IN THE SUPREME COURT OF FLORIDA

JOHNNY SHANE KORMONDY, :

Appellant, :

v. : CASE NO. 84,709

STATE OF FLORIDA, :

Appellee. :

_____/

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CHET KAUFMAN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 814253
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

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IN THE SUPREME COURT OF FLORIDA

JOHNNY SHANE KORMONDY,

Appellant,

vs. CASE NO. 84,709

STATE OF FLORIDA,

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_____/

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

References to the initial brief of appellant shall be made as "IB" and references to State's answer brief shall be made as "AB". Other references shall be as stated in the initial brief. Argument subsections to which no reply was necessary are omitted.

REPLY ARGUMENT

ISSUE I: THE TRIAL COURT ERRONEOUSLY PERMITTED A DEPUTY TO BOLSTER WILLIE LONG'S TESTIMONY AND INTRODUCE HARMFUL INADMISSIBLE DOUBLE HEARSAY UNDER THE ERRONEOUS GUISE OF A PRIOR CONSISTENT STATEMENT, THUS VIOLATING FLORIDA LAW AND KORMONDY'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS

The State argues that for error to have taken place, the witness at trial must "have offered an initial statement [] for the latter statement to have been prior to," AB9, appearing now to argue that there had been no prior statement. That neither comports with logic, law, nor the facts. The State presented Long's testimony, and then offered, through Cotton, Long's prior hearsay statement to Cotton made months before trial. See IB48-49. Moreover, the State offered that prior statement at trial as

a prior consistent statement, so the State cannot be permitted on appeal to refute the very legal ground on which it relied below.

The State claims that because Long did not testify to the "specific matter" involved in the prior consistent statement introduced through Cotton, Long's testimony could not have been bolstered. AB9. Logic fails this argument. If Long was required to testify as to a particular issue but did not do so, as the State now contends, then the State would have had no grounds to claim at trial that his earlier statement was "consistent" to warrant its admission as a prior consistent statement. The State's appellate argument thus defeats the very claim it made in the trial court.

Moreover, a prior consistent statement does not merely bolster a witness's credibility as to a particular fact; it bolsters a witness's overall credibility and adds persuasive value to all his evidence, regardless how it came in. If a person made the same statement consistently, reasonable jurors will tend to view that person's statements as very credible, increasing the evidentiary weight of that person's statements.

The State masks the judge's error by saying the prosecutor resorted to "logic" rather than the law "simply ... to close an evidentiary gap." AB9. The law of evidence controls a prosecutor's attempt to fill holes in its case, and the judge erroneously permitted the prosecutor to violate that law. The gravamen of the State's argument, therefore, is that the error was harmless because it "did not give significant additional weight to the testimony of Long, or significantly diminish the

credibility of Kormondy at trial or penalty phase." AB11. In reaching that conclusion, the State misstates the law and erroneously mischaracterizes Kormondy's argument and this case.

Initially, the State said Kormondy represented that the prosecutor had made "specific reference to this matter" in closing argument. AB10. Kormondy made no such representation, nor would one be necessary. Kormondy accurately pointed out that the State at trial put great reliance on statements made by its key witness -- Long -- making his credibility a pivotal issue as to guilt and punishment. IB51-52.

The State said Long's testimony about which gun had been used was "hardly consequential." AB11. That is both wrong and it misses the point. Long's testimony is the only testimony the jury heard placing the murder weapon in Kormondy's hand and making him the triggerman. Had the State not thought that fact was so important, it would not have underscored the point in the case and on appeal. The State even emphasized this point in its answer brief, citing to the prosecutor's closing argument in which the State tried to distinguish the roles of the co-defendants by calling Buffkin the "robber," Hazen the "rapist" and Kormondy the "murderer." AB1; T1411. Additional prejudice is inherent in the fact that the murder weapon was the victim's own weapon, a fact that could have emotionally charged the jurors. And Long's overall credibility was crucial both because of the gun and because Long's statements were the only guilt-phase evidence to contradict critical portions of Kormondy's own statements, most importantly as to the identity of the

triggerman. Identity of the triggerman also is key in determining aggravating and mitigating circumstances, certainly making Long's credibility a weighty factor for penalty purposes, so at the very least the error infected the penalty phase. See Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979) (due process violated when court refused to introduce, and prosecutor argued the absence of, testimony that codefendant may have been triggerman).

The State relies on a handful of distinguishable cases. AB10-12. In Tefeteller v. State, 439 So. 2d 840 (Fla. 1983), the prior statement of witness Poteet had been properly admitted, contrary to this case; and the same evidence had come in earlier in even more damaging form from two other witnesses, unlike the present situation. In Parker v. State, 476 So. 2d 134 (Fla. 1985), properly introduced evidence included Parker's admission to Williams that Parker admitted to being the triggerman and administered the fatal gunshot. The Court found harmless error in the introduction of prior similar statements Williams had made to her mother and sister in which she repeated what she had said on the stand. That was harmless because the jury already heard the evidence, whereas in this case Long's statements were the only clear guilt phase evidence placing the murder weapon -- the victim's gun -- in Kormondy's hand. In Livingston v. State, 565 So. 2d 1288 (Fla. 1988), the opinion omits any mention of what witness Baker had said, so there is no way to compare the harmful impact of that prior statement to the evidence in the present case. Moreover, whatever Baker's prior statement had been, the

Court said the jury already had heard the same evidence from Baker himself, contrary to the present case where the challenged double hearsay statement presented a new critical fact in addition to bolstering the credibility of this witness. Similarly, in Caruso v. State, 645 So. 2d 389 (Fla. 1994), the prior consistent statement of Walker mirrored what had been testified to already, so the error did not result in any new, critical fact being placed in evidence. Also, Walker's testimony was not critical to any guilt or penalty issue, and there is nothing in that opinion to suggest that her credibility had been questioned. Finally, in Hutchinson v. State, 559 So. 2d 340 (Fla. 4th DCA), review denied, 576 So. 2d 288 (Fla. 1990), the court found no error in the admission of the statement, and gave no details of the evidence by which one could not assess harm.

ISSUE II: THE TRIAL COURT ERRED BY NOT GRANTING A JUDGMENT OF ACQUITTAL AS TO PREMEDITATED MURDER BECAUSE THE STATE FAILED TO EXCLUDE THE REASONABLE HYPOTHESIS ESTABLISHED BY ITS OWN EVIDENCE OF AN ACCIDENTAL, UNPREMEDITATED SHOOTING; AND THE COURT COMPOUNDED THE ERROR BY NOT INVALIDATING THE MURDER VERDICT AND INSTRUCTING THE JURY TO CONSIDER PREMEDITATION

The State made some bold statements purporting to be factual accounts of who did what during the incident, when many "facts" are, in actuality, not clearly established in this somewhat muddy record. For example, the State said T1117 demonstrates that Kormondy was the only defendant to have "stringy" hair at the time of arrest, AB17, but the transcript reference does not so demonstrate. The State said the roles of the three codefendants were clearly defined as Buffkin being the "robber," Hazen being

the "rapist," and Kormondy being the "murderer." AB1; T1411, T1413. However, this is merely the prosecutor's rhetorical conclusion in closing argument repeated by the State in its answer brief, and it should not be confused as "fact." The same can be said of the State's conclusion that "[t]his 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 witnesses)." AB22-23 (emphasis supplied). This rhetoric is both doubtful and unsupported.

The State at trial expressly conceded to the jury numerous times that the State did not know from the evidence which of the three codefendants committed many of the various acts in the course of this episode, and the State cannot now take a contrary position.[1] The State on appeal is entitled to reasonable

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[1] For example, the prosecutor repeatedly lumped codefendants together in closing argument by referring to what "they" did, unable to identify which of the codefendants had done many of the specific acts. See, e.g., T1405, 1406, 1407, 1408, 1409, 1410. The prosecutor said "I do not know which one" of the defendants found the murder weapon in the bedroom. T1405. The State admitted it did not know whether Kormondy or Hazen had come back to Mrs. McAdams with the pistol. T1405. The prosecutor said one "accomplice" took Mrs. McAdams into the bathroom and then was joined by "the second accomplice." T1406. When they finished, the prosecutor said, "one of them, either the defendant or his accomplice, Hazen," told her to sit up, and "the other one" had difficulty with an erection. T1406-07. The prosecutor again conceded nobody knows from the evidence which of the defendants took socks off and laid them on the counter while Buffkin was with Mrs. McAdams, asking the jury "Who was doing what," T1408, and answering his own question with "We don't know," T1409. The prosecutor admitted that "the State cannot point out conclusively who did what and when" from the vaginal swab evidence. T1416.

inferences, but inferences are not reasonable when the prosecutor himself did not deem such inferences appropriate at trial.

The State's premeditation argument boils down to its mischaracterization of the issue, asking this Court to focus entirely on inconsistencies in appellant's statements. The State hopes that by putting the focus there, rather than on the State's entire case, this issue will fall within the general rule that a jury is entitled to disbelieve the defendant's version of the facts. AB20-23. That rule is inapplicable because all the State's evidence -- not just Kormondy's statements -- failed to establish premeditation inconsistent with every other reasonable hypothesis, in particular the reckless, accidental or reflexive shooting. Only after the State presented evidence inconsistent with other reasonable hypotheses is a jury question presented. E.g. Hoefert v. State, 617 So. 2d 1046, 1048 (Fla. 1993).

In cases relied on by the State, evidence aside from the defendants' own respective statements had been inconsistent with their alternative hypotheses. In Peterka v. State, 640 So. 2d 59, 68 (Fla. 1994), cert. denied, 115 S. Ct. 940, 130 L. Ed. 2d 884 (1995), the State presented evidence "conflicting" with the defendant's theory, whereas none was presented here. In Pietri v. State, 644 So. 2d 1347 (Fla. 1994), cert. denied, 115 S. Ct. 258, 132 L. Ed. 2d 836 (1995), independent evidence tended to refute the defendant's theory of the crime, whereas that is not true here. In Asay v. State, 580 So. 2d 610 (Fla. 1991), cert. denied, 502 U.S. 895, 112 S. Ct. 265, 116 L. Ed. 2d 218 (1992), evidence clearly established premeditation, and no evidence,

including the defendant's own statements, tended to support the defendant's claim of an impulsive shooting. Here, all of the evidence is consistent with an accidental or reflexive shooting.

The State attempted to rebut case law cited by the appellant by saying in all those cases the facts of the murders were "essentially speculative" and/or the evidence there showed no more than an intent to commit the underlying felonies. AB23. If anything, the facts in those cases were far more clear-cut than in the present case. Likewise, the only evidence of intent prior to the crime was an intent to rob, and during the episode an intent to commit sexual battery, so the State's co-called "distinction" fails. The State claimed defendants "had a number of purposes," AB24, yet there was no proof of a premeditated plan to kill, certainly no proof inconsistent with any other reasonable hypothesis as required by law. And even if Kormondy "had the opportunity to fully form an intent to kill," AB24, an "opportunity" is not proof of a fully formed, conscious purpose to kill, nor is having the opportunity inconsistent with the accidental or reflexive firing of the weapon.

The State alternatively claimed that the erroneous instruction as to premeditation was waived by lack of objection. AB26. Any such objection would have been futile given that the judge had just denied the defense's motion for judgment of acquittal on a sufficiency of evidence ground.

As to harmfulness, AB26, no general jury verdict should be sustained under the Florida Constitution where the verdict is predicated on two theories of prosecution, only one of which is

supported by sufficient circumstantial evidence to survive a judgment of acquittal. Appellant recognizes that the federal rule presently is to the contrary, Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991). However, this Court has not applied that rule to the due process clause of article I, section 9, Florida Constitution. That clause gives greater protection than its federal counterpart, Haliburton v. State, 514 So. 2d 1088 (Fla. 1987), and that protection should apply here against this jury's ambiguous finding.

ISSUE III: THE TRIAL JUDGE VIOLATED KORMONDY'S CONSTITUTIONAL RIGHTS IN THE PENALTY PHASE BY PERMITTING THE STATE TO PRESENT EVIDENCE OF BAD CHARACTER INCLUDING UNCONVICTED CRIMES OR WRONGS, OTHER ACTS, AND NONSTATUTORY AGGRAVATING CIRCUMSTANCES

A. Kevin Beck's testimony about Buffkin was impermissible.

The State claims the violation of Mr. Kormondy's rights under the sixth amendment, e.g. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and article I, section 16, were not preserved. AB30. Kormondy argued his constitutional rights, citing to the appropriate constitutional provisions, T1803, and the judge overruled those objections, T1803. Kormondy also argued these issues as due process issues, and that ground was overruled as well. T1803.

The State attempts to rebut Derrick v. State, 581 So. 2d 31 (Fla. 1991) by claiming that Kormondy's inadmissible double-hearsay deposition statement made months after the crime about his present desire to kill another person at some unspecified future time is relevant to prove that months earlier he had fully

formed a motive to eliminate the deceased. AB31. This is tenuous, far fetched, speculative, remote in time, and inherently unreliable. The focus must be on appellant's then-existing motive, which had to be fully formed at the time of the killing, e.g. Stein v. State, 632 So. 2d 1361, 1366 (Fla.), cert. denied, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994), and had to be proved with "very strong," "positive" evidence, not evidence that requires speculation, Hannon v. State, 638 So. 2d 39, 44 (Fla. 1994), cert. denied, 115 S. Ct. 1118, 130 L. Ed. 2d 1081 (1995); Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S. Ct. 1937, 104 L. Ed. 2d 408 (1989). Speculative evidence of present state of mind indicating rumblings to commit a crime in the future has no logical or legal bearing whatsoever whether a motive toward a different person existed six months earlier. Cf. Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975) (post-death trauma to murder victim is not probative of whether that just-committed murder had been heinous, atrocious or cruel); Heath v. State, 648 So. 2d 660, 665 (Fla. 1994) (defendant's state of mind when he made a statement long after a murder is not an issue in murder trial), cert. denied, 115 S. Ct. 2618, 132 L. Ed. 2d 860 (1995). Moreover, the State mischaracterizes the record by claiming Beck said the appellant would kill Ceclia McAdams "because she could identify him." AB31. In fact, Beck did not say anything about Buffkin's saying why Kormondy said what he purportedly said.

The State's cases are materially distinguishable. Floyd v. State, 569 So. 2d 1225 (Fla. 1990), cert. denied, 501 U.S. 1259,

111 S. Ct. 2912, 115 L. Ed. 2d 1075 (1991), involved a resentencing before a new jury in which the State introduced Floyd's threat to kill his cell mate to whom he had confessed his intent and acts to commit a burglary and a killing during the burglary. This Court found Floyd's threat relevant in the resentencing proceeding to prove guilty knowledge of the burglary. The State may have been within its prerogative to re-present evidence of Floyd's guilt, including guilty knowledge of the enumerated felony, to a jury that had not yet heard all the facts of the crime. Here, however, the same jury already heard all the evidence of Kormondy's guilt, and guilty knowledge was not in issue in the penalty phase. The issue in this case was witness elimination, not, as in Floyd, murder committed during an enumerated felony that had to be proved again. Here, the "threat" against Mrs. McAdams was nothing more than speculative rumblings of a prisoner who had no means to carry them out, contrasted with a prisoner's very real threat to kill his cell mate. Here, there is no connection between appellant's present state of mind as to one person and his former state of mind as to another, whereas there was a direct connection between Floyd's telling his cell mate he committed a burglary and murder, and Floyd's own guilty knowledge of those acts, a fact that was relevant to prove that aggravator to a new jury.

Finney v. State, 660 So. 2d 674 (Fla. 1995), cert. denied, 116 S. Ct. 823, 133 L. Ed. 2d 766 (1996), cited by the state, actually supports the petitioner. The Court found error in the admission of evidence of crimes committed two weeks after the

murder because those facts did not explain the earlier crime for which he was facing the death sentence.

Alternatively, if Floyd is not distinguishable, appellant contests its holding that evidence to prove consciousness of guilt in a penalty phase is admissible. Guilt is not an issue in a penalty phase, so evidence introduced and admitted to prove guilt is necessarily irrelevant. Moreover, Floyd is grossly inconsistent with this Court's holding that a defendant's evidence of residual doubt of guilt is inadmissible in a penalty phase, see Preston v. State, 607 So. 2d 404, 411 (Fla. 1992), cert. denied, 507 U.S. 999, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993). It makes no sense to allow the State to present evidence to prove guilt when guilt is not an issue, while an accused is denied the right to present evidence of innocence under identical circumstances. This Court has spoken of a desire to "level the playing field" in capital cases by giving the State benefits (to which it has no constitutional right) for the sake of fairness and objectivity. Dillbeck v. State, 643 So. 2d 1027, 1030 (Fla. 1994), cert. denied, 115 S. Ct. 1371, 131 L. Ed. 2d 226 (1995). Yet the Floyd rule, when viewed in light of Preston and similar cases, does just the opposite, placing this Court's "thumb [on] death's side of the scale," Stringer v. Black, 503 U.S. 222, 232, 112 S. Ct. 1370, 117 L. Ed. 2d 367 (1991), contrary to appellant's state and federal constitutional rights to due process, equal protection, a fair trial and appeal, and against cruel and/or unusual punishment.

The State claims harmless error. Few errors could be more damaging and could do more to unfairly prejudice the defendant in the eyes of the jury, creating "the risk that the jury will give undue weight to such information in recommending the penalty of death." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). As this Court said in Derrick, such evidence is "highly prejudicial because it suggests [the appellant] will kill again." 581 So. 2d at 36. Moreover, Bruton held that the inherent unreliability and devastation of incriminations of a codefendant are compounded when a codefendant's statements are spread before the jury untested by cross-examination, as occurred here. 391 U.S. at 136. The weight of harm is so great that it cannot be cured even by limiting instructions. Id. at 387.

The State alternatively argues for the first time on appeal a new theory of admissibility, claiming the evidence was properly admitted as rebuttal evidence. AB32. That issue is procedurally defaulted because the State did not raise the issue in the trial court. Dupree v. State, 656 So. 2d 430, 432 (Fla. 1995) (State barred from arguing a ground of admissibility of evidence on appeal when that ground was not raised in the trial court); Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) (State barred from arguing issue for first time on appeal because "procedural default rules apply not only to defendants, but also to the State"). Moreover, the evidence does nothing to rebut the defense's mitigation evidence. To the contrary, it is completely consistent with the defense's mitigation case. In any event, the defense has consistently maintained that the evidence's undue

prejudice outweighs whatever probative value it may have had. See § 90.403, Fla. Stat. (1991).

B. Allegations of unconvicted crimes of homosexual rape and cocaine possession while in jail awaiting trial for this crime, and presentation of Kormondy's juvenile record, were impermissibly introduced.

The State places undue focus on procedural default. Appellant acknowledged defense counsel had contemporaneously objected to only some of the improper evidence and shortly thereafter moved for a mistrial. The primary focus is the fundamentally unfair and unduly prejudicial nature of the collateral crimes character evidence. Derrick, Hitchcock v. State, 21 Fla. L. Weekly S139 (Fla. March 21, 1996), Geralds v. State, 601 So. 2d 1157, 1162-63 (Fla. 1992), Garron v. State, 528 So. 2d 353, 358 (Fla. 1988), Robinson v. State, 487 So. 2d 1040 (Fla. 1986), Maggard v. State, 399 So. 2d 973, 977-78 (Fla.), cert. denied, 454 U.S. 1059, 102 S. Ct. 610, 70 L. Ed. 2d 598 (1981), unambiguously establish that the State was not entitled to introduce collateral crimes evidence and nonstatutory aggravation in the penalty phase under the guise of impeachment, especially when the mitigating circumstance of no significant history of prior criminal activity had been waived and the State had no other good faith basis to seek to introduce this evidence.

The State erroneously argues that "claims of this nature must be preserved and do not constitute fundamental error," AB37, relying on Farinas v. State, 569 So. 2d 425 (Fla. 1990), and Peterka v. State, 640 So. 2d 59 (Fla. 1994), cert. denied, 115 S. Ct. 940, 130 L. Ed. 2d 884 (1995). Farinas merely stands for the

familiar proposition that issues should be preserved for review unless, on the facts of a given case, they amount to fundamental error. Peterka does not address the fundamental error issue at all, instead disposing of the objection that the evidence had been beyond the scope of direct examination. Additionally, the evidence here is much more prejudicial than the evidence in Peterka, which dealt with a mere juvenile adjudication for delinquency for burglary at some time in the defendant's past. Here the evidence dealt with an allegation of a violent homosexual sex crime committed just before this trial. The State is wrong to suggest that Farinas and Peterka typify claims of "this nature," because claims of this nature deal with the introduction of significant nonstatutory aggravating circumstances and collateral bad acts evidence that goes right to the heart of the ultimate penalty phase issue, and those claims were decided for the accused in Derrick, Hitchcock, Geralds, Garron, Robinson, and Maggard. The question of fundamental error depends on the facts of this case.

The State also relies on a line of cases arising from Parker v. State, 476 So. 2d 134 (Fla. 1985), for the proposition that no error had been committed. AB38-39. Those cases are distinguishable. To the limited extent that those cases permit the State to introduce nonstatutory collateral crimes evidence through cross-examination of a defense mitigation witness even when the mitigator of lack of significant history of prior criminal history had been waived, the evidence would have to be of an alleged crime committed before the murder, not before the

sentencing. Harvey v. Dugger, 656 So. 2d 1253, 1257 (Fla. 1995) ("when considering the existence of this mitigator, the term 'prior' means before the commission of the murder", not before the sentencing). The evidence here was of an alleged crime committed after the murder, whereas the evidence introduced in Parker and the other cases on which the State relies was of prior criminal activity that took place before the respective murders, comprising defendants' prior histories on which the defense experts testified. Also, on the facts of this case, Dr. Larson's testimony focused on the conditions of Kormondy's upbringing and development leading up to the murder, so the doctor's knowledge of crimes committed thereafter is irrelevant. Furthermore, the fact that another crime may have been committed does nothing to impeach any of Dr. Larson's conclusions. The State had no good faith basis to use the cross-examination of either Dr. Larson or of Kormondy's mother to introduce this horribly prejudicial evidence. The only reason it did so was to lay inadmissible character evidence before the co-sentencers.

The State also claims Kormondy opened the door in his mother's cross-examination. AB41. However, the record belies that contention because she said nothing in that proceeding about rehabilitation, unlike what occurred in Bonifay v. State, 626 So. 2d 1310 (Fla. 1993). And she said nothing whatsoever that knowledge of the homosexual rape allegation could rebut or impeach. Gunsby v. State, 574 So. 2d 1085 (Fla.), cert. denied, 502 U.S. 843, 112 S. Ct. 136, 116 L. Ed. 2d 103 (1991), is not

relevant because that opinion does not detail what the character witness said to open the door to specific act impeachment.

C. The trial judge violated Kormondy's constitutional rights by allowing the State to manufacture a purported act of contempt for not testifying in Hazen's trial, by issuing a judgment of contempt, by jailing him indefinitely for contempt, and by using the contempt finding against Kormondy in sentencing him to die.

By relying on the fact that immunity had been offered, the State entirely overlooks the fact that whatever immunity had been offered was, of necessity, a frivolous, meaningless, sham offer when, as here, the sentence had not yet been imposed.

D. The State was permitted to introduce over objection bad character evidence in impeaching Kormondy's brother.

The record defeat's the State's preservation claim:

> Q. [by prosecutor] When did you meet Curtis Buffkin?
> MR DAVIS [defense] Objection. Beyond the scope of direct.
> THE COURT: Overruled.
> Q. [by prosecutor] When did you meet Curtis Buffkin?
> A. I saw him -- I can't remember a date. I've only seen the man one time.
> Q. That's when you went out to a go-go place with him or a strip joint?
> A. Yes, sir.
> Q. So who went out to the strip joint with you and Curtis Buffkin?
> A. Me. Shane, Curtis, and Vernon.
> Q. Was this before or after the murder?
> A. To the best of my recollection, it was after, but I can't remember exactly.

T1675-76. Clearly the improper facts flowed directly from the objected to question, and they would not have been heard by the jurors but for the trial court's erroneous ruling.

ISSUE IV: THE COURT COMMITTED MULTIPLE ERRORS IN ERRONEOUSLY INSTRUCTING, FINDING, AND DOUBLING AGGRAVATING CIRCUMSTANCES, THEREBY VIOLATING

FLORIDA LAW AND KORMONDY'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS

A. Cold, calculated and premeditated should not have been instructed or found.

1. The instruction should not have been given.

The State claims Kormondy's counsel "created" the error. AB53-54. However, the instruction was agreed to only after the judge repeatedly rejected defense counsel's timely objections as to both the propriety and constitutionality of the instructions. R148; T216-17; R161-75; T221-25; R290-92; T217; T225; T1506-07; T1850-56; T1851-52. None of the State's cases stand for the proposition that defense counsel's cordial, inevitable, and ethically-required acceptance of a judge's repeated adverse rulings amounts to defense counsel's creation of error. Constitutional claims must be judged by "reason and common sense," not an "arcane maze" of procedural traps. Melbourne v. State, 21 Fla. L. Weekly S358, 360 (Fla. Sept. 5, 1996). Moreover, this Court has made clear that counsel is not required to submit a proposed alternative instruction to preserve the claim as long as he timely objected to language of the instruction. E.g. Crump v. State, 654 So. 2d 545, 548 (Fla. 1995) ("The objection at trial must attack the instruction itself, either by submitting a limiting instruction or by making an objection to the instruction as worded.") (emphasis supplied); Walls v. State, 641 So. 2d 381, 387 (Fla. 1994) (same), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995).

It should be impossible for this Court to accept the State's claim that the vague, inadequate, and inappropriate instruction

amounted to a mere harmless "technical error." AB54. Contrary to the State's averment, AB54, CCP theoretically could be defined in a constitutional fashion if we truly understood what each element of the factor means. But when "calculated" has been construed to be the same as "premeditated," and "premeditated" has been construed to be something more than "premeditated," one can only be left to guess at the meaning of this instruction.

Moreover, a new jury proceeding is required when the jury considers a significant aggravating circumstance unsupported by the evidence. Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993).

2. The factor was erroneously applied.

Many of the State's cases, AB57-58, applied the now-extinct, lax standard pre-dating Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988), such as Eutzy v. State, 458 So. 2d 755 (Fla. 1984) (jury returned a special verdict finding premeditation in the guilt phase, and the Court gave total deference to guilt-phase premeditation as support of the aggravating circumstance, contrary to contemporary constitutional requirements), cert. denied, 471 U.S. 1045, 105 S. Ct. 2062, 85 L. Ed. 2d 336 (1985). And all predated this Court's tightening and clarification of the CCP requirements in Jackson v. State, 648 So. 2d 85 (Fla. 1994). Therefore the cases cited by the State are inapplicable. Moreover, the facts in those cases are materially different from the present case, and to the extent they may represent good law, the proof of CCP in those cases is clear.

In Lightbourne v. State, 438 So. 2d 380 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1330, 79 L. Ed. 2d 725 (1984), the defendant, acting alone, placed a pillow between the gun barrel and the victim's head before firing, unerring proof that he thought about and planned to fire the gun into her head while muffling the sound to avoid detection. In Swafford v. State, 533 So. 2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100, 109 S. Ct. 1578, 103 L. Ed. 2d 944 (1989), the victim had been shot with Swafford's gun nine (9) times, two (2) to the head and one (1) to the chest; the killer had to stop and reload at least once; and Swafford made highly incriminating statements about how he would get rid of a woman by firing multiple gunshots in her head. In Jackson v. State, 522 So. 2d 802 (Fla.), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 153 (1988), Jackson killed two people. First he shot McKay in the back after arguing about drugs, drove off to a remote area and shot McKay again. Then cleaned his car to conceal the crime, came upon Milton, shot him after arguing about drugs, drove to another remote area, and shot him several more times, dumping both bodies in a river. In Occicone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied, 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991), the defendant had made statements that he disliked his girlfriend's mother and father and thought about killing them, and he threatened his girlfriend's relatives. Then he went to his girlfriend's parents' house, and when they refused to talk to him, he left, returned an hour later with a gun, and murdered them both, chasing down the mother and shooting her four times.

In Owen v. State, 596 So. 2d 985 (Fla.), cert. denied, 506 U.S. 921, 113 S. Ct. 338, 121 L. Ed. 2d 255 (1992), Owen bludgeoned the victim with five blows of a hammer as she slept, strangled her, then sexually assaulted her. Finally, in Maharaj v. State, 597 So. 2d 786 (Fla. 1992), cert. denied, 506 U.S. 1072, 113 S. Ct. 1029, 122 L. Ed. 2d 174 (1993), Maharaj murdered a father and son as the result of an ongoing dispute. Maharaj appeared from behind a door with a gun and a small pillow, argued with the father and shot him; tied up the son; shot the father again three or four times; shot him yet again as he crawled away; and then shot the son.

This case is much more like Hamilton v. State, 21 Fla. L. Weekly S227, 228-229 (Fla. May 23, 1996). This Court rejected the finding of CCP where no motive for the murder had been proved beyond a reasonable doubt and the evidence was consistent with an alternative theory, a rage killing. Here, because the evidence is consistent with the alternative theory of an accidental or reflexive shooting, the same result should obtain. A new jury proceeding is required. E.g. Padilla.

B. Witness elimination should not have been instructed or found.

1. The instruction should not have been given.

The State says there is no "good cause" to revisit the witness elimination instruction. AB59-60. However, the State certainly took the same position with respect to CCP before Jackson v. State, 648 So. 2d 85 (Fla. 1994), and the State certainly took the same position with respect to HAC before

Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992). The time has come to clarify the vague and ambiguous jury instruction that presently gives none of the guidance that this Court, and the state and federal constitutions, require. Appellant recited numerous legal requirements never disclosed to jurors, any one of which could mean the difference between a life and death recommendation. That is "good cause."

The State also claims the matter is barred because no alternative instruction had been offered. AB59-60. That is wrong legally and factually. First, as noted above, counsel is not required to submit a proposed alternative instruction to preserve the claim as long as he timely objected to language of the instruction. Crump v. State, 654 So. 2d 545, 548 (Fla. 1995); Walls v. State, 641 So. 2d 381, 387 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995). Second, not only did appellant timely object on the grounds argued here, he stated with specificity and case law citation the requirements of law set forth judicial decisions that the instruction failed to incorporate. R229-37; T1507; T1843-45. Surely requiring more would elevate form over substance, creating an arbitrary and artificial barrier to prevent deciding preserved issues on the merits. The cases on which the State relies do not, and could not, support such a broad and flawed proposition. Also, it was error to give the instruction because, as this Court held in Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993), a new jury

proceeding is required when the jury is instructed to consider a significant aggravating circumstance unsupported by the evidence.

2. The factor was erroneously applied.

The State agrees that the judge relied on facts not in this record, arguing that it had been invited by defense counsel. AB62-63. Although the State's concession is well taken, its argument is not. The first paragraph the State quoted from defense counsel's sentencing memo, AB60, correctly reflects the evidence of Kevin Beck, who testified as to some particulars of Buffkin's deposition, compare R441 with T1799-1804. Defense counsel did nothing improper or "inviting." In the second quoted paragraph, AB60-61, defense counsel did not bring to the court's attention any fact not in evidence in this trial. Evidence that Kormondy's face was covered had been presented to this jury. Compare R442 with T1084-91, T1240-41. The judge's employing the phrase "by all accounts of the crime," AB61, R602, does not suggest he responded to invitation to go outside the record after hearing numerous accounts of the crime in this trial.

Neither Florida nor federal law permits a judge to find facts not in evidence (even had counsel asked the judge to do so, which counsel did not), and the State cites no authority holding otherwise. In fact, this Court recently found error in identical circumstances in Hartley v. State, 21 Fla. L. Weekly S391, S394 (Fla. Sept. 19, 1996), where the trial judge who separately tried and sentenced two codefendants erred by relying on facts from codefendant Ferrell's case in sentencing Hartley. See also, Consalvo v. State, No. 82,780 Slip op. at 23-26 (Fla. Oct. 3,

1996). (Constitutional error in court's use of statement from depositions, that had not been introduced, in sentencing defendant to death.)

Essentially, the State complains for the first time on appeal that appellant's argument at trial was improper. If the State thought counsel's argument was improperly based on facts not in evidence, the State was obligated to raise that issue before the judge, e.g. Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994), and its failure to timely do so cannot now be used as both a shield and a sword. Dupree v. State, 656 So. 2d 430, 432 (Fla. 1995); Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). Regardless, judges both in the trial and appellate courts are obligated by law to reject arguments based on facts not in the record. If the facts were not presented in this case, the judge erred by relying on such facts irrespective of how convincingly, or by whom, they were argued.

The State's reliance on Vining v. State, 637 So. 2d 921, 927 (Fla.), cert. denied, 115 S. Ct. 589, 130 L. Ed. 2d 502 (1994), is highly suspect, for the State omits to disclose the one fact critical to the decision contained in the very next sentence after the one quoted by the State -- that the judge had put counsel on notice in writing long before imposition of sentence:

> The record contains two letters from the trial judge that clearly inform counsel that the judge had reviewed these materials. The first letter was filed in open court on March 1, 1990, during a motion hearing prior to the penalty phase trial that commenced on March 7, 1990. The second letter was mailed to counsel on March 14, 1990, over three weeks before sentencing by the judge on April 9, 1990. Yet, defense counsel never raised

> any objection to the judge's review of these materials during the motion hearing, the penalty trial, or the sentencing proceeding. In fact, the record of the motion hearing reveals several instances where the judge discusses his review of depositions without comment or objection by defense counsel. Thus, contrary to Vining's assertion on appeal, the judge's consideration of this material was not revealed for the first time in the sentencing order.

Vining, 637 So. 2d at 927. Certainly that did not happen here. The first time Kormondy's counsel learned the judge would rely on evidence not in this record was when the judge read the sentencing order in open court.

The nonexistent evidence on which the judge relied was not "somewhat cumulative," "surplusage," or "harmless," as the State would have this Court believe, AB64. The purported evidence on which the judge relied was that Kormondy pulled the hammer back to cock the weapon, and when Buffkin saw that, he vehemently protested; then Kormondy, rejecting Buffkin's protest, fired the fatal shot. R603. This is most damning because if true it might have supported guilt-phase premeditation, CCP, and might have influenced the judge's finding of witness elimination; plus it would help defeat mitigation that Kormondy had not been as culpable as Buffkin, who got a lesser sentence.

Contrast the nonexistent evidence on which the judge relied with what actually was presented. There was no evidence as to whether the gun in fact had or had not been cocked. T1194, T1240, T1284, T1292-93; R370; T1808. There was expert testimony that it would have taken ten to twelve pounds of pressure to fire a gun like the murder weapon had such a gun been in good

condition and had the gun not been cocked. T1314. There was expert testimony that it would be unlikely such a gun would have discharged by being bumped against the victim's head without being cocked. T1315. But (1) There was no evidence of the pressure required to fire such a weapon had it been cocked, T1314-17; (2) There was no evidence that had the gun been cocked it could not have been discharged accidentally under the circumstances, T1314-17; (3) There was no evidence that the actual murder weapon had been in good working condition and had fit manufacturer's specifications on the day of the crime, T1322-23; and (4) there was evidence the gun in fact had been fired accidentally or reflexively, T1292-93; T1808; R370. Consequently, there was no evidence to eliminate the reasonable possibility that had the weapon been cocked when it was being bumped, it could have been discharged accidentally.

The cases on which the State relies, AB 65-66, are easily distinguishable. In Thompson v. State, 648 So. 2d 692 (Fla. 1994), cert. denied, 115 S. Ct. 2283, 132 L. Ed. 2d 286 (1995), the killer returned to the place where he had been fired, killing two of his fellow former-coworkers when he went to steal money he believed their employer owed him. When discovered, Thompson stabbed one victim nine times and shot her in the face, and shot the other in the head. There is also no mention of any reasonable hypothesis of an accidental or reflexive killing or some other motive. In Espinosa v. State, 589 So. 2d 887 (Fla. 1991), reversed on other grounds, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), Espinosa and his co-defendant violently

struggled with Bernardo Rodriguez in the victim's kitchen over a drug haul Bernardo wanted them to get involved with. They shot Bernardo once and stabbed him six times. That victim's wife, Teresa, witnessed the crime, pleaded with them to leave, and promised not to call the police to identify them; so they grabbed her, dragged her off, suffocated her with a pillow and stabbed her six times. Upon realizing the couple's daughter, Odanis, was present, they lured Odanis out of her room and stabbed her sixteen times. There was no doubt the murder of Teresa had been to eliminate her as a witness, and no other reasonable hypotheses was discussed. In Correll v. State, 523 So. 2d 562 (Fla.), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988), Correll repeatedly stabbed and killed his ex-wife, Susan Correll, her sister, Marybeth Jones, their mother, Mary Lou Hines, and the Corrells' five-year-old daughter, Tuesday, culminating a history of family problems. It was evident that Correll, who went to the home to murder his wife, intended to leave no survivors in the house. Marybeth, who knew Correll, had come to that home right after the other three murders had taken place. Tuesday also was a likely witness to the murders, and because her relationship with her father had been cordial, there was no reasonable hypothesis other than witness elimination to explain her murder.

The erroneous finding of this circumstance cannot be deemed harmless beyond a reasonable doubt, AB 66-67, given that it was the theory of the State's case throughout both phases, T1410, T1433, T1890, and the judge heavily relied on it. The harm also

must be reviewed in light of the other errors and strong mitigation. A new jury proceeding is required. E.g. Padilla.

C. Pecuniary gain should not have been instructed or found.

Again the State asks this Court not to review an instruction where it had been timely objected to and supported at trial, using the guise of procedural bar for want of a proffered expanded instruction. AB68-69. Appellant, however, did timely raise the issue and cited case law setting forth requirements not incorporated in this instruction. R223-28; T1507-08; T1845-47. The issue was adequately preserved. E.g. Crump v. State, 654 So. 2d 545, 548 (Fla. 1995).

The state claims appellant is "simply wrong" in demonstrating that the pecuniary gain cannot be vicariously imputed to him. AB71; see IB83. However, that State's bold assertion is both unsupported by its cases and is unsupportable for reasons stated in the initial brief. James v. State, 453 So. 2d 786 (Fla.), cert. denied, 469 U.S. 1098, 105 S. Ct. 608, 83 L. Ed. 2d 717 (1984), does not even address the pecuniary gain aggravating circumstance because it had not been found in that case. Copeland v. State, 457 So. 2d 1012 (Fla. 1984), cert. denied, 471 U.S. 1030, 105 S. Ct. 2051, 85 L. Ed. 2d 324 (1985), discusses only whether Copeland could be held vicariously responsible for that aggravating circumstance under a felony-murder theory of prosecution. This issue was not raised in that case. Moreover, there had been no evidence of an accidental or reflexive killing in Copeland, where the woman was shot three

times. Here the accidental shooting and the other facts render at least doubtful a finding that Kormondy personally had fully formed a motive to kill, no less for pecuniary gain. The State's cases also had not contemplated the analysis of Archer v. State, 613 So. 2d 446 (Fla. 1993), and Omelus v. State, 584 So. 2d 563 (Fla. 1991), which the State was unable to distinguish.

D. The judge erroneously doubled factors of committed during a burglary with pecuniary gain, and CCP with witness elimination.

The State concludes that the cases on which appellant relies are "distinguishable," yet the State offers no rationale in support. AB74. Instead, the State relies on three cases that are inapplicable, for in each case the trial judges expressly found the aggravator of murder committed during an enumerated felony had been based on two distinct crimes, robbery and rape/sexual battery, rendering the inappropriate one to be what this Court called "harmless surplusage." Brown v. State, 473 So. 2d 1260, 1267 (Fla.) (judge made findings of murder committed during a "burglary and rape" to support aggravator, rendering burglary finding surplusage for pecuniary gain doubling purposes), cert. denied, 474 U.S. 1038, 106 S. Ct. 607, 88 L. Ed. 2d 585 (1985); Brown v. State, 381 So. 2d 690, 695 (Fla. 1980) (same where judge based aggravator on "Robbery and Rape"), cert. denied, 449 U.S. 1118, 101 S. Ct. 931, 66 L. Ed. 2d 847 (1981); Lightbourne v. State, 438 So. 2d 380, 391 (Fla. 1983) (same where judge based aggravator on "burglary and sexual battery"), cert. denied, 465 U.S. 1051, 104 S. Ct. 1330, 79 L. Ed. 2d 725 (1984). The judge in this case based his finding on only one underlying

felony -- the burglary - rendering these cases inapplicable, and instead bringing Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2929, 53 L. Ed. 2d 1065 (1977), and its progeny, into play. IB84. The judge also made no finding that appellant's intent to commit a burglary had a broader and independent motive apart from theft, and the evidence supports none. There is no evidence that appellant knew a woman was in the house when the intruders broke in, and all of the evidence of intent before the break-in is of intent to steal.

The State therefore suggests this Court find and apply an essential element of an aggravating circumstance not expressly found and applied by the trial judge. That would be highly improper, well beyond the bounds of this Court's appellate function, and would violate the fair trial and appeal, due process, and cruel and/or unusual punishment protections of the Florida and United States Constitutions.

The State also fails to explain why doubling the witness elimination and CCP factors was not error even though the judge expressly relied on the same precise grounds to support each.

ISSUE V: THE JUDGE ERRONEOUSLY FAILED TO FIND VALID MITIGATION ESTABLISHED BY THE EVIDENCE, THEREBY DISTORTING THE WEIGHING PROCESS IN VIOLATION OF KORMONDY'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS

A. The judge relied on erroneous and unsupported reasons to reject Kormondy's youthful age of 21.

The State's argument boils down to fact that the judge had some discretion to reject Kormondy's age of 21 as mitigation. AB75-79. That is not novel, and appellant stated so in his

initial brief. IB86. The issue here, however, is whether the facts upon which this judge relied were unsupported and inappropriate to reject age in this case, IB87-88, and to that the State offers no legal or factual analysis or support.

B. The judge erroneously rejected Kormondy's history of drug and alcohol addiction as non-statutory mitigation.

The State's answer suggests that it was "reasonable" for the judge to misapprehend and misapply the facts and law. AB82. That is unsupportable on any ground, legally or logically. The State's reliance on Arbalaez v. State, 626 So. 2d 169 (Fla. 1993), cert. denied, 114 S. Ct. 2123, 128 L. Ed. 2d 678 (1994), lends no credence to its argument. That case dealt with a man who suffered epilepsy, a disorder that occasionally causes convulsions or seizures in a person who otherwise is normal and in full control, and Arbalaez suffered no epileptic seizure within the period embracing his criminal episode. In contrast, this case is about an extensive history of long-term drug and alcohol abuse and addiction dating back at least to childhood, disorders that caused numerous personality and behavioral problems including distorted beliefs, values, and actions on a continuing, ongoing basis. The ever present affects of addiction cannot be analogized to the absence of an epileptic seizure. Also, addiction drives the addicted person to acquire intoxicants and the money to buy them. Surely the drive for drug money was the very genesis of the criminal episode at issue here.

C. The judge erroneously rejected unrefuted evidence of Kormondy's learning disability and lack of education as nonstatutory mitigation.

The State again misrelies on Arbalaez and says rejection of uncontroverted mitigation was merely a "technical error." AB85. For the same reasons as stated above, the State's reliance on epilepsy and intoxication cases is misplaced and unsupportable, as is its claim of "technical error." Learning disability and poor education are ever-present conditions that cannot by nature be linked to particular aspects of particular crimes. The legally and factually uncontroverted mitigation had to be found.

E. The judge applied an erroneous reason to reject Kormondy's cooperation with law enforcement as nonstatutory mitigation.

The State asks this Court to overlook what the judge himself viewed to be a "significant" basis of his ruling. AB86-87; R613; R573-74. That is illogical and defies the very underpinnings of harmless error analysis required by the state and federal constitutions, placing the burden on the State to show beyond a reasonable doubt that the error did not affect the finding. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Saying that a particular fact supports a conclusion can in some instances be surplusage; but the fact that the judge himself deemed it a "significant" basis for his decision necessarily makes it impossible to say the State has carried its burden.

The State also said the judge found no "facts were proffered" in support of this mitigator, AB87, whereas the judge actually said no "argument" had been made in the sentencing memo, R615. Counsel need not present legal argument. Counsel argued the factor to the jury, T1925, raised the mitigator again with

the judge, R447, and facts in the record and known to the judge established that Kormondy indeed cooperated with the law officers by giving two voluntary inculpatory statements that were used to identify and capture his codefendants to close the case, T1246.

F. The judge erroneously rejected the disparate treatment of Buffkin where evidence showed the shooting was not premeditated, and Buffkin, if anybody, was the leader.

This is a unique situation because assuming that Kormondy had fired the weapon, evidence demonstrates that it was fired accidentally or reflexively, or at the very least the evidence was consistent with an accidental or reflexive shooting. None of the cases on which the State relies, AB89-90, deal with facts like these, so those authorities do not support the State.

The State misleads by saying the "only" evidence that Buffkin was the leader came from Kormondy. AB91. Mrs. McAdams testified that Buffkin appeared to be the ringleader; that Buffkin was the first one to enter the house; that Buffkin was the one carrying a weapon to begin the crime. T1067-69; T1084-91. Independent evidence also established that Buffkin -- not Kormondy or Hazen -- had stolen the weapon Buffkin used to begin this crime, and that he still possessed it when arrested ten days after the crime. T1310-11. Beck also testified that the State itself portrayed Buffkin as the leader in Buffkin's trial. T1806. The State commits prosecutorial misconduct and violates due process by taking fundamentally unfair, inconsistent positions against separately tried codefendants, and it should be estopped from doing so here. See Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979) (due process violated

when State argued Green was triggerman and successfully opposed evidence in Green's trial showing Moore was triggerman after State inconsistently argued in Moore's trial that Moore was triggerman); Drake v. Kemp, 762 F.2d 1449, 1470-79 (11th Cir. 1985) (en banc) (Clark, J., specially concurring), cert. denied, 478 U.S. 1020, 106 S. Ct. 3333, 92 L. Ed. 2d 738 (1986).

The State says "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..." AB89. Appellant's counsel does not know what "representation" the State is talking about. When the triggerman is the more culpable of codefendants, the death sentence is not rendered disproportional punishment on that basis. However that argument is besides the point here.

First, the claim at issue is one of nonstatutory mitigation, which in this context is similar to but not the same as proportionality. Mitigating evidence established that the gun was fired reflexively or accidentally, and none of the State's evidence contradicted that fact. The judge cannot reject this mitigation, which is supported and unrefuted by the evidence. E.g. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); Campbell v. State, 571 So. 2d 415 (Fla. 1990).

Second, even if Kormondy pulled the trigger, that fact alone does not make him more culpable than others given that the evidence was of a reflexive or accidental shooting, and given that other evidence -- including the State's own prosecution theory against Buffkin -- indicated that Buffkin led this crime.

The absence of proof of an intentional shooting distinguishes this case from the classic "triggerman" cases.

ISSUE VI: THE DEATH PENALTY IS UNCONSTITUTIONAL, AND HERE IT WAS DISPROPORTIONAL PUNISHMENT IN LIGHT OF SUBSTANTIAL MITIGATION AND ONLY TWO VALID AGGRAVATING CIRCUMSTANCES THAT AROSE SOLELY FROM THE PRESENT CRIME

B. The death sentence constitutes disproportional punishment after taking into consideration all the judge's erroneous findings with respect to aggravating and mitigating circumstances.

None of the cases cited by the State are on point because none find proportional a death sentence based on two aggravating circumstances where the murder was the result of an accidental/-reflexive killing, where the leader may have been a codefendant, and where a great deal of mitigation existed.

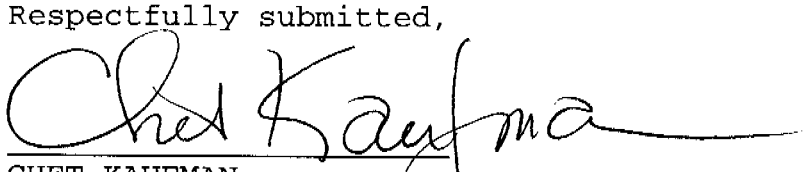
CONCLUSION

For the reasons expressed above and in the Initial Brief, alleging individual and cumulative error, this Court should reverse the convictions, vacate the sentences, and remand for a new trial before a different judge. In the event this Court affirms the conviction for first-degree murder, it should vacate the death sentence and remand for a new penalty phase conducted before a different judge and jury panel.

CERTIFICATE OF SERVICE

I certify that a copy of this reply brief of appellant has been furnished by delivery to Mr. Richard Martell, Assistant Attorney General, Criminal Appeals Division, the Capitol, Plaza Level, Tallahassee, FL, 32301; and a copy has been mailed to Mr. Johnny Shane Kormondy, on this 9th day of October, 1996.

Respectfully submitted,



CHET KAUFMAN
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR APPELLANT
FLORIDA BAR NO. 814253

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458