IN THE SUPREME COURT OF FLORIDA

JOHNNY SHANE KORMONDY,

Appellant,

v. CASE NO. SC05-1200

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF THE APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
Tallahassee, Florida
(850) 414-3300, Ext. 3583
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, Johnny Shane Kormondy, raises eleven claims in this appeal of the trial court's denial of Kormondy's amended motion to vacate his judgments of conviction and sentence to death. References to appellant will be to AKormondy@ or AAppellant,@ and references to appellee will be to Athe State@ or AAppellee.@

The record on direct appeal from Kormondy's original trial will be referenced as "TR" followed by the appropriate volume and page number. Citations to the record from Kormondy's second penalty phase proceeding will be referred to as "2PP" followed by the appropriate volume and page number. Citations to the supplemental record from Kormondy's second penalty phase proceeding will be referred to as "2PP-Supp", followed by the appropriate volume and page number. Citations to the seven-volume record in the instant post-conviction appeal will be referred to as "PCR" followed by the appropriate volume and page number. Citations to the three-volume transcript of the evidentiary hearing will be referred to as "PCR-T" followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The relevant facts concerning the July 11, 1993, murder of Gary McAdams are recited in this Court=s opinion on direct appeal:

> …The victim Gary McAdams was murdered, with a single gunshot wound to the back of his head, in the early morning of July 11, 1993. He and his wife, Cecilia McAdams, had returned home from Mrs. McAdams' twenty-year high-school reunion. They heard a knock at the door. When Mr. McAdams opened the door, Curtis Buffkin was there holding a gun. He forced himself into the house. He ordered the couple to get on the kitchen floor and keep their heads down. James Hazen and Johnny Kormondy then entered the house. They both had socks on their hands. The three intruders took personal valuables from the couple. The blinds were closed and phone cords disconnected.
>
> At this point, one of the intruders took Mrs. McAdams to a bedroom in the back. He forced her to remove her dress. He then forced her to perform oral sex on him. She was being held at gun point. Another of the intruders then entered the room. He was described as having sandy-colored hair that hung down to the collarbone. This intruder proceeded to rape Mrs. McAdams while the first intruder again forced her to perform oral sex on him.
>
> She was taken back to the kitchen, naked, and placed with her husband. Subsequently, one of the intruders took Mrs. McAdams to the bedroom and raped her. While he was raping her, a gunshot was fired in

> the front of the house. Mrs. McAdams heard someone yell for "Bubba" or "Buff" and the man stopped raping her and ran from the bedroom. Mrs. McAdams then left the bedroom and was going towards the front of the house when she heard a gunshot come from the bedroom. When she arrived at the kitchen, she found her husband on the floor with blood coming from the back of his head. The medical examiner testified that Mr. McAdams' death was caused by a contact gunshot wound. This means that the barrel of the gun was held to Mr. McAdams' head.
>
> Kormondy was married to Valerie Kormondy. They have one child. After the murder, Mrs. Kormondy asked Kormondy to leave the family home. He left and stayed with Willie Long. Kormondy told Long about the murder and admitted that he had shot Mr. McAdams. He explained, though, that the gun had gone off accidentally. Long went to the police because of the $50,000 reward for information.

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

Kormondy, Buffkin, and Hazen were charged by indictment on July 27, 1993, for one count of felony murder, three counts of armed sexual battery, one count of burglary of a dwelling with an assault, and one count of armed robbery. Each of the three co-defendants was tried separately.

At the conclusion of the State’s case in chief, Kormondy’s trial counsel moved for a judgment of acquittal on both the premeditated murder and sexual battery counts of the indictment. (TR Vol. VIII 1351, 1353). The trial court denied the motion. (TR Vol. VIII 1352, 1354). At the conclusion of the trial,

trial counsel filed a motion for a new trial. The trial court denied the motion.

At the penalty phase, Kormondy presented several mitigation witnesses.1 After the penalty phase, the jury, by a vote of 8-4, recommended Kormondy be sentenced to death. (TR Vol. X 1939).

The trial court found the State had proven five aggravating circumstances beyond a reasonable doubt: (1) Kormondy was previously convicted of a felony involving the threat of violence to the person; (2) the capital felony was committed while Kormondy was engaged or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit a burglary; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (4) the capital felony was committed for pecuniary gain; and (5) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (TR Vol. IV 599-606).

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1 In mitigation, Kormondy called to testify his mother, his sister, his brother, his grand mother-in-law, an uncle-in-law, a psychologist who testified Kormondy did not suffer from any major mental illness and did not qualify for any of the statutory mental mitigators, a pharmacologist who testified about the effects of addiction, a physician who diagnosed Kormondy as a cocaine and alcohol addict, and Curtis Buffkin's defense counsel.

The trial judge found no statutory mitigators. In non-statutory mitigation, the trial judge considered Kormondy's childhood including his deprivation, trauma, and loss of parental comfort and companionship during his early years. The trial judge gave these factors moderate weight. The Court noted, however, that it was well satisfied that Kormondy was more a product of his failure to choose a positive and productive lifestyle than a victim of family dysfunction. The trial judge also found Kormondy was a good employee in the past and gave this factor moderate weight. He found Kormondy has a personality disorder and assigned this factor moderate weight. Finally, the trial judge found Kormondy was drinking alcohol before the crime was committed and that he was well-behaved at trial. He gave both of these factors little weight.

The trial judge gave no weight to Kormondy’s suggestion that he was a drug addict or to Kormondy’s learning disability and lack of education. He gave no weight to the fact that Buffkin was given disparate treatment. The trial judge found the State had established beyond a reasonable doubt that Kormondy actually killed Gary McAdams. Finally, the trial judge gave no weight to Kormondy’s suggestion he was cooperative with law enforcement, finding that Kormondy had unlawfully refused to testify in co-defendant Hazen’s trial. The trial court followed the jury’s

recommendation and sentenced Kormondy to death. (TR Vol. IV 606-616).

On direct appeal, Kormondy raised six issues. He alleged: (1) the trial court erred during the guilt phase by allowing Deputy Cotton to bolster Willie Long's testimony; (2) the trial judge erred during the guilt phase by denying Kormondy's motion for a judgment of acquittal as to premeditated murder; (3) the trial court erred in the penalty phase by admitting bad character evidence in the form of unconvicted crimes or nonstatutory aggravating circumstances; (4) the trial court erred in its treatment of aggravating circumstances; (5) the trial court erred in its treatment of mitigation; and (6) the death sentence is unconstitutional or, more specifically, disproportionate.

At issue regarding the trial testimony of Deputy Cotton was whether Kormondy confessed to Willie Long that he shot the victim with Mr. McAdams' own gun. Shortly after the murder, Mr. Long told Deputies Cotton and Hall the details of Kormondy's confession. He informed the deputies that Kormondy told him he had used Mr. McAdams' gun to shoot Mr. McAdams.

At trial, Willie Long was called by the State to tell the jury what Kormondy told him about Mr. McAdams' murder. When asked whether he told the deputies Kormondy reported he shot Mr. McAdams with his own gun, Mr. Long could not specifically

recall. He did testify, however, that the deputies took everything down “word for word” and that his memory was fresher at the time he spoke with the deputies.

The State, thereafter, called Deputy Cotton to the witness stand. Over a defense hearsay objection, Deputy Cotton testified that Long reported that Kormondy confessed to using the homeowner's gun to commit the shooting.

This Court agreed with Kormondy that Cotton’s testimony constituted inadmissible hearsay. This Court determined, however, that the error was harmless because there was ample evidence to establish that Kormondy used Mr. McAdams’ gun to shoot him in the back of the head.

Next, Kormondy alleged the trial court erred in failing to grant Kormondy’s motion for a judgment of acquittal as to first-degree premeditated murder. Kormondy argued the court should have granted the motion because the State’s evidence failed to discount the reasonable hypothesis the shooting was accidental.

This Court agreed and found there was insufficient evidence to support a finding the murder was premeditated. This Court found no reversible error, however, because the record clearly supported a finding of first-degree felony murder. Accordingly, this Court affirmed Kormondy’s convictions for first-degree felony murder, three counts of armed sexual battery, one count

of burglary with a dwelling with an assault, and one count of armed robbery. Kormondy v. State, 703 So.2d 454 (Fla. 1997).

As to Kormondy's allegations of penalty phase error, this Court found reversible error because the State was permitted to present testimony, during the penalty phase, that Kormondy told co-defendant Buffkin that, if he got out of jail, he would kill Willie Long and Mrs. McAdams. This Court found this testimony was not directly related to a statutory aggravating factor and as such constituted impermissible nonstatutory aggravation. This Court also ruled it could not say this evidence was harmless beyond a reasonable doubt. This Court reversed and remanded for a new penalty phase before a new jury. Kormondy v. State, 703 So.2d 454 (Fla. 1997).

At his original trial, assistant public defenders, Ronald Davis and Antoinette Stitt represented the defendant. Prior to the commencement of his second penalty phase proceeding, on April 16, 1998, Kormondy filed a motion to discharge Ms. Stitt from the case. (2PP Vol. I 18-19). He stated no specific grounds in his *pro se* motion. Instead, Kormondy alleged only he intended to pursue claims of ineffective assistance of counsel against Ms. Stitt and that she had failed to keep and maintain his trust.

With the assistance of trial counsel, Ronald Davis, Kormondy filed a subsequent *pro se* motion for substitution of counsel on

October 28, 1998 (2PP Vol. I 92-93). Kormondy alleged that Ms. Stitt knew the victim, Mr. Gary McAdams, had gone to high school with him, and shared common friends and acquaintances with Mr. McAdams. Kormondy alleged this created a conflict of interest between Kormondy and the Office of the Public Defender. (2PP Vol. I 92-93).

On the same day that Mr. Kormondy filed his motion to remove Ms. Stitt as his trial counsel, Kormondy filed a *pro se* motion to disqualify the original trial judge, Judge John Kuder. Kormondy alleged that Judge Kuder had a banking relationship with First Union Bank, the bank for which Mr. McAdams worked prior to his death. Kormondy also alleged Judge Kuder knew Mr. McAdams. Kormondy claimed this acquaintance, coupled with the banking relationship with Mr. McAdams' bank, were grounds for disqualification. (2PP Vol I. 89-91).

The trial court held a hearing on Kormondy's motions on October 28, 1998, some seven months before Kormondy's second penalty proceeding began. The court, first, heard testimony from both Ms. Stitt and Mr. Kormondy on the motion for substitution of counsel.

Ms. Stitt testified she knew Gary McAdams from high school from 1969-1972. She testified that, though she did not have specific recall, she remembered attending functions such as parties, football games, proms, dances where Mr. McAdams was

present. She believed Ms. McAdams was at their ten year high school reunion. (2PP Vol. I 30).

She told the court she discussed her acquaintance with Mr. McAdams with Kormondy prior to the original trial and discussed the potential conflict. Ms. Stitt testified Kormondy told her he felt comfortable with her representing him. (2PP Vol. I 31).

Ms. Stitt did not perceive this alleged conflict affected the manner, enthusiasm, vigor or aggressiveness with which she defended her client. She told the court that although her acquaintance with Mr. McAdams did not make her relationship with Mr. Kormondy difficult in the past, she believed that it would in the future because Mr. Kormondy was now bothered by it. (2PP Vol. I 40-41).

Ms. Stitt told the court she was uncomfortable with the situation and believed that Mr. Kormondy was reluctant to talk to her one-on-one. She told the court that, for whatever reason, based on her acquaintance with Mr. McAdams, Kormondy no longer trusted her or the Office of the Public Defender. (2PP Vol. I 42).

Judge Kuder next called Kormondy to testify. Kormondy testified he did not specifically recall Ms. Stitt discussing her acquaintance with Mr. McAdams prior to his first trial but believes she did talk to him about it. (2PP Vol. I 44). He testified it did not concern him at the time.

Kormondy testified that since he had been sentenced to death, he had plenty of time to think about it. When the trial judge asked Kormondy specifically what things he believes Ms. Stitt did or failed to do because of the conflict, Kormondy was "[] really not sure". (2PP Vol. I 45). He testified Ms. Stitt's acquaintance with Mr. McAdams did not affect his ability to communicate with Ms. Stitt during both phases of his original trial. (2PP Vol. I 48). Kormondy told the court that now, however, he has no trust in her. (2PP Vol. I 50).

The Court next took up Kormondy's motion to disqualify Judge Kuder. At the motion hearing, Kormondy amended his motion to add another ground to disqualify Judge Kuder. Kormondy alleged that Judge Kuder's wife worked in the State Attorney's Office, the same office that was seeking the death penalty in his case. (2PP Vol. I 72). Kormondy acknowledged he had known about the facts, upon which he based the motion to disqualify, since his first trial. (2PP Vol. I 75).

On October 28, 1998, Judge Kuder entered orders granting Kormondy's motion to remove Ms. Stitt as trial counsel. He also entered an order granting Kormondy's motion for his recusal. (2PP Vol. I 94-95). On December 8, 1998, Glenn Arnold was appointed to represent Kormondy during his new penalty phase proceeding. (2PP Vol. I 97).

On May 3, 1999, with Judge Joseph Q. Tarbuck presiding, the trial court conducted a new penalty phase before a new jury. The State put on several witness, including the victim's friends and family members and members of law enforcement. The defense put on no witnesses.

This new jury recommended Kormondy be sentenced to death by a vote of 8-4. The court found and gave great weight to two aggravating factors: (1) Kormondy had previously been convicted of a felony involving the use of threat or violence, and (2) the murder was committed in the course of a burglary. The court found no statutory mitigators and rejected Kormondy's argument he was a relatively minor participant and less culpable than his accomplices. The trial court considered but rejected several nonstatutory mitigating factors. (2PP Vol. I 202-210). The trial court followed the jury's recommendation and sentenced Kormondy to death. (2PP Vol. II 210)

On appeal, Kormondy raised seven issues. Kormondy alleged: (1) the death penalty is unconstitutional and his death sentence was disproportionate given that his codefendants ultimately received life sentences and Mr. McAdams' death was caused by an accidental firing of the weapon; (2) the resentencing trial and order violated this Court's mandate from the first appeal, violated principles of law protecting the accused from having questions of ultimate fact re-litigated

against him, and violated Kormondy's rights by finding aggravators not tried or argued; (3) the trial court erred in its mitigation findings because the trial court defied this court's mandate, committed legal and factual errors, and contradicted itself; (4) the trial court erred by allowing the State to present irrelevant, cumulative, and unduly prejudicial collateral crime and non-statutory aggravating evidence about Kormondy's capture by a canine unit more than a week after the crime took place; (5) Kormondy was denied his right to cross-examine and confront State witness Cecilia McAdams concerning her ability to identify and distinguish the perpetrators; (6) the trial court erred in permitting the State to introduce compound victim impact evidence, much of which was inadmissible, because it undermined the reliability of the jury's recommendation; and (7) 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 unusual punishment.

This Court rejected each of Kormondy's claims and affirmed his sentence of death. Kormondy v. State, 845 So.2d 41 (Fla. 2003). The United States Supreme Court denied review on October 14, 2003, in Kormondy v. Florida, 540 U.S. 950 (2003).

On August 30, 2004, Kormondy filed his initial motion for post-conviction relief and filed an amended motion on April 5,

2005. Kormondy raised nine claims in his amended motion. (PCR Vol. III 356-516). On January 13, 2005, the trial court held a Huff hearing on Kormondy's motion.

The collateral court granted an evidentiary hearing on four of Kormondy's claims. (PCR Vol. III 540-542). On April 5, 2006, shortly before the evidentiary hearing, Kormondy amended Claim III of his motion for post-conviction relief. (PCR Vol. III 549-555).

On April 18 and 19, 2005, the collateral court held an evidentiary hearing on Kormondy's amended motion for post-conviction relief. On July 7, 2005, the collateral court entered an order denying Kormondy's amended motion for post-conviction relief. (PCR Vol. VI 948-997). This appeal follows.

SUMMARY OF THE ARGUMENT

Claim I: Kormondy claims that original trial counsel was ineffective for failing to ensure Kormondy's presence at pre-trial conferences held on May 26, 1994, June 20, 1994, June 21, 1994, June 23, 1994, and July 1, 1994. While Kormondy raises this claim in the guise of an ineffective assistance of counsel claim, Kormondy actually presents a substantive claim in his argument before this Court. Any substantive claim is procedurally barred because a claim Kormondy was absent from critical stages of the proceeding could have, and should have, been raised on direct appeal. In any event, none of Kormondy's

absences were involuntary. Kormondy failed to show how he was prejudiced by his absences because Kormondy failed to show his absence from these pre-trial conferences affected the validity of the trial to the extent the verdict could not have been obtained.

Claim II: Kormondy claims trial counsel was ineffective for failing to purse a motion to suppress statements Kormondy made to law enforcement authorities shortly after his arrest for the murder of Gary McAdams. Kormondy's claim may be denied on two grounds. First, even if trial counsel would have persisted in pursuing the motion to suppress she filed on June 17, 1994, the motion would not have been granted. Kormondy demonstrated no grounds for suppression of Kormondy's statement. Additionally, trial counsel's decision to withdraw the motion to suppress was a reasoned tactical decision designed to persuade the jury to recommend a life sentence.

Claim III: Kormondy claims trial counsel was ineffective for conceding during opening statement and closing argument that Kormondy was guilty of burglary and robbery. In light of Kormondy's admissions to law enforcement officers and to William Long, as well as the overwhelming evidence linking Kormondy to the robbery of Cecilia and Gary McAdams and the burglary of their home, trial counsel's decision to concede guilt to

burglary and robbery was a reasoned tactical decision designed to persuade the jury to recommend a life sentence.

Claim IV: Kormondy claims trial counsel was ineffective for failing to impeach State witnesses, Cecilia McAdams and William Long. Several of Kormondy's claims of ineffective assistance of counsel as to these two witnesses were not presented to the collateral court and are not properly before this Court. For those claims that are properly before this Court, Kormondy failed to demonstrate a reasonable possibility the impeachment he suggests would have changed the outcome of the trial.

Claim V: Kormondy alleges trial counsel was ineffective during his original trial for failing to move for disqualification of the trial judge and to withdraw from representation. Kormondy failed to demonstrate legal grounds for disqualification of Judge Kuder. Even if grounds for challenge existed, Kormondy failed present any evidence he was deprived of a fair trial or that Judge Kuder displayed any actual bias against the defendant. Kormondy also failed to demonstrate there is a reasonable probability the outcome of the proceeding would have been different had Judge Kuder been recused.

Kormondy also claims trial counsel Stitt should have filed a motion to withdraw because she went to high school with Mr. McAdams. Ms. Stitt disclosed her nodding acquaintance with Mr.

McAdams with her client. Kormondy did not ask her to withdraw and affirmatively consented to her continued representation. Further, Kormondy failed to show the alleged "conflict of interest" adversely affected her performance.

Finally, Kormondy claims Ms. Stitt was obligated to move to withdraw because the Office of the Public Defender represented William Long, a witness for the State in the McAdams' murder, at the same time trial counsel represented Mr. Kormondy. Kormondy failed to show an actual conflict of interest as the Office of the Public Defender moved to withdraw from Long's case shortly after appointment and as soon as they discovered the potential conflict. Further, Kormondy can point to no nexus between any alleged deficient performance and the alleged conflict.

Claim VI: Kormondy alleges trial counsel was ineffective during the second penalty phase of Kormondy's capital trial in various ways. Kormondy failed to demonstrate that trial counsel was ineffective for failing to present mitigation evidence before the jury or at the Spencer hearing.

Kormondy freely, voluntarily, and knowingly waived his right to put on mitigation evidence before the jury. Additionally, there is no reasonable possibility that presentation of any of the available mitigation evidence would have resulted in a life sentence.

Kormondy failed to demonstrate counsel was ineffective for failing to ensure his presence at three pre-trial hearings and at the Spencer hearing. Kormondy was actually present at two of the three pre-trial conferences and at the Spencer hearing. Kormondy failed to show he suffered any prejudice as a result of his absence from the July 21, 1998 hearing.

Kormondy failed to present any argument to support his claim trial counsel was ineffective for failing to object to improper victim impact evidence and has apparently abandoned the claim. Likewise, Kormondy failed to provide any legal support for the notion that failure to request a "victim impact" instruction constitutes ineffective assistance of counsel.

Finally, Kormondy failed to demonstrate trial counsel was ineffective for failing to proffer Ms. McAdams' deposition to enlighten the court where trial counsel was going in trying to impeach Ms. McAdams' deposition of one of her assailants. Kormondy failed to proffer the deposition as well. The collateral court properly denied Kormondy's claim when he failed to present any evidence to support it.

Claim VII: Kormondy alleges newly discovered evidence entitles him to a new penalty phase. Kormondy failed to show the collateral court abused its discretion when it determined the testimony of co-defendants Curtis Buffkin and James Hazen was not credible. Further, Kormondy failed to show Buffkin and

Hazen's testimony, in light of all the circumstances of the case, is of such a nature as to probably result in a life sentence on retrial.

Claim VIII: This claim is procedurally barred. A claim attacking the constitutionality of the Florida Bar Rule of Professional Conduct governing interviews of jurors can and should be raised on direct appeal.

Claim IX: This claim is procedurally barred. Constitutional challenges to Florida=s death penalty statute on Eighth Amendment grounds can be and should be on direct appeal. Further, this Court has consistently ruled that neither execution by electrocution nor lethal injection constitute cruel and/or unusual punishment.

Claim X: Because the Governor has not signed a death warrant and Kormondy's= execution is not presently pending, this claim is not ripe for adjudication.

Claim XI: When a defendant fails to demonstrate any individual error in his motion for post-conviction relief, it is axiomatic his cumulative error claim must fail. Kormondy has failed to demonstrate any individual error. Accordingly, any cumulative error claim must fail.

ARGUMENT

CLAIM I

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE FOR FAILING TO ENSURE KORMONDY'S PRESENCE AT PRETRIAL CONFERENCES

Kormondy alleges counsel was ineffective for failing to ensure his presence at five pre-trial conferences. Specifically, Kormondy claims he was involuntarily absent from pre-trial conferences held before his initial trial in 1994. Kormondy alleges he was absent from pre-trial conferences held on May 26, June 20, June 21, June 23 and July 1, 1994. (IB at 17-19).

While Kormondy couches this claim in terms of ineffective assistance of counsel, the argument he presents in his initial brief raises more of a substantive claim of error. Any substantive claim, however, is procedurally barred.

A defendant=s claim he was involuntarily absent during critical stages of the proceedings can be, and should be, raised on direct appeal. Armstrong v. State, 862 So.2d 705 (Fla. 2003) (ruling that the defendant=s claim he was effectively absent from critical stages of his trial was procedurally barred because it could have been raised on direct appeal); Vining v. State, 827 So.2d 201, 217 (Fla. 2002) (determining that "substantive claims relating to Vining's absence [during critical stages of trial] are procedurally barred as they should have been raised either at trial or on direct appeal"); Moore v. State, 820 So.2d 199, 203 n.4 (Fla. 2002) (ruling that post-conviction claim that the

defendant was absent from critical stages of trial is procedurally barred because it could have and should have been raised on direct appeal). Because Kormondy did not raise this issue on direct appeal, his substantive claim is procedurally barred.

The trial court granted an evidentiary hearing on Kormondy's claim that trial counsel was ineffective for failing to ensure his presence at each critical stage of the proceedings. Trial counsel, Stitt, testified at the hearing on this claim. The gist of her testimony was that none of Kormondy's absences from pre-trial conferences were involuntary because Kormondy told her he did not want to attend. (PCR-T Vol. I. 151).

Kormondy offered nothing at the evidentiary hearing to refute trial counsel's testimony that all of Kormondy's absences were voluntary. When asked why he waived his presence at pre-trial hearings, Kormondy testified his attorneys told him that only legal issues about the death penalty would be discussed, as well as motions and stuff he wasn't needed for. (PCR-T Vol. III 310). Kormondy also testified that based on Ms. Stitt's advice, he made a choice not to attend the pre-trial hearings. (PCR-T Vol. III 366). In its order denying Kormondy's claim, the collateral court noted that trial counsel testified, at the evidentiary hearing, that Kormondy showed little interest in what was occurring in court and that he did not want to show up

for the hearings. Ms. Stitt told the collateral court that Kormondy often would ask her if the pre-trial conferences were going to be "legal mumbo jumbo" and told her he did not want to be present. The court also noted Ms. Stitt's testimony that Kormondy personally informed the court he wanted to waive his appearance at not just one hearing but at the hearings, plural. (PCR Vol. VI 952). The collateral court ruled that none of the defendant's absences were involuntary. Further, the Court found that Kormondy was not prejudiced by his choice not to be present at the pre-trial conferences. (PCR Vol. VI 953).

The collateral court's findings that none of Kormondy's absences were involuntary should end the inquiry. However, even if this court reaches the prejudice prong of Kormondy's ineffective assistance of counsel claim, Kormondy is still entitled to no relief.

This Court has ruled a defendant has a constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Wike v. State, 813 So.2d 12 (Fla. 2002). In order to show counsel was ineffective for failing to object to Kormondy's absence during certain portions of his trial, however, Kormondy must demonstrate prejudice from his absence. To show prejudice, Kormondy must show his failure to be present at these pre-trial conferences affected the validity of the trial itself to the extent that the

verdict could not have been obtained. Orme v. State, 896 So.2d 725, 738 (Fla. 2005).

A. May 26, June 20, June 23 and July 1, 1994, hearings.

As to these hearings, Kormondy made no allegation in either his motion for post-conviction relief or in his initial brief that he personally would have taken a different position than that taken by counsel or would have contemporaneously objected to any decision made or taken by trial counsel. Kormondy offers no support for the notion that any matters discussed at these hearings required his input nor did he demonstrate at the evidentiary hearing how his presence would have assisted his counsel. Likewise, Kormondy has failed to show, in any way, the position taken by counsel at those hearings was incorrect, strategically unwise, or otherwise subject to attack. Accordingly, Kormondy has failed to demonstrate he was prejudiced by trial counsel's failure to ensure his presence at the May 26, June 20, June 23 and July 1, 1994, pre-trial hearings.

B. The June 21, 1994 hearing

This hearing is the only hearing at which Kormondy avers he would have objected to trial counsel's actions. Specifically, Kormondy claims he did not consent to trial counsel's decision to withdraw his motion to suppress because he wanted his motion heard (PCR-T Vol. II 322).

Kormondy was actually present at the June 21, 1994, hearing

and affirmatively waived his continued presence on the record. (PCR VOl. VI 999). The trial judge informed Kormondy he had the absolute right to be present at a hearing on a motion that pertains to his case. Kormondy indicated he understood.

The trial judge also advised Kormondy the motions he would hear and his rulings on the motions may affect and certainly would affect the manner and quality in which the evidence is presented. Kormondy indicated his understanding. The trial judge asked Kormondy whether anyone used any pressure, threat, force or duress in order to get Kormondy to waive his right to be present. Kormondy said no. Even so, the trial judge persisted and asked Kormondy whether he was absolutely certain he wanted to waive his presence. Kormondy said he was. (PCR Vol. VI 1002). The Court found the waiver to have been freely, knowingly, and voluntarily given. (PCR Vol. VI 1002).

Having affirmatively waived his presence, Kormondy should be precluded from claiming, in post-conviction proceedings, his counsel was ineffective for failing to ensure he did not waive his presence. Amazon v. State, 487 So.2d 8, 11 (Fla. 1986) (noting that while a capital defendant is free to waive his or her presence at a crucial stage of the trial, the waiver must be knowing, intelligent, and voluntary). The colloquy between Kormondy and the trial judge refutes Kormondy's claim that trial

counsel, somehow, induced him to waive his presence at the June 21, 1994, hearing. Even so, Kormondy can show no prejudice from his absence. (PCR Vol. VI 1002).

The collateral court found that had trial counsel persisted in her litigating the motion to suppress, it would have been unsuccessful. Alternatively, the trial court found that withdrawing the motion to suppress was the result of a reasoned tactical decision. (PCR Vol. VI 957-958).

Even if Kormondy wanted his motion heard, trial counsel was within her authority to withdraw the motion to suppress as long as she believed it was in Kormondy's best interest to do so. Nixon v. Florida, 543 U.S. 175, 188 (2004) (ruling that while an attorney undoubtedly has a duty to consult with the client regarding "important decisions," including questions of overarching defense strategy, that obligation does not require counsel to obtain the defendant's consent to "every tactical decision"); Sims v. State, 602 So.2d 1253, 1257 (Fla. 1992) (noting that trial counsel has considerable discretion in preparing a trial strategy and choosing the means of reaching the client's objectives).[2]

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2 The State's answer to Kormondy's claim trial counsel was ineffective for failing to persist in the motion to suppress is discussed at length below in Claim II. Trial counsel testified at the evidentiary hearing she withdrew the motion because she wanted to get Kormondy's partially exculpatory statement to the jury without having to put Kormondy, a many time convicted

Because the only decision on the part of trial counsel at the June 21, 1994, pre-trial hearing, about which Kormondy takes issue, is one the collateral court deemed to be sound trial strategy, Kormondy cannot show trial counsel's failure to ensure his presence affected the validity of the trial itself to the extent that the verdict could not have been obtained. Orme v. State, 896 So.2d 725, 738 (Fla. 2005). This claim should be denied.

CLAIM II

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR ALLOWING KORMONDY'S STATEMENTS TO LAW ENFORCEMENT TO BE INTRODUCED INTO EVIDENCE.

Kormondy next alleges that trial counsel was ineffective for allowing Kormondy's statement to law enforcement to come into evidence at trial. Kormondy's claim seems to rest on two basic assumptions.

First, Kormondy assumes that if trial counsel would have pursued her motion to suppress filed on June 17, 1994, the motion would have been successful. Kormondy alleges his statement was involuntary because, at the time he gave his statement, he was suffering from injuries received as a result of being bitten by a police canine when he attempted to elude police capture. Kormondy also alleges his statement was involuntary because investigators falsely promised him that, if he cooperated, he

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felon, on the witness stand. (PCR Vol. I, 139, 188-189).

could go home and would either not be incarcerated or get less time than Hazen and Buffkin. (IB 25).[3]

Kormondy's second assumption is trial counsel did not make a reasoned tactical decision to withdraw the motion. Kormondy is mistaken on both counts.

In his order denying Kormondy's motion for post-conviction relief, the collateral court judge found that trial counsel cannot be ineffective for failing to file a motion to suppress where existing case law does not require suppression.[4] The

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3 The grounds upon which Kormondy claims now as groundS to suppress his statements were not the grounds set forth in his motion to suppress. (TR Vol. I 97-98).

In his motion to suppress, Kormondy raised the dog bite only as a historical fact. Kormondy did not argue, or present any authority in support of the notion, that a statement is involuntary if a declarant is injured as a result of unlawful flight from law enforcement authorities. Kormondy did not even claim his injuries were so severe as to render his statement involuntary. Likewise, Kormondy did not claim his statement was involuntary because law enforcement investigators offered an unlawful inducement. (TR Vol. I 97-98).

4 Trial counsel testified that she was under the impression that the prosecutor would not contest the motion to suppress.

The prosecutor testified at the evidentiary hearing he did not specifically recall the conversation. He testified he believed he told Ms. Stitt she would lose the suppression but even if she did win it, they would go with Willie Long's testimony. When pressed by collateral counsel, Mr. Edgar did not recall either acquiescing to the motion or even implying the State would not contest it. Mr. Edgar testified, however, that if Ms. Stitt made a notation about the conversation, he is sure that is what happened. He did recall talking with her about his view that it would not make much difference to the State if she either won or withdrew it because they had statements from the defendant in any event. (PCR Vol. I 18-19).

collateral court found that Kormondy's admissions to police came after he was properly advised of his Miranda rights. The collateral court also found the defendant agreed, as evidenced by a tape recorded statement, that there had been no promises made to him nor had there been any threats made which would pressure him into giving a statement. The court concluded that Kormondy's taped statement reflected his agreement that neither Deputy Cotton nor Deputy Hall had mistreated him in any way or coerced him into giving a statement. (PCR Vol. VI 956). The court noted that Deputy Cotton testified at the evidentiary hearing he never made any promises or guarantees to the Defendant, his sister, or his mother. The collateral court found Deputy Cotton's testimony at the evidentiary hearing to be credible. (PCR Vol. VI 956).

As to Kormondy's claim he was too wounded, as a result of the dog bite, to voluntarily waive his rights, the collateral court rejected this claim. The court found that while Deputy Cotton was aware Kormondy had been bitten by a police dog after Kormondy fled to elude police capture, he observed no sign of injury as a result of the bite and Kormondy did not request medical treatment or report he was in any pain. (PCR Vol. VI 957).

Further, the court credited Deputy Cotton's testimony that Kormondy was not upset or crying at the beginning of the

interrogation. Instead, Kormondy only began crying after he reported that Buffkin had shot Mr. McAdams. (PCR Vol. VI 957).

The collateral court found, considering the totality of the circumstances surrounding Kormondy's arrest and interrogation, that a motion to suppress would not be meritorious. The court found there was no reliable evidence that Kormondy gave his statement because he was promised he would not be incarcerated and would get to go home.

The collateral court found, to the contrary, that the trial record and the evidence adduced at the evidentiary hearing demonstrated that Kormondy knowingly and intelligently waived his rights without any inducements by law enforcement. (PCR Vol. VI 957). The collateral court also found that Kormondy was not under any physical duress, at the time he gave his statement, due to his dog bite injuries. (PCR Vol. VI 957-958). The court specifically found Kormondy's testimony at the evidentiary hearing that he was promised he would not be incarcerated and could go home if he gave a statement, not credible. (PCR Vol. VI 956, n. 44).

The collateral judge's conclusions that Kormondy's statement was freely and voluntarily made, free from physical duress or unlawful inducement, is supported by the evidence. Deputy Cotton testified at the evidentiary hearing he made no promises or threats to cause Kormondy to give a statement. He also testified

that Kormondy never requested medical assistance. (PCR-T Vol. III 400). In his tape recorded statement given to police, Kormondy was read and waived his Miranda rights. Kormondy averred that Deputies Hall and Cotton had not mistreated him in any way and had not coerced him into giving a statement in any way. Kormondy also averred the investigators had not made any promises to him. He stated he had not been threatened in any way. (2PP Supp. Vol. II 175-176). In that statement, Kormondy never complained he was in pain or that he needed medical assistance. The collateral court correctly determined that any motion to suppress Kormondy's statement to law enforcement would not have been successful. Schoenwetter v. State, 31 Fla.L.Weekly S261 (Fla. April 27, 2006) (observing that in order to demonstrate a statement is involuntary, there must be a finding of coercive police conduct).

The court also correctly ruled that trial counsel's decision to withdraw the motion to suppress was a tactical decision. Considering the evidence presented at trial and at the evidentiary hearing, the court concluded the decision to withdraw the motion was "sound trial strategy" for which trial counsel cannot be considered ineffective. (PCR Vol. VI 958). This ruling was supported by the testimony of trial counsel Stitt during the evidentiary hearing.

Ms. Stitt testified she withdrew the motion to suppress because she thought it important to get the defendant's version of events before the jury without having to put the defendant on the witness stand. (PCR-T Vol. I 139, 188-189). She was concerned about, among other things, putting Mr. Kormondy on the stand given his substantial criminal record. (PCR-T Vol. I 139). Ms. Stitt believed Kormondy's statement might help save his life.

She testified that, while she had no specific recollection of the conversation, it was her practice to discuss matters such as withdrawing a motion with her clients. She believed she received Mr. Kormondy's permission to withdraw the motion.[5] She testified she would probably dispute any testimony from Kormondy that she neither spoke to him about withdrawing the motion nor received his permission to withdraw the motion. (PCR-T Vol. I 136).

Ms. Stitt's decision to withdraw her motion to suppress and the state's subsequent decision to place Kormondy's partially exculpatory and partially inculpatory statement into evidence put evidence before the jury that Kormondy was not the shooter.

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5 Trial counsel was not required to obtain Kormondy's permission to withdraw the motion to suppress. Nixon v. Florida, 543 U.S. 175, 188 (2004) (ruling that while an attorney undoubtedly has a duty to consult with the client regarding "important decisions," including questions of overarching defense strategy, that obligation does not require counsel to obtain the defendant's

It also put before the jury Kormondy's statement he did not participate in sexually assaulting Ms. McAdams and his assertion the shooting, albeit done by Buffkin, was accidental.

The trial judge found Ms. Stitt's decision to withdraw the motion to suppress was a strategic one. This ruling is supported by the testimony of defense counsel at the evidentiary hearing. Maharaj v. State, 778 So.2d 944, 959 (Fla. 2000) (Counsel's strategic decisions, viewed from the vantage of 20-20 hindsight, do not demonstrate ineffective assistance of counsel).

Even if this Court were to reject the collateral judge's conclusion that trial counsel's strategy was sound and reasoned, Kormondy cannot meet Strickland's prejudice prong. Kormondy's claim of prejudice seems to be premised on the notion that, without Kormondy's statement to police admitting to his participation in the murder, there would have been little evidence to link him to the murder scene. The evidence adduced at trial refutes Kormondy's assertion. Apart from his statements to the police, the State put on ample evidence establishing beyond a reasonable doubt that, not only was Kormondy one of the three men who invaded the McAdams' home at gunpoint, Kormondy raped Cecilia McAdams and pulled the trigger on the gun that killed Gary McAdams.

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consent to "every tactical decision").

At trial, Ms. McAdams described the events leading up to her rape and her husband's murder. She testified that three assailants entered her home. Ms. McAdams told the jury the first man to enter her home had a gun. She later positively identified this man as Curtis Buffkin. (TR Vol. VI 1088).

Ms. McAdams described another of her assailants as a thin sharp featured man with long, mousy brown sandy colored hair that was kind of stringy. Ms. McAdams testified the man with long hair raped her in the vanity area of her bedroom while another assailant orally sodomized her. (TR Vol. VI 1076-1077). According to Ms. McAdams, these two men came into contact with a dress she had worn to her high school reunion that evening; the one she had taken off at the direction of the first man who sexually assaulted her. (TR Vol. VI 1063).

After they were done raping and sodomizing her, the two men took Ms. McAdams, naked, back into the kitchen where her husband was. Eventually, Buffkin took her back into the master bedroom and vaginally raped her. He told her that "I don't know what the other two did to you, but I think you're going to like what I'm going to do. (TR Vol. VI 1079). She was not certain whether this third rapist came into contact with her dress.

She testified that in addition to her husband's billfold and her purse, the men took some jewelry from her home, including several watches and several rings. She also reported they took

a big shopping canvas bag she had gotten in Colorado. (TR Vol. VI 1087). She testified unequivocally that all three men raped her. (TR Vol. VI 1088).

Detective Cotton testified as to the appearance of Kormondy's hair. He testified that when Kormondy was arrested, not long after the murder, he had collar length long blond hair. (TR Vol. VI 1114).

Bobby Lee Prince put the defendant's car near the murder scene. Mr. Prince testified that on the evening of July 10, 1993, he and his wife were watching television when he heard a car pull up. Mr. Prince lives about ½ mile from the entrance of the subdivision where the McAdams lived. The car did not sound normal and he went to look out the window. (TR Vol. VI 1130). Mr. Prince saw the dome light go on and saw three individuals sitting in the car. The driver had long hair and had a ball cap on. There was a guy in the back seat and someone in the passenger seat. He saw the men get out and he watched them until he lost visual contact. He described their route as "north" (apparently in the general direction of the McAdams' home). (TR Vol. VI 1133).

He said he had a gut feeling about the car so he went outside and wrote the tag number down. He described the car for the jury. Mr. Prince testified the car had a "Bad Boys" symbol

on the back window, a Z28 symbol on the front of the car, had a black skirt, and rims with big holes. (TR Vol. VI 1133).

Mr. Prince saw the men when they came back to the car. He described the driver as having long hair, kind of sandish color and was skinnier than the other two men. The passenger had dark hair and the guy in the back also had dark hair, darker than the passenger. (TR Vol. VI 1135).

He wrote the information down, including the tag number, but the slip of paper got inadvertently thrown in the trash. He testified at trial, however, he could, without a doubt, identify the car again. He identified State's Exhibit 18, 19, and 20 as the car he saw outside his apartment complex on the night of the murder.

Ms. Valerie Kormondy, appellant's wife, testified at trial. She identified the car Mr. Prince saw in the vicinity of the McAdams' home as her husband's car. She testified that on the evening of July 10, 1993, her husband was at home with Curtis Buffkin and James Hazen. The men left in Kormondy's car about 9:00 p.m. She went to bed about 12:00 a.m., and then men had not returned to her home. She next saw them at 5:00 a.m. (TR Vol. VI 1149). They were in her living room, awake and dressed. She went back to bed.

Ms. Kormondy also saw proceeds from the robbery in Kormondy's car on the morning of the murder. At 7:00 a.m. on

July 11, 1993, at her mother-in-law's request, Ms. Kormondy gave James Hazen a ride to meet her mother-in-law. She took her husband's car. In the car she noticed a bag of jewelry containing watches. She had never seen these items before and never saw them again afterwards. (TR Vol. VI 1151-1152).

William Long testified at trial.[6] (TR Vol. VII 1184-1201). He testified that Kormondy made two admissions about his involvement in the murder. The first occurred when he and Kormondy visited a Jr. Food Store to get some gas. The pair saw a reward poster offering a reward for information leading to the arrest and conviction of the persons or persons involved in the homicide of Gary McAdams. (TR Vol. VII 1186).

Mr. Long told the jury that Kormondy remarked that "the only way they would catch the guy that shot Mr. McAdams was if they were walking right behind us". (TR Vol. VII 1186, 1201). Mr. Long told Kormondy he did not want to hear about it.

Mr. Long testified that despite his admonition, Kormondy brought the subject up again. Mr. Long told the jury they were at his house when he noticed Kormondy looked down and was

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6 Prior to Mr. Long's trial testimony, and outside the presence of the jury, the parties held a hearing. The purpose of the hearing was to ensure the witness did not allude to Kormondy's criminal record. The prosecutor instructed the witness not to discuss any other crimes Kormondy has committed. The parties also reviewed and discussed Mr. Long's criminal record. Based on his voir dire testimony and his criminal record, the court concluded that he could be impeached on his felony marijuana

actually crying. Kormondy told Long that he and two other guys went to the man's house and broke in. Long testified that Kormondy told him about the sexual assault and then told him how he shot Mr. McAdams in the back of the head. (TR Vol. VII 1187-1189).

The State also introduced evidence of Kormondy's consciousness of guilt. The police asked Mr. Long to wear a wire and inform Kormondy the police were looking for him. He did so and Kormondy told him that he was going to leave town. (TR Vol. VII 1190).

Kormondy fled immediately and led the police on a car and foot chase that culminated in Kormondy's arrest. A K-9 officer testified she and her dog located and apprehended Kormondy. (TR Vol. VII 1232).

Fiber evidence also linked Kormondy to the murder scene. Two witnesses' testimony established that fibers recovered from Kormondy's car were microscopically consistent with fibers from the green silk dress Ms. McAdams was wearing on the night she was raped and her husband murdered. The testimony also established that two gray wool fibers from the seat covers in Kormondy's car were found in Ms. McAdams' bedroom (TR Vol. VII 1324-1332, 1335-1138).

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conviction.

Withdrawing the motion to suppress induced the State to introduce Kormondy's own statement which downplayed his role in the rape of Ms. McAdams and the murder of Gary McAdams. Kormondy has failed to show this decision resulted in prejudice and this claim should be denied.

CLAIM III

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR CONCEDING TO THE JURY THAT KORMONDY WAS GUILTY OF BURGLARY AND ROBBERY

In his motion for post-conviction relief, Kormondy alleged that trial counsel was ineffective for conceding to the jury he was guilty of robbery and burglary without the defendant's knowledge or permission.

Trial counsel's testimony at the evidentiary hearing, however, established she discussed her trial strategy with Kormondy, a strategy to which Kormondy made no objection.

Ms. Stitt told the collateral court she conceded to the jury that Kormondy was guilty of a robbery. She was aware that robbery was a qualifying felony for the crime of felony murder. She testified that Kormondy admitted to her that he went to the McAdams' home to break into their home and rob them. She did not know whether Kormondy consented to the strategy. (PCR-T Vol I. 170-171).

Ms. Stitt also testified she conceded during closing argument that Kormondy went to the McAdams' home to burglarize

it. She testified that she believed she told Mr. Kormondy that she would concede the burglary charge. When she told him her intent, Kormondy responded "well that's why I went there". When asked whether she had a specific recollection of telling Kormondy she was going to concede the burglary, Ms. Stitt testified "I think I did". (PCR-T Vol. I 172). Ms. Stitt told the collateral court that her strategy was geared toward saving Kormondy's life. (PCR-T Vol. I 173).

Kormondy testified, at the evidentiary hearing, that Ms. Stitt did not discuss her strategy to concede the burglary and the robbery. Kormondy claimed Ms. Stitt never discussed it with him and he never gave her permission to do so. (PCR-T Vol. II 306-307).

In denying this claim, the collateral court found Ms. Stitt's testimony that she discussed her strategy with Kormondy to be "far more credible" than Kormondy's claim he knew nothing about it. The court found that Ms. Stitt adequately disclosed and discussed the strategy with her client. (PCR Vol. VI 960).

The court found that Kormondy neither consented nor objected to trial counsel's strategy. Accordingly, the collateral court concluded that trial counsel was not barred from employing such a strategy. The court noted that the jury heard Kormondy's custodial statements, in his own words, admitting to his participation in the robbery and burglary. The court determined

that it would have been disingenuous for trial counsel to argue contrary to the Defendant's own admissions. The collateral court found Kormondy had failed to show how he was prejudiced by his trial counsel admitting the uncontroverted facts in evidence at trial. (PCR Vol. VI 960).

In Nixon v. Florida, 543 U.S. 175 (2004), the United States Supreme Court granted certiorari review on the issue of whether counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial automatically renders counsel's performance deficient. The Court determined that in a capital case, counsel must consider both the guilt and penalty phases, together, in determining how best to proceed at trial. Nixon v. Florida, 543 U.S. at 190-192.

The Court ruled that when counsel informs her client of the trial strategy she believes to be in her client's best interest, and the defendant is unresponsive, counsel is not prohibited from employing such a strategy. The Court determined that any decision on trial counsel's part that, given the evidence bearing on the defendant's guilt, satisfies the Strickland standard, will not give rise to a finding that counsel was ineffective. Florida v. Nixon, 543 U.S. at 186-187.

In the case at bar, the evidence demonstrated Kormondy admitted to Deputies Cotton and Hall he participated in the robbery of the McAdams' and the burglary of their home.

Kormondy also told Willie Long that he and two others had broken into the McAdams' home. Kormondy's car was seen about ½ mile away from the McAdams' home on the evening of the murder and proceeds from the robbery were found, in Kormondy's car, by Kormondy's wife just hours after the murder.

Fibers from Ms. McAdam's green dress were found in Kormondy's car and fibers from his car seat covers were found in Ms. McAdams' bedroom. Ms. McAdams's description of Kormondy's hair was consistent with Kormondy's hairstyle and consistent with Mr. Prince's description of the man he saw driving Kormondy's car on the evening of the murder.

Trial counsel's closing argument demonstrates her strategy was to concede what the evidence overwhelmingly showed to be true, yet still minimize Kormondy's role in the invasion of the McAdams' home. Trial counsel argued that while Kormondy intended to rob the McAdams and burglarize their home, he did not intend that Ms. McAdams be raped and he did not intend that Mr. McAdams be killed. (TR Vol. VIII 1395-1396).

During closing argument, trial counsel pointed to the fact that Ms. McAdams could not positively identify Kormondy as one of the men who sexually assaulted her and argued that Willie Long was not believable because he only came forward because of a promised reward. She also pointed to Kormondy's statement to police and argued the jury should believe him because the

statement was not self-serving as he willingly admitted his involvement in this horrible crime.

Trial counsel argued the State had not proven the murder was premeditated and asked them to evaluate what Kormondy intended to happen when he entered the McAdams' home. Trial counsel told the jury if they did that, she believed they would return an honest, true and fair verdict. (TR Vol. VIII 1399).

Trial counsel's use of Kormondy's statement to the police and its confession to burglary and robbery demonstrated her strategy was two-fold. First, convince the jury that Kormondy did not premeditate the murder of Gary McAdams, nor intend that it happen. Touting the truth of Kormondy's confession to burglary and robbery, allowed trial counsel to more credibly argue the entire statement was believable.

Second, trial counsel's strategy was forward thinking to the penalty phase. No reasonable trial counsel would believe, given the evidence, that her client was not going to be found guilty of first degree murder. Yet, persuading the jury that Kormondy's statement to police was true would defeat the CCP aggravator and eliminate the jury's consideration of Kormondy's participation in the sexual assault on Ms. McAdams.

As was true in Nixon, trial counsel pursued a strategy of trying to persuade the jury to recommend a life sentence. Nixon v. State, 31 Fla.L.Weekly S245 (Fla. April 20, 2006). The trial

court properly found that trial counsel was not ineffective for conceding Kormondy's guilt to the robbery of the McAdams' and the burglary of their home and this Court should deny this claim.

CLAIM IV

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO IMPEACH STATE WITNESSES

In this claim, Kormondy alleges that trial counsel was ineffective for failing to impeach state witnesses. Specifically, Kormondy faults trial counsel for failing to impeach state witnesses Willie Long and Cecilia McAdams.

A. William Long

Kormondy claims that trial counsel was ineffective for failing to question Mr. Long about his one felony conviction for possession of a controlled substance (cocaine), a conviction about which trial counsel was aware. Kormondy also claims trial counsel was ineffective for failing to impeach Long on the fact he received a benefit from the State in return for his testimony, specifically that Deputy Cotton spoke on his behalf at his probation hearing and he was released from jail into the pre-trial release program without paying the established bond.

Kormondy alleges Long lied at trial when he testified that no one spoke on his behalf at his VOP hearing and trial counsel was ineffective for discovering someone did so. Finally,

Kormondy alleges trial counsel was ineffective for failing to impeach Long on his allegedly inconsistent deposition testimony.

According to Kormondy, Long testified in his deposition that Kormondy first remarked "yeah, the only way they can catch the guy that did this is if they were walking behind us right now". (IB 33). At trial, however, Mr. Long testified that Kormondy told him, "The only way they can catch the guy that shot Ms. McAdams, is if they were walking behind us right now." (TR Vol. VII 1186).

At the evidentiary hearing, Kormondy admitted having the conversation with Long. Kormondy claimed Long was mistaken about their conversation because he actually said, during that first conversation, "if he wanted to catch the ones who was involved in that he would be walking behind us right now". (IB 33, citing to PCR-T Vol. II 340). Kormondy followed up that particular testimony three questions later, however, and testified he told Long "if he wanted to catch the ones that shot him, he would have to be standing behind us." (PCR-T Vol. II 340-341). Because Long was undisputedly not involved in the murder, the only part of "us" that remained was Johnny Kormondy.

Even at the evidentiary hearing, collateral counsel could not shake Long from his testimony that Kormondy stated to him "the only way they would catch the person who shot Mr. McAdams is if they were behind us right now". (PCR-T Vol I 63, 68).

Kormondy did not specifically deny, at the evidentiary hearing, that Long's testimony about Kormondy's later admission about breaking into the McAdams' home and shooting Mr. McAdams accurately reflected their conversation. Ms. Stitt testified at the evidentiary she was aware that there had been a bond reduction in Long's VOP but was not aware that Long did not pay any bond to gain his release. She was also not aware that law enforcement appeared at his VOP hearing. (PCR-T Vol. I 141-142).

Ms. Stitt did not recall specifically why she did not ask Long about his one felony conviction. She testified it could have been an oversight on her part. (PCR-T Vol. I 175-176). She told the collateral court she did ensure the jury knew Long had violated his probation, that he was on the run from the law, had failed five urinalyses, and had used drugs on the night Kormondy explicitly confessed to shooting Mr. McAdams. (PCR-T Vol. I 189).

She testified her primary objective in cross-examining Long was to try to show his intoxication on drugs and alcohol could have shaded his recollection of what was said to him. (PCR-T Vol. I 190). She also told the collateral court that Long had already admitted to the actual substance of the violations that Kormondy alleges she should have questioned him about. (PCR-T Vol. I 190).

The collateral court found that trial counsel questioned Long about his running from the law, violating his probation, and failing five urinalyses because he tested positive for marijuana. The court noted that trial counsel also brought out before the jury that Long has used cocaine on the night of Kormondy's confession and had drank six pitchers of beer. Further, trial counsel brought out that Long only came forward because of a substantial reward. The Court found trial counsel's questioning was aimed at impeaching Long's trial testimony and that impeaching Long about his one prior conviction would not have made a difference in the jury's evaluation of his testimony.[7] The evidence supports the

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[7] The collateral judge did not rule on some of the claims, pertaining to Long, that Kormondy presents to this Court now on appeal.

Specifically, the collateral court did not address claims that counsel was ineffective for failing to investigate details about Long's bond and probation sentencing hearing and that counsel was ineffective for failing to impeach Long on his prior deposition testimony. The Court did not rule on these claims because Kormondy did not raise these claims in his motion for post-conviction relief as a claim of ineffective assistance of counsel. (PCR Vol. III 371).

In his initial brief, Kormondy explains that because the factual basis surrounding Long's bond and probation hearing were presented in a newly discovered evidence claim, the collateral court and this court should consider these facts as they relate to Kormondy's claim of ineffective assistance of counsel. The State disagrees. The collateral court did not consider these unpresented claims. By its nature, the same facts cannot be newly discovered evidence and evidence that trial counsel should have used to impeach a witness at trial. Even so, Kormondy

collateral court's conclusions and this Court should deny Kormondy's claim. Brown v. State, 846 So.2d 1114 (Fla. 2003) (noting that collateral counsels' argument that trial counsel should have cross-examined McGuire on certain issues, or more strenuously examined him on certain issues, is essentially a hindsight analysis).[8]

B. Cecilia McAdams

Kormondy avers trial counsel was ineffective for failing to impeach Cecilia McAdams with allegedly inconsistent statements she made to the first patrol officer on the scene, Deputy Todd Scherer. Specifically, Kormondy claims that trial counsel was ineffective for failing to impeach Ms. McAdams on the following points:

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presented no evidence that Long testified because of any law enforcement benefit received or offered because Long told an acquaintance about Kormondy's statement well before any benefit was offered or received. As brought out by trial counsel during Long's testimony, Long was in it for the reward money.

8 Even if this court should decide to address this issue even though it was not raised below and determine that trial counsel was ineffective for failing to point out Long's allegedly inconsistent deposition testimony, such impeachment would have only been relevant to Kormondy's first admission and would have done nothing to undermine Kormondy's most inculpatory statement. Additionally, such impeachment would have done nothing to diminish the fact that Kormondy admitted his guilt to felony murder to Long. At the evidentiary hearing, even Kormondy acknowledged he used the word "shot" in his initial comment to Long. (PCR Vol. II 340).

(1) At trial, Ms. McAdams testified she was sexually assaulted on the toilet and the floor of her vanity area. She allegedly told Deputy Scherer, the rape occurred on the bed.

(2) At trial, Ms. McAdams testified that she heard the first shot coming from the kitchen and the second shot in the bedroom. Kormondy alleges she told Deputy Scherer the first shot was in the bedroom and the second came from the kitchen.

(3) At trial, Ms. McAdams testified that Buffkin was the only one in her bedroom with her when she heard the shot from the kitchen. Kormondy alleges she told Deputy Scherer there were two assailants in the bedroom when she heard the gunshot.

(4) At trial, Ms. McAdams testified that one of the assailants she saw in her bedroom had a cloth on his head that did not cover his face. She described him having mousy brown stringy hair to his collarbone. Kormondy alleged she told Deputy Schere that two of her assailants, not Buffkin, had hoods or masks on and made no mention of their hair.

(5) At trial, Ms. McAdams testified that three individuals raped her. Kormondy alleges she told Deputy Scherer that two individuals raped her.[9]

The collateral court denied Kormondy's claim as to this issue. The court found that Kormondy failed to show that Scherer, who is not an investigator, was trained to conduct a proper interview or to take proper notes. The court noted that Kormondy failed to call Deputy Scherer at the evidentiary hearing or explain why he could not do so. As such, Kormondy failed to present any evidence to demonstrate that calling Deputy Scherer at trial likely would have affected the outcome of the trial. Further, the Court noted that Kormondy also failed to call Ms. McAdams at the evidentiary hearing in an attempt to attack her trial testimony. (PCR Vol. VI. 963-964).

The collateral court found that even if trial counsel would have attempted to impeach Ms. McAdams with allegedly inconsistent statements to Deputy Scherer, there is no reasonable probability the outcome of the trial would have been

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9 This last allegation was not raised in Kormondy's motion for post-conviction relief and was not before the trial court. Accordingly, it is not properly before this court. More importantly, it is also a misstatement of Deputy Scherer's deposition testimony. At the point in his deposition when this statement occurred, Deputy Scherer was being questioned only about a fixed point in time, specifically Ms. McAdams' statements about who was raping her at the time she heard a gunshot. There is nothing in Deputy Scherer's testimony that even implies that Ms. McAdams told Deputy Scherer that only two

different at either the guilt or penalty phase. (PCR Vol. VI. 964).

The collateral court found that Ms. McAdams' trial testimony was clear, affirmative, and very credible. The court found that Kormondy failed to prove that trial counsel's failure to impeach Ms. McAdams via the testimony of Deputy Scherer constituted ineffective assistance of counsel. (PCR Vol. VI. 965).

The trial court's conclusions are supported by the record in this case. There is no reasonable probability the results of the trial would have been different had trial counsel attempted to impeach Ms. McAdams with the statements she allegedly made to Deputy Scherer just moments after she discovered her husband of ten years dead on their kitchen floor.

Certainly, Kormondy did not demonstrate such a possibility at the evidentiary hearing. Kormondy failed to call either Deputy Scherer or Ms. McAdams to testify at the evidentiary hearing. While Kormondy chides the collateral court judge for speculating this "impeachment" would not have altered the outcome of the trial, Kormondy's failure to call the two witnesses involved invited the collateral court to do just that. (IB 41-42). The collateral judge demurred and ruled that Kormondy was required to present proof in support of his claim of ineffective assistance of counsel.

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of her assailants raped her. (PCR Vol. VI 1085).

Kormondy asked for, and was granted, an evidentiary hearing on this claim. Having been granted a hearing, but presenting no evidence to support the claim, Kormondy, in effect, asks this Court to speculate that calling Deputy Scherer to impeach Ms. McAdams' trial testimony likely would have affected the outcome of his capital trial. As did the collateral court, this Court should decline to do so.

CLAIM V

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO SEEK DISQUALIFICATION OF THE TRIAL JUDGE AND TO WITHDRAW FROM REPRESENTATION BEFORE THE FIRST TRIAL DUE TO A CONFLICT OF INTEREST.

Kormondy raises two sub-claims here. First, Kormondy claims trial counsel was ineffective for failing to move for disqualification of Judge Kuder because Judge Kuder knew the victim, Gary McAdams, and because Judge Kuder's wife worked in the misdemeanor section of the State Attorney's office.

At a pre-trial conference held on February 4, 1994, a hearing at which all three defendants were present, Judge Kuder announced he had a professional relationship with Mr. McAdams. Judge Kuder informed the defendants and their counsel that Mr. McAdams was a banker at the bank where he had a banking relationship. Judge Kuder informed the parties that Mr. McAdams was known to him only in a professional capacity as a loan officer with whom he had business dealings. Judge Kuder told

the defendants and their counsel that he did not know Mr. McAdams socially and never saw him outside the bank. (TR Vol. I 16-18).

Judge Kuder also disclosed his wife was an employee of the State Attorney's Office in Escambia County. Judge Kuder announced his wife was a lawyer in the misdemeanor division of the State Attorney's Office and that he has nothing to do with her cases and she has nothing to do with his. He also disclosed his wife had been an assistant public defender before she was an assistant state attorney. (TR Vol. I 16-18).

Counsel for all three defendants informed Judge Kuder they had no objection to him continuing to preside over the case. In addition to counsel's assurances, Judge Kuder gave all three defendants an opportunity to object. All three, including Kormondy, personally indicated they had no objection. (TR Vol. I 19-20).

Nonetheless, the collateral court granted an evidentiary hearing on Kormondy's claim that trial counsel was ineffective for failing to file a motion to disqualify Judge Kuder. At the hearing, Ms. Stitt testified she was aware of Judge Kuder's acquaintance with Mr. McAdams. She was also aware his wife worked at the State Attorney's Office. She told the court she advised Mr. Kormondy he should not file a motion to recuse Judge Kuder. (PCR Vol. I 160).

In order to show counsel was ineffective for failing to seek Judge Kuder's disqualification at his original trial, Kormondy must do more than show a motion to recuse, if made, would have or should have been granted. Kormondy must also demonstrate there is a reasonable probability the outcome of the proceeding would have been different had Judge Kuder been recused. Teffeteller v. Dugger, 734 So.2d 1009, 1018 (Fla. 1999). At the very least, in these post-conviction proceedings, Kormondy should have to point to some evidence he was deprived of a fair trial or that Judge Kuder displayed actual bias against him.

Kormondy admits that he cannot show any specific instance where Judge Kuder expressed bias on the record. (IB at page 46). Indeed, Kormondy can point to no evidence at all that Judge Kuder was anything but a fair and impartial trial judge. Accordingly, his claim should be denied.

Kormondy's claim that trial counsel was ineffective for failing to withdraw is also without merit. Kormondy claims that trial counsel, Stitt, should have filed a motion to withdraw on two grounds.

First, Kormondy alleges trial counsel Stitt had an actual conflict of interest because she knew the murder victim. An "actual" conflict of interest exists if counsel's course of action is affected by the conflicting representation, i.e., where there is divided loyalty with the result that a course of

action beneficial to one client would be damaging to the interests of the other client. An actual conflict forces counsel to choose between alternative courses of action. Hunter v. State, 817 So.2d 786, 792 (Fla. 2002).

Here, Kormondy seems to allege some sort of hybrid conflict of interest. Rather than alleging a conflict between two clients, Kormondy alleges that Stitt's acquaintance with Gary McAdams, an acquaintance that ended some 22 years before Kormondy's trial commenced, caused Stitt to choose between her loyalty to Kormondy and her loyalty to a, now deceased, high school classmate of long ago.

In its order denying relief, the collateral court found there was no actual conflict of interest based on Ms. Stitt's acquaintance with Mr. McAdams. (PCR Vol. VI 967). The record supports the trial judge's findings.

Ms. Stitt's acquaintance with Mr. McAdams was, at most, casual. At the evidentiary hearing, Ms. Stitt testified that she and Mr. McAdams were in high school together and graduated the same year, in 1972. Ms. Stitt told the court she had only a "nodding acquaintance" with him. Ms. Stitt told the court that he ran with one group and she ran with another. She did not consider them friends.

She told the collateral court she discussed her acquaintance with Mr. McAdams fully with Mr. Kormondy. According to Ms.

Stitt, Mr. Kormondy told her that if it did not bother her, it did not bother him. (PCR Vol. I 157). Ms. Stitt did not perceive her acquaintance with Mr. McAdams affected the manner, enthusiasm, vigor or aggressiveness with which she defended her client. (2PP Vol. I 40-41).

Her testimony established that her nodding acquaintance with Mr. McAdams did not force her to choose between Mr. Kormondy and Mr. McAdams' memory. Rather, her testimony established her only loyalty was to Johnny Shane Kormondy.

Kormondy next alleges that Ms. McAdams should have moved to withdraw because another attorney in her office had been appointed to represent State witness, William Long, at the same time Ms. Stitt represented Kormondy. The trial judge denied Kormondy's claim. The Court found no actual conflict of interest. (PCR Vol. VI 967-970). The record supports the trial judge's findings.

Chief Assistant Public Defender Earl Loveless testified at the evidentiary hearing that his office was appointed to represent State witness, Willie Long, on a violation of probation. (PCR Vol. II 384). Mr. Loveless told the collateral court that once it was discovered that Long would be a witness in Kormondy's trial, the Public Defender's Office withdrew from its representation of Mr. Long. (PCR Vol. II 220).

Mr. Loveless testified that his office discovered the potential conflict and withdrew before any work had begun on Mr. Long's case and before any attorney from his office even spoke to Mr. Long. He testified that no attorney-client relationship had been formed between Mr. Long and any attorney with the Office of the Public Defender on Long's violation of probation case.[10] According to Mr. Loveless, his office was appointed in August 1993 and it withdrew from Long's case in September 1993. (PCR Vol. II 382-388).

When questioned by collateral counsel, of the necessity for a waiver, Mr. Loveless testified that if the office continues to represent both clients, the office would seek a written waiver of that conflict. In this case, however, when the office withdrew from Mr. Long's case, a waiver is not necessarily required. (PCR Vol. II 220).

The collateral court correctly found that no actual conflict of interest existed. Kormondy presented no evidence the Public Defender's Office's brief appointment to Mr. Long's violation of probation case resulted in divided loyalty.

To demonstrate an actual conflict, the defendant must demonstrate his trial counsel actively represented conflicting interests. Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). The

10 Mr. Long was on probation as a result of his no contest plea to possession of a controlled substance and possession of less

defendant must identify specific evidence in the record that suggests his or her interests were compromised by the conflict. Herring v. State, 730 So.2d 1264, 1267 (Fla. 1998). A possible, speculative or merely hypothetical conflict is "insufficient to impugn a criminal conviction."

While Kormondy attributes every perceived failure of trial counsel to her alleged conflict, Kormondy presented no evidence that Ms. Stitt's efforts on his behalf were actually impaired or compromised for the benefit of the Office of the Public Defender, Mr. Long, or another party. Herring v. State, 730 So.2d at 1267. During cross-examination of Mr. Long, Ms. Stitt brought out that, on the day that Kormondy confessed to Long he shot Mr. McAdams, Long had smoked crack cocaine, bought more cocaine, and drank six pitchers of beer. (TR Vol. VII 1192-1193). She also elicited his admission he gets very, very paranoid when he uses crack. (TR Vol. VII 1193).

During her cross examination, the jury also learned Long was on probation. Ms. Stitt also brought out that Long was "on the run from the law", had managed to avoid jail on his VOP charges after he came forward with Kormondy's confession, and came forward only for the reward money. (TR Vol. VII 1195-1197). Because Kormondy has failed to demonstrate that any conflict of

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than 20 grams of marijuana. (TR Vol. VII 1180).

interest impaired or compromised Ms. Stitt's efforts on his behalf, this Court should deny his claim.[11]

CLAIM VI

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF KORMONDY'S TRIAL

In his Sixth claim of error, Kormondy claims that trial counsel was ineffective, in various ways, during his second penalty phase proceeding. The standard for ineffective assistance of counsel is as follows: First, a defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Henry v. State, 31

11 Well before the new penalty phase commenced, at Kormondy's request, the Court appointed Kormondy new trial counsel. Kormondy was represented at his new penalty phase by attorney Glen Arnold. (2PP Vol. I 95-97).

Fla.L.Weekly S342 (Fla. May 25, 2006).

When evaluating claims that counsel was ineffective for failing to investigate or present mitigating evidence, this Court has phrased the defendant's burden as showing that counsel's ineffectiveness deprived the defendant of a reliable penalty phase proceeding. Asay v. State, 769 So.2d 974, 985 (Fla. 2000); Rutherford v. State, 727 So.2d 216, 223 (Fla. 1998)).

A. Appellant's waiver of presentation of mitigation to the jury at the recommendation of his attorney was invalid because Defense Counsel failed to investigate

It is well established that a competent defendant may waive his right to present evidence in mitigation. Boyd v. State, 910 So.2d 167, 188 (Fla. 2005). However, any waiver must be knowingly and voluntarily made. Kormondy makes no claim he was not competent during his second penalty phase proceeding.

During his second penalty phase, immediately before jury selection began, Kormondy waived his right to present certain evidence in mitigation. (2PP Vol. III 20-21)

The following colloquy took place:

> **Mr. Arnold:** Mr. Kormondy, have we discussed the fact that tactically it would be beneficial to you to announce to the State that you would not present evidence or testimony or argument dealing with the fact that you have no prior criminal history because, in fact, you do have a prior criminal history.
>
> **Mr. Kormondy:** Yes

Mr. Arnold: And do you understand that the State, of course, could come back in and impeach us or impeach you if you so testified that you had no prior criminal history? We've discussed that?

Mr. Kormondy: Yes

Mr. Arnold: And you agree to the waiver of that particular mitigator?

Mr. Kormondy: Right, Yes.

Mr. Arnold: The next matter is that during the guilt phase trial, there was testimony taken by the lawyers who represented you at that time dealing with the fact that you may have previously been under some sort of extreme mental or emotional disturbance or that you may have been, if not addicted to, at least abusing crack cocaine or other drugs or alcohol, and in fact there was testimony by a psychologist with regards to those matters; and do you understand that those avenues of defense are available to you at this time?

Mr. Kormondy: Yeah.

Mr. Arnold: The same thing goes with the mitigator I announced to the Court and to the State dealing with your lack of capacity to conform to the laws of our state or to the laws of the United States. Do you understand that you have the right to present testimony that you simply don't have the ability to follow the law because of some other pressing problem, mentally or emotionally or whatever, do you understand that?

Mr. Kormondy: Yes.

Mr. Arnold: And have we discussed those and have you agreed to waiver those as mitigators?

Mr. Kormondy: Yes, sir.

Mr. Arnold: And there was some testimony previously, and you have the availability of that testimony now to present testimony that you either had mental problems associated with your childhood upbringing or that you were either abused and that doesn't mean you were beaten, it could mean that you were either beaten, or sexually, or mentally or any other way abused by parents or a figurehead or persons of authority over you. Do you understand that you still have that avenue of defense available to you at this time?

Mr. Kormondy: Yes.

Mr. Arnold: And have we discussed that avenue of defense and all those various matters?

Mr. Kormondy: Yes, Sir.

Mr. Arnold: And are you satisfied that it is in your best interest not to present testimony, evidence or argument pertaining to those mitigators?

Mr. Kormondy: Yes, Sir.

Mr. Arnold: There was another mitigator that I mentioned and it had to do with whether or not the victim in this particular case, the decedent, Mr. Gary McAdams, in any way participated or consented to the offense, and of course, you are not claiming that in any way whatever, are you?

Mr. Kormondy: No.

Mr. Arnold: And you would waive that mitigator?

Mr. Kormondy: Yes

Mr. Arnold: Judge, I believe I had covered those mitigators. Are you satisfied, Mr. Edgar?

Mr. Edgar: Yes, your honor. I just wanted to make sure they discussed it to the defendant's

satisfaction. I know Mr. Arnold is an experienced attorney and he is fully capable of advising his clients. I just wanted to make sure the defendant understood and that he had that opportunity and what effect that would have by not doing that, what effect it might possibly have, it could make a difference in this matter and that he should be aware of that for his own reasons and advice of counsel, he is choosing not to do that.

The Court: Mr. Kormondy, you heard your lawyer announce to the Court the various mitigators that you're waiving; have you discussed each of those at length with him and arrived at the conclusion it would not be in your best interest to present these.

Mr. Kormondy: Yes, Sir.

The Court: You're satisfied that your lawyer has adequately represented you and represented things to you in regard to those mitigators so that you can make an intelligent decision with regard to not wanting the introduction of those into evidence?

Mr. Kormondy: Yes Sir.

(2PP Vol. III 222-27; PCR Vol V 898-906).

At the conclusion of the State's case, the defense immediately announced rest. At the request of the prosecutor, another colloquy between his counsel and Kormondy was placed into the record.

This colloquy went like this:

Mr. Arnold: Mr. Kormondy, have I discussed with you the statutory mitigating circumstances, that the defendant has no significant criminal history of a prior criminal activity and we have previously announced that we would not deal with that and the State likewise agreed they would not deal with that?

Mr. Kormondy: Yes, sir.

Mr. Arnold: Did we do that as a part of the strategy proceedings in this case?

Mr. Kormondy: Yes, sir.

Mr. Arnold: With regards to the second statutory mitigating circumstance, the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Did I discuss with you any---not only medically diagnosed problems, but any problems you have thought about dealing with mental or emotional disturbance, and did we rule out any evidence or argument pertaining to whether or not you were under the influence of extreme mental or emotional disturbance?

Mr. Kormondy: Yes, Sir

Mr. Arnold: And did we agree that as part of our strategy, that it may be in our best interest not to present that testimony so that we did not open the door for the State to put evidence in on some other matters?

Mr. Kormondy: Yes, sir.

Mr. Arnold: With regards to the statutory mitigator that the victim was a participant in the defendant's conduct or consented to the act, we have agreed that it is not true and that we would not use it as a statutory mitigator?

Mr. Kormondy: Yes, Sir.

Mr. Arnold: With regards to the mitigator that the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor, we are going to argue that. May not request it as a jury instruction, but I may argue that if the evidence, if I believe that the evidence is present?

Mr. Kormondy: Right.

Mr. Arnold: Agree?

Mr. Kormondy: Right.

Mr. Arnold: Okay, with regards to the next mitigator, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Again, in conjunction with the emotional disturbance and that sort of thing, have we discussed that in detail and agreed that we would not present any evidence or attempt to put any evidence or argument pertaining to that mitigator into the record?

Mr. Kormondy: Yes.

Mr. Arnold: And that likewise is in your best interest not to do so?

Mr. Kormondy: Right

Mr. Arnold: The age of the defendant at the time of the crime. If its requested, the Judge usually puts that into the jury instructions, although we've not really brought that up as an issue; is that correct?

Mr. Kormondy: Yes, sir.

Mr. Arnold: There are a number of nonstatutory mitigators, and under no pretense do I attempt to tell you each and every one of them, okay.

Mr. Kormondy: Okay

Mr. Arnold: Because they can be most anything that someone can think of. Let me cover a few, if I may. With regards to family background or employment background or military service, we've not presented any evidence on those matters, correct?

Mr. Kormondy: Correct

Mr. Arnold: Do you desire to put in any evidence or argument pertaining to those three items?

Mr. Kormondy: No

Mr. Arnold: Okay. With regards to mental problems, which do not reach the level of extreme mental anguish or mental emotional defect, do you wish to present any testimony, argument, or evidence, pertaining to mental problems of any nature, whatever?

Mr. Kormondy: No

Mr. Arnold: And we have discussed that fully and completely?

Mr. Kormondy: Right

Mr. Arnold: With regards to abuse of the defendant by parents, either physically, mentally, or sexually, we have agreed that there would be no testimony, evidence, or argument pertaining to that nonstatutory mitigator, is that correct?

Mr. Kormondy: Yes, sir.

Mr. Arnold: And we have discussed that in detail?

Mr. Kormondy: Right.

Mr. Arnold: I believe that previously there was some testimony dealing with that and you discussed that with me and asked me not to present any evidence to the court, did you not?

Mr. Kormondy: Right

Mr. Arnold: Okay. With regards to contribution to the community or society or charitable or

humanitarian acts or deeds, we have no evidence pertaining to those, correct?

Mr. Kormondy: Correct

Mr. Arnold: With regards to the quality of being a caring parent, I understand that you have a child but we've not presented any evidence dealing with that, correct?

Mr. Kormondy: Correct

Mr. Arnold: And it's not your desire to present any evidence dealing with those items?

Mr. Kormondy: (Shakes head negatively)

Mr. Arnold: The same thing goes with regular church attendance or religious devotion, such as that?

Mr. Kormondy: Correct.

Mr. Arnold: We've talked about it, discussed it, you've agreed not to present it. I have discussed with the State Attorney and we will present to the Judge shortly jury instructions which include the non-statutory mitigators. One, being that you cooperated fully with law enforcement after your arrest, another being the two co-defendants are serving life in prison, another being you had no intent that Gary McAdams die as a result of these crimes that we talked about, and fourth, I'm asking the Court to present and be that you exhibited good behavior and good conduct during the course of this trial. Are there any other nonstatutory mitigators that you think I should present to the Court?

Mr. Kormondy: (Shakes head negatively)

(2PP Vol. V 483-489).

At the evidentiary hearing, trial counsel Glen Arnold testified he was appointed to represent Kormondy for the penalty phase of his capital trial. (PCR-T Vol. II 254). Mr. Arnold

testified that he reviewed the mitigation presented during the first penalty phase and went over those with Kormondy. Mr. Arnold told the collateral court that Mr. Kormondy did not want to present that evidence into the record. In particular, Kormondy did not want Mr. Arnold to put in evidence relating to his drug and alcohol use. (PCR-T Vol. II 257).

In preparation for the penalty phase, Mr. Arnold spoke with his client and his client's mother a number of times. He did not recall what else he did in preparation. Mr. Arnold had a stroke after Kormondy's second penalty phase but before the evidentiary hearing. (PCR Vol. II 254).

Initially, Mr. Arnold testified he did not recall speaking to an expert witness, however subsequently he did recall talking to Dr. Larson. (PCR-T Vol. II 266). He reviewed all the records that were in previous counsel's file and he spoke with Ronald Davis, Kormondy's prior trial counsel. (PCR-T Vol. II 259).

Mr. Davis testified that Kormondy specifically told him he did not want any evidence regarding his family or family life presented at the second penalty phase. He did not recall him saying he did not want to present any mitigation at all but did recall him being concerned that about some of his behaviors that came out during the original mitigating phase, that may cast him in an unfavorable light, in particular the "psychological

stuff". (PCR-T Vol. II 302). Mr. Davis testified that Kormondy did not want that presented. (PCR-T Vol. II 302).

Mr. Arnold recalled talking with Kormondy extensively and asking him questions about the mitigators that Kormondy did not want him to put into the record. Mr. Arnold testified that Kormondy asked him not to put any mitigation in the record before the jury. He did not recall Kormondy telling him not to present mitigation at the Spencer hearing. (PCR-T Vol. II 261).

Mr. Arnold testified he discussed mitigation evidence with Kormondy several times. He told the collateral court he investigated potential mitigation, explored and discussed it with Mr. Kormondy and decided not to put on mitigation as a matter of trial strategy. (PCR-T Vol. II 268). Despite Kormondy's instructions to Mr. Arnold that he did not want the evidence that was presented in the first trial to be presented in the second penalty proceeding, Mr. Arnold tried to encourage Kormondy to put on mitigation evidence. Mr. Arnold testified there was so much bad that came with the available mitigation. Mr. Arnold told the collateral court that Kormondy specifically did not want any evidence regarding his drug addiction to come out. Kormondy also did not want his mother to testify. (PCR-T Vol. II 270).

Mr. Arnold testified that he had been involved in a bunch of death cases. Mr. Arnold testified that, in this case, one of

his strategies was to capitalize on the fact this Court had ruled there was insufficient evidence of premeditation. Accordingly, Mr. Arnold pushed the idea that death was not appropriate. Mr. Arnold also argued that because the other two co-defendants had received a life sentence, it was not fair to Mr. Kormondy that he get death. (PCR-T Vol. II 273). His strategy was to minimize Kormondy's involvement in the murder. (PCR-T Vol. II 273).

The collateral court ruled that trial counsel properly investigated possible mitigation evidence before agreeing with the defendant not to present the evidence. The court found Kormondy's waiver valid. Alternatively, the collateral court concluded that even if trial counsel had not investigated possible mitigation, the outcome of the trial would not have been different. The Court pointed to the fact that with or without mitigation, both juries voted 8-4 for death.

The collateral court's conclusions are supported by the record. Apart from the specific and detailed on-the-record waivers, Kormondy cannot satisfy Strickland's prejudice prong.

At the evidentiary hearing, Kormondy put on no expert witnesses. Even now, there is no evidence to suggest that trial counsel could have established either statutory mental mitigators applied. There is no evidence Kormondy suffers from any mental illness at all.

Dr. Larson testified at Kormondy's original penalty phase proceeding that Kormondy is not mentally ill but has a serious personality disorder. (TR Vol. IX 1548). This personality disorder creates deficits in the way Kormondy relates to other human beings. Dr. Larson testified that persons with personality disorders are more likely to make antisocial choices and engage in criminal behavior. (TR Vol. IX 1571). Additionally, Dr. Larson opined that Kormondy is of normal intelligence. (TR Vol. IX 1572). Dr. Larson opined that neither mental mitigator applied in Kormondy's case. (TR Vol. IX 1566-1567).

At the evidentiary hearing, the only "mitigation" evidence presented came from three of the same lay witnesses that were presented at Kormondy's original trial. Laura Hopkins, Kormondy's sister, testified that she did not recall whether there was a resentencing proceeding in 1999. She would have testified if she was asked to. Ms. Hopkins testified she did not take off from her job to be there but she did not know why. (PCR-T Vol.II 213). She thought maybe she was not there because she had to work or maybe she did not know about it. She does not recall discussing the new penalty phase with her brother. (PCR-T Vol II 214).

Ms. Hopkins testified she did not recall the exact reason why she was not there for the second penalty phase. (PCR-T

214). Ms. Hopkins provided no testimony about her childhood or Kormondy's family, employment, medical, or social history.

Mr. Wesley Halfacre testified he was aware his brother's case had been remanded for a new penalty phase. He was never contacted by Kormondy's attorney. He testified his brother Shane told him he was not needed to testify at the new penalty phase. (PCR-T Vol. II 224). He testified that he would not have testified differently at the second penalty phase than he did at the first. (PCR-T Vol. II 224). Mr. Halfacre provided no testimony about his or Kormondy's childhood or Kormondy's family, employment, medical, or social history.

Kormondy's mother testified at the evidentiary hearing. She testified her son did not want her to testify at the second penalty phase proceeding. (PCR-T Vol. II 224). Kormondy testified himself that he instructed Mr. Arnold not to put his mother on the witness stand. (PCR-T VOl. II 360). Because she did not testify during the second penalty phase, she sat in the courtroom during the second penalty phase proceeding. (PCR-T Vol. II 239). Ms. Barrett did not provide any testimony about Kormondy's childhood or his social, family, medical or occupational history.

Mr. Arnold's testimony established he reviewed the record and decided, as matter of strategy and in accord with his client's wishes, not to put on the same evidence that was presented in

Kormondy's original trial. As Kormondy failed to put on any additional mitigation evidence at the evidentiary hearing, Kormondy failed to demonstrate trial counsel was ineffective for failing to investigate and discover additional mitigation evidence. Likewise, Kormondy failed to demonstrate trial counsel was ineffective for putting on the original mitigation-mitigation that had already been insufficient to persuade a jury to recommend a life sentence.

B. Trial counsel was ineffective for failing to put additional evidence at the Spencer hearing.

Kormondy put on no additional mitigating evidence at the evidentiary hearing. As such, Kormondy is left with a claim that counsel was ineffective for failing to put on evidence from the original trial (e.g. proffer the transcripts) at the Spencer hearing. The trial judge ruled that, even had trial counsel done so, the outcome of the proceedings would not have been different.

The collateral court noted that trial counsel did present argument for mitigation in his sentencing memorandum. As found by this Court, the trial court considered each mitigator suggested by trial counsel. Kormondy v. State, 845 So.2d 41 (Fla. 2003). The court also concluded that while trial counsel could have presented the same record evidence as did original trial counsel, there was much negative information that would impress neither a judge nor jury. (PCR Vol. VI 974). Such

evidence included evidence that Kormondy was faking mental disturbance when Dr. Larson evaluated him before his original trial, that he was accused of forcibly sodomizing and raping a man in jail while awaiting trial, that he was a habitual crack user, that he had a lengthy criminal history, and although he had a deprived childhood, his siblings grew up in the same home and all were upright citizens in the community.

The trial judge's findings, that presenting the mitigation evidence presented Kormondy's original trial at the Spencer hearing would not have resulted in a life sentence, is supported by the evidence. This court should affirm.

C. Counsel was ineffective for failing to ensure Kormondy was present at critical stages of the proceedings

Kormondy alleges that he was involuntarily absent from pre-trial conferences on July 21, 1998 and the Spencer hearing. Kormondy also alleges the record does not indicate that Kormondy was present for pre-trial hearings held on March 23, 1999 and April 16, 1999. Kormondy put on nothing at the evidentiary hearing in support of this claim. Specifically, Kormondy put on no evidence that any absence, if he was indeed absent, was involuntary.

While Kormondy couches this claim in terms of ineffective assistance of counsel, the argument he presents in his initial brief raises more of a substantive claim of error. Any substantive claim, however, is procedurally barred.

A defendant=s claim he was involuntarily absent during critical stages of the proceedings can be, and should be, raised on direct appeal. Armstrong v. State, 862 So.2d 705 (Fla. 2003) (ruling that the defendant=s claim he was effectively absent from critical stages of his trial was procedurally barred because it could have been raised on direct appeal); Vining v. State, 827 So.2d 201, 217 (Fla. 2002) (determining that "substantive claims relating to Vining's absence [during critical stages of trial] are procedurally barred as they should have been raised either at trial or on direct appeal"); Moore v. State, 820 So.2d 199, 203 n.4 (Fla. 2002) (ruling that post-conviction claim that the defendant was absent from critical stages of trial is procedurally barred because it could have and should have been raised on direct appeal). Because Kormondy did not raise this issue on direct appeal, his substantive claim is procedurally barred.

The collateral court found Kormondy was present at the March 23, 1999, and the April 16, 1999, hearing. This finding is supported by the evidence. (PCR Vol. VII 1199-1200). As Kormondy was present for these two hearings, trial counsel cannot be ineffective for failing to ensure his presence.

Likewise, the collateral court found Kormondy was present at the Spencer hearing held on June 30, 1999. The record supports this finding. (PCR VOl. VII 1205). As Kormondy was present for

the Spencer hearings, trial counsel cannot be ineffective for failing to ensure his presence.

In order to show counsel was ineffective for failing to object to Kormondy's absence during the July 21, 1999, hearing, Kormondy must demonstrate prejudice from his absence. To show prejudice, Kormondy must show his absence at this pre-trial conference affected the validity of the trial itself to the extent that the verdict could not have been obtained. Orme v. State, 896 So.2d 725, 738 (Fla. 2005).

Kormondy made no allegation that at any point in the July 21, 1999, hearing he personally would have taken a different position than that taken by counsel or would have contemporaneously objected to any decision made or taken by trial counsel. Kormondy offers no support for the notion that any matters discussed at these hearings required his input nor did he demonstrate at the evidentiary hearing how his presence would have assisted his counsel. Likewise, Kormondy has failed to show, in any way, the position taken by counsel at those hearings was incorrect, strategically unwise, or otherwise subject to attack. Accordingly, Kormondy has failed to demonstrate he was prejudiced by trial counsel's failure to ensure his presence at the July 21, 1999, hearing.

D. Trial counsel was ineffective for failing to object to impact evidence and to the lack of corresponding instructions

Kormondy does not set forth in his brief any argument in support of this claim trial counsel was ineffective for failing to object to victim impact evidence. Specifically, Kormondy does not point to any objectionable victim impact evidence offered by the State at Kormondy's second penalty phase proceeding or set forth any basis upon which trial counsel should have objected. It appears Kormondy abandoned this claim.

Additionally, insofar as Kormondy claims counsel was ineffective for failing to request an impact instruction, Kormondy has presented no authority for the proposition that counsel is ineffective for failing to do so. This claim should be denied.

E. Trial counsel was ineffective for failing to proffer the testimony of Ms. McAdams after the trial court sustained the State's objection

Appellant claims trial counsel was ineffective for failing to present the deposition testimony of Ms. McAdams when the state objected to trial counsel's attempt to impeach her with a prior inconsistent statement. Appellant claims that trial counsel was ineffective because he failed to preserve this issue for appeal. As found by the collateral court, Kormondy failed to proffer the deposition during the evidentiary hearing.

In fact, throughout his initial brief Kormondy cites extensively to Ms. McAdams' deposition in support of his positions. However, Kormondy failed to proffer this deposition

at the evidentiary hearing and did not include this deposition anywhere in the record on appeal. Kormondy has failed to show how trial counsel's failure to proffer the deposition prejudiced the outcome of this trial.

CLAIM VII

WHETHER THE TRIAL COURT ERRED IN FINDING THAT NEWLY DISCOVERED EVIDENCE IN THE FORM OF RECANTED TESTIMONY WAS NOT CREDIBLE AND WOULD NOT HAVE CHANGED THE OUTCOME OF KORMONDY's CAPITAL TRIAL?

Initially, none of the so-called newly discovered evidence would result in Kormondy's acquittal. Even if the testimony of James Hazen and Curtis Buffkin were true, Kormondy would still be guilty of first degree murder. Kormondy concedes this is the case. (IB 77, 86). Accordingly, the only issue is whether this "newly discovered" evidence probably would have resulted in a life sentence. Appellant claims that newly discovered evidence exists in the form of the testimony of James Hazen, Curtis Buffkin, and Willie Long.

In order to prevail on a claim of newly discovered evidence, the defendant must make four showings. First, the defendant must show the "evidence" existed at the time of trial. Second, there must be a showing the evidence was unknown by the trial court, by the defendant, or by trial counsel at the time of trial. Third, there must be a showing that neither the defendant nor defense counsel could have known of the evidence by the exercise of due diligence. Finally, if all three prongs of the newly discovered evidence test are met, the collateral court must then determine whether the newly discovered evidence is of such a nature as to probably produce an acquittal or

imposition of a life sentence on retrial. Rutherford v. State, 926 So.2d 1100(Fla. 2006); Wright v. State, 857 So.2d 861 (Fla. 2003).

The standard of review on a claim of newly discovered evidence is an abuse of discretion. Absent an abuse of discretion, a trial court's decision on a motion based on newly discovered evidence, including recanted testimony, will not be overturned on appeal. Consalvo v. State, 31 Fla.L.Weekly S313 (Fla. 2006); Mills v. State, 786 So.2d 547, 549 (Fla. 2001) (citing Woods v. State, 733 So.2d 980 (Fla. 1999); State v. Spaziano, 692 So.2d 174 (Fla. 1997); Parker v. State, 641 So.2d 369 (Fla. 1994).

A. JAMES HAZEN

At the evidentiary hearing, Hazen testified that upon his arrest he did not give a statement to the police. (PCR-T Vol. I 107-108). Hazen testified that, at his trial, he denied ever being at the McAdams' home. (PCR Vol. I 108). At the evidentiary hearing, however, Hazen admitted he was in their home, however. He claimed he saw Buffkin with a gun in his hand standing behind Mr. McAdams. He did not actually see Mr. McAdams get shot. Hazen claimed he was at the back of the house when Mr. McAdams was killed. Hazen claimed that after the shot he went back to the front of the house. He did not see the gun. Hazen testified the gun he saw Buffkin holding before the

shooting was Mr. McAdams's pistol. Hazen testified that Buffkin told him, "If it didn't happen like that, I was going to have to shoot him anyhow." (PCR Vol. I 110). Hazen took this to mean that Buffkin shot him point-blank. Hazen told the collateral court that he would have, if called, testified at Kormondy's trial. (PCR-T Vol. I 110). Hazen was tried after Kormondy went to trial.

During cross-examination, Hazen told the collateral court that at his trial, he had denied being in the house, denied sexually assaulting Ms. McAdams and denied robbing anyone. He testified that he lied under oath. He told the court that sometimes he has no problem lying under oath. (PCR-T Vol. I 112).

Mr. Hazen said he could not describe the gun that Buffkin had. He claimed it was larger than the one they brought into the house. Hazen claimed it was he who fired the shot into Ms. McAdams' bedroom floor. He claimed the gun went off because he "bumped" something as he was leaving. He claimed Ms. McAdams was not in the bathroom when the gun went off in the bedroom, but was also in the bedroom.

He acknowledged that Ms. McAdams testified it was Buffkin in the room with her when she heard the gunshot from the front of the room. Hazen testified he was not saying she did not know who she was with. (PCR-T Vol. I 115).

Hazen testified that he filed a Rule 3.850 motion in his case. He testified that the basis of his Rule 3.850 motion was that he was innocent of the crimes. He testified he lied in his motion when he claimed he was innocent. (PCR-T Vol. I 117). Hazen said his 3.850 was over and he did not take an appeal. (PCR Vol. I 119). He did not see who shot Mr. McAdams. (PCR-T Vol. 123).

The collateral court denied Kormondy's claim as to James Hazen. The Court noted that Hazen did not testify at Kormondy's trial. Because Hazen's trial commenced after Kormondy's trial, and Hazen was unavailable to trial counsel before his trial, the collateral court found that Hazen's testimony constituted evidence that was not known to the trial court, trial counsel, or the defendant and could not have been discovered.

The collateral court found Hazen's testimony not credible. The court found that Hazen and Kormondy share a close relationship (grew up as "cousins") and that Hazen fabricated the newly discovered evidence to save Kormondy's life. The Court observed that Hazen admitted at the evidentiary hearing he had previously lied to the court. The collateral court found it difficult to believe that Hazen, who admitted he had nothing to lose, was telling the truth. (PCR Vol. I 982).

The Court found that Ms. McAdams' trial testimony, as well as that of Mr. Long, carried far more weight than that of Hazen.

The trial court found that Ms. McAdams had no bias for or against any of her attackers and no reason to lie about which one was with her when the fatal shot was fired. The collateral court found she gave unwavering testimony. Contrary to Hazen's version of events, Ms. McAdams testified quite credibly at Kormondy's trial that Buffkin was the person with her at the time her husband was shot. The court observed that Ms. McAdams had seen Buffkin when he first came into the house as the lights were on in the kitchen and she was able to see his face clearly. She was able to identify Buffkin's voice. The court noted that Ms. McAdams testified that Buffkin was the man in the back of the house with her when she heard the gunshot and that after the shot, she heard someone yell "Bubba" or "Buff" or something like that and he ran out of the room. (PCR Vol. VI 983).

The Court found this testimony greatly outweighed Hazen's testimony that Ms. McAdams was just wrong about her identification of Buffkin as the person who was raping her when her husband was shot. (PCR Vol. VI 983).

The Court also looked to the testimony of William Long to determine whether Hazen's testimony likely would have resulted in Kormondy receiving a life sentence. The Court observed that Long and Kormondy had a close relationship. The Court noted that Long resisted Kormondy's efforts to tell him about the

murder because Kormondy was his "cousin-in-law" and he really did not want to hear about it. (PCR VOl. VI 984).

The Court found Long's testimony about Kormondy's confession credible and determined that if Long were to lie about it, he likely would have lied in a way not to implicate Kormondy. The Court found that Long's testimony that Kormondy admitted to shooting Mr. McAdams far outweighed Hazen's testimony that while he did not actually see Buffkin shoot Mr. McAdams', Buffkin admitted he did so. The court found that Hazen's testimony, when viewed in light of the other evidence adduced at Kormondy's trial, would not have changed its outcome. (PCR Vol. VI 985).

Appellant claims the collateral court erred in viewing Hazen's testimony against the testimony actually adduced at trial because the trial judge ignored Hazen's "prior consistent statement at his own trial." (IB at 78).[12] However, Hazen testified at the evidentiary hearing he lied at his trial. At his own trial, Hazen denied he was even at the murder scene.

Additionally, Appellant chides the collateral court for viewing Hazen's testimony as recanted testimony. (IB 74). While Hazen did not testify at Kormondy's trial, he did testify

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12 Presumably, Appellant is referring to Hazen's testimony at his own trial that Buffkin admitted to shooting Mr. McAdams. Hazen has ample motive for pinning the shooting on Buffkin, as Buffkin testified against Hazen at Hazen's trial. Kormondy v. State, 703 So.2d at 454. Kormondy refused to testify against Hazen and was held in contempt of court for his refusal to do so. Id.

at his own trial, completely denying being at the McAdams' home. Accordingly, the trial judge correctly viewed this evidence as recanted testimony.

In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. Brown v. State, 381 So.2d 690 (Fla. 1980), *cert. denied*, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981); Bell v. State, 90 So.2d 704 (Fla. 1956). This Court has found that recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial when it is not satisfied that such testimony is true. This Court has determined this is especially true when the recantation involves a confession of perjury. Bell v. State, 90 So.2d at 705.

Here, the collateral court had the opportunity to observe Hazen and his demeanor while testifying. The court viewed Hazen's testimony in light of all the evidence adduced at trial and found his testimony not credible. As there is competent substantial evidence to support the collateral judge's conclusions, including Hazen's admission of multiple lies under oath, his testimony that he has no problem lying under oath, his close relationship with the defendant, his motive to cast Buffkin in the worst possible light, and Ms McAdams' and Mr.

Long's unwavering and credible testimony at trial, this court should affirm the collateral court's denial of this claim.

B. CURTIS BUFFKIN

At the evidentiary hearing, Buffkin testified he shot Mr. McAdams. (PCR-T Vol. I 70). Buffkin admitted that in a statement given on June 30, 1994, he told police that Kormondy shot Mr. McAdams. He claimed he lied in that statement.

During cross-examination, Buffkin testified he pinned the shooting on Kormondy because Kormondy had told police that Buffkin was the shooter. (PCR-T Vol. I 85). He claimed that, at the time of the shooting, he and Kormondy were with Mr. McAdams. According to Buffkin, Hazen was in the back with Ms. McAdams.

Buffkin testified that when he heard the gun go off in the bedroom, he assumed Hazen had killed Ms. McAdams. He told the collateral court that if he knew he had not done so, he would have gone back and killed her. (PCR-T Vol. I 98).

Consistent with his statement to police, Buffkin testified at Hazen's trial that Kormondy shot Mr. McAdams. (PCR-T Vol. I 99). He also said he told the same story in a deposition and to his lawyers. He wanted to avoid the death penalty. (PCR-T Vol. I 99). Buffkin admitted to being convicted of a felony quite a few times. (PCR I. 101).

The collateral court found that Buffkin's recantation was not known to the court, trial counsel, or the defendant and

could not have been discovered by the exercise of due diligence. Like Hazen's testimony, the court properly analyzed Buffkin's testimony as recanted testimony.

Accordingly, the collateral court was obligated to examine Buffkin's testimony in light of all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. The court clearly did so. Like Hazen, Buffkin claimed he committed perjury all those other times, but was now telling the truth. The court found Buffkin's testimony not credible. The collateral court concluded that Buffkin's testimony, when weighed with the other testimony adduced at Kormondy's trial, specifically Ms. McAdams and Mr. Long's testimony, would not have affected the outcome of the trial. (PCR Vol. VI 990).

In addition to finding Buffkin's recent recanted testimony incredible, the Court pointed to evidence that Buffkin's motive to testify was to effect an escape plan, rather than to testify truthfully. At the evidentiary hearing, Correctional Officer Hobby testified he was dispatched to see Curtis Buffkin at the Santa Rosa Correctional Institution on April 18, 2005. Buffkin's leg restraints could not be opened as there appeared to be something jamming the keyway. The officers had to cut the restraints off. Upon inspection, Officer Hobby found a piece of metal in the mechanism. The piece would have made it difficult

to double lock the restraints. He testified the metal appeared to be the tip of a cuff key. (PCR Vol. III 429).

Officer Hobby polled other correctional officers to see if anyone had broken a cuff key but no one had. Officer Hobby testified he had seen inmates use makeshift cuff keys from all sorts of things, including paper clips, ink cylinders, parts of a Bic lighter, and small sections of Coke cans. (PCR Vol. III 430).

During cross-examination, Officer Hobby testified the way the metal was broken off deep into the mechanism, Buffkin would not have been able to open the lock. When asked whether he intended to imply Buffkin was actually trying to escape, Officer Hobby told the court that the piece looked a lot like a piece of a cuff key. It was not a typical manufactured cuff key and he had never seen such a key in all his eight years with the Department of Corrections. In his opinion, it was a homemade device. (PCR Vol. III 433).

Officer Lewis testified he transported Buffkin on April 18, 2005, and put him in leg irons. When he put them on, they were in good working order. After Buffkin testified however, they could not get the restraints off. Officer Lewis saw a piece of metal in the keyhole and the restraints had to be cut off. (PCR Vol. III 434-437).

The collateral court concluded that Buffkin's sole motive in claiming he shot Mr. McAdams was to use the evidentiary hearing as a means to escape from prison. The Court noted that Buffkin was in fact an escapee when he invaded the McAdams' home at gunpoint. The Court found that Buffkin fabricated his testimony in order to escape again. The Court also noted that Buffkin testified at the evidentiary hearing that he had lied to everybody, including the court.

Here, the collateral court had the opportunity to observe Buffkin and his demeanor while testifying. The court viewed Buffkin's testimony in light of all the evidence adduced at trial and at the evidentiary hearing and found his testimony not credible. The collateral court correctly denied relief when it determined Buffkin's testimony was not true. Bell v. State, 90 So.2d 704, 705 (Fla. 1956) (noting that recanting testimony is exceedingly unreliable, and ruling it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true, especially when the recantation involves a confession of perjury).

There is competent substantial evidence to support the collateral judge's conclusions, including Buffkin's admission of multiple lies under oath, his multiple felony convictions, his escape attempt, and Ms McAdams' and Mr. Long's unwavering and credible testimony at trial. Kormondy can show no abuse of

discretion and this court should affirm the collateral court's denial of this claim.

C. WILLIAM LONG

Appellant concedes that William Long's testimony does not constitute newly discovered evidence. (IB 93).[13] In his brief, however, he claims that had Ms. Stitt discovered his probation file, she would have learned about the benefits Long received from law enforcement. However, Kormondy never presented this claim below. The only claim that Kormondy brought in the guise of an ineffective assistance of counsel claim as to William Long was trial counsel's failure to impeach him on his one felony conviction. (PCR-T Vol III 371). Accordingly, given Appellant's concession that Long's testimony is not newly discovered evidence, a claim of ineffective assistance of counsel as to Long's probation proceedings is not properly before this Court.

CLAIM VIII

13 The collateral court found the evidence was not available at the time of trial but that it would not have changed the outcome of the trial because Long testified at the evidentiary hearing that he testified truthfully. (PCR Vol. VI 992). Additionally, the collateral court found, and the evidence supports, that Long did not come forward with his testimony because of any offer of leniency from law enforcement, nor was any offer made to him in return for his testimony. Long testified at the evidentiary hearing that no matter what law enforcement said to him, his testimony would not have been different. (PCR Vol. I 61 and PCR Vol. VI 992).

WHETHER KORMONDY WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL BECAUSE THE RULES PROHIBITING POST-CONVICTION COUNSEL FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT IS UNCONSTIUTIONAL.

Kormondy first argues that Florida Rule of Professional Conduct limiting his right to interview his jurors is unconstitutional because it fails to put counsel on notice what behavior is subject to disciplinary action. Kormondy argues that precluding him from interviewing jurors denies him due process and access to the courts.

Kormondy's constitutional attack on Florida Rules of Professionalism 4-3.5(d)(4), is procedurally barred because Kormondy failed to raise this issue on direct appeal. A claim attacking the constitutionality of the Florida Bar Rule of Professional Conduct governing interviews of jurors can and should be raised on direct appeal. Allen v. State, 854 So.2d 1255, 1258 n.4 (Fla. 2003); Marquad v. State, 850 So.2d 417, 423 n.2 (Fla. 2003) (deciding that a post-conviction challenge to the rule prohibiting counsel from interviewing the jurors is unconstitutional is procedurally barred because it should have been raised on direct appeal); Rose v. State, 774 So.2d 629, 637 n.7 (Fla. 2000) (holding that the claim attacking the constitutionality of the Florida Bar Rule of Professional Conduct governing interviews of jurors is procedurally barred because Rose could have raised this issue on direct appeal).

Kormondy's claim also fails on the merits. This Court has consistently rejected constitutional challenges to rule 4-3.5(d)(4). Power v. State, 886 So.2d 952, 957 (Fla. 2004); Johnson v. State, 804 So.2d 1218 (Fla. 2001).

Kormondy's argument is premised on the notion that Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar prevents collateral counsel from interviewing jurors. This is not the case.

The rule actually prohibits a lawyer from initiating communication with any juror regarding a trial with which the lawyer is connected, except to determine whether the verdict may be subject to legal challenge. The rule also provides that a lawyer "may not interview the jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist." R. Regulating Fla. Bar 4-3.5(d)(4).

The rule's foundation rests on strong public policy against allowing litigants to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it. *See generally* Marshall v. State, 854 So.2d 1235, 1243 (Fla. 2003). Juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings. Jones v. State, 31 Fla.L Weekly S229 (Fla. April 13, 2006); Johnson v.

State, 804 So.2d 1218, 1225 (Fla. 2001); Baptist Hosp. of Miami, Inc. v. Maler, 579 So.2d 97, 100 (Fla. 1991).[14]

Kormondy proffers no basis to believe that grounds for a legal challenge to his convictions and sentence to death will be illuminated by an interview of his jurors. Rather, that pointing to specific evidence of juror misconduct or prejudicial outside influence, Kormondy presents only a bare bones claim for "preservation" purposes. Significantly, Kormondy never filed a motion with the trial court requesting he be allowed to interview jurors, alleged any specific juror misconduct, or presented sworn allegations that, if true, would require the court to order a new trial. At its core, Kormondy's complaint is that the rule impermissibly forbids him from conducting a fishing expedition in hopes of landing a keeper. Kormondy's claim should be denied.[15]

CLAIM IX

WHETHER EXECUTION BY ELECTROCUTION OR LETHAL INJECTION ARE CRUEL AND/OR UNUSUAL PUNISHMENTS

This claim is procedurally barred. Constitutional challenges to Florida's death penalty scheme can and should be

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14 Juror interviews are not permitted when post-conviction allegations focus on jury deliberations and matters that inhere in the verdict. Parker v. State, 904 So.2d 370, 380 (Fla. 2005).

15 Claims of ineffective assistance of post-conviction counsel are not cognizable in these proceedings. Knight v. State, 923

raised on direct appeal. Because Kormondy failed to raise this issue on direct appeal, his claim is procedurally barred. Suggs v. State, 30 Fla.L.Weekly S812 (Fla. Nov. 17, 2005) (ruling that a post-conviction claim, alleging execution by electrocution or lethal injection is unconstitutional, was procedurally barred because the claim was not raised on direct appeal).

This claim is also without merit. This Court has consistently rejected arguments that execution by electrocution or lethal injection is unconstitutional. Suggs v. State, 30 Fla.L.Weekly S812 (Fla. Nov. 17, 2005) (ruling that death by electrocution or lethal injection does not constitute cruel and unusual punishment); Rodriguez v. State, 919 So.2d 1252, 1285 (Fla. 2005) (rejecting Rodriguez' claim that death by electrocution or lethal injection is unconstitutional), Sochor v. State, 883 So.2d 766, 789 (Fla. 2004) (rejecting claims that both electrocution and lethal injection are cruel and unusual punishment); Provenzano v. State, 761 So.2d 1097, 1099 (Fla. 2000) (holding that execution by lethal injection does not constitute cruel or unusual punishment or both); Provenzano v. Moore, 744 So.2d 413, 416 (Fla. 1999) (holding that execution by electrocution in Florida's electric chair does not constitute cruel or unusual punishment). This Court should deny this claim.

So.2d 387, 415 (Fla. 2005).

CLAIM X

WHETHER KORMONDY'S EIGHTH AMENDMENT RIGHTS WILL BE VIOLATED IF HE IS INCOMPETENT AT THE TIME OF EXECUTION

This claim is not ripe for review as no death warrant has been signed and Kormondy has not been found to be incompetent. Kormondy admits his claim is not yet ripe but raises it for "preservation purposes". Whether an inmate is presently incompetent so as to prohibit execution is not ripe for review until a death warrant has been signed and execution is imminent. Ferrell v. State, 918 So.2d 163, 180 (Fla. 2005) (noting that Ferrell's claim he may be incompetent at the time of execution because of prolonged incarceration was not ripe for review as Ferrell had not been found incompetent and no death warrant had been signed). This Court should deny this claim.

CLAIM XI

WHETHER CUMULATIVE ERROR IN KORMONDY'S CAPITAL TRIAL DEPRIVED KORMONDY OF A FAIR TRIAL.

When a defendant fails to demonstrate any individual error in his motion for post-conviction relief, it is axiomatic his cumulative error claim must fail. Downs v. State, 740 So.2d 506, 509 (Fla. 1999); Bryan v. State, 748 So.2d 1003, 1008 (Fla. 1999) (concluding that the defendant's cumulative effect claim was properly denied where individual allegations of error were found to be without merit). Kormondy failed to demonstrate any

individual error. Accordingly, any cumulative error claim must fail. Reed v. State, 29 Fla.L.Weekly S156 (Fla. April 15, 2004).

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of Kormondy's motion for post-conviction relief.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
Department of Legal Affairs
PL-01, The Capitol
(850) 414-3583 Phone
(850) 487-0997 Fax
Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Michael P. Reiter, Esq., 4543 Hedwood Drive, Tallahassee, Florida 32309 this 16th day of June 2006.

_____
MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
MEREDITH CHARBULA