IN THE SUPREME COURT OF FLORIDA

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JOHNNY SHANE KORMONDY,

Appellant,

v. Case No. 84,709

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's Statement of the Case and Facts, but would express disagreement with the suggestion that the prosecutor "acknowledged" any lack of clarity of regard to the respective rules played by each of the codefendants (Initial Brief at 2). To the contrary, the prosecutor offered a relatively concise view of these roles, stating that Buffkin was "the robber" Hazen was "the rapist" and Kormondy was "the murderer" (T 1411). [1] It is also worth noting that the statement which Kormondy gave to the authorities, in addition to conflicting with the testimony of Cecilia McAdams, failed to mention a number of matters. For instance, Kormondy omitted any reference to the fact that it was he who ensured that the defendants were armed that night, retrieving a gun from underneath his couch and carrying it out to the car, wrapped in a towel, prior to their departure to the victim's house (T 1167-8). Likewise, Kormondy, in his statement, made no reference to the fact that he and his companions had robbed the McAdamses in their kitchen of their money and car keys, at

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[1] As in the Initial Brief, (T __) represents a citation to the transcript, whereas (R __) represents a citation to the formal record.

gunpoint, or that he and Hazen had closed all the blinds and ripped the phone cords out of the wall (T 1070-1; 1273).

SUMMARY OF THE ARGUMENT

Kormondy raises six (6) points on appeal, in regard to his convictions of first-degree murder, burglary, robbery, and sexual battery, and in regard to the death sentence imposed for the murder. His guilt phase issues do not merit lengthy discussion. Even if Appellant is correct that hearsay was admitted through a state witness, any error was unquestionably harmless. Likewise, the evidence fully supports Kormondy's conviction under both premeditation and felony murder theories. Although it is clear that there were at least three felonies committed during this criminal episode, the victim was murdered in a cold-blooded execution style, by a single bullet to the back of the head, fired at point blank or contact range; Kormondy had more than adequate time to form the requisite intent to kill, and neither the judge nor the jury was obliged to accept his claim that the shooting was "accidental".

In imposing death, Judge Kuder found the existence of five (5) aggravating circumstances, which he found to outweigh the five (5) specific matters found as nonstatutory mitigation, such factors including Kormondy's unhappy childhood, personality disorder, good employment record, good behavior during trial and consumption of alcohol on the night of the murder. Appellant offers no challenge

to two of the aggravating circumstances, and his attack upon the pecuniary gain aggravating factor is patently without merit. The trial court properly found both the avoid arrest and cold, calculated and premeditated aggravating circumstances, and no improper "doubling" occurred. Likewise, the court properly rejected five other proposed nonstatutory mitigating factors, including that relating to the life sentence imposed upon one of Appellant's codefendant. Appellant's evidentiary complaints regarding the admission of certain evidence at the penalty phase are, for the most part, not preserved and/or otherwise not sufficient to merit relief. Finally, the instant sentence of death is proportionate.

ARGUMENT

ISSUE I

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE ADMISSION OF DEPUTY COTTON'S TESTIMONY.

As his first point on appeal, Appellant asserts that his convictions must be reversed, and a new trial awarded, because the State was allegedly allowed to "bolster" the testimony of witness Long through the testimony of Deputy Cotton. Relying upon such precedents as Rodriguez v. State, 609 So. 2d 493 (Fla. 1992), Anderson v. State, 574 So. 2d 87 (Fla. 1991), and Caruso v. State, 645 So. 2d 389 (Fla. 1994), Kormondy maintains that reversible error occurred, in that the predicates for admission of a prior consistent statement and/or for impeachment of Long were not established, and that impermissible hearsay was admitted. Appellee disagrees, and would contend that reversible error has not been demonstrated.

The record indicates that the State called William Long, Appellant's cousin, as a witness (T 1184-1201). The witness testified that Kormondy had made a number of admissions to him after the murder, and, at one point, had told him "how everything took place." (T 1187). Long stated that Kormondy had told him "how he shot him in the back of the head" (T 1188); in his

confession to the authorities, Kormondy had contended that Buffkin had shot the victim (T 1289-1290). Long was troubled by this knowledge, and went to the authorities himself. At the conclusion of the direct examination, the following took place:

> Q. Now, when you were interviewed by Deputies Cotton and Hall after he told you this, did you tell them about the defendant saying which gun was used to shoot Mr. McAdams?
>
> A. It was brought up. I really -- it's been almost a year ago, so I vaguely remember exactly word for word what I said, but to my knowledge, Shane never had a gun that I have ever seen. And I might have said that, yes, sir, I might have. I really can't remember.
>
> Q. Do you recall the defendant telling you that he shot him with this man's own gun?
>
> A. I want to say yes, but I would hate to say yes and it not be true.
>
> Q. Were the deputies -- were they taking notes and writing down what you said?
>
> A. Yes, sir. Word for word, everything I said, they wrote down.
>
> Q. Would you say that when you told them what he told you, that it was fresher in your mind?
>
> A. Oh, yes, sir. It was within three or four days after he had told me.

(T 1191-2).

Defense counsel then began her cross-examination, eliciting the following:

> Q. Could you have said, Mr. Long, that the man was shot with his own gun without saying who did the shooting?
>
> A. No, ma'am, there was no doubt in my mind who shot him. He would never have told me that. And I know Shane real well. He would never have told me that.

(T 1192).

Kormondy's counsel then asked Long whether he had used drugs and alcohol on the day of Appellant's admission, and the witness answered in the affirmative (T 1192-4). Likewise, counsel elicited exculpatory aspects of Kormondy's statement, i.e., his assertion that the gun had gone off accidentally and that he had not raped the victim's wife (T 1194). Counsel also forced the witness to admit that he had been on probation, and subject to violation, at the time of this occurrence, and that he had likewise been aware of the existence of a $50,000 reward (T 1195-6). The cross-examination ended on the following note:

> Q. All right. So you're going to get $25,000 for your testimony?
>
> A. Yes, ma'am.

(T 1197).

The State then called Deputy Cotton (T 1202-1210), and asked him about his interview with Long (T 1202-3). Cotton confirmed that he had taken notes during his interview with Long, and that,

in fact, he had the notes with him in the courtroom (T 1203). When the prosecutor asked the witness whether Long had indicated to him what Kormondy had said about the gun which had been used to shoot the victim, defense counsel objected on the grounds of hearsay (T 1203). The prosecutor responded that the statement would be admissible as a prior consistent statement to rebut the notion that Long had "fabricated . . . for the reward." (T 1204); the prosecutor also stated that he was entitled to impeach his own witness (T 1204). The court overruled the objection, and the following question was then asked and answered:

> Q. What, if anything, did Mr. Long tell you that you may have written in your notes, sir, about what the defendant in this case told him as to which weapon he used when he shot Mr. McAdams in the back of the head?
>
> A. The homeowner's gun that was used, a .38.

(T 1204).

On cross-examination, defense counsel again brought out the fact that Long could have known about the reward at the time of this interview (T 1208-09).

In the Initial Brief, Appellant devotes a good portion of his argument on this point to a scholarly discussion of § 90.801(2)(b), Fla.Stat. (1993), as well as the principles of law relevant to prior consistent statements and the improper "bolstering" of one's

own witness (Initial Brief at 46-50). Appellee has no quarrel with Kormondy's statement of the law, but finds it inapplicable to this case. Cf. Teffeteller v. State, 439 So. 2d 840, 843 (Fla. 1983).[2] It would seem axiomatic that in order for the State to have, arguably, improperly introduced a "prior consistent statement", the witness must, at trial, have offered an initial statement, for the latter statement to have been prior to. Here, Long could not recall whether or not he had told Cotton a certain matter, and suggested that Cotton, who had taken notes of their conversation, would be the better witness. Likewise, it is difficult to see how the State "bolstered" or "corroborated" the testimony of a witness such as Long who, as to the specific matter at hand, failed to offer any testimony whatsoever.

Rather, it would seem that the prosecutor below, following, perhaps, the dictates of logic more closely than the letter of the hearsay rule, simply sought to close an evidentiary gap. Any technical error was harmless, as, indeed, was the result in the

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[2] Appellant's discussion of the predicate required for impeaching one's own witness (Initial Brief at 50-52) is likewise correct. Nevertheless, the posing of the instant single question, even if technically incorrect, is an insufficient basis for reversal under Jackson v. State, 498 So. 2d 906 (Fla. 1986), or State v. Smith, 573 So. 2d 306 (Fla. 1990), for the reasons set forth above.

majority of the precedents cited by Appellant. See, e.g., Rodriguez, supra (admission of testimony of defendant recounting information gathered from witnesses concerning victim's dying declarations and concerning description of individual in store prior to murder inadmissible hearsay, but harmless error); Anderson, supra (admission of testimony of FDLE agent concerning co-defendant's recitation of admission by defendant inadmissible hearsay, but harmless error); Caruso, 645 So.2d at 395 (admission of testimony of police officers concerning statements of witness, as well as prior consistent statements of witness offered to "boost" her credibility, harmless error, where inter alia, declarant cross-examined on subject).

Here, as in Caruso, Long was extensively cross-examined as to the matter at issue, and the jury was fully able to assess his credibility in all respects. Further, contrary to the representation in the Initial Brief (Initial Brief at 51-2), the prosecutor made no specific reference to this matter in his closing argument. To the extent that the State discussed inconsistencies between Kormondy's statements, the State was obviously referring to the most important inconsistency, which related not to which gun had killed the victim, but rather to which defendant had pulled the trigger. As noted, Kormondy stated to the police that Buffkin had

shot the victim, whereas he admitted to Long that he had done so. The fact that the victim had been shot with his own gun was established through the testimony of the ballistics expert (T 1314),[3] and any conflict between Kormondy's statements concerning the murder weapon (T 1204, 1296), was hardly consequential. Admission of this one statement did not give significant additional weight to the testimony of Long, or significantly diminish the credibility of Kormondy either at trial or penalty phase, and any error was harmless. See Teffeteller, supra; Parker v. State, 476 So. 2d 134, 137 (Fla. 1985) (wrongful admission of prior consistent statement regarding defendant's admissions harmless error, where such did not give significant additional weight to testimony of declarant); Hutchinson v. State, 559 So. 2d 340, 341 (Fla. 4th DCA), cert. denied, 576 So. 2d 288 (Fla. 1990) (wrongful admission of prior consistent statement harmless error, where such did not give significant additional weight to witness's testimony).

Finally, this case would seem, in many respects, comparable to Livingston v. State, 565 So. 2d 1288, 1291 (Fla. 1988). In

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[3] The gun which Buffkin brought to the house was a .44 caliber (T 1310), whereas the McAdamses owned a .38 caliber Smith & Wesson (T 1303-4); the bullet which was recovered from the victim's body had been fired from a .38 caliber or a 357 Magnum, not a .44 caliber (T 1314).

Livingston, the defendant had contended that reversible error had occurred in the State's examination of a police investigator, who had related statements that another witness had made concerning the defendant; this witness, Baker, had previously testified. This Court found that any wrongful admission of hearsay through the police officer (testimony, which, according to Livingston, had given Baker's statements "a cloak of credibility") was harmless error, and had not prejudiced the defendant, given, inter alia, the other evidence in the case. Here, Kormondy's participation in these crimes is undeniable, and no reasonable possibility exists, under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), that the admission of this one statement affected the verdict. Accordingly, the instant convictions should be affirmed in all respects.

ISSUE II

DENIAL OF APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WAS NOT ERROR; SUFFICIENT EVIDENCE OF PREMEDITATION EXISTS TO SUPPORT THE VERDICT

As his next point on appeal, Kormondy contends that the trial court erred in denying his motion for judgment of acquittal, because the evidence was allegedly insufficient to establish premeditated murder. Although Appellant does not contest the sufficiency of the evidence to support his conviction of first degree murder under a felony murder theory (Appellant conceded his participation in some of the felonies in his statement to the authorities, and in his counsel's arguments to the jury (T 1265-1294; T 965-974; T 1392-9; T 1435)), Kormondy maintains that it was error to even submit the charge of premeditated murder to the jury as well as to instruct them thereupon. Accordingly, Appellant maintains that a new trial is warranted. Appellee disagrees in all respects. Kormondy's conviction of first degree murder is supported by evidence establishing both premeditation and felony murder beyond a reasonable doubt, and the instant convictions should be affirmed in all respects.

The record in this case demonstrates that this was anything but a burglary that "went bad," and that the victim was coldly executed by a single, and premeditated, shot to the back of the

head. Appellant's wife, Valerie, testified that on the night of the murder, she heard Appellant, Hazen and Buffkin discuss a robbery, Buffkin specifically stating that he knew a house on Gulf Beach Highway which he wanted to rob (T 1147). James Popejoy, who was also present in the Kormondy home at this time, saw Appellant retrieve a pistol from under the couch, and carry it out of the house wrapped in a towel (T 1167-8). According to Kormondy's statement, the three initially drove around in his car that night looking for someone named "Chris" who owed him money (T 1262). When such search proved fruitless, the three proceeded to the Ensley area, where Buffkin was looking for a house for them to break into; the three went in Kormondy's car, and Appellant was driving (T 1263).

At around midnight, they ended up at the Thousand Oaks Subdivision off of Chemstrand (T 1263-4). Bobby Lee Prince saw Appellant and his companions park the vehicle in front of an apartment complex (T 1132). He saw all three exit the car and proceed on foot to Chemstrand (T 1132-3). In his statement, Kormondy said that Buffkin was "in the lead at this time," and kept telling him and Hazen to hurry up (T 1126). As the three progressed into the subdivision, they had seen a sports car pull into the garage of one of the houses (T 1266-7). Appellant stated

that he had initially seen a person standing outside the house, and that such person had then gone inside (T 1266). Buffkin, armed with a gun, headed for that house and motioned for Appellant and Hazen to follow (T 1266).

Cecilia McAdams, the surviving victim, testified that she and her husband had returned to their home in Thousand Oaks at approximately 12:55 a.m., after a class reunion; they drove a 1989 Nissan (T 1061-4). They left the garage door open, because her husband was going to take the dog out for a walk, and, once inside, they made preparations to do so (T 1064-6). While the two were standing in the kitchen, there was a loud knock on the door from the garage, and when Gary McAdams asked who was there, someone said, "It's me"; believing it to be their neighbor, the victim opened the door (T 1067). At this point, Curtis Buffkin entered the house, armed with a .44 pistol which he had stolen from another residence a day or so earlier (T 1067-8; 1310-11).

Buffkin ordered both McAdamses to get down on the floor, with their heads down; Hazen and Kormondy then entered the house, with socks on their hands and shirts or masks over their faces, and Buffkin told the McAdamses that if they moved or did not obey him, he would blow their heads off (T 1268-1271; T 1069). According to Mrs. McAdams, the three demanded money, and her husband handed over

his wallet and car keys, and they took her purse, as well, which was on the kitchen counter (T 1070-1). The witness stated that the defendants then began closing the blinds and tearing the phone cords out of the wall (T 1071). Hazen and Kormondy then proceeded to the back of the house.

The two then converged upon the master bedroom, with Kormondy literally "holding the bag" which Hazen filled with jewelry and other items (T 1272). In rifling through the dresser, Hazen came upon Gary McAdams' loaded .38 caliber Smith & Wesson (T 1272-4). At this point, Hazen returned to the kitchen and asked the victim who he thought he was going to hurt with the gun (T 1071). When the victim replied, "No one," one of the defendants stated, "You're right you're not." (T 1071). Hazen then rubbed the gun against Mrs. McAdams and stated that she had a "cute ass", and told her to come with him. Both McAdamses begged them not to do this, offering to give the defendants anything that they wanted, but Hazen marched Mrs. McAdams to the back, leaving Buffkin guarding her husband (T 1071-2).

When Mrs. McAdams had trouble removing her dress, Hazen told her that he would blow her head off, if she did not do so (T 1073). Mrs. McAdams was then menstruating, and Hazen removed her tampon and forced her to sit up on the toilet seat and perform fellatio

upon him (T 1073-4). When she began to gag, he told her that if she let it come out of her mouth one more time, he would shoot her (T 1074). When they returned to the bedroom, Mrs. McAdams saw the other masked intruder going through one of her purses. Despite the mask, she could see that this individual had stringy, mousy brown or sandy hair of a length to the collarbone, and "thin, sharp features" (T 1076); at the time of arrest, Kormondy was described as the only one of the defendants to have stringy, collar length blonde hair (T 1114).

According to Mrs. McAdams, Hazen then asked this individual (who, unquestionably, was Kormondy) if he wanted "some of her", and Appellant answered in the affirmative (T 1076). The victim was then taken back into the vanity area where Hazen again forced her to perform fellatio upon him, while Appellant raped her vaginally (T 1076-7). When Hazen began to ejaculate, he said, "Sit up, bitch, I wanna see you swallow it"; the victim could not say whether Appellant ejaculated (T 1077-8). Mrs. McAdams, still completely nude, was then taken back to the kitchen and forced to kneel by her husband (T 1078).

When she reached out to take his hand, the defendants yelled at her and stated that they had not told her that she could touch him; they then forced Gary McAdams to drink a beer (T 1078). At

this point, Buffkin approached Mrs. McAdams and said, "I don't know what the other two did to you, but you're going to like what I'm going to do." (T 1079). Buffkin forced Mrs. McAdams back to the vanity area, where he raped her vaginally (T 1079). As this rape was in progress, the witness heard a shot from the front portion of the house (T 1080). She stated that she heard someone yell out, "Bubba or Buff," and said that the person who had been raping her "stopped and jumped up and threw a towel over my face and ran out." (T 1082). As Buffkin proceeded back towards the bedroom, the witness heard a shot, and a .44 caliber bullet was later recovered from the bedroom floor (T 1317).[4]

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[4] Kormondy's statement to the police differs markedly from Mrs. McAdams' testimony. Thus, Appellant denied raping the victim, and stated that, when he came upon Hazen forcing Mrs. McAdams to fellate him, he went back to the kitchen (T 1276-8). According to his statement, Buffkin, at this time, handed him the gun, and took Mrs. McAdams back into the back where he raped her, possibly in conjunction with Hazen (T 1278-9). After the victim was returned to the kitchen, Hazen allegedly said, "I ain't through with her yet," and again took her to the back; Appellant stated that Buffkin then took the gun back from him (T 1280-2). While Hazen was raping Mrs. McAdams a second time, Buffkin allegedly directed the victim to put his head between his legs (T 1282). When Mr. McAdams did not immediately comply, Buffkin started "bumping" him in the head with the gun, and the gun "went off" (T 1282-5). The defendants then ran out of the house, taking the bag of jewelry and stolen goods with them (T 1236-7). In his statement to his cousin, Kormondy stated that he had shot the victim, but likewise maintained that the gun had gone off accidentally (T 1194).

Gary McAdams was found lying in a pool of blood on the floor of the kitchen. He had been shot once in the back of the head, and the wound was a "contact wound", meaning that the barrel of the gun had been pressed against his skull (T 51-3). The bullet entered the back of the head just left of the midline and penetrated the left portion of the brain, lacerating the parenchyma (T 1051). The bullet recovered from the brain was .38 or .357 caliber, which was consistent with the gun found in the victim's bedroom; the gun which Buffkin had brought to the house was a .44 caliber (T 1303-4, 1310, 1314). Although the murder weapon was never recovered, the individual who had given the gun to Gary McAdams testified that it had been in good working order at the time that he had done so (T 1304). The ballistics expert testified that the "trigger pull" for a gun of this type in good working order would be approximately ten to twelve pounds, and that it would be "quite unlikely" for the gun to fire without being cocked (T 1315). The witness stated that the gun had two internal safeties - a "rebound" and a "hammer block" - which would mean that, even if dropped, the gun would not go off accidentally (T 1315-16).

In the Initial Brief, Appellant maintains that judgment of acquittal was appropriate because the jury heard only one "eyewitness" account of the shooting, that of Kormondy, and that

this account was to the effect that the shooting had been accidental (Initial Brief at 53). Appellant likewise contends that the circumstantial evidence "is fully consistent with an accidental shooting" (id. at 54), stating that Kormondy would have had no reason to murder Gary McAdams, given the fact that he had worn a mask, and that the defendants would not have disabled the phone "if they had intended to leave nobody alive behind to use those phones." (Id. at 55). In support of reversal, Kormondy relies upon such precedents as Mungin v. State, 21 Fla. L. Weekly S66 (Fla. Feb. 8, 1996), Terry v. State, 668 So. 2d 954 (Fla. 1996), Jackson v. State, 575 So. 2d 181 (Fla. 1991), Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990), and Hall v. State, 403 So. 2d 1319 (Fla. 1981).

Appellee would contend that the above cases are distinguishable, and that the jury was under no obligation to accept Kormondy's version of events, especially given the fact that he had given inconsistent statements. See Peek v. State, 395 So. 2d 492, 495 (Fla. 1980) (jury entitled to disbelieve defendant's version of events where he gave inconsistent statements). This Court has not only held that the jury is not required to believe a defendant's version of events where the State has produced conflicting evidence, see, e.g., Holton v. State, 573 So. 2d 284,

289-290, (Fla. 1991), Deangelo v. State, 616 So. 2d 440 (Fla. 1993), but has also held that a defendant's interpretation of circumstantial evidence need not be accepted even if not specifically contradicted. See Songer v. State, 322 So. 2d 481, 483 (Fla. 1975); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989); Pietri v. State, 644 So. 2d 1347, 1352 (Fla. 1994) (jury not required to believe defendant's testimony that he did not intend to kill victim). Appellant's version of events was riddled with holes. His contention that he did not rape Mrs. McAdams was, of course, refuted by her testimony, as well as the presence of fibers from her dress in the driver's area of Kormondy's car (T 1335, 1286). His bare assertion that he shot the victim "accidentally," such assertion made to William Long, was contradicted by his statement to the police, in which he claimed that Buffkin was the shooter. His statement failed to maintain certain critical matters, such as his ensuring that a gun would be brought to the scene, and the fact that he and Hazen had ripped the phones out of the wall (T 1167-8, T 1070-1). The jury below was not required to accept any contention of "accident", especially in light of the testimony of the ballistics expert regarding the improbability of any accidental discharge of the gun (T 1315-16).

It is well established that premeditation may be shown through circumstantial evidence, see Sireci v. State, 399 So. 2d 964, 969 (Fla. 1981), Preston v. State, 444 So. 2d 939, 944 (Fla. 1984), and the evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. Id; Spencer v. State, 645 So. 2d 377, 380 (Fla. 1994). As this Court held in Asay v. State, 580 So. 2d 610, 612 (Fla. 1991):

> Premeditation is a fully-formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable results of that act.

In this case, Gary McAdams was executed with a single shot to the back of the head, fired at point-blank range. He was in no position to threaten his captors, and he had been forced to kneel in his own kitchen as, one by one, the three defendants raped his wife. He had been forced to drink a beer and had been taunted with his own gun, after its initial discovery. This was a witness-elimination murder (the shot which Buffkin fired into the bedroom floor was no doubt intended to convince Hazen and Kormondy that he

had eliminated the other witness), and the issue of premeditation was correctly submitted to the jury. See, e.g., Pietri, supra (motion for judgment of acquittal as to premeditated murder properly denied where, inter alia, defendant shot police officer in the heart from close range); Peterka v. State, 640 So. 2d 59, 68 (Fla. 1994) (motion for judgment of acquittal as to premeditated murder properly denied where, inter alia, victim shot once in the head, and testimony offered to the effect that gun required certain pounds of pressure in order to discharge and that safety measures would prevent accidental discharge); Asay, supra (motion for judgment of acquittal as to premeditated murder properly denied where, inter alia, victim fatally shot once at close range).

The cases relied upon by Appellant - Terry, Mungin, Jackson, Van Poyck, and Hall - all represent instances in which the circumstances surrounding the homicide were essentially speculative and/or where there was no showing that the defendant ever intended more than the particular felony at hand. Terry (witness hears shot during course of armed robbery of convenience store); Mungin (convenience store clerk found shot, following robbery); Jackson (same); Van Poyck (correctional officer shot during escape attempt, and evidence in conflict as to defendant's location at the time); Hall (deputy sheriff shot after prior crime, circumstances

unknown). Here, Gary McAdams was murdered during a well-planned criminal enterprise which had a number of purposes. The defendants knew that the house which they entered was occupied, given the fact that they had seen a car pull into the garage, and the defendants took a number of precautions to avoid detection - masks, socks on their hands to prevent fingerprints and the disabling of the telephones.

As opposed to Terry, Mungin or Jackson, the defendants in this case had more than robbery in mind, and went about systematically torturing the victims, by raping, in seriatim, Mrs. McAdams, and by forcing Mr. McAdams to kneel helplessly by; at the time that the victim was shot, the last defendant was literally "taking his turn" with Cecilia McAdams. The defendants plainly contemplated that deadly force would be used for more purposes than to commit a "simple" burglary or robbery, and Gary McAdams was executed in order to facilitate their escape from the house and/or to prevent arrest for their prior crimes; even in his own statement, Kormondy admitted holding a gun on the victim while others raped Mrs. McAdams (T 1274-8). The criminal enterprise lasted long enough such that Kormondy had the opportunity to fully form an intent to kill McAdams when he pulled the trigger, and, as opposed to some of the above cases, it is clear that the victim did nothing to

precipitate his own death. Taking into account all of these facts, and every conclusion favorable to the State which the jury may reasonably and fairly infer from the evidence, see Barwick v. State, 660 So. 2d 685, 695, n.13 (Fla. 1995), Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991), it is clear that denial of Appellant's motion for judgment of acquittal was not error.

To the extent that this Court disagrees, there remains no basis for reversal of Kormondy's conviction of first degree murder. In the cases cited by Appellant - Mungin, Terry, Jackson, Van Poyck - this Court affirmed the defendants' convictions of murder, even after finding an absence of premeditation, on the basis that the evidence supported a finding of murder under a felony murder theory.[5] Given the plethora of felonies, to which even Kormondy has admitted, the instant conviction can clearly be sustained on the basis of felony murder. See, e.g., Atwater v. State, 626 So. 2d 1325, 1327-8, n.1 (Fla. 1993) (where jury returned general verdict on first degree murder charge, insufficiency of evidence on one possible ground no basis for vacation of conviction, where ample evidence existed to support conviction on other basis);

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[5] This Court reduced Hall's conviction to one of second degree murder, as no felony was involved. Appellant does not request such relief sub judice, and, of course, Kormondy is guilty of nothing less than first degree murder.

Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991). Appellant has offered no cause as to why the above precedents should not apply, and it is clear that premeditation was hardly a "feature" of the prosecutor's opening or closing arguments to the jury (T 944-5, "It is not necessary for the State to prove the defendant had a premeditated design or an intent to kill someone to convict him of first degree felony murder."); (T 1433, "You don't have to decide he was the triggerman to find him guilty of first degree murder.").

Finally, any specific complaint regarding the fact that the jury was instructed on premeditated murder, under McKennon v. State, 403 So. 2d 389 (Fla. 1981), or Mungin, has been waived due to lack of objection. See Gunsby v. State, 574 So. 2d 1085, 1089 (Fla. 1991) (defendant's claim that it had been error to instruct jury on felony murder waived where counsel did not object). Here, despite the denial of Appellant's motion for judgment of acquittal as to the charge of premeditated murder, no objection was interposed in regard to the instruction on first degree murder (T 1360-1388), and any claim in this regard is procedurally barred. In the alternative, any error, as in McKennon and Mungin, would be harmless beyond a reasonable doubt under State v. DiGuilio. The instant convictions should be affirmed in all respects.

ISSUE III

FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO CERTAIN EVIDENTIARY RULINGS AT APPELLANT'S PENALTY PHASE AND SENTENCING

As his next point on appeal, Kormondy presents a multifaceted attack on his death sentence, contending that, in at least four respects, reversible error occurred. Appellant specifically asserts: (1) that the State elicited impermissible testimony concerning Buffkin, on cross-examination of Buffkin's attorney; (2) that the State improperly presented evidence concerning other offenses committed by Kormondy, including rape and cocaine possession; (3) that the court impermissibly issued a judgment of contempt against Appellant, and (4) that the State impermissibly cross-examined Appellant's brother about their visit to a "strip joint." In virtually every instance, the State questions the preservation of any claim of error, and, in all respects, maintains that Kormondy's sentence of death should be affirmed in all respects. Each of Kormondy's allegations will now be addressed.

A. Fundamental Error Has Not Been Demonstrated In Regard To The State's Cross-Examination Of Witness Beck

As the first component of this claim, Appellant contends that the State's cross-examination of Kevin Beck constitutes reversible

error. Initially, Kormondy complains that the State elicited testimony to the effect that Buffkin had said that Kormondy had stated that, "if he ever got out of jail, he would kill William Long and Cecilia McAdams"; Appellant contends that this testimony was irrelevant, prejudicial, and beyond the scope of direct examination. Kormondy next complains that the State's cross-examination of Buffkin elicited double hearsay, which was derived from a discovery deposition, and which consisted of the inadmissible confession of a non-testifying co-defendant (Initial Brief at 62). Appellee questions the preservation of most of these arguments.

The record indicates that the defense called Kevin Beck, Buffkin's attorney, as a witness at the penalty phase (T 1794-1808). On direct examination, Kormondy's counsel elicited the fact that Buffkin had gone to trial on these charges, but that, while the jury was deliberating, the State made an offer of life imprisonment, in exchange for a plea of guilty, which was accepted (T 1795-6). Beck testified that he believed that the State had made this offer because the evidence demonstrated that Buffkin had not been the triggerman and because the State had need of Buffkin's testimony in Hazen's prosecution (T 1797). On cross-examination, the State elicited testimony from Beck, without objection,

concerning Buffkin's IQ of 65 to 72, such score in the borderline retarded range (T 1798). Likewise, the State elicited testimony, again without objection, to the effect that, at his deposition, Buffkin had stated that Kormondy had killed the victim, even as Buffkin had "indicated to him to stop." (T 1799).

When the prosecutor asked the witness if his client had told him that Kormondy had stated that, if he ever got out of jail, he was going to kill William Long and Cecilia McAdams, because the latter could identify him, defense counsel objected on relevancy grounds (T 1799). In response, the State contended that the evidence was relevant to the avoid arrest/witness elimination aggravator under §921.141(5)(e), Fla.Stat. (1993), and indicated that other witnesses could provide similar testimony (T 1799-1802). Defense counsel countered that the matter was outside the scope of direct, and the court ruled that it would allow the testimony (T 1802-3); defense counsel then stated that the prejudicial value of the evidence outweighed its probative value, and such objection was overruled (T 1803).

The State then asked Beck if Buffkin had told him that Kormondy had made the statement at issue, and the witness answered in the affirmative (T 1803-4). On redirect, defense counsel elicited the fact that "third parties" had been present at

Buffkin's deposition, and that Buffkin's version of events differed from that of Cecilia McAdams in a number of respects (T 1805). Specifically, defense counsel elicited testimony to the effect that Buffkin had stated that Kormondy had said that the shooting was accidental (T 1808).

While defense counsel below definitely objected to the State's asking Buffkin about Kormondy's jailhouse statement, on the grounds of lack of relevancy and/or prejudice, it is clear that defense counsel made no objection per se to testimony concerning Buffkin's deposition, and defense counsel raised no objection on the grounds of hearsay or an alleged violation of Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). Accordingly, these latter matters are not preserved for review. See Terry, 668 So. 2d at 961 (". . . in order for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for the objection, exception or motion below."); Larkins v. State, 655 So. 2d 95, 99 (Fla. 1995) (claim not preserved for appeal, where defendant objected on one basis at trial, and asserted another on appeal); Rodriguez, 609 So. 2d at 499 (same). Thus, the only matters properly before this Court are whether the instant testimony was relevant and/or otherwise admissible in a penalty proceeding. Finally, because the only matter which was the

subject of objection was that which related to the jailhouse statement, no other claim of error concerning the State's cross-examination of Beck has been preserved for review. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982); Stein v. State, 632 So. 2d 1361, 1367 (Fla. 1994).

In contending that reversible error has occurred, Kormondy primarily relies upon this Court's decision in Derrick v. State, 581 So. 2d 31 (Fla. 1981). In Derrick, this Court found that the State should not have been allowed to elicit testimony concerning the defendant's statement that he had killed the victim "and that he would kill again." This Court found that such testimony was not relevant to any aggravating circumstance or to rebut any mitigation, and had been highly prejudicial. Derrick is inapplicable sub judice. The State did not introduce evidence of any generalized statement on the part of the Kormondy to the effect that he would kill person or persons unknown. Rather, as the prosecutor argued below, the statement was relevant to the avoid arrest aggravator, in that it cast light upon Appellant's motivation in killing Gary McAdams; Appellant's statement was to the effect that he would kill Cecilia McAdams, if able, because she could identify him. Appellee would contend that this evidence was properly admitted. See Floyd v. State, 569 So. 2d 1225, 1230-1

(Fla. 1990) (testimony at penalty phase regarding defendant's threat to "get" cellmate, who was to testify for the State, properly admitted as going toward defendant's guilty knowledge of felony committed, in support of felony murder aggravator); Finney v. State, 660 So. 2d 674, 681-2 (Fla. 1991) (evidence of subsequent rape and robbery committed by defendant could have been admitted to show defendant's motive for underlying prior murder). Furthermore, this statement could be considered rebuttal to some of the prior psychiatric testimony offered in mitigation to the effect that Kormondy, due to his personality disorder, was "impulsive" and could not "think things out." (T 1549). See Wuornos v. State, 644 So. 2d 1000, 1009-1010 (Fla. 1994) (once defendant argues existence of mitigation, State has right to rebut through any means permitted by rules of evidence).

Assuming that this court deems admission of this one statement to be error, Appellee would contend that any error was harmless beyond a reasonable doubt under State v. DiGuilio. This matter was only mentioned once in the State's closing, and that was in support of its contention that the avoid arrest aggravator applied (T 1889-1890). The judge's sentencing order found this aggravating circumstance, without any reference to this testimony (R 601-02), and also stated that, in imposing death, the court had relied only

upon the statutory aggravating circumstances expressly cited, and, further, that in finding such factors, had only relied upon the evidence set forth in the order. (R 605-6). Given, inter alia, the wealth of other aggravation, there is no reason to believe that either the jury or the judge, especially in light of his order, considered this matter in determining Kormondy's sentence, and no relief is warranted. See Allen v. State, 662 So. 2d 323, 331 (Fla. 1995) (even if prosecutor's argument suggested "future dangerousness" on part of defendant, any error was harmless, where court's order indicated that death sentence imposed solely based upon statutory aggravating factors set forth therein). The instant sentence of death should be affirmed.

B. Fundamental Error Has Not Been Demonstrated In Regard To The State's Voir And Cross-Examination Of Doctor Larson Or In Regard To The Cross-Examination Of Lane Barrett

Appellant next contends that his death sentence must be reversed, because the State improperly asked Dr. Larson both during voir dire and cross-examination, about Kormondy's unconvicted crimes; opposing counsel likewise complains that, during the sentencing proceeding before the judge, the State likewise questioned Appellant's mother about one of these matters (Initial

Brief at 63-4). Kormondy maintains that reversible error has been demonstrated under such precedents as Hitchcock v. State, 673 So. 2d 859 (Fla. 1996), Geralds v. State, 601 So. 2d 1157 (Fla. 1992), Garron v. State, 528 So. 2d 353 (Fla. 1988), Robinson v. State, 487 So. 2d 1040 (Fla. 1986) and Maggard v. State, 399 So. 2d 977 (Fla. 1981), especially in light of Appellant's waiver of the statutory mitigating factor pertaining to lack of significant criminal history, under §921.141(6)(a) Fla. Stat. (1993). On appeal, Kormondy specifically contends that the prosecutor's questioning introduced "prejudicial irrelevant evidence." Appellee disagrees, and would again question the preservation of any claim of error.

The record indicates that, during voir dire of Larson, the defense psychologist, the State asked the witness if he had reviewed Kormondy's prior records, as part of the background information utilized in his diagnosis; specifically, counsel asked the witness if he had reviewed Kormondy's juvenile records, as well as records from the Santa Rosa and Escambia County jails, which had referred to a prison rape and possession of cocaine (T 1547). No objection was interposed in regard to these questions (T 1547). When Dr. Larson was later recalled as a witness, the prosecutor asked if Appellant has previously "been through every single program for rehabilitation" that the county offered, and defense

counsel objected, stating, "That's assuming facts not in evidence." (T 1718). Without objection, the prosecutor then asked Larson about Kormondy's prison, school and HRS records, specifically questioning him whether such demonstrated that, despite attempts at rehabilitation, Appellant had continued to commit crimes such as battery, theft, criminal mischief and burglary (T 1718-1722). Larson agreed that this was so, and stated that such behavior was consistent with Kormondy's personality disorder (T 1718-1722).

No objection was interposed in regard to any of this testimony, and, after Dr. Larson stepped down, a number of other witnesses were called. The next day, the charge conference was held (T 1387-1876). Immediately before proceedings were to recommence before the jury, defense counsel approached the bench and stated that he wished to move for mistrial (T 1877). Counsel said that although it had been proper for the State to inquire into matters which the expert relied upon, the State's characterization of one matter in the jail records, "homosexual rape," was so prejudicial that a new sentencing was required (T 1877). Counsel stated that he had not objected at the time, because he did not wish to call attention to this matter, and because he wanted to wait and see if the State was going to "develop" the matter further (T 1878); Kormondy's attorney reiterated that these were matters

that the State could properly go into on cross-examination, but that the matter in question was simply so "inflammatory and unfairly prejudicial" that a mistrial was mandated (T 1878). Judge Kuder denied the motion for mistrial, specifically finding it to be untimely (T 1880). Defense counsel then asked for a motion in limine to prohibit the State from referring to this matter in closing argument, and the State voluntarily agreed to omit any such reference (T 1880). Indeed, neither the State's closing argument nor the judge's sentencing order makes any reference to these matters.

Inasmuch as there was no contemporaneous objection to any of the voir dire or cross-examination of Dr. Larson, and the subsequent motion for mistrial was unquestionably untimely, it is clear that this issue is procedurally barred. Although this Court observed in Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990), that a motion for mistrial need not be made "in the next breath" following any objectionable matter, this Court reiterated that the purpose of the contemporaneous objection rule is to place the court on notice that an error might have been committed and to provide the court with an opportunity to correct such at an early stage of the proceedings. Kormondy's belated motion for mistrial obviously served neither of these objectives, and, under Nixon, his failure

to make a contemporaneous objection during cross-examination likewise waives the point.

Additionally, even if the motion for mistrial were timely, its grounds are markedly different from those asserted on appeal, given the fact that trial counsel conceded the correctness of the State's actions, focusing solely upon its characterization one incident. See Craig v. State, 510 So. 2d 857, 864 (Fla. 1987) (motion for mistrial on certain grounds cannot operate to preserve for appellate review other issues not raised by specific objection at trial). This Court has specifically held that claims of this nature must be preserved through objection and do not constitute fundamental error. See Farinas v. State, 569 So. 2d 425, 429 (Fla. 1990) (improper impeachment of defense witness not fundamental error); Peterka, 640 So. 2d at 70 (claim involving State's alleged improper impeachment of defendant's mother with Peterka's juvenile convictions not preserved for review, where defendant objected on different basis at trial). This matter is procedurally barred, Steinhorst, supra, and Appellant's reliance upon Whitton v. State, 649 So. 2d 861 (Fla. 1994), is misplaced, due to the fact that no portion of this claim has been preserved for review.

To the extent that the merits need be addressed, the cases relied upon by Kormondy are clearly distinguishable. The State is

entitled to fully inquire into the history utilized by a defense expert in determining whether that expert's opinions have a proper basis. This principle holds true even when, as here, examination of the "history" will include disclosure of the defendant's prior criminal activity and, again as here, where the defendant has waived the statutory mitigating circumstance under §921.141(6)(a). See e.g. Parker v. State, 476 So. 2d 134, 139 (not error to allow State to examine defense expert concerning defendant's breaking into school as child and other offenses, even where defendant waived mitigator; Maggard not controlling); Johnson v. State, 608 So. 2d 4, 10-11 (Fla. 1992) (defense expert could properly be questioned concerning defendant's illegal drug use, despite waiver of mitigating circumstance, where such relevant to basis for expert's opinion); Jones v. State, 612 So. 2d 1370, 1374 (Fla. 1992) (not error to allow State to cross-examine defense expert as to "inflammatory information" concerning defendant's background, under Parker and Johnson; additionally, as matter not fundamental, defendant's failure to object waived claim); Carroll v. State, 636 So. 2d 1316, 1318-19 (Fla. 1994) (defense expert could be questioned as to whether defendant had previously sought to use alcoholic blackout as defense in child sex crime). By virtue of his testimony, Dr. Larson held himself out to be a virtual expert

on every facet of Kormondy's life, and offered his diagnosis of personality disorder as a means of explaining Kormondy's past and present behavior (T 1549-1550, 1572). Accordingly, as in the cases cited above, it was appropriate for the State to determine whether the expert, in fact, was truly aware of all relevant facts concerning Kormondy, and error has not been demonstrated.

The State would additionally note that in Muehleman v. State, 503 So. 2d 310, 315-16 (Fla. 1987), this Court found that it was appropriate for the State to call rebuttal witnesses concerning the previous crimes committed by the defendant in Illinois, even where Muehleman had waived the mitigating circumstance regarding lack of significant criminal history. This Court, following Parker, found such to be warranted in order to "expose the jury to a more complete picture of those aspects of the defendant's history which had put in issue," and expressly declined to follow Maggard. Here, the defense literally put Kormondy's entire life (including his time in utero) at issue, and Dr. Larson testified extensively from a "time line" listing significant events in Appellant's life (T 1682-1712). If a defendant such as Kormondy wishes to take the position that his entire life constitutes mitigation or that all of his life experiences can be explained by an alleged personality disorder, it hardly seems equitable that such defendant can bar the

jury from seeing certain less savory aspects of his past, by strategically invoking a waiver of a statutory mitigating circumstance; Appellee would contend that the State would have been authorized in eliciting substantive evidence concerning Kormondy's past crimes. As it stands, however, the sole matter before this Court is one reference to the "homosexual rape" committed by Kormondy in prison, such reference made during the cross-examination of Dr. Larson, and any error therein is surely harmless under State v. DiGuilio. See Carroll, supra (State's improper impeachment of defense expert harmless error and not grounds for mistrial); Peterka, supra (any improper usage of defendant's juvenile record harmless error); Allen, supra.

A similar result should obtain in regard to the claim involving the State's cross-examination of Appellant's mother. The record reflects that, following the penalty phase before the jury, Lane Barnett testified briefly before the court on September 23, 1994 (R 520-6). During her direct examination, the witness stated that Appellant "doesn't have the heart and soul of a murderer or a rapist," and testified that she believed he was innocent of those crimes (R 522-3). On cross-examination, the prosecutor asked the witness if she aware that Appellant had been charged with sexual battery for a homosexual rape upon an inmate at Santa Rosa County

jail, and, without objection, the witness answered that she did know that (R 523). When the prosecutor asked her if she was aware that DNA evidence demonstrated Kormondy's responsibility, she stated that she did not know that, and defense counsel objected on the basis that the prosecutor was asking the witness to "assume facts that she had no knowledge of"; the objection was overruled (R 523-4).

Again, the State questions the preservation of any claim of error, as no objection was interposed in regard to the question now deemed objectionable, and such objection as was later interposed was on a ground different from that asserted on appeal. See Steinhorst, supra; Rodriguez, supra; Terry, supra; Bertolotti v. State, 565 So. 2d 1343, 1345 (Fla. 1990). Further, it is clear that the direct examination opened the door to inquiry into this matter on cross. See, Bonifay v. State, 626 So. 2d 1310, 1312 (Fla. 1993) (where defendant's mother testified that he could be rehabilitated, it was proper to allow cross-examination as to her knowledge of all the things which he had done, despite the waiver of mitigation under §921.141(6)(a)); Gunsby v. State, 574 So. 2d 1085, 1089 (Fla. 1991) (not improper to allow defense character witness to be questioned concerning specific acts of misconduct on part of defendant). Finally, any error would be harmless, given

the fact that the jury did not hear this exchange, and the judge's sentencing order indicates an independent basis for imposition of the death sentence. See Allen, supra. The instant sentence of death should be affirmed in all respects.

C. Any Error In The Trial Court's Finding Of Contempt Against Kormondy Has No Effect Upon His Sentence Of Death

As the next component of this claim, Kormandy contends that Judge Kuder improperly found him in contempt of court for failing to testify against codefendant Hazen in the latter's trial. In addition to attacking the method in which such contempt was imposed, Appellant maintains that this matter was improperly considered by the sentencing judge in rejecting the nonstatutory mitigating circumstance relating to cooperation with law enforcement. Rather paradoxically, opposing counsel urges that the State, in offering Kormondy use immunity for his testimony, presented him with a "Hobson's choice", and specifically asserts this claim as a basis to vacate the instant death sentence. Appellee would maintain that any defect in the contempt process and/or judgment and sentence therefore provides no basis for vacation of Kormondy's death sentence.

The record indicates that the penalty proceeding before the jury in this cause concluded on July 9, 1994, and that, on August

26, 1994, a short hearing was held before the court (R 1416-1420); although the style of the case contains Kormondy's name, this proceeding would seem, in fact, to be a part of Hazen's case. The court initially announced that the jury was not present, and that the State was to proffer some testimony (R 417). The State then called Appellant, who verified that he had had a chance to consult with his attorney, and that he understood his options (R 417-18). Kormondy specifically affirmed that he understood that, if called to testify, he could assert his privilege against self-incrimination (R 418). When the prosecutor asked Kormondy if he had already given a statement "implicating this defendant [presumably, Hazen] to the sheriff's department," Appellant stated that he was going to "plead the fifth" (R 418).

The prosecutor then gave Kormondy use immunity, "so that whatever he says today could not be used against him," and defense counsel verified that she had explained the concept of immunity to Appellant, but that he still wished to take the fifth (R 418-19). The following exchange then took place:

> THE COURT: Sir, notwithstanding your fifth amendment right, the Court requires you to testify in this case since you now have use immunity and whatever you say cannot be used against you. Do you wish to testify?
>
> THE WITNESS: No, sir.

> THE COURT: All right, this witness refuses the Court's order to testify. The Court holds him in direct civil contempt of court and he will be incarcerated in the Escambia County Jail until such time as he elects to purge himself which he may do by giving truthful testimony in this case (R 419).

A formal judgment and sentence was rendered that day, adjudicating Kormondy guilty of civil contempt of court and providing that he would be imprisoned in county jail for an indefinite term (R 421).

In the Initial Brief, Appellant contends initially that Kormondy was entitled to assert his Fifth Amendment privilege, and implies that, under such precedents as Meehan v. State, 397 So. 2d 1214 (Fla. 2d DCA 1981) and King v. State, 353 So. 2d 180 (Fla. 3d DCA 1977), the finding of contempt was erroneous. Appellant's reliance upon these cases is misplaced. In Meehan, the State sought to compel the defendant to testify against himself at his own sentencing proceeding, by asking him questions about his own record so that he could be habitualized; here, Kormondy was not asked to testify against himself in his own sentencing proceeding. In King, the State, as here, sought to compel a previously convicted codefendant to testify against another, and the trial court therein held that the defendant could not invoke his privilege against self-incrimination because he had testified in his own case. Unsurprisingly, the court of appeals reversed, and

specifically rejected the State's argument premised upon immunity, on the basis that King was "not informed that he had been given immunity." Id. At 181. Here, Kormondy unquestionably was aware that he would be granted use immunity, and King is simply not applicable. See also Landenberger v. State, 519 So. 2d 712, 713 (Fla. 1st DCA 1988) ("In the absence of a promise of immunity, a convicted felon with an appeal pending has a Fifth Amendment privilege not to testify...."). Finally, the out-of-state precedent cited by Appellant, Frank v. United States, 347 F.2d 486 (D.C. Cer. 1965), quashed, 384 U.S. 882, 86 S. Ct. 1912, 16 L. Ed. 2d 994 (1966), does not deal with a court's contempt powers under circumstances comparable to those sub judice, and, as Kormondy did not testify below, the rest of the Frank holding would hardly seem applicable.

Appellant also complains that the basic requirements of civil contempt were not met, and notes that a court cannot impose a term of incarceration absent a specific finding that the contemnor has the ability to comply "with the purge conditions"; Kormondy also suggests that the civil contempt should have expired at the end of Hazen's trial, but notes that the judge imposed an "indefinite" sentence. (Initial Brief at 69, n.10). Appellee can see no procedural irregularity in imposition of the civil contempt below.

The fact that the judgment and sentence appear to indicate an indefinite sentence is not unusual. See Bontrager v. Sessions, 582 So. 2d 766, 767 (Fla. 1st DCA 1991) (imprisonment may be imposed in a civil contempt proceeding, but it is coercive rather than punitive and the sentence is usually indefinite, contingent upon compliance with the court's order). It is, of course, somewhat misleading to regard any "sentence" as a traditional one. See Owens v. Owens, 578 So. 2d 444, 445, n.1 (Fla. 1st DCA 1991) (imposition of incarceration in civil contempt is not a "sentence", but only an open-ended penalty to coerce compliance, which may be avoided or terminated by compliance with the conditions of the court's order). Here, Judge Kuder made it clear that Kormondy could purge himself of the contempt by giving truthful testimony in Hazen's case. Inasmuch as Hazen's case has concluded, Appellee does not agree that Kormondy "is still incarcerated for civil contempt" (Initial Brief at 69, n.10); the State would contend, however, that during the pendency of Hazen's circuit court proceedings, Kormondy had the ability to purge himself of the contempt.

As asserted earlier, the only possible relevance of this prior contempt is its relationship to Kormondy's present death sentence. Contrary to the representations in the Initial Brief (Initial Brief

at 69-70), it is difficult to see how this matter could constitute "a nonstatutory aggravating circumstance." The jury in this case never heard of it, and the prosecutor never argued it as a basis to aggravate the sentence. The most that can be said is that, in rejecting the proposed nonstatutory mitigating factor relating to Kormondy's alleged "cooperation with law enforcement," Judge Kuder noted, among other things, Kormondy's refusal to testify against Hazen and the contempt imposed (R 1615); the judge also noted the fact that Kormondy had fled from the authorities when they first sought to apprehend him and that he had given a pretrial statement which was contradicted by other evidence (R 615). The judge's rejection of this factor, as will be argued more fully in Point V, infra, is completely proper under the law, see Washington v. State, 362 So. 2d 658, 667 (Fla. 1978), and any reference to the contempt per se in the sentencing order can be regarded as surplusage. See Rutherford v. State, 545 So. 2d 853, 856 (Fla. 1989). The instant sentence of death should be affirmed in all respects.

D. Fundamental Error Has Not Been Demonstrated In Regard To The State's Cross-Examination Of Kormondy's Brother

As the final subclaim in this point, Kormondy contends that his sentence of death must be reversed because, in cross-examining Appellant's brother, Bill Halfacre, the State impermissibly

introduced "bad character evidence," to-wit: testimony concerning Appellant's visit to a "strip joint" after the murder (T 1676). Appellant maintains that testimony that Kormondy "was out drinking and carousing in sexually provocative surroundings" within eight days of the murder amounted to "impermissible evidence of lack of remorse", which is absolutely forbidden (Initial Brief at 70). Appellee must observe that opposing counsel reads quite a bit into one item of testimony to which trial counsel interposed no objection.

The record indicates that, on direct examination, Halfacre was questioned as to his relationship with Appellant (T 1666-1672), and was specifically asked if he drank alcohol, to which he responded, "very seldom" (T 1672). On cross-examination, the prosecutor asked Halfacre when he met Buffkin, and defense counsel objected that such question was beyond the scope of direct; that objection was overruled (T 1675-6). The witness then stated that he had "only met the man one time" (T 1676), and when the prosecutor asked if that was when they had gone to a strip joint, he answered, without objection, in the affirmative (T 1676). Halfacre stated that Appellant and their other brother, Vernon, had also come along, and testified that he could not remember exactly when this had occurred but thought it was after the murder (T 1676). Examination then

proceeded other areas, and the visit to the strip joint was never mentioned again either to judge or jury; likewise, it found no place in the judge's sentencing order.

Initially, Appellee would contend that no claim of error has been preserved. No objection was interposed to the reference to the "strip joint", and the objection made as to Halfacre's knowledge of Buffkin was not based upon relevancy, prejudice or "bad character." This matter has been waived. See Stein, 632 So. 2d at 1367 (contention that State improperly admitted evidence at penalty phase concerning inadmissible prior crimes or arrest procedurally barred in absence of objection; Steinhorst, supra; Rodriguez, supra; Terry, supra. To the extent that the merits need be considered, it is difficult to discern any. The fact that Halfacre was "out drinking" was relevant, given his prior testimony that he very seldom drank. The fact that Appellant, Buffkin and Vernon Holderfeld were also along, and that such imbibing took place at a "strip joint" was simply a fact.

The prosecutor, unsurprisingly, never argued to the jury that Kormondy should receive death because he once had chosen to go to a "strip joint", and the judge did not refer to this matter, as noted, in his sentencing order. See Allen, supra. Any error was harmless beyond a reasonable doubt under DiGuilio. See e.g.,

Rogers v. State, 511 So. 2d 526, 523 (Fla. 1987) (error in admitting evidence of defendant's alleged violence during an incident in a restaurant insufficiently prejudicial to merit relief); Wyatt v. State, 641 so. 2d 1336, 1340 (Fla. 1994) (error in admitting testimony concerning thefts committed by defendant while on escape harmless). The instant sentence of death should be affirmed in all respects.

POINT IV

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE SENTENCER'S FINDINGS IN AGGRAVATION.

In sentencing Appellant to death, Judge Kuder found the existence of five (5) aggravating circumstances - (1) that Kormondy had been previously convicted of a violent felony, by virtue of his contemporaneous convictions for the sexual battery of Cecilia McAdams, under § 921.141(5)(b) Fla. Stat. (1993); (2) that the capital felony had been committed while Kormondy had been engaged in the commission of a felony, as evidenced by his conviction of burglary with an assault, under § 921.141(5)(d) Fla. Stat. (1993); (3) that the capital felony had been committed for purposes of avoiding arrest, under § 921.141(5)(e) Fla. Stat. (1993); (4) that the capital felony was committed for pecuniary gain, under § 921.141(5)(f) Fla. Stat. (1993) and (5) that the homicide was

committed in a cold, calculated and premeditated manner, under § 921.141(5)(i) Fla. Stat. (1993) (R 599-606). On appeal, Kormondy offers no challenge whatsoever to the first two aggravating circumstances, and, thus, apparently concedes that they have been established beyond a reasonable doubt. Appellant does, however, challenge the remaining aggravating circumstances, both as to evidentiary sufficiency and as to constitutional validity of any jury instruction thereon, and further contends that impermissible "doubling" has taken place. Appellee would contend that reversible error has not been demonstrated, and that the instant sentence should be affirmed in all respects.

A. The Cold, Calculated and Premeditated Aggravator Was Properly Found

Appellant initially contends that the sentencer's finding of this aggravating circumstances was error, and, further, that the jury should have received no instruction upon it. Although recognizing that the instruction given to Kormondy's jury was that specifically promulgated by this Court in Jackson v. State, 648 so. 2d 85, 89, n.8 (Fla. 1994), opposing counsel nevertheless contends that such was constitutionally deficient. Kormondy also maintains that this aggravating circumstance should not have been found, repeating his contention, raised in Point II, that this was an

unpremeditated killing, and suggesting that the crime is equally consistent "with an accidental shooting by a cocaine addict and alcoholic who had consumed intoxicants that night." (Initial Brief at 75). Appellant asserts that reversal is required, under such precedents as Stokes v. State, 548 So. 2d 188 (Fla. 1989), Gore v. State, 599 So. 2d 978 (Fla. 1992), Valdes v. State, 626 So. 2d 1316 (Fla. 1993) and Barwick, supra. Appellee disagrees in all respects.

As to the jury instruction on this aggravating circumstance, Appellee would contend that Kormondy is precluded from obtaining relief on this ground. While it is true that defense counsel below filed pretrial motions attacking the validity of the jury instruction on this factor, and likewise contended that the amended instruction promulgated by this Court in Jackson was insufficient (R 161-178; T 221-5), the fact remains that the instruction given to Kormondy's jury was that proposed by the defense (T 1928-9; R 388). During the charge conference, Kormondy's counsel contended that the evidence was insufficient to support an instruction on this factor, and such objection was overruled (T 1851-4). The court then noted that Kormondy had proposed an instruction on CCP which was comparable to that in Jackson, and defense counsel offered that the language "was verbatim from Jackson." (T 1855).

The prosecutor then asked if there were any differences between the two which could be reconciled, and defense counsel again stated that they were the same (T 1855-6). Kormondy then "proposed" giving the instruction "over our earlier objection." (T 1856).

It is well-established that a party cannot take advantage on appeal of a situation which he himself created at trial. See McCrae v. State, 395 So. 2d 1145, 1152 (Fla. 1980); White v. State, 446 So. 2d 1031, 1036 (Fla. 1984). The jury in this case was given exactly the instruction which Appellant asked for, and, accordingly, it would be inequitable for him to now secure relief on such basis. See e.g., Street v. State, 636 So. 2d 1297, 1303 (Fla. 1994) (defendant's constitutional challenge to jury instruction not preserved where defendant's proposed alternative instruction constitutionally deficient); Johnson v. State, 660 So. 2d 637, 648 (Fla. 1995) (defendant's constitutional challenge to jury instruction procedurally barred where he failed to present "a true alternative", in that substitute instruction offered by defendant "not significantly different from the standard instruction"); Castro v. State, 644 So. 2d 987, 991, n.3 (Fla. 1994) (same). It is clear that the instruction below could have been modified, if the defense had so desired. See e.g., Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990) (jury instruction challenge

not preserved, where defense offered no objection following court's decision to modify instruction). Any claim of error has been waived.

In addition to the above, acceptance of Appellant's position would essentially mean that no constitutional instruction can ever be crafted as to this aggravating circumstance, a plainly preposterous proposition. Cf. Arave v. Creech, ___ U.S., 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993) (term, "cold-blooded" is capable of definition). Here, the instruction given Kormondy's jury was not that condemned in Jackson, which had offered no definition of any of the legal terms therein, but rather that affirmatively promulgated by this Court in Jackson, which did include definitions. The fact that, some months later, the instruction was further modified or revised, see Standard Jury Instructions in Criminal Cases (95-2), 665 So. 2d 212 (Fla. 1995), hardly means that the original version was constitutionally deficient. Appellant is essentially stating that this Court promulgated an unconstitutional jury instruction, and that, in any case in which the trial judge was unfortunate enough to rely upon this Court's action, reversal is mandated. Appellee finds such contention unacceptable. Any technical error in the jury instruction sub judice was unquestionably harmless, under State v. DiGuilio, supra.

As to the finding of this aggravating factor, it is the State's position that such was properly found, and that the cases relied upon by Kormondy are distinguishable. Thus, in Barwick, this Court found no evidence of a prearranged design to kill the victim, in an instance in which the victim was stabbed repeatedly; this case, of course, involved an execution-style murder, by means of a single lethal shot to the head, executed at point blank range. Likewise, in Gore, the circumstances of the murder, as well as the precise manner in which the victim had met her death, were not clear; here, there is no question, as noted above, that the victim was executed. Finally, in Valdes and Stokes, the precise circumstances of the shooting were unknown, and in the latter case, there was affirmative evidence that the murder weapon was vulnerable to accidental firing; here, of course, there was evidence specifically to the contrary from the ballistic expert. What distinguishes this case from those relied upon by Appellant, as noted earlier in Point II, supra, is the fact that this murder occurred during an unquestionably well-planned criminal episode.

There is absolutely no evidence that the murder in this case began as a "caprice", see Wickham v. State, 593 So. 2d 191 (Fla. 1991), and every indication that it did not. Kormondy and his companions went to the victim's home in the dead of night, knowing

that it was occupied. One carried a gun, which Kormondy himself had brought out to the car from his home, and Kormondy and Hazen wore masks over their faces and socks on their hands, to prevent leaving fingerprints; this amount of planning would seem to negate any inference of intoxication or the effects of "addiction." Once inside, one defendant held the victims at gunpoint, while Kormondy and Hazen closed the blinds and ripped the phones out of the wall, prior to ransacking the house for valuables. When the victim's own gun was discovered, one of the defendants taunted Gary McAdams with it, prior to taking Mrs. McAdams to the bedroom and initiated the sexual battery component of this criminal enterprise; Gary McAdams was unquestionably aware of what was going on in the back of his house. In his own statement, Kormondy admits to holding the gun on the victim during one of these assaults. Each defendant took his turn sexually battering Cecilia McAdams, two of them simultaneously, and Gary McAdams was executed, as knelt helplessly in his own kitchen, as the last of the rapes was occurring; Buffkin, who had been with Mrs. McAdams at the time of this incident, discharged his own gun, at point-blank range, into the bedroom floor, no doubt to give the impression that Cecilia McAdams had likewise been dispatched.

While no two capital cases are exactly alike, Appellee would contend that this Court has affirmed the finding of this aggravating factor under comparable circumstances. See e.g., Lightbourne v. State, 438 So. 2d 380, 391 (Fla. 1983) (circumstance properly found where defendant executed victim with single shot, following residential burglary and sexual battery; phone cords had been severed); Eutzy v. State, 458 So. 2d 755, 757-8 (Fla. 1984) (aggravating circumstance properly found where defendant procured gun in advance and executed taxi-cab driver, for pecuniary gain; no sign of struggle); Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990) (aggravating circumstance properly found where, during course of residential burglary, defendant shot unarmed victim at close range, after rendering telephones inoperable); Owen v. State, 596 So. 2d 985, 990 (Fla. 1992) (aggravating circumstance properly found where defendant broke into home, place socks over his hands, selected weapons, and committed sexual assault on victim prior to murder); Maharaj v. State, 597 So. 2d 786 (Fla. 1992) (aggravating circumstance properly found where defendant executed victim, who had witnessed prior crime, by a single shot to the head).

This Court held in Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988), that this aggravating circumstance could properly be found based upon such factors as the advance procurement of a

weapon, lack of resistance or provocation and the appearance of a killing carried out as a matter of course. All these factors are present sub judice. There unquestionably was no provocation, and the killing was carried out as a matter of course. While Kormondy did ensure that a gun was brought to the scene, the fact that the victim's own gun was used was, in all likelihood no accident, as such would obviously cut down on the odds of detection. Further, in affirming this aggravating circumstance in Jackson v. State, 522 So. 2d 862 (Fla. 1988), this Court noted that the defendant had had "ample time" during the series of events leading up to the murder "to reflect on his actions and their attendant consequences." Such observation is plainly applicable here, as despite Kormondy's claim of "accident" (more than unlikely, given the fact that the barrel of the gun had been pressed against the victim's head, at the time of the shooting), it is clear that, prior to the actual shooting, Appellant had ample time to appreciate the consequences of what he was about to do. This was a cold and calculated murder, and all of the elements set forth in Jackson and Walls v. State, 641 So. 2d 381 (Fla. 1984) are present. The sentencer's finding of this aggravating circumstance should be affirmed.[6]

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[6] The consequence of any error in this finding will be addressed in the next section, IV(B), infra.

B. The Avoid Arrest Aggravator Was Properly Found

Appellant next contends that the aggravating circumstance under § 921.141(5)(e) was likewise improperly found, and, again, that the jury instruction on such factor is unconstitutional. Kormondy repeats his contention that this was an "accidental" shooting, and maintains that Judge Kuder essentially speculated in finding this aggravating circumstance applicable. At one point, Appellant suggests that the trial court went outside of the record in making his written findings (Initial Brief at 8, n.13), and contends that reversal is mandated, under such precedents as Livingston, supra, Thompson v. State, 647 So. 2d 824 (Fla. 1994), Geralds, supra, Scull v. State, 533 So. 2d 1137 (Fla. 1988) and Perry v. State, 522 So. 2d 817 (Fla. 1988). Again, Appellee disagrees in all respects.

As to the jury instruction, Appellant correctly concedes (Initial Brief at 78), that this Court rejected any attack upon this instruction in Whitton v. State, supra, stating that because this factor did not contain "terms so vague as to leave the jury without sufficient guidance," no further limiting instruction was necessary. 649 So. 2d at 867. In Jackson, this Court, of course, specifically rejected the contention that every court construction of an aggravating factor had to be incorporated into the jury

instruction defining such factor. 648 So. 2d at 90. Appellant has shown no good cause for recession from these precedents, and it would not appear that Appellant proposed any alternative instruction, thus waiving claim of error. See Jackson, supra.

As to the finding of this aggravating circumstance, Appellee would likewise contend that no error has been demonstrated, and would specifically maintain that reversible error has not been demonstrated in regard to the sentencer's alleged consideration of any extra-record matters (Initial Brief at 80). In his sentencing memorandum to the court, defense counsel specifically argued against the finding of this aggravating circumstance, contending, inter alia:

> In addition, assuming in arguendo, that the State's assertion that the defendant was the triggerman is correct, then the Court should also consider co-defendant Buffkin's account of the killing. In his sworn deposition statement, as recounted by his attorney Kevin Beck during penalty phase, Buffkin stated that the defendant immediately ran out of the house after the shot was fired and never checked to see if it was fatal. Furthermore, Buffkin testified that the defendant repeatedly told him afterwards that he did not mean to do it. This evidence clearly refutes the State's argument that the killing was for witness elimination.
>
> Also, all accounts of the crime, as presented by various witnesses during the three co-defendants' trials, have shown that the

> defendant's face was covered the entire time, thus obviating his need to eliminate witnesses. If anyone had a motive to kill a witness, it was Buffkin, who never bothered to conceal his face and who fled the State afterwards. Given these facts, as well as those presented above, the State has failed to prove this aggravating circumstance beyond a reasonable doubt and the Court should disregard it. (R 441-2).

In his sentencing order, Judge Kuder, in finding this aggravating circumstance, responded to this argument by Kormondy's counsel, as follows:

> Defense counsel contend that the State has failed to establish by direct evidence any planned or intended killing of Mr. and Mrs. McAdams and further that the court should reject this compelling circumstantial evidence of intent in favor of this testimony of co-defendant Curtis Buffkin who indicated that defendant Kormondy immediate ran from the home after the shot was fired without determining whether or not Mr. McAdams had been fatally wounded and that Kormondy had repeatedly indicated to him that the shooting was accidental. Defense counsel further argue that by all accounts of the crime the faces of two defendants were masked during the entire episode and telephone lines were cut for disconnected thereby obviating the necessity for witness elimination. (R 602).
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> Defense counsel further contend that all evidence supporting this aggravator is circumstantial and fails to exclude (as a

> reasonable hypothesis) the accidental shooting of Mr. McAdams. As to this issue the Court finds particular significance in the eye witness testimony of co-defendant Buffkin. Buffkin testified that Kormondy had (over his vehement protest) pulled the hammer of the thirty-eight caliber pistol into cocked and firing position immediately before the weapon discharged. There could have been no purpose for cocking the weapon except to effect its immediate discharge. The Court, therefore, finds that the totality of evidence, even if circumstantial, does in fact exclude every reasonable hypothesis including that of accidental killing. (R 603)

When Judge Kuder read his sentencing order aloud, at the hearing on October 7, 1994, defense counsel interposed no objection to the court's consideration of Buffkin's "testimony" per se, but rather, simply to the fact that the court had acceded Buffkin any credence. (R 578). Defense counsel then maintained that Buffkin "was not a credible witness," stating that his account was "markedly different" from that of Cecilia McAdams (R 578); defense counsel had, of course, specifically endorsed other portions of Buffkin's account. The prosecutor then noted for the record that, in fact, Buffkin had not testified in this trial (R 579-580).

Although the State agrees with Appellant that the trial court's reference to Kormondy pulling the hammer of the pistol and cocking it, "over Buffkin's vehement protest" (R 603) would seem to be without direct support in this record, such fact does not

dictate that Appellant is entitled to any relief thereby. First of all, as previously argued, a party cannot take advantage on appeal of a situation which he himself created at trial. McCrae, supra; White, supra, Here, defense counsel urged the sentencing court to consider Buffkin's account of the murder in rejecting this aggravating circumstance, and the matters cited in defense counsel's sentencing memorandum are outside the record themselves, i.e., that Appellant immediately ran out of the house after the shot without checking to see if the victim was dead, and that Kormondy "repeatedly" maintained that he had not meant to do it (R 441). If the judge below strayed outside of the record, it was at defense counsel's invitation.

Further, this Court has held that claims of this nature are not fundamental error, and must be preserved through objection, stating in Vining v. State, 637 So. 2d 921, 927 (Fla. 1994),

> Vining complains that the trial judge improperly considered matters not presented in open court, including depositions in the court file, the medical examiner's report, and the probate record of Caruso's estate. We find that this issue was waived for purposes of appellate review as defense counsel never objected to the court's consideration of this material.

This Court found that it was not inequitable to impose the procedural bar, as the trial judge had made reference to his

consideration of these matters previously, and defense counsel had been on notice prior to the sentencing hearing itself.

A similar result should obtain sub judice. After the trial court read the sentencing order, defense counsel objected not to the consideration of Buffkin's testimony, but rather to the court's ultimate findings. Under Vining, defense counsel, who had likewise sought to utilize Buffkin's "testimony" for his own purposes, should have objected earlier, if, in fact, he perceived any basis for objection. To the extent that the merits need be reached, Appellee would contend that the matter referred in the sentencing order - Buffkin's claim that he had protested as Kormondy cocked the gun - is somewhat cumulative to the testimony which Buffkin's attorney actually offered during the penalty phase, to the effect that Buffkin had indicated to Kormondy to stop at the time of the shooting (T 1799). Further, because this matter is not critical to the court's finding of this aggravating circumstance, it can be considered surplusage. See Rutherford v. State, 545 So. 2d at 856 (court's gratuitous reference of lack of remorse would be treated as surplusage, where finding of aggravator otherwise correct). Any error was harmless beyond a reasonable doubt under DiGuilio. Cf. Lockhart v. State, 655 So. 2d 69 (Fla. 1995); Delap v. State, 440 So. 2d 1242 (Fla. 1983).

Finally, as to the propriety or the evidentiary sufficiency of this factor, the State would maintain that Judge Kuder acted in accordance with precedent in finding this aggravator. In finding the application of this aggravating circumstance, the judge focused upon the fact that this was a "witness elimination" crime, and specifically noted the firing of the second shot into the bedroom floor, meant to suggest that Cecilia McAdams had likewise been eliminated; the court noted that Gary McAdams had previously witnessed the burglary of his home, the robbery of himself and his wife, and that he was no doubt aware of the repeated brutal rapes of his wife. Where, as here, a victim has witnessed prior, or other, crimes committed by the defendant and/or where the defendant's criminal objective may be regarded as having been fulfilled prior to the murder, this Court has upheld the finding of this aggravating circumstance. See, e.g., Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994) (avoid arrest aggravator properly found where, once defendant had obtained money from victims, "there was little reason to kill them other than to eliminate the sole witnesses to his actions," such actions including kidnapping and robbery); Espinosa v. State, 589 So. 2d 887, 894 (Fla. 1991), reversed on other grounds, Espinosa v. Florida, ___ U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), affirmed on remand, 626 So.

2d 165 (Fla. 1993) (murder of victim who had witnessed defendant's attack upon other victim during residential armed robbery qualified for avoid arrest aggravating circumstance); Correll v. State, 523 So. 2d 562, 567-8 (Fla. 1988) (murder of two victims who had witnessed prior crimes properly found to have been to avoid arrest; defendant intended to leave no survivors to crime spree, as evidenced by his cutting of telephone lines). The cases relied upon by Appellant are distinguishable, in that, as opposed to this case, the circumstances preceding or accompanying the murder were not known, see Livingston, supra, Thompson, supra, Scull, supra, and/or the State had simply sought to rely upon speculation that witness elimination had been a motive, due to the fact that the victim had known the defendant. See Geralds, supra; Perry, supra. The finding of this aggravating circumstance should be affirmed.

To the extent that any error is perceived as to the finding of this aggravating circumstance, and/or as to that set forth in the prior section, any error would be harmless under State v. DiGuilio, supra, as there is no reasonable likelihood of a different sentence, even should these aggravators be stricken. See Rogers, 511 So. 2d at 535. There would remain at least three valid aggravating circumstances to be weighed only against nonstatutory mitigation. While the mitigating evidence demonstrated that

Kormondy suffers from a "personality disorder", and that he has truly led an unfortunate life, even the defense mental health expert conceded that he had not found any indication of a serious mental illness (T 1548-9), and Appellant did not suffer any "abuse" of a caliber comparable to that of many other death row inmates; likewise, Kormondy was an adult at the time of these crimes and is of average intelligence (T 1572). This Court has found allegedly comparable sentencing error to be harmless, under circumstances virtually identical to those sub judice. See, e.g., Dailey v. State, 595 So. 2d 246, 248 (Fla. 1995) (death sentence would be affirmed, where, after striking two aggravators, three valid factors remained to outweigh nonstatutory mitigation); Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994) (same, where defendant's nonstatutory mitigation consisted of growing up in broken and unstable home with mentally ill parent); Peterka, 640 So. 2d at 71 (striking of two aggravating circumstances harmless error, where three remained to outweigh statutory mitigation pertaining to defendant's lack of criminal history). The instant sentence of death should be affirmed in all respects.

(C) The Pecuniary Gain Aggravating Circumstance Was Properly Found

As the next aspect of this claim, Appellant contends that the sentencing judge erred in finding that the pecuniary gain aggravating circumstance applied. Kormondy maintains that the standard jury instruction on this aggravating factor is likewise unconstitutional, and asserts that this aggravating circumstance lacks evidentiary support. Opposing counsel claims that, under this Court's precedents, the State was required to show that the defendant formed the subjective intent to kill for enrichment, not simply that a killing took place while he was unlawfully enriching himself; counsel also states that this factor cannot be vicariously imputed to one defendant, based upon another's motive to kill (Initial Brief at 83, n.14). Finally, opposing counsel suggests that, under the facts of this case, this murder was an "afterthought" to the robbery.

Appellee disagrees with all of the above. As to the jury instruction, as noted, this Court held in Jackson, 648 So. 2d at 90, that not every court construction of an aggravating factor must be incorporated into a jury instruction defining that factor, and Appellant has failed to demonstrate any constitutional necessity for expansion of the standard instruction; additionally, Appellant

failed to proffer any alternative instruction below, thus waiving the point. Cf. Jackson, supra. As to the finding of the factor itself, error has likewise not been demonstrated. This Court has held that § 921.141(5)(f), applies when the State has proven "a pecuniary motivation for the murder," Allen, 662 So. 2d at 330, or that the murder was motivated "at least in part by a desire to obtain money, property or other financial gain." Finney v. State, 660 So. 2d 674, 680 (Fla. 1995); Clark v. State, 609 So. 2d 513, 515 (Fla. 1992). Applying this criteria, it is clear that this factor was properly found.

The record demonstrates that Kormondy fully participated in the planning of, at least, a burglary, one of whose motivations was pecuniary gain, and that it was he who ensured that a gun would be brought to the residence, taking a gun from underneath the couch of his house and carrying it to his vehicle (T 1147, 1167-8). Once inside the victims' home, Kormondy held the bag into which Hazen dumped jewelry and other items, while Buffkin held the gun on the McAdamses, after having relieved them of their wallets and other items, likewise at gunpoint (T 1721-3; 1070-1). Despite Appellant's claims of "accident", and suggestion of "panic" after the shooting, the bag was taken from the victims' home, and the defendants divided the spoils in Kormondy's living room (T 1286-7);

a witness who observed the defendants returning from the scene of the crime, noted that they took elusive action when a car seemed to be pulling into the parking lot, such action hardly consistent with "panic" (T 1134). The next morning, Appellant's wife found the bag of jewelry in the car, when she drove Hazen to meet a relative (T 1151).

Inasmuch as the record demonstrates that the defendants had the intent to rob, inter alia, that the defendants in fact relieved the victims of money and other items at gunpoint and ransacked their home, and the fact that, after the murder, Kormondy continued in possession of the victims' goods, it defies all logic to deny that this crime was motivated at least in part by financial gain. See, e.g., Allen, supra (where defendant took victim's money and jewelry, crime committed for pecuniary gain); Larkins, 655 So. 2d at 99-100 (pecuniary gain aggravating factor properly found in convenience store robbery and murder, despite expert testimony that defendant may have fired gun "due to stress"). Any assertion that the instant murder was an "afterthought" is an insult to the intelligence of all concerned, and in finding this aggravating circumstance, the sentencer could properly reject Kormondy's version of events. See Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994) (pecuniary gain aggravating factor properly found,

despite defendant's contention that taking of victim's property was "afterthought"; State's theory prevailed, and was more consistent with the facts than the defense view). Further, in light of the evidence as to Kormondy's own actions, it is clear that his liability for this aggravating circumstance was direct, rather than vicarious, although it should be noted that opposing counsel is simply wrong as to the law. See James v. State, 453 So. 2d 786, 792 (Fla. 1984) (where defendant was present and actively participating in joint operation with co-defendant, the fact that he was not the triggerman did not preclude application of the felony/murder pecuniary gain, avoid arrest or cold, calculated and premeditated aggravating circumstances to him); Copeland v. State, 457 So. 2d 1012, 1018-19 (Fla. 1984) (where defendant's liability for the murder was vicarious, pecuniary gain and avoid arrest aggravating circumstances could nevertheless apply to him; evidence showed that murder was culmination of events which began when defendant initiated robbery). The instant aggravating circumstance, as well as the death sentence itself, should be affirmed.

(D) No Impermissible "Doubling" Of Aggravating Circumstances Occurred Sub Judice

Finally, Appellant contends that two impermissible "doublings" of aggravating circumstances have occurred - commission during a burglary and pecuniary gain and avoid arrest and cold, calculated and premeditated. Kormondy contends that, not only do these factors overlap, but that the court erred in instructing the jury upon them and/or in not cautioning the jury not to themselves "double" (Initial Brief at 85). Appellee disagrees with all of the above.

As to the jury instruction component of this claim, Appellee would question the preservation of any claim of error. In Castro v. State, 597 So. 2d 259, 261 (Fla. 1992), this Court held that it had been error for the court to have refused to give the defendant's proposed "anti-doubling" instruction; in that case, the defendant had objected to the jury being instructed on both of the factors at issue and had, of course, submitted a proposed instruction to combat such problem. Here, although the defense offered twenty (20) proposed instructions (R 381-403), none concerned "doubling", and if trial counsel felt that there was any potential overlap between the avoid arrest and CCP factors, he kept

such knowledge to himself during the charge conference (T 1837-1876).

The most that can be said to have occurred below is that, during the charge conference, Judge Kuder asked both parties if there would be any "doubling" if the jury were instructed on both burglary and pecuniary gain (T 1847). Kormondy's counsel answered in the affirmative, and suggested that the defense was entitled to an instruction on doubling, "if we can come up with one that the jury can understand." (T 1848). The prosecutor then drew the Court's attention to Brown v. State, 381 So. 2d 690, 696 (Fla. 1980), in which this Court provided that such improper doubling did not occur where a sexual battery had occurred, in addition to any theft or robbery (T 1849-1850). The Court then announced that it would amend the instruction under § 921.141(5)(d), to refer to burglary and/or sexual battery, and, indeed, such modified instruction was given (T 1850, 1872-3, 1927-8); although defense counsel indicated that he still maintained his prior objection, he never submitted any alternative instruction (T 1850, 1872). This should be considered to constitute waiver under Castro and Steinhorst, although, alternatively, the amendment of the instruction cured any error.

As to any doubling of the burglary and pecuniary gain factors, such doubling is, in fact, precluded, given the fact that Kormondy was also convicted of sexual battery (R 376, 586), and the cases upon which he relies are distinguishable. See Brown, supra; Lightbourne, 438 So. 2d at 391 (pecuniary gain and burglary aggravating factors did not "double" where defendant committed crime of rape in conjunction with the murder); Brown v. State, 473 So. 2d 1260, 1267 (Fla. 1985) (factors did not double where burglary had "broader purpose on the minds of the perpetrators", than simple theft, given their rape of the victim). As to any doubling of the avoid arrest and CCP factors, this Court rejected such contention in Stein, supra, observing that the avoid arrest factor focused on the defendant's motivation, whereas the CCP factor focused on the manner in which the crime had been executed. Id. at 1366. Stein plainly applies sub judice, and the instant sentence of death should be affirmed in all respects.[7]

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[7] Appellant also maintains that the aggravating circumstance under § 921.141(5)(d), is unconstitutional, because it is "automatic", in every felony murder; opposing counsel concedes that this Court has previously rejected such argument in Johnson v. State, 660 So. 2d 637, 649 (Fla. 1995) (Initial Brief at 86). This Court recently reaffirmed its position in Sims v. State, 21 Fla. L. Weekly S320, S323 (Fla. July 18, 1996), and Appellant provides no basis for reconsideration. Further, Kormondy is a particularly inappropriate individual to make this argument. Although there may have been "only" one murder, there were, in every respect, two

POINT V

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE SENTENCER'S FINDINGS IN MITIGATION

Appellant next contends that his sentence of death must be reversed because Judge Kuder allegedly wrongfully rejected both statutory and nonstatutory mitigation. As to the former, Kormondy contends that the judge erred in not finding the mitigating circumstance relating to age, under § 921.141(6)(g), Fla. Stat. (1993). As to the latter, it is maintained that the sentencer wrongfully rejected nonstatutory mitigation pertaining to: (1) Kormondy's drug addiction; (2) Kormondy's learning disability and lack of education; (3) Kormondy's status as a husband and father; (4) Kormondy's alleged cooperation with law enforcement, and (5) the alleged disparate treatment of Buffkin. Elsewhere, Appellant has grudgingly conceded that Judge Kuder did in fact find in mitigation certain nonstatutory factors, such as: (1) Kormondy's deprived and traumatic childhood and the fact that he lacked the companionship of a father; (2) Kormondy's status as a good employee, his potential rehabilitation and his productivity in the prison system; (3) that Kormondy had consumed alcoholic beverages

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victims, and at least three felonies in this criminal episode. Appellant's death sentence was anything but "automatic".

on the night of the murder; (4) that Kormondy's behavior at trial had been acceptable, and (5) that Kormondy had a personality disorder (Initial Brief at 44) (R 608-616). As to the Court's rejection of age as a mitigating factor, Appellee would contend that no error has been demonstrated, and, as to the court's resolution of the nonstatutory mitigation, Appellee would likewise contend that the court below faithfully complied with this Court's precedents. The instant sentence of death should be affirmed in all respects.

(A) Rejection Of Appellant's Age In Mitigation Was Not Error

As to this portion of the claim, Appellant vehemently asserts that Judge Kuder abused his discretion in rejecting this statutory mitigating circumstance. While conceding that a trial judge "has some discretion to reject an adult's age as a mitigating circumstance" (Initial Brief at 86), Kormondy maintains that the trial judge utilized invalid and unsupported reasons, some allegedly outside the record, in his findings. Appellant takes particular umbrage at the fact that the judge perceived this crime as one involving planning. Appellant cites no specific precedent of this Court which would dictate reversal, and Appellee would

contend that no abuse of discretion or reversible error has been demonstrated.

The court's findings read as follows:

> (g) The age of the defendant at the time of the crime. F.S. § 921.141(6)(g).
>
> The evidence established that this defendant was twenty-one years of age at the time he murdered Gary McAdams. There is nothing in the evidence to suggest that either his chronological age or developmental, mental or emotional maturity mitigated in any fashion whatsoever against his culpability for the murder of Mr. McAdams. To the contrary, his age and life experience had brought him to a point of maturity sufficient to allow him to conceive and successfully complete a carefully planned and methodically executed sequence of criminal events intended to ultimately conclude with the witness elimination of both Mr. and Mrs. McAdams. The age of this defendant was, therefore, not reasonably established as a statutory mitigating factor and gives it no weight. (R 608).

These findings are certainly permissible, as they focus upon the relevant criteria, i.e., Kormondy's age itself (21), and whether there is any reason that he would act or function below his chronological age, such as lack of maturity. Appellant's belief that the court's characterization of the crime as "a methodically executed sequence of criminal events," somehow demonstrates that

material outside the record has been considered (Initial Brief at 88-9, n.18) is difficult to fathom.[8]

It is, of course, well established that the decision as to whether a mitigating circumstance has been established and the weight to be afforded it is within the trial court's discretion. See, e.g., Foster v. State, 654 So. 2d 112, 114 (Fla. 1995); Wyatt, 641 So. 2d at 359. Further, whether a defendant's age constitutes a mitigating circumstance is a matter within the trial court's discretion, depending upon the circumstances of a given case. Sims v. State, 21 Fla. L. Weekly S320, S322 (Fla. July 18, 1996). Every defendant has an age, see Echols v. State, 484 So. 2d 568, 575 (Fla. 1985), and there is no per se rule which pinpoints a particular age as a mitigating factor. See Peek v. State, 395 So. 2d 492, 498 (Fla. 1980). This Court has, in fact, affirmed a sentencing judge's rejection of this mitigating circumstance, where the defendant was the same age as Kormondy, or even younger. See, e.g., Merck v. State, 664 So. 2d 939, 942 (Fla. 1995) (defendant's age of nineteen rejected); Cooper v. State, 492 So. 2d 1059, 1062-3

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[8] To the extent that it is perceived that this finding, or any other rejecting mitigation, is somehow attributable to "extra record" materials, Appellee would contend that any error is harmless, in that, based upon the record in this case, Judge Kuder had more than adequate bases to reject all proffered mitigation. Cf. Rutherford, supra; Lockhart, supra; Delap, supra.

(Fla. 1986) (age of eighteen rejected); Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986) (age of twenty rejected); Ford v. State, 374 So. 2d 496, 501-2 (Fla. 1979) (age of twenty one rejected). The record in this case indicates that Appellant was, in all respects, an adult - he lived outside the family home, he was married and fathered a child, he had held a job, he was of average intelligence and, by age twenty-one, he apparently was no stranger to the criminal justice system. The trial court did not abuse its discretion in rejecting this statutory mitigating circumstance, and the instant sentence of death should be affirmed in all respects.

(B) Reversible Error Has Not Been Demonstrated In Regard To The Sentencer's Handling Of Nonstatutory Mitigation

As noted, Judge Kuder expressly found at least five nonstatutory factors in mitigation - (1) Kormondy's deprived and traumatic childhood and the fact that he had grown up without a father; (2) Kormondy's status as a good employee; (3) the fact that Kormondy had been drinking on the night of the murder; (4) the fact that Kormondy's behavior at trial had been acceptable, and (5) the fact that Kormondy had a personality disorder (R 608-616). Appellant contends, however, that reversible error has occurred, because the sentencer did not likewise find the following matters - (1) the fact that Kormondy "suffers from the disease of addiction;"

(2) the fact that Kormondy suffers from a learning disability, resulting in lack of education; (3) the fact that Kormondy has a wife and child; (4) Kormondy's alleged cooperation with law enforcement, and (5) the allegedly disparate treatment of Curtis Buffkin. Initially, it must be noted that this case has nothing in common with such precedents as Crump v. State, 654 So. 2d 545 (Fla. 1995), or Larkins, supra, in which the sentencing order was deficient for failing to evaluate all of the proffered nonstatutory mitigation. Here, it is undisputed that Judge Kuder fully complied with such precedents of this Court as Campbell v. State, 571 So. 2d 415 (Fla. 1990), and Lucas v. State, 568 So. 2d 18 (Fla. 1990), and, in fact, evaluated all of the nonstatutory mitigation urged by Kormondy (R 611-615). Appellant's only complaint relates to the court's disposition of certain items of nonstatutory mitigation, and opposing counsel's disagreement with the sentencer's resolution of these matters provides no basis for reversal. Each of Kormondy's claims will now be addressed.

1. Kormondy's "Addiction"

In the Initial Brief, Appellant contends that Judge Kuder "failed to understand the distinction between mitigation in the form of intoxication at the time of the offense and mitigation in

the form of history of alcohol and drug addiction" (Initial Brief at 91), and faults the court below for failing to find as nonstatutory mitigation Kormondy's alleged addiction to both alcohol and cocaine. Opposing counsel contends that this was "perhaps the most crucial mitigating evidence on which Kormondy relied." Id. at 92. Appellant's complaints are not well taken.

The sentencing order indicates that Judge Kuder fully considered the evidence proffered as to addiction, and that he rejected such due to the fact that there was no nexus between any addiction and the crimes committed; the judge specifically found that the evidence failed to establish that Kormondy was under the influence of drugs at the time of the murder (R 611). It should also be noted, however, that the judge utilized evidence of Kormondy's alcohol addiction in his finding relating to alcohol consumption on the night of the murder:

> (d) That defendant was drinking on the night the crime occurred.
>
> Although the evidence fails to establish that the defendant was intoxicated during the commission of the offense, it does establish that he was drinking alcoholic beverages shortly before the criminal episode occurred. The Court has considered this together with evidence of his addiction and to the extent that it may have caused a lessening of inhibition and heightened potential for aggression the Court finds that same has been

> reasonable established as a non-statutory mitigating factor. The Court, nonetheless, gives it little weight. (R 613).

Appellee would contend that although the sentencing order did not find "addiction" as an "independent" nonstatutory mitigator, the court, as noted above, utilized any addiction as part of its finding concerning alcohol consumption. Under the facts and circumstances of this case, this was a reasonable thing to do, and reversible error has not been demonstrated. It is axiomatic that, in order to constitute mitigation, a matter must in some way "ameliorate the enormity of the defendant's guilt." Eutzy, 458 So. 2d at 759. Contrary to opposing counsel's rhetoric, it is by no means without precedent for a court to reject a defendant's physical or mental condition as mitigation due to its lack of relationship to the crime. See Arbelaez v. State, 626 So. 2d 169, 178 (Fla. 1993) (trial court's rejection of defendant's epilepsy as mitigation not error, where the record showed that Arbelaez's epilepsy did not play a part in the murder). Here, the State's expert testified that Kormondy's actions at the time of the crime were inconsistent with cocaine toxicity (T 1816), and Kormondy's purposeful conduct on the night in question was likewise inconsistent with any finding of intoxication by alcohol. See, e.g., Johnson, 608 So. 2d at 13 (defendant's self-imposed

intoxication did not constitute mitigation under the facts of the case, given that there was "too much purposeful conduct"). Appellant has gotten as much "mileage" out of his drug and/or alcohol addiction as the facts of this case warrant, and any error would, in any event, be harmless. See Wuornos, 644 So. 2d at 1011 (trial court's failure to weight defendant's alcoholism in mitigation harmless, in that weight of such factor would be slight when compared with the case for aggravation).

2. Kormondy's Learning Disability

Appellant next maintains that Judge Kuder erred in declining to find in mitigation Kormondy's learning disability and lack of education, again complaining that the judge misunderstood the law, given the fact that the court noted, inter alia, that there had been no showing of any relationship between the disability and Kormondy's failure to conform his conduct to the requirements of the law (R 612). Appellant points to other cases in which a learning disability was found in mitigation, and opines that reversal is mandated here.

Appellee disagrees. The sentencing judge rejected Kormondy's learning disorder as mitigation because he found that, although established by the evidence, it did not mitigate the offense. This

was not an abuse of discretion. See Lucas, 568 So. 2d at 23 (". . . determining what evidence might mitigate each individual's sentence must remain within the trial court's discretion."). The court's reference to Kormondy's failure to conform his conduct to the requirements of the law was not, as asserted, a misplaced reference to a statutory mitigator (Initial Brief at 93), but rather, again, a recognition that no nexus existed between Appellant's condition and the crime for which he was being sentenced. Cf. Arbelaez, supra. Certainly if, as demonstrated above, a sentencer may refuse to find intoxication as mitigation based upon the presence of "too much purposeful conduct", see Johnson, then it would seem to follow that a sentencer can similarly reject learning disability or lack of formal education on such grounds.

Here, despite the best efforts of opposing counsel, this was not an "unplanned," "spontaneous," "youthful," "unintelligent" crime spree, and the judge was within his rights to note the evidence of planning and premeditation in rejecting the proposed mitigators. Although Kormondy did not finish high school, he still had the presence of mind to ensure that a gun was brought to the scene and to wear a mask and socks over his hands, so as to prevent fingerprints; further, despite any learning disability, Kormondy

was of average intelligence, according to the testimony of his own expert (T 1572). Any technical error in this regard is simply harmless. Cf. Wickham v. State, 593 So. 2d 194 (sentencer's failure to weigh defendant's abused childhood, alcoholism, extensive evidence of hospitalization for mental disease and related matters harmless, in light of very strong evidence in aggravation); Wuornos v. State, 20 Fla. L. Weekly S481 (Fla. Sept. 21, 1995) (sentencer's failure to weigh defendant's personality disorder in mitigation harmless error).

3. Kormondy's Status As A Husband And Father

Appellant next complains that Judge Kuder rejected Kormondy's status as a husband and father as a mitigating factor. In his sentencing order, the judge noted that Appellant's relationship with his soon-to-be ex-wife was "irretrievably broken" (R 614-15), a fact which Appellant does not dispute. Opposing counsel complains, however, that the judge "completely overlooked the child and whatever relationship existed between them" (Initial Brief at 95).

It is, of course, well established that it is within the discretion of the trial court to determine whether family or personal history establishes a mitigating circumstance. See Sochor

v. State, 619 So. 2d 285, 293 (Fla. 1993); Jones v. State, 652 So. 2d 346, 351 (Fla. 1995). Here, Valerie Kormondy presented a less than idyllic picture of her married life with Appellant (T 1152-1162), and Dr. Larson testified that, when Appellant used drugs, he became less concerned about his relationship with his wife and withdrew from his relationship with his own child (T 1581). Thus, it would seem that it was Kormondy himself, rather than the judge, who overlooked his relationship with his child, and no abuse of discretion has been demonstrated. Alternatively, any error would be harmless. See Cook v. State, 581 So. 2d 141, 144 (Fla. 1991) (court's failure to weigh defendant's status as "good family man" harmless error).

4. Kormondy's Alleged Cooperation with Law Enforcement

Appellant next asserts that Judge Kuder erroneously rejected, as nonstatutory mitigation, his "cooperation" with law enforcement, repeating his contention that his contempt conviction was improperly considered. While it is true that the court referred to such matter in the sentencing order, the judge also found independently:

> The evidence established beyond a reasonable doubt that when first confronted by law enforcement this defendant fled and was forcibly arrested. Thereafter he gave a recorded statement wherein he minimized his

> own participation, denied sexually battering Cecilia McAdams, denied killing Mr. McAdams and named his co-defendants as the perpetrators of those crimes. The Court finds that whatever cooperation there may have been with law enforcement was merely an attempt to minimize his own culpability. (R 615).

Appellee contends, as it did previously, that the above constitutes a proper basis for rejection of this nonstatutory mitigating factor, and any reference to the contempt was surplusage. See Rutherford, supra.

It should be noted, as did Judge Kuder, that although the defense identified this factor as a potential mitigator in the sentencing memorandum, no facts were proffered in its support (R 615); it is, thus, questionable whether Kormondy fully complied with Lucas. Further, the judge's reading of the record is more accurate than that of opposing counsel. One reading the Initial Brief would assume that Kormondy drove to the police station, turned himself in, handed over the murder weapon and the bag of stolen goods, and offered full cooperation with law enforcement. Instead, as noted in the order, Appellant's reaction upon seeing a police car was to flee (T 1216). When the police succeeded in forcing him to stop his vehicle, Kormondy ran out and fled on foot, and it was necessary for the police to deploy the canine unit in order to root him out, as he hid in a shed (T 1218-1221; 1230-

1232). Although Appellant did apparently supply the authorities with information as to the location of at least Hazen (T 1245-6), the statement which he gave to the authorities was, as noted by the court below, inconsistent with other evidence. No abuse of discretion has been demonstrated. See Washington, 362 So. 2d at 667 (defendant's cooperation with law enforcement officials properly rejected as mitigation, where defendant did not surrender until he was aware that he was wanted, and his accomplices had already been apprehended).

5. The Treatment Of Co-Defendant Buffkin

Appellant finally contends that the trial court erroneously rejected as mitigation the fact that Buffkin had received a life sentence.[9] As he has continuously throughout his brief, Kormondy maintains that Buffkin was "the leader of this episode" (Initial Brief at 97), and essentially suggests that the identity of the triggerman is not greatly relevant. In his order, Judge Kuder

[9] The First District affirmed Buffkin's sentences for the other felonies, but remanded his sentence for murder for correction of the mandatory minimum. See Buffkin v. State, 667 So. 2d 489 (Fla. 1st DCA 1996). Hazen also received death for this murder, and his appeal is likewise presently pending before this Court. Hazen v. State, Florida Supreme Court Case No. 84,645. Appellee does not read Appellant's claim as implicating Hazen or his sentence.

found that the evidence established "beyond and to the exclusion of every reasonable doubt" that Kormondy had killed the victim (R 614). The court then reasoned that imposition of a life sentence upon a non-triggerman did not constitute "disparate treatment." (R 614).

The court below was correct, and should be affirmed. As this Court has frequently observed, while disparate treatment of an equally culpable co-defendant may render a defendant's sentence disproportionate, disparate treatment is not impermissible when it is the defendant who is more culpable. See, e.g., Larzelere v. State, 20 Fla. L. Weekly S147, S151 (Fla. March 28, 1996); Cardona v. State, 641 So. 2d 361, 365 (Fla. 1994); Hannon v. State, 638 So. 2d 39, 44 (Fla. 1994); Williamson v. State, 511 So. 2d 289, 292-3 (Fla. 1987); Hoffman v. State, 474 So. 2d 1178, 1182 (Fla. 1985) (". . . it is permissible to impose different sentences on capital defendants whose various degrees of participation and culpability are different from one another"). Contrary to the representation in the Initial Brief, this Court has specifically rejected claims of disproportionality based upon the fact that the defendant was the "triggerman" or actual killer, see Armstrong v. State, 642 So. 2d 730, 739-740 (Fla. 1994), Downs v. State, 572 So. 2d 895, 901 (Fla. 1990), although it should also be noted that death has been

deemed the appropriate sentence even where the actual killer had received life, or less, where the defendant was judged to be the "dominant force" behind the homicide. See Larzelere, supra; Heath v. State, 648 So. 2d 660, 665-6 (Fla. 1994). Further, this Court has held that prosecutorial plea bargaining with accomplices is constitutionally permissible and does not violate the principle of proportionality. See Garcia v. State, 492 So. 2d 360, 368 (Fla. 1986).

Applying these principles to the case at hand, it is clear that error has not been demonstrated. The only manner in which Buffkin was the "leader" of this group was that he was the first person in the house, and the fact that he did not wear a mask does not mean that he had the greatest motive to kill the victims, as has been asserted; he may simply have believed that the victims would not open the door to a masked man. As noted previously, it was Kormondy who ensured that a gun would be brought along that night, and it was Kormondy, as well as Hazen, who entered the house masked and gloved. Kormondy fully participated in the burglary, robbery and sexual batteries, and, based on the testimony of Cecilia McAdams, it was impossible for Buffkin to be the triggerman. She identified Buffkin as the individual who had been with her in the back when the shot was heard (T 1068-1069, 1079-

1080); she stated that immediately after the shot, she heard someone yell, "Bubba or Buff," and the individual who had been raping her immediately ran out (T 1082). The only version of events that would render Buffkin more culpable than Appellant was Kormondy's own self-serving statement, which neither the judge nor the jury was required to accept. See Walls v. State, 641 So. 2d 381, 387 (Fla. 1994); Wuornos, 644 So. 2d at 1019. The trial court's rejection of this nonstatutory mitigating factor was based on competent, substantial evidence in the record, and the instant sentence of death should be affirmed in all respects.

POINT VI

THE INSTANT SENTENCE OF DEATH IS NOT DISPROPORTIONATE

As his final claim, Appellant maintains that his death sentence is disproportionate, because, according to Kormondy, there are only two valid aggravating circumstances.[10] Appellant repeats his contention that this an "accidental shooting," and analogizes

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[10] Kormondy also contends that the death penalty is unconstitutional "because of systemic problems in review and practice," and urges this Court to review the rationale of two dissenting opinions by Justices of the Supreme Court of the United States "under the Florida Constitution." (Initial Brief at 97-8). As this claim would not seem to have been raised below, it is procedurally barred. See Ventura v. State, 560 So. 2d 217, 221 (Fla. 1990). Additionally, this claim would not seem to merit discussion.

this case to Terry, supra, Livingston, supra, Besaraba v. State, 656 So. 2d 441 (Fla. 1995) and Cherry v. State, 544 So. 2d 184 (Fla. 1984). Appellee would contend that the above cases are distinguishable, and that the death sentence sub judice is not disproportionate.

As should be apparent from the pleadings to date, the parties view the facts of this case in a markedly different fashion. The picture of Kormondy painted in the Initial Brief is essentially that of an unfortunate waif who found himself in the wrong place at the wrong time, and who is allegedly paying a disproportionate penalty for such. The picture of Kormondy set forth in this brief, consistent with the evidence accepted by the judge and jury below, is that of an individual who fully and willingly participated in a number of violent felonies and who plainly contemplated that lethal weapon would be utilized; even under Appellant's own version of events, he held the gun on Gary McAdams as his companions were raping his wife (T 1274-8). Unlike Terry, or Livingston, the instant homicide did not occur during a "simple" convenience store robbery, and, unlike Besaraba, it can hardly be said that substantial statutory mitigation exists; Cherry might be applicable if the victim in this case had died of a heart attack, which, of course, he most emphamatically did not.

This crime is outside the "norm" of capital felonies, in that residential burglaries do not "traditionally" entail multiple sexual assaults and physical and emotional terrorization of victims. Kormondy and his companions did not simply steal the victim's monetary goods, they also deprived them of their dignity, by forcing Gary McAdams to kneel helplessly by, at gunpoint, as Cecilia McAdams was repeatedly sexually battered. Gary McAdams's death is nothing less than it would seem to be on the surface - a cold-blooded execution - and Appellee would contend that this Court has affirmed the death sentence under comparable circumstances. See e.g., Thomas v. State, 374 So. 2d 508 (Fla. 1979) (death penalty appropriate where defendant broke into residence and shot husband while sexually battering wife; defendant ransacked home and wore a mask throughout episode); Lightbourne, supra (death penalty proportionate where defendant broke into home, sexually battered victim and shot her once in the head, in order to eliminate a witness; defendant cut phone lines and stole jewelry); Freeman supra (death penalty proportionate where defendant with prior conviction murdered victim during course of residential burglary; defendant's low intelligence and abused childhood found in mitigation); Watts v. State, 593 So. 2d 198 (Fla. 1992) (death

penalty proportionate where defendant forced his way into home, demanded money, sexually battered wife and murdered husband).

The death sentence would not be disproportionate, even if, for any reason, it were assumed that Kormondy did not fire the fatal shot. See e.g., Diaz v. State, 513 So. 2d 1045, 1049 (Fla. 1987) (death penalty not disproportionate, even assuming defendant did not shoot victim, and even in light of life sentence imposed upon codefendant; victim shot during hold-up of bar by three defendants); Garcia supra (death penalty proportionate even where defendant convicted of only felony murder, during robbery of farm market; defendant present at scene and participated in all crimes, even though two codefendants received life); Cave v. State, 476 So. 2d 180, 187 (Fla. 1985) (death penalty not disproportionate, even though defendant not killer, where he clearly contemplated that lethal force would be used); State v. White, 470 So. 2d 1377 (Fla. 1985) (death penalty not disproportionate, where codefendants committed murder over defendant's protest, in that he did nothing to disassociate himself from the murder or robbery); Copeland, supra; James, supra. The instant sentence of death should be affirmed in all respects.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the instant convictions and sentence of death should be affirmed in all respects.

Respectfully submitted,
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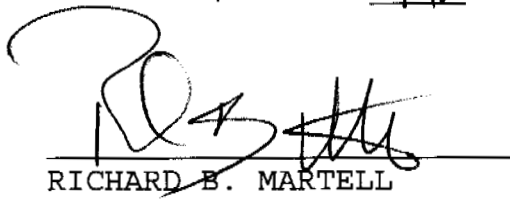
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Chet Kaufman, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 7th day of August, 1996.



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