IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-2428

JOHNNY SHANE KORMONDY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

ARGUMENT I

NEWLY DISCOVERED EVIDENCE DEMONSTRATES THAT KORMONDY'S DEATH SENTENCE IS CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Much of the State's brief is dedicated to regurgitating the findings of the circuit court while wholly failing to address or even acknowledge the arguments set forth in Kormondy's brief demonstrating the erroneousness of the circuit court's order. For instance, the State continues to maintain that the newly discovered evidence would be inadmissible (see Answer at 26, 27, 29), without acknowledging that this Court in Marek v. State, 14 So. 3d 985, 996 (Fla. 2009), held otherwise. The State also continues to maintain that Kormondy was not diligent (see Answer at 26), without acknowledging that the circuit court made this finding by erroneously relying on only a selective portion of Buffkin's 2005 evidentiary hearing testimony. And the State continues to maintain that the issue is procedurally barred (see Answer at 14, 26, 29), without addressing the fact that the cases relied on by the circuit court in support of a bar are inapposite to the facts of Kormondy's case. Given that the State has failed to provide any substantive response to the facts, caselaw and argument contained in Kormondy's Initial Brief, he will refrain from repeating those points and rely on those previously set forth.

Kormondy does find it necessary, however, to respond to

several inaccurate statements and arguments made by the State in its Answer Brief. First, the State apparently has taken the position that the issue of whether Kormondy was the shooter is irrelevant. According to the State, Kormondy was not sentenced to death because he was the shooter but because he was the most culpable (Answer at 24-25).[1] The State proceeds to cite to a number of cases in its brief indicating that there is no disparate treatment where one co-defendant receives a greater sentence if he was more culpable (See Answer at 24, 27, 29)(citing to Henyard v. State, 992 So. 2d 120 (Fla. 2008); Stein v. State, 995 So. 2d 329 (Fla. 2008); Ventura v. State, 794 So. 2d 553 (Fla. 2000); Johnson v. State, 696 So. 2d 1035 (Fla. 1997); and Van Poyck v. State, 961 So. 2d 220 (Fla. 2007).

While citing to these cases, the State offers no explanation as to how Kormondy would be the most culpable if he wasn't the shooter.[2] Contrary to the State's assertion, Kormondy's death sentence has remained intact based on the notion that he was the shooter, and therefore the most culpable. Indeed, in making its argument, the State ignores that this Court specifically relied on this distinction to justify a death sentence for Kormondy. On

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[1]The State goes so far as to claim that "[t]he trial court, as well as the Florida Supreme Court, has determined Kormondy was not sentenced to death 'because he was the shooter,' rather his sentence has been repeatedly vetted as appropriate because he was the most culpable." (Answer at 24-25).

[2]The State also fails to mention the fact that at Buffkin's trial, the prosecution argued that he was the leader of the group and arguably the most culpable.

direct appeal following Kormondy's resentencing, this Court stated that "[t]he evidence from trial and the resentencing demonstrates that Kormondy committed the homicide and is more culpable than his codefendants; therefore, his sentence of death is not disproportional on this basis." Kormondy v. State, 845 So. 2d 41, 47 (Fla. 2003). This Court again later reiterated in the same opinion that "[t]he testimony presented at trial tends to prove that Kormondy was the triggerman, and therefore his sentence of death is not disproportionate to the life sentences received by his codefendants." Id. at 48.

Additionally, the State in its Answer Brief relies on this Court's decision in Marek v. State, 14 So. 3d 985 (Fla. 2009) as somehow foreclosing Kormondy's claim (Answer at 22).[3] In making this argument, the State ignores the fact that unlike in Kormondy's case, Marek was afforded an evidentiary hearing. Marek, 14 So. 3d at 988-89. Further, the State ignores the fact that this Court's affirmance of the denial of relief in Marek was based on a consideration of those facts developed at the evidentiary hearing:

> Before proceeding with the analysis, we observe that even if we assume that the witnesses accurately recounted what Wigley had said to them, this newly discovered evidence is of minimal value because there is no reason to believe that Wigley was being truthful when he made the statements which lessened the culpability of Marek. Certain of Wigley's statements are vague statements ("I've killed before") that have

[3]The State also cites to this Court's subsequent unpublished decision in Marek v. State, 17 So. 3d 707 (Fla. 2009) (Answer at 22).

no express connection with the murder of Ms. Simmons. Other statements which are connected with Simmons' death reveal specific details that Wigley would have known by virtue of his being present at the crime for which he was convicted (e.g., the victim was strangled). **Furthermore, most of the witnesses considered Wigley's statements to have been boasting or otherwise self-interested, rather than unadulterated expressions of guilt. The testimony suggests that Wigley's acquaintances did not necessarily believe Wigley, and the evidence showed that Wigley's statements were either calculated to garner favor or were "tough talk" for prison as a means of self-protection, intimidation, or braggadocio. The testimony that Wigley was a small, "wimpy" man was uncontradicted, and several witnesses suggested that he may have made the claims for his own personal protection.** Wigley made the statements in situations in which he was being questioned about his sexual orientation and thus felt a need to brag, was arguing or talking to his lover, or was under the influence of alcohol or drugs. Even his statements to Conley—which contain the admission that Wigley strangled the victim—were made after he had denied killing the victim and feared that Conley would not help him obtain legal assistance to challenge his murder conviction. In addition, when speaking to Pearson, Wigley equivocated about whether he remembered strangling the victim. **Given the inconsistencies in Wigley's statements and the strong inference that the statements constituted prison "tough talk" and were calculated by Wigley to obtain some advantage for himself, the probative value of the testimony recounting Wigley's statements is negligible.**

* * * *

Having determined that Wigley's statements are admissible, the next question is whether introduction of Wigley's statements in the penalty phase would probably yield a less severe sentence. *Kormondy v. State*, 983 So. 2d 418, 437-38 (Fla. 2008) (citing Jones I, 591 So. 2d 911). To make this determination, we must consider in a cumulative analysis the testimony of the witnesses reporting Wigley's statements along with the evidence presented at Marek's trial and penalty phase that we outlined above.

For the reasons discussed previously, we conclude that Wigley's statements would not be credited by either the jury or the trial court. **Through cross-examination, the**

State could readily demonstrate that most of the witnesses did not credit Wigley's statements. For the most part, the witnesses attributed Wigley's "admissions" to the kind of "tough talk" necessary for self-protection or simply everyday parlance in prison. Further, some of Wigley's statements contradicted his own previous statements and others conflicted with otherwise unchallenged trial testimony, such as his claim that he—not Marek—talked the victim into getting into the truck. In addition, under section 921.141, the State could submit the sworn statement Wigley made shortly after the murder. In it, Wigley detailed what both he and Marek did with the victim from the time she got in the truck until they left her brutalized and lifeless body some three hours later. Wigley admitted his participation in the crimes and implicated Marek as the dominant actor.

When considered in context, the newly discovered evidence does not significantly undermine the evidence of Marek's dominant role in the crime. Marek was charged in the alternative with premeditated and felony first-degree murder, and in opening and closing arguments, the State's theory of prosecution was explained to the jury in the alternative as well. That is, either Marek killed Simmons, or Wigley killed her and Marek was a principal to the premeditated murder or a participant in the felony murder. Based on the evidence we recited above, the jury found him guilty of first-degree murder. Other than the jail deputy's testimony that Marek was a well-behaved prisoner, no other testimony or evidence was adduced in the penalty phase. Accordingly, in finding Marek guilty and in recommending a sentence of death (by a vote of ten to two), the jury clearly did not believe Marek's trial testimony that he slept through the entire criminal episode and never saw the victim even as he walked around for a quarter of an hour inside the small lifeguard shack where the body of Adella Simmons lay.

In imposing the death sentence, the trial court found four aggravators and no mitigation. *Marek*, 492 So. 2d at 1057. One of those aggravators was subsequently stricken; thus, the sentence rests on the aggravators that the murder was (1) especially heinous, atrocious, or cruel (HAC); (2) committed in the course of attempted burglary with the intent to commit a sexual battery and in the course thereof an assault was committed; and (3) committed for pecuniary gain. See *Marek v. Singletary*, 626 So. 2d 160, 161-62 (Fla. 1993) (noting that this Court previously affirmed the

postconviction court's striking of the prior violent felony aggravator). None of these aggravators rests on a determination that Marek was the actual killer, and none of the aggravating factors are undermined by the newly discovered evidence.

Although this Court has previously held that a codefendant's life sentence precluded a death sentence for the other defendant, we have held otherwise when the codefendant sentenced to death is found to be the dominating force in the crime. See *Stein v. State*, 995 So. 2d 329, 341 (Fla. 2008) ("However, the triggerman has not been found to be the more culpable where the non-triggerman codefendant is `the dominating force' behind the murder."). In *Henyard v. State*, 992 So. 2d 120 (Fla. 2008), for example, the defendant brought a similar claim to this Court, relying on newly discovered evidence that while his codefendant awaited trial, another inmate overheard him brag that he was a "killa." Henyard and his codefendant kidnapped a woman and her two children from a parking lot, raped and shot the woman, and killed the two children. This Court held that even assuming the statement was admissible as newly discovered evidence, the admission of this statement would not probably yield a lesser sentence. *Id*. at 126. We found that the State's case at trial "relied on [Henyard's] dominant role in the entire criminal episode and unrefuted evidence of his close proximity to the child victims at the time of their deaths." *Id*. The identity of the actual killer was unimportant in light of "Henyard's substantial culpability." *Id*.

We reach the same conclusion in this case. In affirming Marek's death sentence in light of Wigley's life sentence, we cited evidence and determined that Marek, "not Wigley, was the dominant actor in the criminal episode." *Marek*, 492 So. 2d at 1058. Wigley's statements are not credible. They would have no effect on the previous determination that—without regard to the identity of the actual killer—Marek's death sentence is appropriate due to his dominant role in the entire criminal episode.

Wigley's statements do not undermine Marek's convictions for first-degree murder, kidnapping, attempted burglary, and battery. Nor do they undermine the evidentiary basis for the three aggravating factors supporting the death sentence. They do not call into question the conclusion that Marek played the dominant role in this murder. When considered in context with

> the other evidence from Marek's guilt and penalty phases, Wigley's post-trial statements—which were made years after the crime and in circumstances which provide no indication of reliability—lack both weight and credibility. Accordingly, we hold that their admission in the penalty phase would not probably result in a lesser sentence.

Marek, 14 So. 3d at 994, 996-98 (emphasis added). Contrary to the State's argument, there is no broad precedent in Marek which mandates that Kormondy be denied relief without an evidentiary hearing. Instead, Marek was given an evidentiary hearing, the hearsay statements were deemed admissible at a penalty phase, and despite Marek having raised a disparate treatment claim previously, his newly discovered evidence claim was not found to be procedurally barred and was considered on the merits.[4]

Finally, the State argues that the statements of the five witnesses listed by Kormondy in his claim of newly discovered evidence "shed no light or credibility to the truth, rather they only confirm what Buffkin testified to in Kormondy's 2005 post-conviction evidentiary hearing." (Answer at 22)(fn omitted).

The State's argument ignores the fact that in its order denying postconviction relief in 2005, the circuit court found Buffkin to be incredible on the basis that he manufactured his testimony in order to give himself the opportunity to escape from custody (PC-R. 990). The newly discovered evidence establishes that the trial court's basis for the denial of relief was

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[4]Moreover, ignored by the State is the fact that in State v. Mills, 788 So. 2d 249 (Fla. 2001), the defendant was granted relief on a culpability issue despite having previously raised that issue. See Mills v. State, 786 So. 2d 547 (Fla. 2001).

erroneous. Buffkin's admission that he was the shooter as far back as 1993 defies the notion that he manufactured his testimony more than a decade later in order to effectuate an escape. Further, it defies logic to believe that Buffkin would continue to maintain that he was the shooter almost a decade after his escape plot was thwarted if that was the motivation for his testimony. Contrary to the State's assertion, the newly discovered evidence does add credibility to Buffkin's admission that he was the shooter.

CONCLUSION

Based upon the record and his arguments, Kormondy respectfully urges the Court to reverse the lower court, order a resentencing, and/or impose a sentence of life imprisonment, and/or remand for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic transmission to opposing counsel on this 30th day of December 2014.

CERTIFICATE OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

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