jones, the co-perpetrator in Bradley, was offered by Bradley as evidence in the trial court at the pre-sentencing hearing (known as the Spencer hearing), and was made part of the record with the trial judge's permission and by Order of this Court. See Bradley v. State, No. SC93373, Motion to Supplement Record (filed May 3, 1999), and Order Directing Circuit Court to Supplement Record (filed March 8, 2000). The mere fact that this Court's opinion in Bradley omitted the pedigree of the co-perpetrator's record does not mean the decision actually supports the State's proposition.

Appellant has been forced by this Court's order to address the State's improper arguments in the reply brief. Accordingly, Appellant does so as follows, without abandoning or waiving in any respect any claim as to the constitutionality of this appellate process.

Initially, the State insinuates that Kormondy wants to hide facts in the Hazen trial. See AB26-27. But the entire Hazen trial transcript was not made part of this record. Moreover, Kormondy's appellate counsel was conflicted out of the Hazen appeal and has never had the benefit of reviewing Hazen's trial transcript. Kormondy had no opportunity to cross-examine the witnesses as they testified in Hazen's trial, and Kormondy's defense certainly was at odds with that of Hazen. Kormondy did not brief the facts as presented in the Hazen record and is totally unprepared to argue those facts. Had the State wanted to seek the introduction of the Hazen transcript into this record, it could have sought to do so in the trial court, but it did not.[1] Under the circumstances, Appellant cannot and will not discuss any

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[1]. Even if it had, such a request may have been opposed and denied, as even the State recognized, see AB28 n.19. Introduction of such evidence by the State might very well impair the constitutional rights of Appellant, such as the right of confrontation.

alleged portions of the Hazen record that were not made part of this record or reported in this Court's decision.

Yet at AB39 n.28, the State relies on Buffkin's testimony at Hazen's trial for evidence of Kormondy's intent and motive, even though Kormondy had no chance to confront Buffkin, who never testified against Kormondy. Again that evidence was not in this record, and Kormondy's appellate counsel has never seen the Hazen transcripts.

The State emphasizes specific mental mitigation evidence and alleged prior criminal history evidence introduced through expert defense witnesses in the first Kormondy penalty proceeding. See AB35-38. Again, in an attempt to distinguish Kormondy from Buffkin, the State cites to and relies on Kormondy's IQ "evidence presented at Kormondy's original trial," see AB30-31, (emphasis supplied), AB40 n.29, and relies on Buffkin's IQ evidence, see AB21 n17, AB30-31, which the State admits came out of Kormondy's first sentencing proceeding, see AB36 n.26. All that mitigation-related evidence had to come from a different proceeding because Kormondy expressly waived introduction of that very same mitigation evidence in the re-sentencing now on review. See V5T481-89. The State is committing the same kind of error on appeal that would have been reversible had it so acted at trial. See Maggard v. State, 399 So. 2d 973 (Fla. 1981) (holding that the state's presentation of evidence of the defendant's prior criminal record of non-violent crimes to rebut the mitigating factor of no significant prior criminal history, upon which appellant had explicitly waived reliance, constituted reversible error).

Similarly, at AB38, the State admits it relies on "Kormondy's PSI from the original sentencing" to present criminal history evidence in this appeal, when that evidence had not been presented to the trial court in the resentencing proceedings. This Court specifically sought the re-sentencing PSI, if any had been done, see

Kormondy v. State, No. SC96197, Order of February 26, 2001, but apparently none was ever produced, reviewed, or filed, as the State has now conceded. See Response to Motion to Strike Answer Brief of Appellee at 5 (filed April 16, 2001) ("In this case a PSI was prepared, albeit before the first sentencing."). Also, there is no evidence that the trial court or Appellant even saw the years-old PSI at the re-sentencing.

The State purports to tell this Court what Buffkin's prosecutor was actually thinking when that prosecutor offered Buffkin a plea, saying, "Buffkin was allowed to avoid the death sentence only because the State was concerned that the jury was not going to convict him..." See AB37 n.27. Yet there is no evidence of the plea colloquy or of the prosecutor's motivation to offer a plea in this record, and the State cites none. Not only is this nonrecord post-hoc rationale, it is also a waiver of the State's work-product privilege.

At AB40 n.29, the State relies on evidence of Kormondy's invocation of his Fifth Amendment right not to testify against Hazen as proof that Kormondy is more culpable than Buffkin. Yet Kormondy's decision not to testify arose in the first Kormondy proceeding before final sentencing; it was not made part of the present record; its use against him at the first sentencing was vigorously contested in the first appeal; and Kormondy's position was subsequently vindicated by the Supreme Court in Mitchell v. United States, 526 U.S. 314 (1999) (holding that the right against compelled self-incrimination applies at least through sentencing). The State thus urges this Court to use non-record evidence of Kormondy's constitutional exercise of his constitutional right as an aggravating factor.

As mentioned above, see supra at p.3, the State cites the trial transcript of the first Kormondy trial for testimony of firearms expert Edard William Love, Jr. See AB18 nn.13-14. The State quotes and relies on that testimony on appeal in an

effort to demonstrate a so-called substantive change in Love's testimony. See AB19-20 n.15, AB53. However, the transcript excerpt of the witness's testimony at the first trial was neither introduced in the resentencing record in the trial court, nor was an attempt even made to make that excerpt part of the appellate record in this proceeding. The first time any suggestion of an asserted "difference" in testimony was in the State's answer brief, when the State produced the nonrecord testimony to support its argument.

Incredibly, the State cites the testimony of Buffkin's lawyer about an alleged threat to kill in the future. See AB19 n.15, AB40-41 n.30. Yet this was the very evidence that had been improperly introduced in the first trial and was the very basis for this Court's prior reversal. Interestingly, by not having that reversibly introduced evidence in this record, the State presented even less evidence of premeditation on the resentencing than it offered the first time around. That certainly undermines the State's contention that premeditation was proved on resentencing when it had not been proved at the original trial.

The State attacks Kormondy's appellate counsel by name for having relied upon only record evidence, see AB38, and complains that "Kormondy's appellate counsel" was not being "fair to the State" by "cherry-pick[ing] references to Buffkin's and Hazen's prior records," see AB 35-36. Yet every record reference in Appellant's brief were to facts legitimately in this record – contrary to the State's argument – and the State does not contend otherwise. This Court should be asking itself why the State so desperately felt the need to go outside the record to support its position.

B. The State's argument requires unprincipled overruling of settled precedent

The State asks this Court overrule its precedent regarding proportionality

analysis where one of the co-perpetrators entered a plea, citing Kight v. State, 26 Fla. L. Weekly S49 (Fla. Jan. 18, 2001). However this Court in Kight made no such suggestion. Instead, this Court said when a co-perpetrator is charged with or pleads to a "lesser offense," the proportionality analysis may be skewed. The Court specifically distinguished that situation from the one here, citing with approval two examples, Hazen v. State, 700 So. 2d 1207 (Fla. 1997), and Slater v. State, 316 So. 2d 539 (Fla. 1975), both of which were proportionality reversals based on the life sentences imposed on the respective coperpetrators pursuant to pleas to first-degree murder charges. There is no reason, fair basis, or constitutional authority to overrule that precedent and retroactively apply the new substantive rule ex post facto to Kormondy, especially given that the Slater rule is so deeply entrenched in the law, and one of the controlling cases arose from this very homicide. See U.S. Const. art I § 10, amends. VIII, XIV; art. I, §§ 9, 10, 16, 17, Fla. Const.

C. The State's argument and law are inapt

The State claims there is a "minimal likelihood that the State would offer a plea to a more culpable defendant." AB 36 n.26. Yet that is precisely what happened in this very crime, where this Court reversed Hazen's sentence because Buffkin, the leader and more culpable defendant, was offered and accepted a plea. Surely this is the wrong case for the State to be making such a claim.

The State's proportionality argument focuses almost exclusively on whether or not Kormondy was the one who discharged the weapon. As far as the State is concerned, if Kormondy discharged the weapon, there is nothing more to discuss. See AB26-34. But Kormondy's argument was based in large part on the finding that he was the one who fired the weapon, arguing instead that the "triggerman" cases on which the State relies are not controlling under the unique circumstances

on this case. See IB33-38. None of the cases the State cites in support of its proportionality claim, see AB43-44, deal with the especially complex and cloudy situation presented here. The State merely uses them to count aggravators, a practice this Court has rejected. See IB34 (citing cases).

There is no doubt that a horrible crime occurred. But that is true in virtually every felony murder. Principled legal reasoning is necessary to maintain a civilized society. Otherwise, we allow ourselves to be ruled by the uncontrollable, emotional desire to blindly seek retribution. At bottom, the State has made an emotion-based, resulted-oriented, unprincipled, unsupported, and legally superficial plea that should be rejected because the law requires a life sentence.

II. THE STATE'S ARGUMENTS ARE MERITLESS AND DESTROY ALL SENSE OF FAIRNESS

The State contends that this Court has license to find any debatable aggravator that was not charged, not instructed, and not argued below. See AB46-50. That is wrong unsupported by law, logic or basic fairness, and none of the cases cited by the State remotely address this question.

Kormondy's arguments are not procedurally barred. See AB52. Kormondy never had a chance to raise any of these arguments because the issues did not arise until the judge entered the final sentencing order. The State did not urge these uncharged, untried, uninstructed aggravators in the trial court, and therefore abandoned the right to make a procedural bar claim now. In any event, the errors are fundamental sentencing errors going to the heart of the proceeding and can be raised on appeal, especially in a capital case.

The rest of the State's meritless arguments, see AB52-56, were anticipated and addressed in the initial brief, see IB42-51. The State simply reargues its premeditation theory, which is already a settled question.

IV. THE STATE CONTINUES TO MISLEAD WITH ITS GROSS MISCHARACTERIZATION OF THE MITIGATOR

The State in its answer brief continues to blur the very distinction Kormondy raised below, only to see the prosecutor and trial judge ignore it, repeatedly referring to the offered mitigator as the fact that Kormondy "cooperated with police." See AB59-61. That is flat out wrong, and is yet another attempt to mislead. See IB65. Kormondy has the constitutional and statutory right to offer a nonstatutory mitigator, and as such he also has the right to define that mitigator. The State has no licence to put words in the appellant's mouth. If the State wishes to argue that the mitigator should be given little weight, so be it. But the State should not be permitted to get away with mischaracterizing and undermining a mitigator because the State doesn't like it.

Evidence of flight may or may not be probative of guilt, which was not even at issue. See Fenlon v. State, 594 So.2d 292, 295 (Fla. 1992) ("This Court has noted that 'flight alone is no more consistent with guilt than innocence.' Merritt v. State, 523 So.2d 573, 574 (Fla. 1988)."). It certainly is not probative of any aggravator in this case, and the State does not even suggest that it is. It can only be probative of a mitigator if the defense first put into issue a mitigator on which the evidence has a material bearing. At the point the objectionable evidence came in, the defense had presented no evidence, and the defense carefully avoided opening the door to evidence of lack of cooperation before the arrest. Instead, what the State did here was like creating a straw man to later attack. The evidence was irrelevant and unduly prejudicial. See §§ 90.401, .403, Fla. Stat. (1993).

The State draws an analogy to cooperation of the Japanese in 1946. But such an analogy works against the State's position. Japan was a sworn enemy of the United States prior to 1946, but not thereafter. Evidence that Japan fought us

does not change the fact that Japan quickly became a friend and ally of the United States. So, by analogy, the fact that Kormondy acted as many defendants do in trying to avoid capture, has no relevance to the unrebutted fact that he did indeed cooperate once arrested, and that he did give information leading to the capture of the coperpetrators.

The State claims that the evidence was admissible to present the complete story to the jurors who did not hear the guilt phase. See AB60. However what happened immediately prior to Kormondy's capture, long after the homicide, does nothing to complete the story for jurors. The crime was a single discrete episode, and all that evidence came in. Not a single reference to the arrest had to be made to complete the picture for jurors as to what happened to Gary and Cecilia McAdams.

The State claims that the defense's authorities are distinguishable because the mitigator in this case was in fact argued. See AB 60-61. However, the State fails to recognize that Kormondy really had no choice once the State was permitted, over objection, to present a large quantum of irrelevant, extremely prejudicial evidence about lack of cooperation. The defense had to argue cooperation after the arrest at that point, if for no other reason that to try to counterbalance the harm done by the State's inadmissible evidence. It is not reasonable to think that Kormondy would simply stand by silently after that evidence came in. Had evidence of Kormondy's cooperation after arrest not already been introduced by the State's witnesses, the State's improper strategy would have compelled Kormondy to jeopardize his defense strategy by putting on the evidence himself through hostile witnesses (the officers with whom he cooperated) and/or his own testimony.

Finally, the State argues that the error was harmless. Perhaps if one witness had mentioned the irrelevant fact as an aside, and no effort was made by the State to capitalize on that fact, such a claim might be plausible. But here, four witnesses

were called to testify about this one inadmissible, irrelevant, and unduly prejudicial fact – three who testified exclusively to this episode – and the State argued that fact to the co-sentencers. See, e.g., V5T513. Moreover, as noted in the initial brief, the evidence was evidence of an independent crime of resisting arrest, see §§ 843.01, .02, Fla. Stat. (1993), a collateral, uncharged crime that allegedly occurred more than a week after the homicide. Permitting the introduction of this evidence was at the very least an abuse of discretion, and no juror could have been unaffected beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967); Goodwin v. State, 751 So. 2d 537 (Fla. 1999). The entire penalty process was undermined in violation of Kormondy's statutory and constitutional rights. See U.S. Const. amends. VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

V. THE STATE'S ARGUMENT PLACES FORM OVER SUBSTANCE BECAUSE NO PROFFER WAS NEEDED ON THIS RECORD

The State's argument that a proffer was required asks this court to place form over substance. As the initial brief pointed out, Had defense counsel not been abruptly cut off in cross-examination, see V4T326-27, IB67-68, perhaps counsel would have been able to proffer an answer. Perhaps more importantly, no precise proffer was needed. The record and common sense dictate that the only thing counsel was attempting to do was impeach the witness with a prior statement that she previously had not been certain about the identification, thus leading jurors to the inevitable conclusion that her certainly developed for the purposes of testifying at trial, undermining her credibility and the certainty of a critical fact.

VII. FUNDAMENTAL ERROR IS PROPERLY PRESENTED UNDER APPRENDI'S HOLDING THAT EVERY FACT ESSENTIAL TO THE INFLICTION OF THE PUNISHMENT MUST BE CHARGED, TRIED, AND FOUND BY JURORS TO HAVE BEEN PROVED BEYOND A REASONABLE DOUBT

A. There is no procedural bar to fundamental error claims

The State contends that the issue under Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), was not preserved and therefore is procedurally barred. See AB 64. The State, however, omits from its response the fact that Kormondy properly raised the issue as one of fundamental error, see IB76, 84, which well-settled case law holds to be timely and not procedurally barred.

Fundamental error, which has been given various descriptions in Florida law, see Maddox v. State, 760 So. 2d 89, 95 (Fla. 2000) (collecting cases), generally is regarded as error going to the very heart or foundation of the proceedings. This Court long has held that such errors can be raised for the first time on appeal. See, e.g., Harrison v. State, 149 Fla. 365, 5 So. 2d 703 (Fla. 1942) (reversing first-degree murder conviction and death sentence on finding of fundamental error that had not been raised in trial court).

Kormondy's challenge also is a facial constitutional attack on the validity of section 921.141, Florida Statutes, (1993), as violative of the due process and fair trial guarantees discussed in Apprendi. Facial challenges such as this one constitute fundamental error that need not be preserved in the trial court and may be raised for the first time on appeal. See, e.g., Johnson v. State, 616 So. 2d 1, 3 (Fla. 1993); Trushin v. State, 425 So. 2d 1126,1129 (Fla. 1982).

B. The State's argument misperceives the core holding of Apprendi

The State argues that Apprendi has no application to ultimate facts essential for imposing the death penalty, relying on Walton v. Arizona, 497 U.S. 639 (1990). See AB 65-67. But contrary to what the State seems to suggest, the Court did not preclude the application of Apprendi to capital cases. As noted in the initial brief, Apprendi is a jury case, and the Apprendi majority distinguished the jury-based due process requirements from judge-only capital schemes like the one in Walton. Walton is readily distinguishable.

Moreover, one member of the Apprendi majority specifically said that notwithstanding Walton, the application of Apprendi to capital cases in general "is a question for another day," see Apprendi, 120 S. Ct. at 2380 (Thomas, J., concurring). Four other justices said it is apparent that Apprendi and Walton cannot be reconciled, and that Walton will be overruled. See Apprendi, 120 S. Ct. at 2387-89 (O'Connor, J., dissenting, with Rehnquist, C.J., and Kennedy and Breyer, JJ.).

All nine of the Justices thus appear to agree that the core holding of Apprendi is that facts essential to the infliction of the punishment meted out by a court must be charged, tried, and found by jurors to have been proved beyond a reasonable doubt. In other words, but for jurors actually finding the facts essential to the infliction of the statutorily authorized maximum punishment – in this case aggravating circumstances – that punishment cannot be imposed. It is not enough under Florida's death penalty scheme for a jury to find the defendant guilty of a capital crime; the same jury must also find the person guilty of the separately tried aggravating circumstances.

This view of the holding in Apprendi is further supported by the Court's subsequent decision in McCloud v. Florida, No. 006289 (U.S. Jan. 8, 2001) (McCloud V), a case that dealt with victim injury points and apparently had nothing to do with statutory maximums.

An information charged McCloud with, in relevant part, "sexual battery ... by oral, anal, or vaginal penetration by *or union with,* the sexual organ of another, to wit: the Defendant's penis, and in the process thereof used physical force and

violence not likely to cause serious personal injury."[2] McCloud v. State, 23 Fla. L. Weekly D2469 (Fla. 5th DCA Nov. 6, 1998) (McCloud I) (italics in original). The Legislature defined that offense as a second-degree felony. See §§ 794.011(1)(h), (5), Fla. Stat. (1995).

At trial, "proof of penetration was not required for conviction and the evidence of penetration versus mere union was in conflict." McCloud v. State, 741 So. 2d at 512, 513 (Fla. 1999), 24 Fla. L. Weekly D153 (Fla. 5th DCA Jan. 19, 1999) (McCloud II). The jury found McCloud guilty but made no specific finding of penetration. See id. At sentencing, the trial court made a finding of penetration as authorized by the victim injury sentencing statutes, see sections 921.0011(7) and 921.0014(1), Florida Statutes (1995), and scored victim injury points for penetration rather than a lesser amount of points for sexual contact, see McCloud I. Using the penetration points to increase the available sentence, the court sentenced McCloud to imprisonment for eight years and nine months for the second-degree felony.[3] On appeal, McCloud challenged the assessment of victim injury points for penetration, rather than the lesser number for sexual contact, because there had been no specific jury finding of penetration. See McCloud I.

At first, the Fifth District agreed with McCloud and reversed the scoring of

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2. The date of the crime was omitted from the reported decisions. However, the Florida Department of Corrections reports that the crimes occurred on October 4, 1996. See http://www.dc.state.fl.us/ActiveInmates/InmateForm.asp?From=list (visited Jan. 26, 2001). The guidelines applicable to McCloud would have been those under the 1994 or 1995 amended versions, depending on the application of Heggs v. State, 759 So. 2d 620 (Fla. 2000).

3. The sentence was omitted from the District Court's opinions. However, the DOC reports the sentence in its public web site. See http://www.dc.state.fl.us/ActiveInmates/InmateForm.asp?From=list (visited Jan. 26, 2001).

victim injury points under the sentencing statutes because there had been no specific finding of penetration. See McCloud I. The State sought rehearing, and the Fifth District granted that motion, holding as follows:

> no distinction is made in the statute or rule between point assessment for penetration and all other aspects of score sheet point assessment. The *Bradford* [*v. State*, 23 Fla. L. Weekly D2577 (Fla. 1st DCA 1998)] court did not even find it objectionable for the court to score points for possession of a firearm during the commission of the offense, even though the jury made no finding that the defendant had done so. We are doubtful about this method of adjudication in a criminal case, especially given the proliferation of point assessment categories but, at least as to the category of "victim injury,"' we will not recognize a special requirement of a jury finding to support a point assessment for penetration. Consistent with *Lawman* [*v. State*, 720 So. 2d 1105 (Fla. 2d DCA 1998)], we will allow this to be determined by the court.

McCloud II, 741 So. 2d at 513, 24 Fla. L. Weekly at 153 (on rehearing granted).

McCloud moved for rehearing en banc, and the Fifth District granted that motion, concluding that the panel's rehearing decision had been correct. See McCloud v. State, 741 So. 2d 512 (Fla. 5th DCA 1999) (on rehearing en banc), 24 Fla. L. Weekly D2220 (Fla. 5th DCA Sept. 24, 1999) (McCloud III). The en banc court held that victim injury points, even when factually contested, are merely a "'sentencing factor', not an element of the offense." McCloud III, 741 So. 2d at 514. The en banc court then held that "all issues pertaining to the assessment of points on the score sheet are to be determined by the court, not the jury." McCloud III, 741 So. 2d at 512-13. The en banc court held that the decision as to whether there had been "sexual penetration" to warrant the scoring of "victim injury" points was merely a judge-only sentencing determination that due process did not require to be specifically alleged, tried, or found by a jury to have been proved beyond a reasonable doubt. See 741 So. 2d at 512-13. Accordingly, and without regard to whatever the maximum sentence may have been, "a jury finding of penetration as a predicate for scoring penetration as victim injury on a score

sheet for purpose of determining a sentence" is not required. See 741 So. 2d at 515.

In so holding, the Fifth District specifically relied on the three U.S. Supreme Court decisions that Apprendi distinguished and found inapplicable. See McCloud III, 741 So. 2d at 514 (relying on Macmillan v. Pennsylvania, 477 U.S. 79 (1986), Jones v. United States, 526 U.S. 227 (1999), and Almendarez-Torres v. United States, 523 U.S. 224 (1998)). The dissent took issue with the en banc majority's application of Macmillan, Jones, and Almendarez-Torres, and took a position consistent with what the U.S. Supreme Court later decided in Apprendi. See McCloud III, 741 So. 2d at 515-17 (Harris, J., dissenting).[4]

This Court denied review of McCloud III. See McCloud v. State, 767 So. 2d 458 (Fla. 2000) (McCloud IV). The United States Supreme Court then granted McCloud's petition for certiorari, vacated McCloud III, and remanded to the Fifth District for reconsideration in light of Apprendi.

As demonstrated above, there is no indication whatsoever that the "statutory maximum for the charged crime" had anything to do with the Fifth District's decision or analysis in McCloud III, and consequently, with the U.S. Supreme

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[4] The dissent in McCloud III said that penetration was a statutory element of the definition of the offense, that its application as an "enhancer" was authorized by rule and not by statute; and that as an element it had to be charged and proved; that it was charged but the general verdict did not establish that it had been found; and that permitting the judge to find an element the jury did not say it found would be impermissible. With respect to Judge Harris, he is wrong to state that the victim injury point "enhancer" was authorized only by rule. In fact, it was a substantive sentencing element expressly established by the Legislature in section 921.0014. Only the procedure for its application was set forth in the Florida Rules of Criminal Procedure. See generally Smith v. State, 537 So. 2d 982 (Fla. 1989). The fact that it was also an alternative element of the definition of the offense does not matter as long as it is a substantive statutory element used to increase the punishment.

Court's decision to vacate in McCloud V. Neither the sentence imposed, nor the actual statutory maximum applicable to McCloud, were even mentioned in the panel, en banc, or dissenting opinions. Moreover, McCloud's sentence of eight years and nine months was nowhere near the statutorily authorized maximum punishment of 15 years' imprisonment for a second-degree felony under sections 794.011(5) and 775.082, Florida Statutes (1995), and McCloud was seeking a reduction of sentence on appeal.

Because the statutorily authorized maximum sentence had nothing to do with the outcome in McCloud III, it must have been immaterial to the United States Supreme Court when the Court vacated McCloud III. Instead, what the Court must have found troubling was the change in McCloud's sentence based upon an essential sentencing fact unsupported by a specific jury finding. After all, that was the point McCloud argued all along, and it was the fundamental point the Fifth District decided. The decision to reverse McCloud III thereby indicates that the U.S. Supreme Court's concern after Apprendi is with the application of any fact essential to imposition of sentence when that fact had not been charged, tried, and demonstrated by the verdict to have been proved to a jury's satisfaction beyond a reasonable doubt.

Nonetheless, the State claims that the jury did all the statute required, and that by returning a death recommendation upon receiving the instructions required by the statute, the jurors necessarily found at least one aggravator proved beyond a reasonable doubt. See AB65-66. While we do know that collectively a majority of the jurors – by some unknown burden[5] – found that death was the appropriate

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[5]. The burden in unknown because Florida law does not instruct jurors to adhere to even a minimal burden before recommending death. The only "burden" jurors are given is that a mere majority needs to vote for death. See Standard Jury

Instructions in Criminal Cases, 690 So.2d 1263, 1264 (Fla. 1996):

> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
>
> A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.
>
> The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.
>
> In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.
>
> The fact that the determination of whether you recommend sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.
>
> If a majority of the jury determine that (defendant) should be sentenced to death, your advisory sentence will be:
>
>> A majority of the jury, by a vote of _________, advise and recommend to the court that it impose the death penalty upon (defendant).

punishment, we do not know, and we cannot presume to know, as the State seems to presume, whether a majority of jurors found any one aggravating circumstance to have been proved beyond a reasonable doubt.

When a jury returns a bare recommendation, neither the judge as co-sentencer, the defendant, nor the reviewing court, know for certain whether a majority of the jurors found any one aggravator to exist beyond a reasonable doubt if more than one aggravator was instructed and argued. For example, if the jury produces a 10-2 death recommendation in a two aggravator case, five jurors could have found the first aggravator and a different five could have found the second aggravator, with the groups of five joining together to make a death recommendation even though no one aggravator had been found by majority vote. Unless we know for a fact that the requisite number of jurors agreed on a single aggravator, no aggravating circumstance can be deemed to have been proved to the jury beyond a reasonable doubt.

The judge as co-sentencer should not be permitted to find each aggravator proved unless the judge knows that the jury likewise found each aggravator proved. Thus, even in the absence of a unanimity requirement, Florida's jury-based death penalty process does not comply with the fair trial and due process requirements discussed in Apprendi because we do not have any way of assuring that the jury

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> On the other hand, if by six or more votes the jury determines that (defendant) should not be sentenced to death, your advisory sentence will be:
>
> > The jury advises and recommends to the court that it impose a sentence of life imprisonment upon (defendant)without possibility of parole.

See also V2R174-79, V5T545-53.

actually found any one aggravator, no less all of the charged aggravators, proved beyond a reasonable doubt.

The State tries to get around this problem by relying on Schad v. Arizona, 501 U.S. 624 (1991), for the proposition that a jurors need not unanimously agree on a "particular theory of liability." See AB at 66 n.38. Schad, however, addresses two alternate theories of guilt, not separate essential facts necessary to impose a death sentence. The number, type, and weight of aggravating circumstances has always played a dispositive role in capital sentencing in Florida. The weighing process itself is not reliable if we don't know the components that the co-sentencers lawfully were permitted to weigh. To accept the State's argument would be to hold that the jury (and later, the judge), are permitted to weigh against the accused an aggravating circumstance that a majority of the jurors may have rejected. That defeats the principle of Apprendi and undermines the entire process.

A careful reading of Schad also demonstrates why the State's reliance on it in this context is wholly misplaced. The plurality opinion in Schad rested on the historical assumption that the means or manner by which a crime was committed did not matter so long as the crime occurred. See Schad, 501 U.S. at 631. Nonetheless, the plurality recognized that in some contexts "differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated" separately. See Schad, 501 U.S. at 633. Justice Scalia, whose concurrence provided the controlling fifth vote,[6] stressed the importance of

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[6] Hence, his opinion is especially important. See Romano v. Oklahoma, 512 U.S. 1, 9 (1994) ("As Justice O'Connor supplied the fifth vote in Caldwell, and concurred on grounds narrower than those put forth by the plurality, her position is controlling.") (citing authorities).

the historical practice as the polestar guiding the decision. See Schad, 501 U.S. at 648-50 (Scalia, J., concurring). Thus, he suggested, for new, novel, or otherwise distinguishable situations, where there is no substantial history of practice specifically allowing jurors to split their rationales, the Schad process would not constitute the "process" to which a defendant is "due."

In Richardson v. United States, 526 U.S. 813 (1999), the Court applied the limitation forecast in Schad. Schad had been convicted of operating a continuing criminal enterprise, wherein one element was that the defendant committed a "continuing series of violations." The Court reversed, holding that statutory and constitutional principles compelled the jury to find each "violation" beyond a reasonable doubt. The Court found as an unacceptable risk the possibility that the jury would treat violations as alternative means, thus permitting the jury to avoid discussion of the specific factual details of each violation. Also unacceptable was the risk that unless jurors are required to focus upon specific factual detail, they will fail to do so, "simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." See Richardson, 526 U.S. at 819. Finally, the Court relied on Schad to hold that "the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition." Richardson, 526 U.S. at 820.

The Florida death penalty statute provides an example of one of the limitations foreshadowed in Schad and applied in Richardson, where there is no long historical precedent, and where the "means" or "manner" in which a crime occurred makes all the difference in the world, the difference between life and death. Aggravating circumstances – essential facts of punishment – cannot be found in the alternative any more than can be essential elements of a crime. They

must be found by a jury to have been beyond a reasonable doubt, and the jury must regard them to be of sufficient weight to warrant a death sentence, before an individual is death eligible. As demonstrated above, we cannot know with certainty, under Florida's statutory scheme, whether a majority of the jurors found any one aggravating circumstance proved beyond a reasonable doubt. Even if a reviewing court were to conclude that the jury must have found a particular aggravator, there would still be no way to presume in case where more than one aggravator was at issue, that the jury found any other aggravator, or that the jury found any one aggravator to be of sufficient weight to warrant death.

The bottom line in the death penalty context is fairness and certainty, neither of which can be conclusively found in the absence of, at the very least, specific jury findings in aggravation. The present statutory scheme, facially and as applied here, does not satisfy the fair trial and due process requirements of Apprendi.

C. No precedent compels a departure from Apprendi

In Mills v. Moore, 26 Fla. L. Weekly S242 (Fla. April 12, 2001), this Court relied on State v. Weeks, 761 A.2d 804 (Del. 2000) and held that Apprendi does not apply to Florida's capital sentencing scheme. Prior to the release of Mills, the State also relied on Weeks in its answer brief in his case. See AB66 n.37. With respect, Appellant urges this Court to reconsider the issue because the Court in Mills superficially applied language in Apprendi to hold Walton v. Arizona, 497 U.S. 639 (1990), as the controlling law, totally overlooking relevant law that distinguishes Florida's sentencing scheme from Walton in light of Apprendi: Lambrix v. Singletary, 520 U.S. 518 (1997), and Espinosa v. Florida, 505 U.S. 1079 (1992).

Initially, Weeks provides no reasoned basis to compel this Court to follow it. First, Weeks assumed that Apprendi may apply, but finding that a guilty plea

waived his right to make the claim. "By his plea of guilty, Weeks waived his right to a jury determination of the facts underlying those statutory aggravating factors and, in contrast to Apprendi, subjected himself to the maximum penalty without further factual findings." 761 A.2d at 806. Second, reliance in Weeks on the judge's finding in aggravation to avoid the implications of Apprendi effectively gave short shrift to the role of the jury in Delaware's sentencing scheme. Whether or not that was appropriate as matter of Delaware law, the same cannot be done in Florida, where the United States Supreme Court in Lambrix expressly recognized the that the Florida penalty jury plays a substantial role as a co-sentencer.

In Lambrix, the United States Supreme Court candidly acknowledged that it previously had misunderstood Florida law with respect to the jury's substantial role as a co-sentencer. The Court said the recognition it ultimately and correctly reached in Espinosa v. Florida, 505 U.S. 1079 (1992), Sochor v. Florida, 504 U.S. 527 (1992), and Lambrix was "in considerable tension with" the Court's previous view, wherein the Court always had regarded the trial judge as the sentencer irrespective of the jury's role. See Lambrix, 520 U.S. at 533-34. Thus, the Court has acknowledged that it's reliance on Florida law in support of its decision in Walton v. Arizona, 497 U.S. 639 (1990), was based on what was at the time the Court's self-admittedly erroneous view of Florida law.

Lambrix is pivotal to this issue, yet Lambrix was never mentioned in Mills, and to appellant's knowledge it was not even argued to this Court in Mills. Mills applied – and misapplied – dictum in Apprendi to say that it did not apply to capital sentencing. The opinion in Mills itself quoted the language from Apprendi that contains the distinguishing fact:

> 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. 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 or her to the death penalty has an absolute entitlement to jury trial on all the elements of the charge."

Mills, 26 Fla. L. Weekly at S___ (emphasis supplied) (quoting Apprendi, 120 S. Ct. at 2366, which in turn quoted Walton). Apprendi's reliance on Walton expressly took into consideration only those capital sentencing schemes in which the jury plays no role in the sentencing determination. Because, as Lambrix came to recognize, the jury plays a pivotal role in making findings in aggravation, this Court must take Lamrbix into account and reconsider Mills in that light.

Because Walton does not control, the dictum in Apprendi does not apply to Florida's sentencing scheme. In fact, the only U.S. Supreme Court case that even warrants some attention in Hildwin v. Florida, 490 U.S. 638 (1989). But Hildwin suffers from the same misunderstanding the U.S. Supreme Court made in its pre-Espinosa cases. Nothing in Hildwin or its predecessors suggest that the Court understood or appreciated the role of the jury in capital sentencing in Florida. Instead, Hildwin was decided on a sixth amendment issue as the Court understood the sentencing process to operate – with the judge as the sentencer. Hildwin also did not address the jury-based fourteenth amendment due process grounds that underpins much of the analysis in Apprendi.

Moreover, Hildwin did not survive Apprendi in so far as Hildwin rested on the now disavowed distinction between sentencing factors and guilt factors. The

Court in Hildwin relied on Macmillan v. Pennsylvania, 477 U.S. 79 (1986), for the proposition that "the existence of an aggravating factor here is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.'" Hildwin, 490 U. S at 640-41 (quoting Macmillan, 477 U.S at 86). We now know that the "sentencing factor" rationale underlying Macmillan is no longer a constitutionally valid distinction.

Another fact not addressed in Hildwin is the role of the death recommendation vis a vis the role of the aggravating circumstances as defined in Florida law. The Florida sentencing scheme essentially turns both the aggravating circumstances and the jury's penalty recommendation into essential facts that the judge must consider in making the ultimate sentencing decision. Once a jury has found the defendant guilty of all the elements of an offense that carries as its penalty the sentence of death, the defendant is guilty of a capital offense but is not yet "eligible" for the death penalty. In a separate penalty proceeding, a jury must determine four things: (1) whether any aggravating circumstances exist beyond a reasonable doubt; (2) whether one or more of the proven aggravating circumstances is of sufficient weight to make the defendant death eligible; (3) whether any mitigating circumstances were proved to exist by a preponderance of the evidence; and (4) whether death is the appropriate punishment under the totality of the circumstances after weighing the aggravating circumstances against the mitigating circumstances. Only after the jury has made findings against the defendant after completing the first two steps has the defendant crossed the threshold and become eligible for the death penalty. When all four steps are completed, the trial judge must engage in the same four steps, limited by the jury's findings. Hildwin treats the jury's recommendation as the one and only essential fact arising from the jury's penalty deliberations. But the jury is a co-sentencer

responsible both for finding the aggravating circumstances proved beyond a reasonable doubt, and for weighing them. When the jury is given this dual responsibility as co-sentencer, the jury's conclusion as to each is equally important. Hildwin addressed only the latter responsibility, that of the weight the jury gave in the conclusory form of its recommendation. Hildwin did not fully address and gauge the jury's role or contemplate the constitutional gravity of the jury's findings as to the other essential sentencing facts, the aggravating circumstances.

Mills also was wrong for relying on the denial of certiorari in Weeks v. Delaware, 121 S. Ct. 476 (2001), as precedential authority. Denial of discretionary review has no precedential weight at all, both under federal law, see House v. Mayo, 324 U.S. 42 (1945), and Florida law, see Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So. 2d 310 (Fla. 1983).

One last omission in the State's argument and the Mills opinion is the Florida Constitution. That document provides independent grounds upon which to base reversal, and has been interpreted by this Court to be of primary concern and provides greater due process protection than rights provided by the United States Constitution. See, e.g., Traylor v. State, 596 So. 2d 957 (Fla. 1992) (recognizing primacy of art. I, §§ 9, 16, Fla. Const.); Haliburton v. State, 514 So. 2d 1088 (Fla. 1987) (rejecting the constitutional precedent of Moran v. Burbine, 475 U.S. 412 (1986), and applying article I section 9 of the Florida Constitution); Jones v. State, 92 So. 2d 261 (Fla. 1956) (on rehearing granted) (holding that unanimous verdict in criminal cases is required by the right to a fair and impartial trial guaranteed by Florida Constitution's, formerly under article I, section 11, Fla. Const. (1885), and now under article I, section 16, Fla. Const. (1968 revision)). The principles discussed in Apprendi, which have their roots in the common law, are deeply rooted in the Florida Constitution as well.

CONCLUSION

For the reasons stated, 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 this reply brief of appellant has been furnished by delivery to Curtis French, Assistant Attorney General, Criminal Appeals Division, the Capitol, Plaza Level, Tallahassee, FL, 32301, and a copy has furnished by mail to appellant Johnny Shane Kormondy, DOC # A-200754, P-6126-S, Union Correctional Institution, P.O. Box 221 A-1, Raiford, FL 32083, on this_______day of___________________, 2001.

CERTIFICATE OF COMPLIANCE

I certify that this computer-generated document has been prepared with Times New Roman 14-point type, in accordance with Florida Rule of Appellate Procedure 3.210.

Respectfully submitted,

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