IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1200

JOHNNY SHANE KORMONDY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

Lower Tribunal Case No. 1993 CF 003302A

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# REPLY BRIEF OF APPELLANT

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Michael P. Reiter
4543 Hedgewood Drive
Tallahassee, Florida 32309
Attorney for Appellant
(850) 893-4668

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## ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING APPELLANT'S GUILT PHASE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUIRE APPELLANT'S PRESENCE AT PRETRIAL CONFERENCES IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS?

At page 19 of Appellee's answer brief, it is argued that the issue of Kormondy's presence at critical stages of the proceedings is procedurally barred, because it should have been raised on direct appeal. Generally speaking, Appellee is correct if the absence was due to the court's error. Appellee inaccurately cites Vining v. State, 827 So.2d 201 (Fla. 2002) as support that the issue is procedurally barred. The Vining court, 827 at 217, actually stated:

> The substantive claims relating to Vining's absence are procedurally barred as they should have been raised either at trial or on direct appeal. See Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995) ("[I]ssues that could have been, but were not, raised on direct appeal are not cognizable through collateral attack."). **Thus, only Vining's claims of ineffective assistance of counsel were properly raised in his 3.850 motion** (Emphasis added).
>
> In relation to this claim, Vining has failed to show how he was prejudiced by his absence during the pretrial and pre-penalty phase proceedings, nor has he asserted how he could have made a meaningful contribution to counsel's legal arguments during these preliminary proceedings.

Kormondy claimed ineffective assistance of counsel as the reason for his absences, especially since counsel actually waived Kormondy's presence on occasions when Kormondy was not present: May 26, 1994, June 20, 1994, and July 1, 1994.

Although the trial court asked Kormondy on June 21, 1994, about his decision not to be present, it was during Kormondy's absence that Ms. Antoinette Stitt (Kormondy's counsel) withdrew his Motion to Suppress. Stitt's testimony at the evidentiary hearing indicated her total lack of memory concerning the Motion to Suppress or her conversations with Appellant about the Motion (PC-T. Vol. I, p131-133), except it was her practice to discuss those sort of matters with her client (PC-T Vol. I, p136). At the evidentiary hearing, Kormondy testified he first became aware of the withdrawal of his Motion to Suppress when he reviewed his 3.850 Motion (PC-T. Vol. II, p322). He further testified he wanted his motion heard (EH Vol. II, p322).

Concerning prejudice, if Stitt had told Kormondy about her intention to withdraw the Motion to Suppress, he would have informed the court, had he been present, that he didn't want the Motion to be withdrawn. At the June 23, 1994, pretrial conference, Kormondy stated to the court

that he would waive his presence "If my attorney wants me to, I will" (T1. Vol. II, p285). Further, Stitt's own file notes fail to state that she had discussed her intent to withdraw the Motion to Suppress with Kormondy (PC-R. Vol. IV, p589).

Appellee cites Nixon v. Florida, 543 U.S. 175, 188 (2004), at page 23 of their answer brief, as Stitt's authority to withdraw the Motion to Suppress. However, the court in Nixon specifically referenced that authority **after** consultation with the client (emphasis added). No evidence in the postconviction record indicates that Stitt ever spoke to Kormondy about her unilateral decision. In fact the record speaks otherwise: Kormondy denies Stitt spoke with him, Stitt has no recollection of speaking with Kormondy, and her note to the file omits any consultation with Kormondy concerning the withdrawal of the Motion to Suppress.

At page 23 of Appellee's answer brief, mention is made about the court's finding that the Motion would have been unsuccessful. Even if true, the court's order failed to discuss the State's acquiescence to the motion (this will be discussed further in issue II below).

Trial counsel did not obtain a written waiver of Kormondy's presence as provided by Fla. R. Crim. P.

3.180(a)(3). Trial counsel advised Kormondy that his presence was not needed at the pretrial conferences. Trial counsel withdrew the Motion to Suppress without consulting Kormondy. Thus, the validity of the trial affected the probable outcome of the verdict.

## ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR ALLOWING APPELLANT'S STATEMENTS TO LAW ENFORCEMENT TO BE INTRODUCED INTO EVIDENCE?

Appellee's answer brief states two basic assumptions presented by Kormondy in this issue: (1) the motion would have been successful, page 24, and (2) counsel did not make a reasoned tactical decision, page 25.

Appellee is incorrect. Appellee fails to consider, as did the trial court's order, the primary focus of Kormondy's issue at page 20 of his initial brief: "The State acquiesced to the suppression of Appellant's statement and Stitt withdrew the motion without approval or knowledge of the Appellant." Appellee only makes mention of this point in footnote 4 at page 25 of their answer brief, probably because the collateral court's order ignored the point completely.

As to the merits of the Motion to Suppress, Appellee merely recites the court's order to support their position.

Therefore, Appellant will rely upon his initial brief as to the argument on the merits of the Motion to Suppress.

At page 30 of their answer brief, the state asserts that even without Kormondy's statement they presented ample evidence to establish Kormondy was one of the three men who invaded the McAdams's home, raped Cecilia McAdams, and shot Mr. McAdams.

Although Appellee points to circumstantial evidence, there is no direct evidence, other than Long's testimony, which places Kormondy at the McAdams' residence, that he raped Mrs. McAdams, or that he shot Mr. McAdams.

Mrs. McAdams could not positively identify Kormondy as one of her assailants (T1 Vol. VI, p1076-1077). At best, she could describe some physical features.

Even if Bobby Lee Prince (McAdams' neighbor) correctly identified Kormondy's car (T1 Vol. VI. P1133), Mr. Prince's observation of the car took place the night before the offense. Further, Mr. Prince did not observe the occupants in the car committing any criminal activity.

Long's trial testimony sould have been impeached by: (1) his deposition testimony (Long deposition, page 8, on Dec. 7, 1993), (2) his receipt of a reward for his information (PC-T. Vol. I, p65), (3) his belief that if he didn't wear a wire, he would be arrested (PC-T. Vol. I,

p56), (4) law enforcement appearing on his behalf at his termination of probation hearing (PC-T. Vol. I, p61), (5) being released from jail without paying for his bond, although one had been set (PC-T. Vol. I, p59; Exhibit A and B, p59-60), (6) being a convicted felon (T1. Vol. VII, p1184-1199), (7) his state of intoxication during the alleged conversation with Kormondy (PC-T. Vol. I, p63), (8) his belief that if he did not sound positive during his testimony, he would get in trouble (PC-T. Vol. I, p63-64), and (9) his statement that he might have been mistaken about Kormondy's words (PC-T. Vol. I, p64). Long's primary concern while testifying at trial and at the evidentiary hearing was clear: He did not want to go to jail. As a result, Long was "inspired" to comply with law enforcement by wearing a wire, not paying bail, receiving Det. Cotton's help at Long's revocation hearing, and presenting a positive memory while testifying. None of these elements were presented by trial counsel to impeach Mr. Long's testimony.

While the fiber evidence found in Kormondy's car was consistent with the fibers of Mrs. McAdams' dress, Appellee fails to point out that fibers are easily transferred by secondary contact.

The circumstantial evidence presented by the State pales in comparison to the admissions made by Kormondy in his statement. Had the statement been excluded from the trial, the State’s reliance on circumstantial evidence would have failed to prove the crimes charged beyond a reasonable doubt.

## ISSUE III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR CONCEDING TO THE JURY THAT APPELLANT WAS GUILTY OF BURGLARY AND ROBBERY?

On this issue, Stitt’s recollection was rather vague, as noted in Appellee’s answer brief at pages 35 and 36, as well as Appellant’s initial brief at page 28. However, when pressed to explain what the conversation entailed, Stitt stated, “Yes. I told him we were trying to save his damn life” (PC-T. Vol. I, p173). According to Stitt, that statement comprised the entire conversation. However, Kormondy testified he was not told about the concessions to the jury (PC-T. Vol. II, p306-7).

Given the facts introduced at trial, Appellee argues that counsel’s strategy was sound. Kormondy does not contend the strategy was ineffective per se. He does contend, however, the concession would not have been necessary if his statement had been excluded. In addition,

the decision to concede Kormondy's crimes in the opening statement—prior to the admission of any evidence—severely limited his ability to defend himself. Besides, this was contrary to his plea, especially since he was not informed of trial counsel's intention to concede Appellant's guilt of burglary and robbery.

## ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO IMPEACH THE STATE'S WITNESSES?

### A. **WILLIAM LONG**

Long's deposition testimony states Kormondy said to him, "Yeah, the only way they can catch the guy that did this is if they were walking behind us right now" (Long deposition, page 8, on Dec. 7, 1993). Stitt failed to impeach Long with this statement.

At the evidentiary hearing, Kormondy testified, "I said I had told him if he wanted to catch the ones who was involved in that he would be walking behind us right now."

However, at page 41 of Appellee's answer brief, it states, "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 p340-1).

The Appellee's mischaracterization that Kormondy "testified he told Long," reminds the undersigned of the same situation that occurred in the movie *My Cousin Vinnie* I am referring to the interrogation scene between Ralph Macchio and the sheriff. As the sheriff details the sequence of events, he says something like, "When you shot the clerk…" to which Ralph Macchio asks incredulously, "*I* shot the clerk?" Fastforward a few scenes: The sheriff is on the witness stand. When the prosecutor asks what the Defendant said, the sheriff responds, "The Defendant said, 'I shot the clerk.' " (Note: dialogue has been paraphrased for brevity's sake.)

The Appellee misconstrued the Appellant's statement, just like the I-shot-the-clerk statement from the movie. Kormondy's statement was taken out of context as the following shows.

> Q. (By Mr. Edgar) You told Mr. Long you were involved in this?
>
> A. In a way, yeah.
>
> Q. In a way you were involved. Is that what you said, Mr. Long I'm involved in this in a way?
>
> A. No. I said I had told him if he wanted to catch the ones who was involved in that he would be walking behind us right now.

Q. You didn’t say the ones. You say the one didn’t you?

A. No.

Q. There was only one of you walking with him?

A. But that was I’m implying to the other two as well.

Q. He testified that you said if he wants – they wanted to find the man that shot Mr. McAdams, they would have to be walking behind us. Are you telling us that is not true, you did not say that?

A. **If he wanted to catch the ones that shot him he would have to be standing behind us.**

(Emphasis added to indicate this is the question Kormondy repeated only for clarification.)

Q. Will Long didn’t tell the truth?

A. No.

(PC-T. Vol. II, 340-341).

Appellee is disingenuous in suggesting that “Mr. Kormondy followed up that particular testimony three questions later, however, and **testified he told Long…**” Kormondy was merely repeating the prosecutor’s statement and testified that Long was not telling the truth. Appellee

misinterpreted the statement as Kormondy's testimony, which is absurd.

Further, at page 41 of the answer brief, Appellee states that Kormondy did not refute Long's testimony concerning Kormondy's later admission that he (Kormondy) shot Mr. McAdams. Again, another misstatement by Appellee. Apparently, Appellee doesn't want to accept Kormondy's testimony that Long did not tell the truth.

Appellee argues in footnote 7, at page 42 of the answer brief, that Long's deposition testimony, bond, and probation hearing were presented as newly discovered evidence. The trial court did not consider these unpresented claims. However, Kormondy contends that these claims were, in fact, presented. In Claim I (ineffective assistance of counsel) of Kormondy's 3.851 Motion, it was stated, "All other allegations and factual matters contained elsewhere in this motion are fully incorporated herein by specific reference." Further, the collateral court took judicial notice of the records of Kormondy, Buffkin, and Hazen.

Kormondy concedes that the facts of Long's deposition, bond, and probation hearing appear in the newly discovered evidence claim rather than ineffective assistance of counsel claim. However, the court was apprised of those

facts through testimony at the evidentiary hearing, the record, and Kormondy's argument to the court. These facts were specifically incorporated by reference in Kormondy's ineffective assistance of counsel claim in his 3.851 Motion.

Further, this is a court of equity. To ignore these facts prioritizes form over substance. Since this is a death penalty case, and death is different, this court should not ignore significant material facts that support Kormondy's claim, simply because it was presented in a different part of the Motion.

B. **CECILIA McADAMS**

Appellee basically reiterates the collateral court's ruling in support of its argument: Kormondy failed to show that Deputy Scherer, who is not an investigator, was trained to conduct a proper interview or to take proper notes (answer brief at page 45).

Even if that finding were accurate, it is beside the point. The deposition speaks for itself, and it was in Stitt's possession. The only question is: did Mrs. McAdams make these statements to Deputy Scherer, and are they inconsistent with her trail testimony. Deputy Scherer testified under oath that she did make these statements, and they are inconsistent with her trial testimony..

Undersigned counsel could not find any postconviction case law requiring that before statements made in a deposition by law enforecement could be considered credible, the proponent had to first establish if the person giving the statement was an investigator, or was trained to conduct a proper interview, or took proper notes.

The collateral court, as well as Appellee, argues that Kormondy should have called Deputy Scherer and Mrs. McAdams to testify at the evidentiary hearing, answer brief at page 46, but failed to state for what purpose. The deposition of Deputy Scherer and the testimony of Mrs. McAdams is a matter of record and speak for themselves. Deputy Scherer's deposition testimony impeached Mrs. McAdams's trial testimony, period. It was counsel's responsibility to call Deputy Scherer at trial in order to impeach Mrs. McAdams's testimony. Counsel's failure to call Deputy Scherer prejudiced Mr. Kormondy because the jury could not determine the credibility of Mrs. McAdams's testimony in light of her prior inconsistent statements, especially since Stitt argued to the jury that Mrs. McAdams's testimony was mistaken.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO MOVE FOR DISQUALIFICATION OF JUDGE KUDER, AND TO WITHDRAW FROM REPRESENTATION, BEFORE THE FIRST TRIAL?

The Appellee basically reiterates the findings of the collateral court as their argument in their answer brief. Therefore, Appellant relies primarily on the initial brief.

As to Stitt's conflict, however, it should be noted that the answer brief and the collateral court's order make no attempt to distinguish the facts in this case from Lee v. State, 690 So.2d 664 (Fla. 1st DCA 1997), which found that a conflict, in fact, existed under similar circumstances. Kormondy is mindful that Lee was decided on direct appeal, while Cuyler v. Sullivan, 446 U.S. 335 (1980) is the standard for application of conflict of interest in postconviction proceedings.

Again, however, the court in Cuyler, Id. at 346, posed an obligation on judges to inquire of a potential conflict when the court knew or should have known about one.

> **Defense Counsel have an ethical obligation to avoid conflicting representations and to advise the Court promptly when a conflict of interest arises during the course of trial. n11 Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.** n12 Indeed, as the Court noted in *Holloway, supra, at 485-486*, trial

courts necessarily rely in large measure upon the good faith and good judgment of Defense Counsel. "An 'attorney representing two Appellants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" *435 U.S., at 485,* quoting *State v. Davis, 110 Ariz. 29, 31, 514 P. 2d 1025, 1027 (1973).* Unless the **trial court knows or reasonably should know** that a particular conflict exists, the Court need not initiate an inquiry. n13 (emphasis added).

According to Stitt's evidentiary hearing testimony, she informed Judge Kuder and Edgar, in chambers (apparently without the presence of the Appellant), early on, about her potential conflict.

Q. (By Mr. Reiter) The question was, did you consider this to be a potential conflict on your part?

A. Yes, I did.

(PC-T. Vol. I, p153).

* * *

Q. (By Mr. Reiter) Did you notify the court at any time prior to trial about your potential conflict?

A. Yes, I did.

(PC-T. Vol. I, p154).

* * *

Q. Do you have a specific recollection of when it was before it came back the second time, talking about the first trial now –

A. Uh-huh (indicating affirmatively).

Q. – what hearing you appeared at where you told the court of your potential conflict in the case?

A. I know it was early on. I know Mr. Edgar was aware of it because I spoke with him about it.

Q. You spoke with Mr. Edgar?

A. Uh-huh (indicating affirmatively).

Q. In court, out of court?

A. It seems to me it was a chambers conference, if I remember correctly, and I'm not sure that I do. I also spoke to Judge Kuder about it, and told him about my tangential relationship with Mr. McAdams. And I also had a discussion with Mr. Kormondy about it.

(PC-T. Vol. I, p156).

Based upon Stitt's evidentiary hearing testimony, found credible by the collateral court, she informed the court and Edgar about her potential conflict off the record. What is disturbing about this situation is Kormondy sent letters to the court and Stitt before the first trial stating a conflict existed and requested new counsel. The clerk's docket notes a hearing occurred and his request was denied, but no record of that hearing exists. Before the second trial, Kormondy again claimed a conflict. Although he could not articulate a specific reason for the conflict at the 1998 hearing, indicating he wasn't informed by Stitt, the motion was denied. The court and Stitt knew a

potential conflict existed and failed to put it on the record until a later hearing in 1998.

The State should not now be permitted to use Cuyler as the standard of proof under these circumstance. Especially since it was the court, the State, and defense counsel that failed to disclose the conflict during the original trial. Had Stitt informed the court of her potential conflict, or had the court inquired about them, the issue would have been raised on direct appeal. Cuyler obligates the court to inquire about a conflict when it knew or should have known one existed. That is precisely what happened in this case, yet the court failed to inquire.

However, if Cuyler is applied, Kormondy has demonstrated that Stitt's actions and omissions amounted to, at least, a suggestion that the conflict impaired her performance.

## ISSUE VI

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE DURING REPRESENTATION OF APPELLANT FOR THE SECOND PENALTY PHASE PROCEEDING?

Appellee basically reiterates the collateral court's findings as their argument in the answer brief. Therefore, Appellant relies primarily on his initial brief in support of this issue.

However, some specific points will be addressed here.

Waiver of presentation of mitigation

At pages 55-61, Appellee's answer brief contains the waiver colloquy between Kormondy and Glen Arnold, the newly appointed counsel. Appellant does not contest the fact he put a waiver on the record, only the reason for the waiver. Kormondy testified he waived mitigation before the court because he was following Arnold's legally incorrect advice (PC-T. Vol. II, p309). When Kormondy was asked why Arnold did not present mitigation, he testified to Arnold's explanation: Since the State was pressing the premeditation issue, the case would be remanded, so there was no need to present mitigation (PC-T. Vol. II, p308).

Arnold corroborated the premeditation concern at the evidentiary hearing:

> Q. (By Mr. Edgar) I see. What was your – if you can recall, what was your strategy at the sentencing hearing given the limits put on you by the defendant?
>
> A. Well, there was not a heck of a lot you could put into the record at that point in time.
>
> Q. You did bring up, as I understand, the transcripts of the Hazen and the Buffkin and their testimony that you tried to play off.
>
> A. …Another thing was that the Supreme Court had said that it was not a premeditated case at that time. I was trying to argue that to the court, he shouldn't consider premeditation; therefore, to avoid the death penalty…

(PC-T. Vol. II, p272).

Arnold claimed Kormondy did not want mitigation presented. Appellee's answer brief—as well as the collateral court's order—fails to acknowledge that Ronald Davis (Appellant's previous attorney) and Kormondy both testified that Kormondy wanted to present mitigation. These two disparate positions fail to square with common sense. Why would Kormondy request mitigation when represented by Davis, then refuse to have mitigation presented when represented by Arnold? Logic dictates that Arnold advised Kormondy not to present mitigation because the case would be remanded for the issue of premeditation.

Appellee's answer brief is fraught with inaccuracies regarding Arnold's actual testimony. At page 62 of the answer brief, Appellee states, "…however subsequently he did recall talking to Dr. Larson…" and "… he spoke with Ronald Davis…"

In actuality Mr. Arnold stated:

> A. I forgot and I didn't tell him correctly. It **seems like I did talk to Jim Larson**.

(PC-T. Vol. II, p266)(emphasis added).

* * *

> Q. Did you speak to Mr. Davis?
>
> A. **Seems like I did, yes.**

(PC-T. Vol. II, p259)(emphasis added).

There is a substantial difference between *doing* something and <u>*seems*</u> like doing something. It seems that Arnold didn't have a strong recollection one way or the other.

As for Davis, Appellee points out at page 62 of the answer brief that Davis testified Kormondy was *concerned* about his family and psychological stuff. At the evidentiary hearing, however, Davis also testified Kormondy never instructed him not to call family members at the second penalty phase:

> Q. (By Mr. Reiter) And when the case was being prepared by yourself for the second penalty phase, did you meet with Mr. Kormondy at any time?
>
> A. Yes.
>
> Q. Did he ever express to you that he did not want mitigation at that time?
>
> A. Well, he didn't use those words. The expression that he used was he didn't. Again now I'm speaking without the benefit of notes on my file. This is the best of my recollection that he didn't want to see his family drug through the mud so to speak the second time around. But as far as saying he didn't want any mitigation presented no, sir, he never said that.
>
> Q. Did he ever say, Well, I forbid you or don't want you to call them as witnesses?
>
> A. No, sir. Although he did indicate that his preference was that, I did not understand that as I shouldn't or that he didn't want it. He

didn’t want to cause them any undue embarrassment in the newspaper.

* * *

Q. (By Mr. Reiter) Did I understand you to say that Mr. Kormondy never specifically instructed you not to call the family as witnesses?

A. No, sir, I do not recall him saying do not call a particular family witness.

(PC-T. Vol. II, p280). It is clear from Davis’s testimony that while Kormondy was concerned about the presentation of some of the unfavorable testimony and his family’s embarrassment, Kormondy did not prohibit Davis from presenting the witnesses.

Kormondy testified Arnold was the one who incorrectly advised him not to present mitigation to the jury because the case would be remanded. Arnold corroborated the concern about the issue of premeditation. Arnold’s faulty legal advice led Kormondy to waive presentation of mitigation; therefore, his waiver was not knowing and voluntary.

## ISSUE VII

WHETHER THE TRIAL COURT ERRED BY FINDING THAT THE NEWLY DISCOVERED EVIDENCE OF RECANTED TESTIMONY WAS NOT CREDIBLE AND WOULD NOT HAVE CHANGED THE OUTCOME?

Appellee basically reiterates the collateral court's findings in support of their argument in the answer brief. Therefore, Appellant will rely primarily on his initial brief.

However, there are some specific references made in the answer brief that will be addressed here.

**Mr. Hazen's Testimony**

Co-defendant Hazen did not testify at Kormondy's trial.

At page 73 of the answer brief, Appellee stated Hazen testified he did not say Mrs. McAdams was unaware of who was with her. Just as Edgar misconstrued Hazen's testimony at the evidentiary hearing, so does the Appellee in the brief. Hazen was clear that Mrs. McAdams was incorrect in her testimony concerning who was in the bedroom when the gun went off; he was present—not Buffkin (PC-T. Vol. I. P115). Edgar's questions were confusing and convoluted.

The court found Hazen's testimony not credible because he admitted at Kormondy's evidentiary hearing that he lied at his trial. At his own trial, Hazen denied he raped Mrs.

McAdams; he even denied about being there, but testified Buffkin shot Mr. McAdams. After reviewing all of Hazen's statements, the collateral court has decided to believe Hazen's recanted testimony -- he lied about being at the crime or raping Mrs. McAdams, but disbelieved the consistent statement that Buffkin shot Mr. McAdams.

Common sense indicates the opposite should have been found. If "recanted testimony" is extremely unreliable, the court should have found that Hazen's recantation that he lied at his trail was not credible, while his consistent testimony, Buffkin shot Mr. McAdams, should have been found to be reliable.

Hazen's testimony at Kormondy's evidentiary hearing about who shot Mr. McAdams, was *not recanted* despite Appellee's contention otherwise at page 76 of the answer brief.

In its order denying Kormondy's 3.851 Motion, the court acknowledged that Hazen's evidentiary hearing testimony was newly discovered evidence and would have been admitted at trial (PC-R. Vol. VI, p979, 981). After weighing all evidence adduced at trial, as well as new evidence. the only assessment left for the court to decide under the standard for newly discovered evidence, was whether a different outcome of guilt or sentencing would

have occurred at trial. In its order, the court found a different result would not have occurred.

The collateral court's finding that a different result would not occur was a foregone conclusion; the court pointed out, footnote 153 of its order, that Hazen received a death sentence even though he didn't shoot Mr. McAdams, and the Florida Supreme Court reversed Hazen's sentence. However, the collateral court failed to consider that a jury would hear, in addition to Hazen's testimony that Buffkin was the shooter, that Hazen was given a life sentence because he was not the shooter.

In footnote 12, page 76 of Appellee's brief, it is argued that Hazen lied about the shooter's identity because "Hazen has ample motive for pinning the shooting on Buffkin, as Buffkin testified against Hazen at Hazen's trial." If this logic is sound, then Buffkin lied about Kormondy being the shooter—Buffkin also had ample motive for pinning Mr. McAdams's death on Kormondy, because "Kormondy had told police that Buffkin was the shooter" (answer brief at page 77). If these "logical" assumptions are true, then Buffkin's original testimony—that Kormondy was the shooter—is false; conversely, Buffkin's evidentiary hearing testimony is true, because we surmise that Hazen didn't shoot Mr. McAdams, and Buffkin is the only one left.

Appellee shouldn't be permitted to argue that same logic both ways.

**Mr. Buffkin's Testimony**

Co-defendant Buffkin did not testify at Kormondy's trial, although he admitted to shooting Mr. McAdams at Kormondy's evidentiary hearing.

The only motive the State could conjure up to explain Buffkin's admitted culpability for McAdams's death was Buffkin saw an opportunity to escape.

The State's conclusion that Buffkin tried to escape stems from Buffkin wedging a piece of metal in his leg irons while being transported from Kormondy's evidentiary hearing to the jail.

Officer Hobby testified he couldn't rule out that Buffkin's action was motivated strictly to give the officers a hard time; the piece of metal was not a cut-off key, nor could it open the cuff. In addition, Officer Hobby testified he had no personal knowledge of Buffkin attempting to escape (PC-T. Vol. III, p426-434), and Edgar acknowledged that Buffkin denied the attempted escape.

Nonetheless, the collateral court chose to make the unsupported conclusion that Buffkin's only motivation to testify at Kormondy's evidentiary hearing was to escape. In light of Buffkin's admission to being the shooter, he

has subjected himself to possibly being retried and sentenced to death. Logic dictates if Buffkin were serious about an attempt to escape, he would have testified favorably for the State because: (1) if the escape was unsuccessful, he would not be subject to the death penalty by admitting he killed Mr. McAdams, and (2) his escape could have been easier if the State no longer suspected he was the shooter.

The Appellant is mindful, as pointed out by Justice Wells at the oral argument held in Archer v. State, SC04-451, that this Court has never overturned a trial court's finding that a witness's recanted testimony was not credible. However, his case is distinguishable from most, if not all, other cases containing traditional recanted testimony, because Buffkin and Hazen did not testify at Kormondy's trial.

This Court's finding in Armstrong v. State, 642 So.2d 730 (Fla. 1994), reiterates that recanted testimony is exceeding unreliable. However, there are substantial differences among the various types of recanted testimony. For example, testimony about admission of guilt should carry more weight of reliability—as acknowledged by Florida's Rules of Evidence, Section 90.804(2)(C)—when

compared to, say, an identification witness who changes his or her testimony.

The collateral court found Hazen's and Buffkin's version of events not credible. However, Armstrong, 642 at 735, speaks only to recanted testimony as being exceedingly unreliable, not credibility. In Johnson v. State, 769 So.2d 990, 998 (Fla. 2000), this Court cited to the trial court's determination of credibility of a witness pursuant to Florida Standard Jury Instructions in Criminal Cases. When assessing these two cases it appears that reliability and credibility are two separate issues.

In Archer v. State, SC04-451, this court cited Armstrong and Johnson, thereby setting precedence for a two-part test for recanted testimony: (1) reliability, and (2) credibility of the witness when the claim relies on an admission of perjury. So, now it appears that even if the recanted testimony is reliable—but the witness is not credible—the recanted testimony is insufficient to obtain a new trial. On the other hand, if the recanted testimony is unreliable—but the witness is credible-the recanted testimony is insufficient to obtain a new trial.

In the instant case, the collateral court appears to have merged the two findings. The court failed to make a specific determination of Hazen's or Buffkin's credibility

in accordance with Johnson, only stating that their "recent account of events is not credible."

As to reliability, the collateral court failed to make a specific determination of the reliability of Hazen and Buffkin's testimony, again stating the "recent account of events is not credible." If hearsay testimony about a statement against penal interest by an unavailable declarant is reliable pursuant to Section 90.804(2)(C), then surely the admission against penal interest by the declarant themselves must be reliable. Remember, Buffkin has subjected himself to a possible death sentence.

Most other cases the undersigned has researched contained recanted testimony where the witnesses testified at the defendant's trial; these witnesses were subject to cross-examination, which facilitated a credibility determination by the jury. Mr. Kormondy did not have this benefit.

The Appellant contends he was denied the opportunity at his trial to present supporting evidence, via Hazen and Buffkin, asserting his innocence about shooting Mr. McAdams. It is also the Appellant's contention that to deny him a new trial would create paradoxical justice on two grounds: (1) the two witnesses whose testimony would have been admitted at trail and who might have influenced a jury

to recommend a life sentence for Mr. Kormondy are not available anymore, because the collateral court found these witnesses not credible, through no fault of Apellant, and (2) Mr. Kormondy does not receive the benefit of a proportionality review concerning his culpability through Hazen's and Buffkin's testimony, certainly a catch-22 situation (Note, Mr. Hazen *did* benefit from a proportionality review.)

Further, Hazen's evidentiary hearing is not recanted testimony about who shot Mr. McAdams. Buffkin's recanted testimony—albeit not from Appellant's trial—is an admission of guilt for shooting Mr. McAdams, which has been wrongfully attributed to Appellant.

Executing Mr. Kormondy without the ability to submit Hazen's and Buffkin's testimony to a jury denies him a fair trial.

## ISSUE VIII

WHETHER MR. KORMONDY WAS DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING MR. KORMONDY'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT?

Appellant will rely upon his initial brief in support of this issue.

## ISSUE IX

WHETHER MR. KORMONDY WAS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY ELECTROCUTION AND LETHAL INJECTION ARE CRUEL AND/OR UNUSUAL PUNISHMENTS?

Appellant will rely upon his initial brief in support of this issue.

## ISSUE X

WHETHER APPELLANT'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS APPELLANT MAY BE INCOMPETENT AT THE TIME OF EXECUTION?

Appellant will rely upon his initial brief in support of this issue.

## **CONCLUSION AND RELIEF SOUGHT**

Johnny Shane Kormondy prays for the following relief: That his judgment and sentence be vacated, and he be provided a new trial and/or a new penalty phase. However, if the court should deny him a new trial, Kormondy prays the court finds his role in the offense to be no greater than Hazen's and certainly less than Buffkin, and reduce his sentence to Life.

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by hand delivery to Meredith Charbula, Office of the Attorney General, Department of Legal Affairs, The Capitol, PL01, Tallahassee, FL 32399, on August 15, 2006.

MICHAEL P. REITER
Attorney for Appellant
4543 Hedgewood Drive
Tallahassee, FL 32309
(850) 893-4668

____________________________________

MICHAEL P. REITER
Florida Bar #0320234

**CERTIFICATE OF COMPLIANCE**

Undersigned counsel certifies that the type used in this brief is 12 point Courier New.

____________________________________

MICHAEL P. REITER
Florida Bar #0320234