IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1470

LOWER COURT CASE NO. 16-1991-CF-8144-AXXX

KENNETH HARTLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. HARTLEY'S CLAIM THAT HIS SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION DUE TO THE NEWLY DISCOVERED EVIDENCE OF CO-DEFENDANT FERRELL'S LIFE SENTENCE.

The State concedes that the standard of review is found in Puccio v. State, 701 So. 2d 858, 860 (Fla. 1997): "a trial court's determination concerning relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent and substantial evidence." (Answer Brief at 14)(hereinafter "AB at ___"). Here, there is no doubt that the trial court that considered Mr. Ferrell's culpability after considering the conduct of Mr. Hartley (as the shooter) and Mr. Ferrell (as the betrayer), determined that they were equally culpable. This Court found competent and substantial evidence to affirm the appropriateness of the death penalty for Mr. Ferrell's equal culpability in the crime. See Ferrell v. State, 686 So. 2d 1324, 1327 (Fla. 1996). Thus, the circuit court's refusal to accept the previous finding of fact constitutes reversible error.

The State's primary argument in support of the circuit court's order is that Mr. Ferrell's life sentence was a product of prosecutorial discretion and therefore this Court cannot

compare Mr. Hartley's and Mr. Ferrell's culpabilty to determine whether Mr. Hartley's sentence of death now violates the constitution (AB at 7, 9).

First, in making such an argument, the State ignores this Court's pronunciation in Scott v. Dugger, in which this Court held:

> Even when a codefendant has been sentenced subsequent to the sentencing of the defendant seeking review on direct appeal, it is proper for this Court to consider the propriety of the disparate sentences in order to determine whether a death sentence is appropriate given the conduct of all participants in committing the crime.

604 So. 2d 465, 468 (Fla. 1992), citing Witt v. State, 342 So. 2d 497 (Fla. 1977). Thus, the inquiry upon review is to determine whether Mr. Hartley and Mr. Ferrell's conduct permitted the imposition of the death sentence and was equally culpable to one another. That analysis was conducted by both the trial court that heard the evidence concerning Mr. Hartley and Mr. Ferrell's conduct in committing the crime as well as this Court when it reviewed Mr. Hartley and Mr. Ferrell's death sentences on direct appeal. And, both the trial court and this Court determined that Mr. Hartley and Mr. Ferrell were equally culpable co-defendants. Thus, because the facts and conduct have not changed, under both the law of the case doctrine and res adjudicata principles the circuit court was bound to follow the prior ruling of this Court. That ruling was unequivocally stated by this Court in holding: "Although not considered in aggravation, the trial judge noted

that **Ferrell was just as culpable as the shooter** because he used his friendship with the victim to lure the victim to his death." Ferrell, 686 So. 2d at 1327 (emphasis added). This Court also held:

> We also note that the sentence of death in this case is appropriate even though Ferrell was not the shooter and even though Johnson received a sentence of life-imprisonment. First, Ferrell played an integral part in planning and carrying out the murder. Moreover, Ferrell used his friendship with the victim to lure him to his death. Johnson merely provided the getaway vehicle after the crime was committed. We have previously determined that death is the appropriate sentence under similar circumstances.

Id. at 1331.

Second, the cases cited by the State as to prosecutorial discretion simply do not apply in situations, like Mr. Hartley and Mr. Ferrell's where an analysis of culpability was previously performed.[1] For example, the State relies on Wade v. State, 41 So. 3d 857 (Fla. 2010), to support its notion that prosecutorial discretion applies to Mr. Ferrell's life sentence. However, in Wade, Wade's co-defendant was not convicted of the same crime as Wade and thus, this Court held that a culpability analysis was not an issue: "'[i]n order to have that same degree of blame or

[1]The State's citation to Henyard v. State, 689 So. 2d 239 (Fla. 1996), demonstrates the State's misunderstanding of the culpability analysis. In Henyard, one of the co-defendant's was only 14 years of age, making him legally ineligible for the death penalty. The fact that the death penalty was not an option for the 14 year old co-defendant was not a product of prosecutorial discretion, but rather, was simply the law. Therefore, this Court held that the sentences were "incomparable". Id. at 254-5.

fault the codefendants must, at a minimum, be convicted of the same degree of the crime.'" Id. at 868, citing Shere v. State, 830 So. 2d 56, 61 (Fla. 2002). That is not the case here because Mr. Hartley and Mr. Ferrell have both been convicted of first degree murder.

Also in England v. State, 940 So. 2d 389, 406 (Fla. 2006), the co-defendant pleaded to a lesser crime "and, as a part of his plea agreement, gave the State information and recorded testimony implicating England." Here, as the State has conceded, Mr. Ferrell's sentence was not the product of a plea agreement. See AB at 10. Likewise, Mr. Ferrell's acknowledgment is simply not helpful to the State because it does not change the facts upon which the culpability determination was made.[2] Again, "[u]nder the law of the case doctrine, a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case." Here, the facts of the case have not changed. The culpability determination was previously made and fully supports Mr. Hartley's claim.

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[2]It was always the State's theory that Mr. Hartley was the shooter. However, the State told Mr. Ferrell's jury that Mr. Ferrell was the "inside man, he was the man that Gino trusted, he was the one that walked up to Gino that night to make sure that he had drugs, to make sure that night in addition to killing him he'd be able to get some drugs off of him." (PC-R3. 1549-50). Further, it was always Mr. Ferrell's position that he was not present at the time of the crime. Therefore, his acknowledgment is consistent with his longstanding position, i.e., he does not know who the shooter was because he was not there.

Furthermore, contrary to the State's assertion, Mr. Hartley has not been provided a meaningful adversarial process (AB at 12), because the jury and judge that sentenced Mr. Hartley to death and this Court which affirmed Mr. Hartley's sentence was unaware that an equally culpable co-defendant received life. Thus, under the law, Mr. Hartley's death sentence was inappropriate and would not have been imposed, or reversed on direct appeal due to the finding of equal culpability in the crime. See Shere v. Moore, 830 So. 2d 56, 60 (Fla. 2002); see also Wade v. State, 41 So. 3d 857, 867-8 (Fla. 2010).

While the State concedes that "Ferrell played a significant role in the robbery, kidnapping, and murder of Gino Mayhew", the State argues that Mr. Ferrell's role does not matter because Mr. Hartley was the triggerman (AB at 16). However, the evidence that Mr. Hartley was the triggerman was known to the jury, judge and this Court at the time of both Mr. Hartley and Mr. Ferrell's trials and direct appeals. Indeed, this Court specifically held:

> **We also note that the sentence of death in this case is appropriate even though Ferrell was not the shooter** and even though Johnson received a sentence of life-imprisonment. **First, Ferrell played an integral part in planning and carrying out the murder. Moreover, Ferrell used his friendship with the victim to lure him to his death.** Johnson merely provided the getaway vehicle after the crime was committed. We have previously determined that death is the appropriate sentence under similar circumstances.

Ferrell, 686 So. 2d at 1327 (emphasis added). Thus, while reviewing Mr. Ferrell's case on direct appeal, this Court

recognized that though not the shooter, Mr. Ferrell was equally culpable. This Court held that finding to be supported by competent and substantial evidence. The evidence has not changed and thus, the finding that Mr. Hartley and Mr. Ferrell are equally culpable remains intact.

Furthermore, the State's attempt to now minimize Mr. Ferrell's conduct in the crime is refuted by the evidence presented at his capital trial.[3] Indeed, throughout Mr. Ferrell's trial, the State argued to the jury and judge that the evidence established that Mr. Ferrell was equally culpable and deserving of the death penalty.[4] And, contrary to the State's position now (AB at 16), at Mr. Ferrell's capital trial, the State argued that the evidence established that Mr. Ferrell intended Mr. Mahew's murder from the outset:

> Under the law of principals the State doesn't have to show that this defendant was the one that pulled the trigger or this defendant was the one that took the

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[3]The State attempts to rely on the evidence presented at Mr. Hartley's trial to argue that Mr. Ferrell's role in the crimes was minimal. See AB at 16, 17-8. However, such an analysis does not comport with the law. Mr. Ferrell's culpability was and must be judged by the evidence presented at his capital trial, not Mr. Hartley's.

[4]The State misses the point as to why Mr. Hartley identified the prosecutor's statements and arguments to the jury and judge during Mr. Ferrell's trial, arguing that these statements are not newly discovered (AB at 15-6). However, the prosecutor's statements and arguments at Mr. Ferrell's trial make clear that the trial court's findings of fact were supported by competent and substantial evidence presented at Mr. Ferrell's trial and urged by the prosecutor to establish Mr. Ferrell's equal culpability.

> money from Gino. Under the law of principals if we show the defendant knew what was going to happen, that he intended to actively participate, and if he did something to help carry out that crime, that the law considered him doing everything that his partners did. And the reason I mention that you is as you listen to all the evidence, **look for the evidence that shows how this defendant knew what was going to happen, intended to actively participate and actually did something to help.**

(PC-R3. 1144)(emphasis added).[5] The State argued in closing that

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[5]The State has now asserted that Mr. Ferrell never intended Mr. Mayhew to be killed, citing to the testimony in Mr. Hartley's trial that Mr. Ferrell had shouted that Mr. Mayhew "would be back" as the trio drove away in Mr. Mayhew's blazer (AB at 17). However, the State's current position conflicts with the position taken at Mr. Ferrell's trial that the evidence established that Mr. Ferrell intended for Mr. Mayhew to be killed. Indeed, it was the State's theory that Mr. Mayhew had to be killed so that he would not seek retribution for an earlier robbery. Surely, robbing him a second time would not quell the concern that he may seek retribution. The State's reversal of its position constitutes prosecutorial misconduct as it demonstrates that the State wants to "win at all costs" and will violate Mr. Hartley's right to due process to do so. In Berger v. United States, 295 U.S. 78, 88 (1935), the United States Supreme Court held:

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

Here, the State has abandoned its role as a servant of the law and struck foul blows in the hope of maintaining an unconstitutional and unreliable death sentence.

all of the evidence demonstrated that Mr. Hartley and Mr. Ferrell intended to execute Mr. Mayhew (PC-R3. 1527-8)("Because of the law of principals the State does not have to show this is the defendant that pulled that trigger. That's premeditation." (PC-R3. 1528).

Later, the State again argued that Mr. Ferrell planned to execute Mr. Mayhew from the outset: "... **the defendant and his partners didn't stop at just one fatal shot, they wanted to make sure that their plan, that their premeditation was carried out so then they fired more shots into Gino's brain to make sure that their plan, that their execution was fully carried out.**" (PC-R3. 1536)(emphasis added). Thus, the State's argument before this Court that Mr. Ferrell intended for Mr. Mayhew to return is not supported by the State's evidence or argument at his capital trial.

Likewise, at Mr. Ferrell's penalty phase the State argued that the fact that Mr. Ferrell was not the triggerman was not mitigating (PC-R3. 1694). Contrary to the State's position before this Court – that Mr. Ferrell was dominated by Mr. Hartley – at Mr. Ferrell's penalty phase the State made clear that Mr. Ferrell was an integral part of the crimes, referring to him as the "executioner" (PC-R3. 1690). Furthermore, the trial court rejected the State's current contention when sentencing Mr. Ferrell to death (PC-R3. 600). Therefore, the law of the case

and res adjudicata principles required the circuit court to accept the trial court's findings and analysis imposing the death sentence for Mr. Ferrell because he was an equally culpable co-defendant. Those findings now require this Court to vacate Mr. Hartley's death sentence.

The State attempts to analogize Mr. Hartley's case to cases in which this Court found that the shooter or actual killer was more culpable than the co-defendants in those cases (AB at 18-20)(Jennings v. State, 718 So. 2d 144 (Fla. 1998); Ventura v. State, 794 So. 2d 553 (Fla. 2001); Marquard v. State, 850 So. 2d 417 (Fla. 2002). However, the obvious flaw in the State's argument is that in those cases, on direct appeal, this Court found that the defendants were more culpable than their co-defendants due to the specific circumstances presented in those cases. Here, Mr. Hartley was not found to be more culpabale than Mr. Ferrell, rather, the trial court found:

> Ferrell, Hartley, and Johnson twice robbed Mayhew. The first time (4-20-91) Ferrell wore a mask so Mayhew would not recognize his 'trusted friend.' The second time (4-22-91) **Ferrell put the plan into motion when, by trickery, he learned that Mayhew had money and drugs - and reported this back to Hartley and Johnson so the robbery-murder could go forward.**
>
> **Then Ferrell and Hartley approached Mayhew who was unsuspecting because Ferrell was his "trusted friend". Hartley then pointed a pistol at Mayhew's head and, too late, Mayhew realized his "trusted friend" Ferrell had betrayed him.**
>
> **Ferrell's perfidy placed Mayhew in a position where he could not defend or protect himself and his murder was**

> **inescapable.**
>
> **Ferrell's betrayal of trust made the murder possible and his culpability equals Hartley's.**"

(PC-R3. 601)(emphasis added).

Likewise, on direct appeal, this Court stated: "Although not considered in aggravation, the trial judge noted that **Ferrell was just as culpable as the shooter** because he used his friendship with the victim to lure the victim to his death." Ferrell, 686 So. 2d at 1327 (emphasis added). This Court went on to hold:

> **We also note that the sentence of death in this case is appropriate even though Ferrell was not the shooter and even though Johnson received a sentence of life-imprisonment. First, Ferrell played an integral part in planning and carrying out the murder. Moreover, Ferrell used his friendship with the victim to lure him to his death.** Johnson merely provided the getaway vehicle after the crime was committed. We have previously determined that death is the appropriate sentence under similar circumstances.

Id. at 1331 (emphasis added). Thus, the fact that the State contended that Mr. Hartley was the shooter was already considered and determined not to be significant enough to find that Mr. Ferrell was not equally culpable.[6]

Finally, the State also argues that Mr. Ferrell's life sentence would not be significant enough to probably produce a sentence less than death for Mr. Hartley if analyzed under the

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[6]This Court has previously found the non-shooter/killer to be equally or more culpable. See Sexton v. State, 775 So. 2d 923, 935-6 (Fla. 2000); Larzelere v. State, 676 So. 2d 394, 407 (Fla. 1996); White v. State, 403 So. 2d 331, 340 (Fla. 1981).

rubric of newly discovered evidence (AB at 21-2). In doing so, the State attempts to distinguish Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), suggesting that the Court in Scott considered more than just the circumstances of the crime when determining that Scott was entitled to life after his co-defendant's sentence was vacated and he was sentenced to life. The State cites to: the criminal records of the defendant and co-defendant; the age of the defendant and co-defendant; the level of IQs; and the finding that "it 'was not a case where Scott was the 'triggerman' and Robinson [co-defendant] a mere unwitting accomplice along for the ride.'" (AB at 21, citing Scott, 604 So. 2d at 468).

Here, however, as to the fourth factor, the trial court and this Court have already made clear that Mr. Hartley and Mr. Ferrell were equally culpable and Mr. Ferrell was not "a mere unwitting accomplice along for the ride." Id. Likewise, the trial court was well aware of the respective criminal records of Mr. Hartley and Mr. Ferrell at the time they were found equally culpable. While, the State emphasizes Mr. Hartley's criminal record, the State fails to fully and accurately present Mr. Ferrell's criminal record. As the trial court found, Mr. Ferrell had been arrested 14 times and charged with 33 separate crimes at the time of his arrest for the first degree murder of Mr. Mayhew (PC-R3. 589). He served one jail sentence and five prison sentences before he turned twenty-seven (PC-R3. 589). At nineteen years of age, Mr. Ferrell committed an armed robbery

with a firearm (PC-R3. 590).[7] Thereafter, Mr. Ferrell incited a riot in which he committed a battery on a law enforcement officer and resisted arrest (PC-R3. 590).[8] Fifty days later, he committed another felony (PC-R3. 590). On July 28, 1989, Mr. Ferrell, was arrested and convicted for possessing a firearm (PC-R3. 590). As the trial court noted, within a year of his release he committed three more felonies and then committed the first degree murder, robbery and kidnapping of Gino Mayhew (PC-R3. 590).[9] Mr. Ferrell was older than Mr. Hartley and clearly a more experienced and sophisticated criminal.[10]

Likewise, as the State argued to the jury and trial court, the fact that Mr. Ferrell was not the triggerman was not mitigating (PC-R3. 1694).

The State argues that this Court need not grant a new penalty phase because Mr. Hartley's case was aggravated (AB at

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[7]The State asserts that this was an unarmed robbery (AB at 22), However, according to the trial court and Florida Department of Corrections' website, it was an armed robbery.

[8]The State asserts that "no one was harmed in the jail riot" (AB at 22), but according to the trial court and Florida Department of Corrections' website, Mr. Ferrell committed a battery on a law enforcement officer.

[9]According to the State's evidence, Mr. Ferrell also committed the armed robbery of Mr. Mayhew just days before his murder. He was never charged with this crime.

[10]Mr. Hartley was previously convicted of manslaughter, which by its legal definition means that the killing was unintentional. After considering the circumstances of his conviction, the State of Florida granted him parole after he served only four years.

22). However, the State fails to mention that the jury that sentenced Mr. Hartley to death, only by a 9 - 3 recommendation, did not have the benefit of knowing that an equally culpable co-defendant received a life sentence, but also considered an invalid aggravator (heinous, atrocious and cruel), and an unconstitutionally vague aggravator (cold, calculated and premeditated), both of which this Court has previously described as weighty.[11]

In addition, at his penalty phase and in postconviction, Mr. Hartley presented compelling mitigation establishing non-statutory mitigation about his background.

Perhaps most importantly, the trial court found that: "Ferrell's betrayal of trust made the murder possible and his culpability equals Hartley."

Mr. Hartley is entitled to relief.

[11]The aggravators that were found by the trial court were the same as to Mr. Hartley and Mr. Ferrell.

ARGUMENT II

THIS COURT HAS VIOLATED MR. HARTLEY'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On November 9, 2011, Mr. Hartley filed a Rule 3.851 motion relating to the imposition of a life sentence in Mr. Ferrell's case (PC-R3. 1-43).

Proceedings were held before the circuit court on September 10, 2012, and March 21, 2013, at which the parties were permitted to introduce evidence in support of their positions. Indeed, Mr. Hartley introduced three exhibits in support of his claims. The State did not introduce any exhibits to rebut Mr. Hartley's position. In addition, the parties were permitted to file memorandums concerning Mr. Ferrell's record on appeal.

On June 21, 2013, the circuit court denied Mr. Hartley's Rule 3.851 motion (PC-R3. 1923-33). Mr. Hartley timely filed a notice of appeal.

The record on appeal was delivered to this Court on August 21, 2013.

On September 17, 2013, a hearing was held in the circuit court to determine whether the record was complete. The State was represented at the hearing by Assistant Deputy Attorney General Carolyn Snurkowski. At the hearing, undersigned requested that the court reporter provide the transcripts of the hearing to the clerk so that the record could be supplemented. The circuit court agreed that the record should be supplemented

with the transcripts. On behalf of the State, Ms. Snurokowski made no request to re-open the proceedings in the circuit court to submit additional evidence.

On September 25, 2013, Mr. Hartley requested that this Court toll the time to file the Initial Brief due to the fact that the transcripts of the hearings before the circuit court had not been included in the record. This Court granted Mr. Hartley's motion.

Thereafter, Mr. Hartley requested an extension of time to file his Initial Brief. Over the State's objection, this Court granted the motion.

On December 26, 2013, Mr. Hartley filed his Initial Brief. At no time between August 21, 2013 and December 26, 2013, did the State request this Court relinquish Mr. Hartley's case to the circuit court and re-open the proceedings to submit additional evidence.

The State's brief was due on or before January 15, 2014. On the date that State's Answer Brief was due, the State filed a motion to supplement the record and an Answer Brief with an appendix. In its brief, the State relies on the "acknowledgment" included in the appendix to its brief though it was not a part of the record below.

The State did not submit it as evidence[12], Mr. Hartley did

[12]Presumably, Assistant State Attorney Bernie Delarionda and Assistant Attorney General Meredith Charbula, who represented the State before the circuit court at both hearings, did not believe that the "acknowledgment" was relevant and/or admissible as

not have an opportunity to address it, the circuit court did not consider it in ruling on Mr. Hartley's claim and Mr. Hartley did not have an opportunity to address the "acknowledgment" in his Initial Brief.

In Altchiler v. State, Dep't of Prof'l Reg., 442 So. 2d 349 (Fla. 1st DCA 1983), the First District Court of Appeals recognized that the rule that an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court. Yet, that is exactly what the State did. And, this Court has allowed this procedure.

The State's reliance on non-record evidence was improper and its Answer Brief should have be stricken. See Ullah v. State, 679 So. 2d 1242, 1244 (Fla. 1st DCA 1996)("It is elemental that an appellate court may not consider matters outside the record, and when a party refers to such matters in its brief, it is proper for the court to strike same.")(citations omitted); see also Doctors Assocs., Inc. v. Thomas, 898 So. 2d 159, 162 (Fla. 4th DCA 2005)("An appellate court may not consider matters outside the record."); Dep't of Transp. v. Baird, 992 So. 2d 378 (Fla. 5th DCA 2008)("an appellate court on direct appeal is limited to a review of the lower court proceedings"); Sheldon v. Tiernan, 147 So. 2d 593 (Fla. 2d DCA 1962)(holding that it is axiomatic

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rebuttal to Mr. Hartley's claim or had some other strategic reason for not submitting the document into the record.

that appellate review is confined to the record on appeal).

Here, the State's improper reference to matters outside of the record in its brief and attachment of a document that was never submitted to the circuit court for consideration violates appellate rules and practice and Mr. Hartley's right to due process.

Mr. Hartley had no opportunity to object, comment or challenge the document.[13] And, the circuit court had no opportunity to consider the document. See Henn v. National Geographic Society, 819 F.2d 824, 831 (7th Cir. 1987).

Furthermore, this Court's precedent is clearly against the Court's actions. In Johnson v. State, 660 So. 2d 648, 653 (Fla. 1995), this Court set out the procedure to be followed when a claim requires consideration of a separate trial record:

> Effective as of [July 13, 1995], we hold that the proper method of bringing relevant matters before this Court that are contained in separate records of pending cases is by way of a motion to supplement the record, not by a request for the taking of judicial notice. ... In the future, however, any attempt to cross-reference separate records of pending cases will constitute grounds for the opposing party to move to strike the cross reference under the holdings of Wuornos [v.

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[13]Had the State moved to introduce the acknowledgment before the circuit court, Mr. Hartley could have called Mr. Ferrell to testify that he was not present when Mr. Mayhew was shot, so he can provide no information as to who did in fact shoot Mr. Mayhew. Further, Mr. Hartley could have investigated whether a ballistics expert and/or pathologist could refute Mr. Ferrell's acknowledgment and support the theory that the shots were fired from the front passenger seat – where Mr. Ferrell was placed by witnesses. The process permitted by this Court has denied Mr. Hartley due process and a full and fair hearing.

> State, 644 So.2d 1012 (Fla. 1994)] and Jackson [v. State, 575 So.2d 181 (Fla. 1991)]. This Court likewise may strike such a cross reference sua sponte. Any order striking a cross reference shall constitute automatic notice to counsel that the record must be supplemented in keeping with rule 9.200(f)(2), and **the failure to supplement then will work a procedural bar as to the matters at issue in the improperly cross-referenced material**.

Because, the State did not move to supplement the record or introduce the "acknowledgment" in the proceedings before the circuit court, the State waived any reliance on the "acknowledgment".

Certainly, waiver and "procedural default rules apply not only to defendants, but also to the State." Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). The State failed to introduce the "acknowledgment" in the proceedings before the circuit court and should not have been permitted a "do over" because it now relies on the non-record "acknowledgment" in its argument to this Court.

Mr. Hartley is entitled to relief as this Court has denied him notice and opportunity to be heard.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, **KENNETH HARTLEY**, urges this Court to reverse the circuit court's order and remand for a life sentence to be imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by electronic mail to Patrick Delaney, Assistant Attorney General, on this 27th day of February, 2014.

/s/. Linda McDermott
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CERTIFICATION OF TYPE SIZE AND STYLE

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/s/. Linda McDermott
LINDA McDERMOTT