IN THE SUPREME COURT OF FLORIDA

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Record on Appeal consists of four volumes of record, ten volumes of transcript, and one volume of supplemental record. References to the record shall be made as "R"; references to the transcript shall be made as "T"; and references to the supplemental record shall be made as "S".

STATEMENT OF THE CASE

A grand jury indicted appellant Johnny Shane Kormondy, Curtis Darryl Buffkin, and James W. Hazen with identical charges in a single six-count indictment filed July 27, 1993, stemming from an incident on or about July 11, 1993 in Escambia County. Count I charged first-degree murder of Gary Lane McAdams as premeditated murder or felony murder. Counts II, III, and IV charged sexual battery while armed upon Cecelia McAdams, a person 12 years of age or older. Count V charged armed burglary of a dwelling with a battery and intent to commit a theft. Count VI charged armed robbery of a firearm and/or jewelry. R1-4.

The Honorable John P. Kuder, First Judicial Circuit, Escambia County, presided over proceedings for all three defendants, holding some proceedings jointly but ultimately trying each separately. Kormondy was found guilty by a jury on July 7, 1994, R375-77; T1480, and was adjudicated guilty as charged, R378-79; T1483. A penalty phase convened before the same jury on July 8, 1994. The jury returned a death recommendation as to Count I by a vote of 8-4. R410; T1938-39. After issuing a civil contempt judgment and sentence, R416-21, the judge imposed sentence on the indicted crimes on October 7, 1994, giving him death on Count I and life imprisonment with three-year minimum mandatory terms on each remaining count, each life sentence to run consecutive to Count I, R585-616, 544-58. A timely notice of appeal was filed on November 4, 1994. R620.

STATEMENT OF THE FACTS

A. Guilt Phase

Many facts are clear and undisputed. Curtis Darryl Buffkin, James W. Hazen, and Johnny Shane Kormondy, burglarized the home of Gary and Cecelia McAdams. During the burglary, Cecelia McAdams was sexually assaulted numerous times; the intruders took certain items from the home; and one of the men shot Gary McAdams with single gunshot to the head. However, some material details are not clear in this record, especially with regard to the respective roles played by each of the three men, particularly Kormondy and Hazen. Even the prosecutor acknowledged in closing argument that the record in that regard is unclear. E.g., T1405. With that caveat in mind, the record reveals the following facts.

Cecelia McAdams and her husband Gary McAdams attended Cecelia's 20th high school reunion at Woodham High School on July 10, 1993. She wore a new dress. When they arrived home in the Thousand Oaks subdivision at about 1 a.m., Gary got their puppy out of the bathroom, took it outside, and then came back in. T1063-66. They heard a knocking on the door, and when her husband asked who was there, she said it sounded like "It's me." T1067. When her husband opened the door, they saw a man pointing a gun at them. Mrs. McAdams positively identified him as Curtis Darryl Buffkin. T1068, 1089, 1115. Buffkin forced his way into the house at gun point. He wore dark clothing with a white T-shirt and jeans, dark hair course in texture, and he was unshaven. T1067-69. She said he appeared to be the ringleader "since he was the one that entered my home with the gun." T1089.

Buffkin told them to get on the floor in the kitchen and put their heads down. Then Hazen and Kormondy, whom she could not identify, entered the house. Both had socks on their hands; both wore jeans; and one had cloth around his head; she did not see the other's head. T1084, 1089-91. The intruders asked for money, wallets, and car keys. Mr. McAdams threw his wallet and car keys to them. Her purse was on the counter. They took the items. T1068-71.

Two of the three men left the kitchen, closed blinds, tore some phone cords out of the wall, and walked to the back of the house, making noises that sounded like they were rifling through drawers and closets. T1070-71. "One of the individuals returned to the kitchen," she said, "and by what he said I assume that he

found Gary's pistol, because he asked Gary, Who do you think you're going to hurt with this? And Gary responded, No one. And he said, You're right, you're not. At which time he proceeded to come to the side of me and rub the gun up my hip and tell me I had a cute ass and to come with him." T1071-72. She could not identify him, but she knew he was not Buffkin. T1089-91. She went with him and told her husband to do what they asked. She said they could have anything they wanted as long as they did not hurt her husband. T1072.

That man took her to the back of the house and asked if her husband had condoms. She said no. He told her to remove her dress or he'd blow her head off. After she removed the dress and her other clothing, he discovered that she had been menstruating. He removed the tampon, told her to sit down on the toilet seat in the bathroom, and made her perform oral sex on him, putting his penis in her mouth at gun point. T1073-74.

At some point he stopped and told her to get up and go into the vanity area. While in the vanity area, she saw the second of Buffkin's two followers in her bedroom going through one of her purses. "He had some type of cloth wrapped around his head, it did not cover his face, it was just around his head," she said. That person had "sort of stringy" mousey brown, sandy colored hair down to the collarbone, and he was thin with sharp features. She said the first man asked the second man if he would "like of some of me," and he said yes. T1076. The second man came into the vanity area and put his penis in her vagina while the other put his penis in her mouth. The man on whom she performed oral

sex ejaculated, T1077, but she did not know if the other man ejaculated as well, T1078.

She was then taken back into the kitchen, naked, and placed in front of her husband. They told her to release Gary's hand. One put a beer down between them and told them to drink it, and Gary did. T1078. Buffkin then took her to the back of the house, saying "I don't know what the other two did to you, but I think you're going to like what I'm going to do." T1079. He laid her down in the vanity by the bedroom and vaginally penetrated her with his penis. T1079. She said at least the first two men who raped her had come in contact with her dress, which lay on the floor by the vanity. T1081-82.

While Buffkin was having sex with her in the vanity, she heard a gunshot from the front part of the house. She screamed for Gary and heard someone yell out "Bubba or Buff or something at that time, and the person who was raping me at that time stopped and jumped up and threw a towel over my face and ran out." T1080-82. She then heard another shot coming from the bedroom. T1083.

She grabbed the towel, went down the hall and saw Gary laying on the kitchen floor with blood coming from the back of his head. She screamed and ran to the kitchen phone, forgetting that the cord had been yanked out. She grabbed the towel and ran out to the garage where she was met by her neighbor. T1082-83.

A pair of socks was found on the counter by the stove and at the bar, but she had not left it there. She has never recovered her husband's pistol, her purse, and her husband's billfold.

T1087. Several pieces of jewelry also had been taken, including several rings and watches, and a canvas bag. T1088. The items were taken at gunpoint without her consent. T1088.

Nurse Gene Hatcher examined Mrs. McAdams at Baptist Hospital. Mrs. McAdams indicated that she had been sexually assaulted by three different men, two vaginally and one orally; that one who had orally penetrated her ejaculated; and that she was not sure whether the two who vaginally penetrated her had ejaculated. Hatcher found no spermatozoa in a vaginal swab she took, and she did not swab Mrs. McAdams' mouth. Mrs. McAdams had drunk something before the exam. T1085-95.

Phone wires in the first bedroom had been jerked apart, but the phone worked in the small bedroom. T1027-28. No identifiable fingerprints other than those of the victims' were found. Two items, a long-neck Corona beer bottle and the bedroom telephone receiver, had cloth marks that could have been made by socks over someone's hands. T1030-31. The master bedroom had been disturbed, as several dresser drawers had been opened and other things had been upset. A phone had been severed and was not working, and several items were on the bed. Officers recovered a stained green dress and a towel from the master bedroom and vanity, a bullet fragment from the bedroom, a bullet from Mr. McAdams' head, and small lead fragments from the kitchen floor. T1034-43, T1028.

One officer saw a blackened area a couple of inches in diameter in the carpet where he found the bullet in the bedroom floor, showing that the bullet hit the concrete pad or slab after

penetrating the carpet and carpet pad. T1043.

Medical Examiner Charles Fenner McConnell said Mr. McAdams suffered a gunshot wound to the back of the head just to the left of the midline. T1049. The wound was a contact wound administered while the barrel of the gun was firmly pushed against the head at the time of the discharge of the bullet. T1051-53. The bullet penetrated the left part of the brain, causing hemorrhaging and extensive destruction of the brain. Once the bullet entered, death was irreversible, and it did in fact cause his death. T1051-53. "[H]e would have become unconscious immediately," McConnell said. T1056. There were no defensive wounds, no evidence of a struggle, and no evidence of physical mistreatment. T1057-58. Mr. McAdams had recently ingested alcohol equivalent to one beer. T1055.

There is no way to tell how long the gun had been held at Mr. McAdams' head. "[I]t could well have been" instantaneous to the contact with the head, the doctor said. T1058. He could not tell where the head was and what the position of the body was at the time of the shot. He could tell only that the shooter's position would have to have been above the head. T1059.

Officers arrested Kormondy, and then arrested two others, Buffkin and Hazen. Deputy Allen Cotton said of the three, Kormondy had collar-length long blond hair at the time of arrest. T1114. Cotton did not know if Hazen had altered his appearance by the time he was arrested in Oklahoma ten days after the crime, although Hazen's hair was short in a picture taken on July 10, 1993, at a family reunion. T1117.

Magda Clanton, crime lab analyst in the forensic serology section of the Florida Department of Law Enforcement, examined blood samples of Gary McAdams, Cecelia McAdams, and the three defendants. Gary McAdams is an A-type non-secretor. T1121. Cecelia McAdams also is an A-type non-secretor. Buffkin is a B-type secretor. Hazen is an A-type secretor. Kormondy is an A-type secretor. T1121-23. One can detect a secretor's A-B-O blood grouping from the seminal fluid. T1124. She found semen on the towel recovered from the bedroom but could not detect the presence of any A-B-O blood group secretions. T1125. She said that could be due to the fact that the person was a non-secretor or that the stain was not concentrated enough to pick up any A-B-O secretions. She also examined Mrs. McAdams' vaginal swabs and identified blood groups A and B. T1126.

Bobby Lee Prince said that at about 9:30 p.m. on the Friday night before the murder, he was at home a half-mile from the Thousand Oaks subdivision when he heard and saw a car he did not recognize with three individuals inside. They got out of their car and headed north on the main highway. About forty-five minutes later, the three came back and cut across the parking lot. When a car pulled up, they cut back across and started to go west. The driver had long hair, kind of sandish color, wore a ball cap, and was skinnier than the others. The guy in the back was bigger and had darker hair than the other two. The one in the passenger's seat had dark hair and was skinnier than the guy in the back. It was dark and Prince could not identify any of the three men, but he did identify photos of Kormondy's car as

the car he had observed. T1131-37.

Valerie Kormondy, the appellant's wife, said she, her husband, Buffkin, and Hazen were at the Kormondy's home on July 10, 1993. She heard Buffkin say something about robbing a house that he knew about on Gulf Beach Highway. Kormondy, Buffkin, and Hazen left together around 9 p.m. in Kormondy's car. She went to bed around midnight and next saw them around 5 a.m. in her living room, where they were awake and dressed. T1147-49.

At about 7 a.m., she received a call from Lane Barnett, Kormondy's mother, who asked to speak to Hazen. Barnett is somehow related to Hazen. T1149-50. Barnett asked Valerie to awaken Hazen because they were going fishing or out on the boat. She awakened him and took him to meet Barnett, driving in her husband's Camaro. In the car, she saw a bag of jewelry containing watches, and she had not seen those items before. T1150-51. When she returned home, Buffkin was still in the house. He stayed there for a few days. She awakened her husband and told him to get out of the house. T1152. She could not characterize Buffkin or Kormondy as a leader. T1153.

Valerie subsequently filed for divorce. T1152. She had dated Kormondy since she was 13, and they got married at 17. She was 19 when she testified. T1162. They had been married for a year, and they have a child who would soon be two years old. She sought sole custody in the divorce proceedings. T1156. She had no plans for supporting the child. Her father works and her mother had a bait and tackle business in front of the Kormondy home where Valerie sometimes works. Her parents have given some

financial support, and she planned to seek more. T1160-62. She also heard about a $50,000 reward in this case. T1157.

Shane Kormondy used cocaine and alcohol. Valerie said she did not see her husband using crack cocaine on July 10, but she could not always tell when he was under the influence. He would not do crack in front of her. T1157. She did see Buffkin, Kormondy, and Hazen drinking alcohol, beer, on that day. T1158. Also there was hard liquor in the house, and she believed they had a buzz on. T1158. She disapproved of Kormondy's hanging around with her cousin, William Long, because of Long's crack cocaine use. T1157-58.

The three codefendants had access to a pistol in the Kormondy home on the night of the incident. T1148. James Popejoy said that while he was in the Kormondy house that night, he saw Kormondy get a bluish black pistol wrapped up in a towel from under the couch just prior to leaving with the other two men. T1165-68. No evidence was presented as to who put the gun there or whether anybody had instructed Kormondy to get it.

Kormondy made certain statements to Willie Long. Long said sometime after the weekend when the McAdams incident occurred, Valerie asked Kormondy to leave the home, so Kormondy stayed with Long. T1185. On one occasion, when Long and Kormondy were out getting gas at a Jr. Food Store, Long saw a reward posted for people involved in the McAdams' homicide. After seeing it, Kormondy said, "'The only way they would catch the guy that shot Mr. McAdams was if they were walking right behind us.'" T1186. He said Kormondy brought it up again after they had been

drinking, when Kormondy seemed down. T1187. "He told me that him and the other two guys went to the man's house, broke in, and he told me about the sexual assault, and then he told me how he shot him in the back of the head." T1188.

Long and a friend, Chris Robarts, decided that Robarts should turn in Kormondy, with Long and Robarts splitting the reward. T1188. They contacted deputies who put a wire on Long to intercept a conversation Long was to have with Kormondy at Long's uncle's cabinet shop where Kormondy had been working. T1189. Kormondy told Long nobody else knew what had happened. T1190. Long said he was going to leave town, and Kormondy said he was going to also. T1190. Long believed Kormondy looked upset because he thought Long had told someone else about the crime. T1190. Kormondy said the other two individuals already had left town and "I would be the only way he could get caught," stressing that Long should not tell anybody. T1191.

Long had never seen Kormondy with a gun. T1191. Kormondy told him he did not have anything to do with the rape and that the gun had gone off accidentally. T1194. "He told me that he was the one that had the gun, and that Buffkin and Hazen were the ones that had raped Mr. McAdams' wife." T1194. Kormondy did not say whether they had planned to hurt anyone. T1195. Although Long could not recall whether Kormondy had ever told him which gun had been used, T1191, Deputy Allen Cotton was permitted to testify, over objection, that Long told Cotton that Kormondy said he had used "[t]he homeowner's gun," a .38-caliber. T1204.

Kormondy and Long were both under the influence of crack

cocaine when Kormondy talked about the crime. T1198-1200. Long smoked $50 worth of crack cocaine and drank probably six pitchers of beer before Kormondy began to discuss the crime. T1192. Then they bought $40 more worth of crack cocaine, T1193, and "that's when he started telling me how he shot him in the back of the head in the kitchen on the floor." T1199. Crack makes him very paranoid and high. T1193. Nonetheless, Long insisted that he was "still coherent. I mean, I knew what was going on." T1192. Also, Long at the time had been fleeing from the law for violating probation after testing positive in five consecutive urinalysis tests for marijuana, and for failure to submit a monthly report. T1195. He was jailed but released. T1197-98. He is splitting the $50,000 reward with Robarts. T1197.

Kormondy was apprehended in Pensacola with the aid of a K-9 unit after he attempted to elude officers. T1214-32. Sheriff's sergeant Wendell Hall said Kormondy gave two statements after waiving his rights. Only the second statement was recorded. In the unrecorded statement, Hall said Kormondy told him he drove his Camaro to the subdivision and pulled over. Buffkin "instructed them to hurry up and come on." Buffkin walked up to the door said something like "this is Robert," and walked in when the door opened. Buffkin carried a blue steel gun with a 3-to-4-inch barrel. T1238. Buffkin held the gun on the people kneeling on the floor and instructed Kormondy and Hazen to go to the bedroom area. They looked through the belongings. Hazen found a black handgun. They returned to the front and Hazen told the female to go with him into the back. Kormondy walked back and

saw the female sitting on the commode giving Hazen oral sex. Kormondy returned to the kitchen where Buffkin handed him his gun and said to stay there and guard the man. Buffkin went into the bedroom and later brought the female back to sit on the floor next to her husband. T1239.

> [SERGEANT HALL] He said at that point, Darrel handed him the gun again. He said that James Hazen then instructed the female to come -- go back to the bedroom again, and [sic] which he did.
>
> He said at that point, he saw Curtis Buffkin bumping the gentleman that was kneeling on the floor.
>
> Q.[BY STATE] Let me stop you a minute. He said that Darrel got the gun back from him?
>
> A. Yes. He said at that point, when he returned back, that Darrel handed him -- got the gun back from him. He handed the gun back to Darrel.
>
> He said he then saw Curtis Buffkin bumping the gentleman on the head and telling him to keep his head down. And at that point, the gun fired.

T1240. Hall summarized his understanding of what he thought Kormondy told him about the gun, testifying that "[b]asically, what he is saying is that the gun that Buffkin came in with was the gun that he gave back to Buffkin, which was used to shoot the man." T1241-42.

Kormondy and Buffkin ran out; then Buffkin ran back inside, yelled for Hazen, and all three returned to the car and drove off. T1240. Kormondy told Hall he previously scoped out another house in the area without committing a burglary. Kormondy told him he had socks on his hands and a shirt over his face. Hazen had done the same thing. Kormondy said he did not sexually assault the woman. He had told the others he did not want any of the stuff but he ended up getting $10 in cash. T1241.

After again waiving his rights, Kormondy repeated his

statement on tape with no material differences. T1242-43; R348-72. The jury heard the recording. T1256. Details in that statement included the fact that Buffkin took the lead because he was looking for some money. T1263-65; R353-54. While he and Hazen had their hands and faces covered, Buffkin had nothing covering his face and may have had nothing covering his hands, either. T1269-70; R356. After he and Hazen gathered jewels and other belongings, they returned to the kitchen, and Hazen took the woman back. Kormondy walked back, saw the woman giving Hazen oral sex, and returned to the front. Buffkin handed Kormondy his gun went to the back of the house while Kormondy held the gun on the male. T1274-78; R358-60. Buffkin and Hazen later returned to the front and Buffkin took the gun back from Kormondy, but Kormondy did not know which gun it was. T1279-81; R362. Hazen still had the gun he had found in the bedroom, and he took the woman back again. T1281-82; R363-64. At some point either Buffkin or Hazen said "give him a beer," and the man drank the beer. T1288; R367. Buffkin told the man to put his head between his legs, bumping the male's head with the barrel of the gun, and the gun went off. T1282-84; R364-65. Kormondy did not sexually assault the woman "[b]ecause I wouldn't want anybody to do that to my wife." T1290; R368. After the episode, Buffkin said "I didn't -- didn't really mean for it to go off. I didn't mean for the gun to go off." T1292-93; R370. Buffkin was an escaped inmate at the time. T1293; R370. Kormondy admitted that the night before they had been in the same neighborhood "[t]rying to get into a house where there wasn't nobody home there," but they

did not get in. T1294; R371.

An investigator admitted that nowhere in the taped interview did Kormondy ever say the man was killed with the same gun that Buffkin brought into the house. T1297. Likewise, Kormondy was never asked about whether the guns had been swapped in all the hours he was interrogated. T1299. Kormondy substantially aided the officers in their investigation and the apprehension of the other two suspects, Sergeant Hall said. T1246.

McAdams' gun was a .38-caliber model 10 S&W revolver with black rubber grips. The grips had replaced wood grips, a set of which were recovered in the house. T1305-10. The gun Buffkin brought to the crime scene was a .44-caliber handgun that Buffkin had stolen from another home in Pensacola. It was found in Buffkin's possession about ten days after the murder. T1310-11.

Edard William Love, Jr., a firearm and tool-mark examiner with the FDLE, said the bullet that killed McAdams could have been fired from a .38-caliber special or a .357-caliber magnum revolver. It could have been fired from a .38-caliber Smith & Wesson model 10. T1314. A .38-caliber S&W revolver is a double action weapon that requires 10-12 pounds to fire without cocking the hammer. T1315. He did not testify as to the pressure required to fire that model from the cocked position if the gun was in good working order, but did testify as to a hypothetical:

> Q. In your opinion, sir, if a person is seated on a floor and another has such a weapon at a person's head who is seated at the floor and is poking at them, punching like on the head with the gun, and the gun was then further fired in contact with the skull, how likely is it, sir, that the gun would fire without being cocked?

A. It would be difficult. It would be quite unlikely.

T1315. The type of gun suspected to have been used has safety features such that if it was good working order and it was dropped, it wouldn't go off accidentally, Love opined. T1315-16.

Love also examined the bullet fragments but found they were too small to identify. T1316. The .38-caliber slug taken from the victim was badly damaged and could not be use to identify a weapon even if the weapon had been recovered. T1317.

The projectile taken from the floor of the master bedroom was a .44-caliber lead bullet fired by a revolver such as a Charter Arms Bulldog; but it was too badly damaged to identify the gun that fired it. T1318. If a Charter Arms Bulldog double action revolver had been in good working order, the single action trigger pull required would be about 3 pounds, and the double action pull required would be about 9 pounds. T1320. Love said it is possible but unlikely that the carpet powder burn could have resulted from somebody discharging the weapon while slipping and falling; it was more in correspondence with an intentional firing. T1321.

An FDLE fiber analyst said Mrs. McAdams' green dress was pure silk, and a few microscopically consistent fibers were found in Kormondy's car in the front driver's seat, the front driver's floor, the front passenger's seat, the passenger's floor, and in the rear seat. T1334-36. Two gray wool fibers found in the vanity area of the bedroom were consistent with the gray wool fibers composing the seat covers in Kormondy's car. T1338. The small number of fibers found indicates secondary transfer, which

is when a person comes in contact with an item. T1336-37. The analyst had no way of knowing how these fibers got to the locations where they were found. T1338-39.

Kormondy moved for judgments of acquittal on the ground that premeditation to kill had not been proved; that the evidence was insufficient to prove that Kormondy committed sexual battery; and that the evidence was did not prove armed robbery. The motions were denied. T1353-55. Kormondy put on no evidence and was convicted as charged. R375-77; T1480.

B. Penalty Phase

Kormondy presented substantial mitigation from family members, his employer, and doctors expert in the fields of psychology, pharmacology, and drug addiction. The evidence showed that he had been an abused and neglected child born to and raised by a violent mother, and he suffers from both a clinical personality disorder and addiction to cocaine and alcohol.

Louise Smith, Kormondy's grandmother-in-law (Valerie's grandmother), said he lived next door to her since about 1991. He was always willing to help her whenever she asked, and he'd tell her anytime she needed him, just let him know. T1528-29. They went fishing a lot in the Bay Minette Basin up on Tensaw River, and he drove the boat for her. T1529. He never had any difficulty following her instructions; he never had difficulty concentrating on what he was doing; he was never forgetful; he did not have any difficulty performing tasks; he did not have to be told every little thing to do; and he was able to take initiative and do things on his own. T1530-31. Shane acted

"real good when he was around me." T1533.

James E. Carnley, a paint contractor and Valerie's uncle, knows Kormondy well and employed him for six or seven months as a painter. T1534-35. Kormondy was a "very good" employee who found it "easy to catch on to everything that I tried to teach him and he was just -- he was just a good person to work with." T1535. He was a very good worker and employee, getting a raise and a better job. T1535. He was normally on time every day, working sometimes from five to twelve hours, staying as long as he was asked to stay. T1536. "Shane's a good person" and "could go to work for me again today, right now." T1538.

Kormondy's mother and two of his half-siblings described a family history filled with violence, child abuse, child neglect, drunkenness, instability, and a near-revolving door for men who walked into and out of their lives for years on end.

Kormondy was born in Pensacola on May 20, 1972, making him 21 at the time of the murder. He was the youngest of four children, including Willis "Bill" Halfacre, Laura Lynn Hopkins, and Vernon Holderfield. T1582-84. Laura Lynn, 29 at the time of trial, was 7 when Shane was born. Bill, 31 at the time of trial, is 22 months older than Laura Lynn. T1640. Their mother, Lane Barnett, a 15-year-old car hop, married Bill's father, also named Bill Halfacre. T1585-86. They remained married for 6 years. Lane was 17 when Bill was born, and 19 when Laura Lynn was born. T1588. Lane and Halfacre started fighting after two years; it settled down, but after the birth of their second child they started fighting violently. T1587. He would beat her, and she

would respond violently, at one point "cut[ting] him with a butcher knife" while the children were present. T1588.

Lane became romantically involved with Vernon Holderfield, Sr., before she divorced Halfacre, and subsequently married Holderfield. He drank a lot and was a very violent person, beating her frequently in the presence of the children. T1589. She tried to defend herself, but was not very successful, finally deciding to leave him. T1589. "[H]e beat me just like two weeks before my baby [Vernon, Jr.] was born, sent me into early labor. I told him that if he hit me again, I would leave. And it was like the baby was nine months old when he hit me again, and I left." T1590. She returned to Holderfield, who again drank and ran around with women. T1590-92. When she found him cheating, he pushed her and she responded by stabbing him in the stomach with a pocket knife. T1592.

Lane moved to Pensacola in the winter of 1970 with 35 cents in her pocket, moving into a place with no heat. T1592-94. She got a job in a bar, but only briefly, then went to work at a drive-in, which also was a bar, working nights, while either her sister or her oldest son Bill, 9 or 10 at the time, was in charge at home. T1595. She met Kormondy's father, Johnny Frank Kormondy, around 1971. He was a truck driver. She lived with him at the time Shane, the appellant, was conceived. She went on the road with him for about six months, leaving her kids with a friend. T1597. Within a couple of months of meeting Kormondy, she discovered he was married but separated. T1597. She lived with him in a "real dumpy" very small house that had no air

conditioning. T1598. Kormondy's father left her while she was pregnant, so she went on public assistance. She never had any medical attention during her pregnancy, seeing the doctor only the day she learned she was pregnant and the day after Shane was born, so she has no knowledge of whether there had been any prenatal problems. T1598.

When Shane was born, the kids stayed alone, with Bill and Laura Lynn in charge while Lane bartended at night. They put themselves to bed until Lane got off work, usually 2 or 3 a.m. T1640-41. Shane only lived there until he was six or nine months of age, when he got very sick with pneumonia. Lane could not afford a babysitter, so she let Shane go to her sister Sam's house for about six months in Louisiana. T1599, T1640-41. He came back to live with her when he was a little more than 1 year old, while Lane bartended night and lived in the same dumpy house. T1600. She took the father to court in a paternity action; he denied paternity and she never received any financial support. T1600-01. While bartending, the two older children, net yet in their teens, took care of the infant Shane. T1601. She moved to a trailer that had more room for the kids. T1603. HRS investigated her because of her leaving the children by themselves, so she began leaving Shane with an elderly lady while leaving the other kids to for themselves. T1603.

Lane frequently brought home boyfriends. She once tried rooming with a woman when Shane was about 2, but one night that lady, who drank a lot, got violent with Laura Lynn. She awakened Laura Lynn by slapping her and pulling her up out of the bed and

telling her to pray with her. Vernon would have been the only one to sleep through it. T1643. Laura Lynn grabbed Shane and ran out the door to the next-door neighbor's house, and the neighbors called Lane. Bill saw the lady put a knife in Laura Lynn's shirt. When Lane came home, she went into the house and started slapping and hitting the woman while Laura Lynn held Shane. The police arrested the lady. T1644-45.

Soon Lane struck up a relationship with another man, Mike Wright, who was in and out of the house for the next year. "You never knew if he was going to be doing alcohol or have the Bible in his hands. So he was just kind of a -- weird," Lane said. T1604.

Lane moved again and changed employment to another bar, leaving her eldest son, Bill, who was 12 or 13, in charge of the kids, even to the extent that Bill disciplined them himself. T1605-06, T1667-68. Lane said Shane's father came back and spent one night with the family. "The next morning he seen Shane and told Shane he was his father and he would be back, and left to go to work and never seen him again," Lane said. T1605-06. Laura Lynn said they had been living in a trailer with no heat and no water most of the time, and at one point someone called HRS and reported that the kids were living alone. T1646. One night when Lane was working, a man came to the window and exposed himself to Laura Lynn and pulled the door open, but he got in his truck and left when Bill woke up. T1647.

During this period, there were no family activities. Lane didn't take the kids anywhere most of the time, going canoeing

once a year with the relatives and attending an occasional movie. T1606, T1647-48.

Lane enrolled Shane in Head Start when he was three, and he stayed there for two years, then went to pre-kindergarten and kindergarten, failing the first grade but staying in school until his high school years. T1615-16, T1606.

After Mike Wright left, Lane took up with Gary Arant. They dated for a few months and married but only for a month and eight days. He lived with her and the children, but "he was very abusive and he drank a lot. He'd slap me around a lot when he'd get into drinking." T1608. He would do that in front of the children. T1608. When he did, she would "slap him back." T1608. When Shane was 4, she and Gary split up violently: she tried to stab him with a kitchen knife while making sandwiches as the children watched. T1610. Sometime thereafter, Gary fired a shot at her in front of a bar. T1608. A man in the bar flagged down a policeman to assist. That man was George Barnett. T1608-09. She divorced Gary, dated George, moved again, then moved in with him while still working at the bar. T1609-11.

Lane characterized her relationship with George Barnett as "good," but as time passed they argued more and more, and he drank more and more. T1611, T1648. Lane quit working some time after she married him, but he would only work four or five months a year, going off hunting and fishing and causing the family financial hardship. He would get food stamps rather than go to work. She went back to work in a bar, but he started drinking and hanging around in the bars. She ended up quitting that job,

however, because her working and not being at home led Barnett to go out drinking, causing her to go out looking for him. The drinking and fighting increased while his work decreased and their bills piled up. T1612-14.

Lane threw stuff a lot and got mad at George a lot, but he didn't show a lot of temper, which angered Lane even more. T1648-49. They argued and cursed all the time in the presence of Shane and the other children, and "[i]t was nothing for mother to get mad with us, either," Laura Lynn said. T1649. Lane had a short temper, easily angered at little things. When she got angry, she slapped or spanked the kids and kept them from going to church or doing something with their youth groups. T1649-50. Lane said she spanked the children with her hand or a belt, and George used a belt to "discipline" them, one time beating Shane with a belt more than Lane thought appropriate. T1618. George very seldom ever disciplined Laura Lynn, whereas Lane would discipline Vernon and Shane by spanking them and shaking them when she would get mad. T1654. Laura Lynn said she was scared a lot: "You never knew how mom was gonna to be." T1652. If Lane was mad at one child she would very easily take it out on another. T1652. The kids heard yelling and cursing all the time when they were young, Laura Lynn remembered. T1652. Bill moved out when he was 17 due to a disagreement with Lane and George. T1666-67.

Bill also recalled the violent discipline meted out at home. Lane used to strike the kids with an open hand or a closed hand, closing her hand more as they got older. It was not uncommon for

her to strike them across the face or anywhere else. T1668. She used to whip the kids, holding one hand and running them in circles when she hit them. T1671. He also saw his mother pick up Vernon and Shane when they were small children "and literally just shake them, and they'd fall to the ground like a rag doll." T1670. "We didn't know from literally minute to minute what kind of mood she'd be in." T1669.

Despite all the fighting and drinking, George Barnett got along with well with Shane, treating him as his own son. George had moved in when Shane was only three, and Shane came to idolize him. T1615, T1653, T1656. Laura Lynn took to him also, but Vernon was more of an outcast, and Bill moved out. T1653. George always said he would adopt Shane and Vernon, but he never did. T1615, T1656. Shane used George's name, Barnett, in school. T1616.

They moved again when Shane was around ten years old, this time to a house trailer in the Pensacola area; but they stayed only a month, moving the trailer to Alabama. T1616. They had to move out of the house because they were months behind all of their bills and had no means to pay. George was drinking every day, and they were arguing. T1617. George joined the church and "went to church eight days a week," Lane said. T1619. He was unemployed, got food stamps, and did some odd jobs. T1619.

One night, when Laura Lynn was about 18, she came home and told Lane and George that she was to get married. George then told Lane "at the same time at the dinner table that he wanted a divorce," Lane and Laura Lynn remembered. T1620, T1655. Upon

reflection, Laura Lynn said, she believes George treated her as though she was his wife rather than his stepdaughter, molesting her several times, touching her and one time crawling in bed with her. T1655-56, T1663. None of her family members knew anything about it, however, and she didn't tell her mother or her brothers until six months before this trial. T1664.

Then suddenly, George Barnett walked out. Shane was about 11-12 at the time. "I think it devastated him," Laura Lynn said. "I don't think it -- at that age he was able to -- I don't think he was able to handle something like that." T1657. Shane ran away the day George left, going to George's brother's house where George was, but George brought him back to his mother. T1622. After that, Shane changed a lot, rebelling against their mother, running away a couple of times, sometimes to George, who would then return him to Lane. T1657.

Lane had been going back to school, T1620, but when George left, Lane quit and was left with no money, no groceries, and no bills paid. T1621. Lane moved yet again, this time in March 1984 to a trailer in her sister's back yard for a month or two in Cantonment, near Pensacola. Then she sold the trailer and moved to Oklahoma, trying to get Shane away because "George didn't want anything else to do with us." T1623. By this time Laura Lynn had gotten married and Bill had moved out. Shane stayed with his aunt for a couple of months while Lane worked two jobs. Then Vernon suffered an aneurism on the brain in 1984, requiring two brain surgeries. T1624-26. Bill said he remembered seeing his mother shake Vernon before the surgery, and it had crossed his

mind that shaking had caused Vernon's brain damage. T1670.

While Vernon was hospitalized a hundred miles from where they lived, Shane stayed with his next-door neighbor. Vernon returned home but he had lost his mobility skills and was like a new baby, needing to learn how to crawl and everything else. Lane had to devote a lot of time and attention to Vernon to help him rehabilitate. T1625, T1629. She enrolled Shane in a special "LD" class because he had fallen behind, but she was unable to help him with his school work. T1626-27.

Around November 1984, she moved back to Pensacola because she had no idea how long Vernon would live and she wanted to be near her immediate family. Shane would have been around 14 at the time. T1626. Shane was enrolled in middle school. They lived again in the travel trailer behind Lane's sister's home. About a month after they returned to Pensacola, Vernon got sick again and had another brain surgery. Shane remained with his aunt in the trailer while his mother tended to Vernon. T1628.

Lane eventually moved again -- about the tenth time -- into an apartment because Shane did not feel comfortable staying with his aunt, and they needed to get special handicap facilities for Vernon. There were times when she had to leave Shane, then 14, alone or with a relative or neighbor so she could attend to Vernon. Lane then noticed a big change in Shane: every middle school report card indicated problems. T1629-32.

They moved again while Lane was on public assistance, enrolling Shane at Ransom Middle School. She was told if she would keep him home the last six weeks, they would promote him;

and they did. He was then enrolled in Tate High School, where he continued to have problems. T1630. By this time, Lane figured out that he was doing drugs, skipping school, and having other problems. His personality would change a lot when he did drugs. He would stay away from Lane as much as possible if he was doing drugs. When he was doing drugs around her, they would argue and then he would run off because he didn't want her to see him on drugs. He did not complete high school, quitting the tenth grade when he was around 16. T1631.

Shane's problems continued after moving again. Lane tried to encourage him to go into a trade, but he was already deeply involved in drugs, had friends she didn't care for, and they would argue a lot about the fact that she didn't want those friends around her house. He would go off and do drugs with his friends. T1632-33. While in high school, Shane met Valerie K. Fletcher, who later became his wife. They married a week after their son, Devon, was born in August 1992. T1634.

Laura Lynn said that during her first marriage before she had kids, she would yell and scream and throw things, but she no longer does that. She does not experiment with drugs and drinks only socially. T1658. She has a twelfth-grade education; is not employed; cares for her two children at home while her husband works; and has never been convicted of a felony. T1664-65.

Bill Halfacre said growing up in the family environment created by his mother has led to occasions "not uncommon" when he might "go just to the edge of the law of being thrown in jail" for hitting someone when he is upset by something. He has been

in counseling and has modified his own means of disciplining his children. T1671. He tries not to discipline his kids the way his mother disciplined Shane and the others. He seldom drinks and does not use illegal drugs. T1672.[1] He has worked for Escambia County E.M.S. for five years. He never attacked any employee with a knife; never struck them or knocked them down; never broken into anyone's house or stolen anything; and never committed a sexual assault. T1674.

Laura Lynn said the day before Shane's arrest, she saw Shane at her house at a get-together. Shane appeared to be in a good mood, talking with people and enjoying himself. To her knowledge he was not on drugs. T1660-61. The night he was arrested, she asked Shane if he committed these crimes. He said "'I didn't shoot the man, and I did not rape that woman.'" T1659. Over a defense objection, Bill Halfacre testified that he met Buffkin one time when he, Shane, Vernon, and Buffkin attended a go-go place or strip joint sometime after the murder. T1675-77.

Dr. James D. Larson, a psychologist who has testified both for the State and defense in other cases and has evaluated more than a thousand people by court order, said Kormondy has a long history of drug abuse. He began using crack cocaine in his mid-

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[1] Psychologist Dr. James Larson compared Bill with Shane. Although Bill appears to be doing well, he still has a lot of problems caused his upbringing. He has been abusive of his wife and is in counseling for that, and is going through his second divorce. But his environment was not quite the same as Shane's because Bill did not form the same attachment to George Barnett, and Bill, who is older, was with his mother earlier on, so he did not have a break in the bonding that Shane suffered; and he did not get involved with drugs, Dr. Larson said. T1714.

teens, about the age of 14, and had abused many substances, including alcohol, marijuana, and gasoline huffing. T1679. An HRS record indicated that at some point his mother expressed a concern that he was using drugs and that his personality had been undergoing change, he had been increasingly more difficult to handle. T1680. Evidence of prison system records indicated suicidal tendencies twice: a suicide attempt three years or so before the trial, and cutting his wrist after his incarceration for this murder. T1680. After a prior incarceration, he went straight for a while, apparently "did a lot better, and then he gradually became a user again and the addiction pattern resumed." T1681. He began to get into heavy drug and alcohol use, withdrawing from his family. He became less concerned with his family's economic situation and his relationship with his wife. He even withdrew from his relationship with his child, and became real focused on himself and on drugs and substances. T1681. Several calls were made by his family to community agencies seeking assistance for his drug addiction. He may have attended a few meetings of Narcotics Anonymous. T1682.

Dr. Larson found that Kormondy suffers from "addiction" and "a very serious personality disorder" called "mixed personality disorder," alternatively known as "personality disorder not otherwise specified." T1548-49.[2] He found no indication of

[2] Dr. Larson based his evaluation of Kormondy on a battery of psychological tests, records going back to Kormondy's elementary school, jail records, infirmary records, depositions and documents from this case, interviews with people who have had the opportunity to observe Kormondy over a long period of time, including his family members, and interview of Kormondy himself. T1545-47. One

schizophrenia, manic depressive disorder, bipolar disorder, or gross brain damage, T1548-49, and Kormondy has average intelligence, T1572. Over objection, Dr. Larson opined that Kormondy does not meet any of the statutory mitigating factors. T1566-67.

The personality disorder from which Kormondy suffers involves "long-term and enduring traits" of problems that interfere with functioning. T1549. Characteristic of such disorders are

> deficits in a number of basic important ways in which they function. We see deficits in how they relate to other human beings. We see deficits in their ability to control their impulses. We see occupational impairments, that usually meaning they have a hard time maintaining a job or sustaining a job. We see difficulty in their interpersonal relationships in practical ways, such as their ability to sustain marriages, to have harmonious relationships with people. We see changes in their thinking.
>
> We find that so many of these people are very impulsive. They respond just on the spur of the moment without thinking things out. They don't -- they're not so guided by consequences. They just tend to react immediately rather than think in terms of well, I will or won't do this because of the consequences of my actions. And most of these people carry an awful lot of anger, that they are just very angry people.

T1449-50. Kormondy "has almost all of those problems." T1550.

Often, such a personality disorder is caused by both the hereditary variables that come into play and the person's interaction with an unhealthy environment. T1550-51. These factors could include the presence or absence of early childhood

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of the psychological tests was an M.M.P.I., but because the result was invalid, it was not relied on. T1563-66, 1577-79.

rejection, childhood trauma, parental bonding, and parenting skills to appropriately sanction negative behavior and appropriately reward appropriate behavior with love, praise, and affection. Another factor is modeling: watching appropriate behavior in adults, particularly in parents. T1551-52. A behavioral disorder or personality disorder could be further worsened by addiction. T1575.

Typically, a child could go along quite well until adolescence when often the personality disorder emerges in the form of behavior. T1553. A lack of brightness or learning disabilities can make the situation worse, as can hyperactivity, attention deficit disorder, attention deficit hyperactivity disorder, physical conditions such as health problems, and even things like acne, funny faces, funny noses, or other characteristics that could make it harder for a child to get along with peers. T1555.

Free choice and free will are relative terms to the extent that they are tempered by hereditary and environmental factors. One does not have the ability to exercise certain choices when those choices had been socialized out of a person. T1576-77. The general rule is that one raised in a dysfunctional family is more likely to commit crime than others because people who come from impoverished conditions or come from brutal backgrounds, such as victims of child abuse, are more likely as adults to make terrible decisions. However, there are always exceptions to that general rule. T1568-71. Additionally, not all personality disorders are alike. Some tend to produce more physical

aggression, other produce less impulsiveness. T1574.

Family dynamics and attitudes are very significant because it is through them the child learns to relate to the world. T1556. Personality disorders "can be generational," repeating from one generation to the next, as can parenting patterns. T1557. No child comes out of a vacuum because all children are the products of their respective environments and hereditary factors. Consequently, the psychological history of the parents is very important in analyzing the development of a personality disorder. T1556-58. See Defense Exhibit 2 (time line).

Dr. Larson described how Shane, as an unwanted child born into a dysfunctional family with a violent mother, was terribly affected by his family history and "chaotic" environment. T1684-86, T1693-95. His mother came from a very dysfunctional family, the daughter of an adulterous, sexually abusive, alcoholic truck driver who was absent much of the time and beat the wife and kids when he returned home, spending more time with his girlfriend down the street than his own family. T1685-86. Lane continued the generational pattern by repeating the chaos of her own childhood with divorces, bad marriages and relationships with other alcoholic, violent, abusive men, poverty, etc. T1689-90. "[E]motionally, she was very poorly equipped to be a parent," he said. "So rather than being an adequate parent, she had learned how to parent from her inadequate parents, and she was repeating that process." T1690. By the time Shane was born, his mother was already bitter about men and "out of control of her own emotions." T1691.

Shane was born under those circumstances and with no father, all of which played a very important role in his development and identity. T1693-95. Rejection was enhanced by a number of other "unstabilizing factors," such as the family's moving 16 to 20 times, which is very hard on children; the fact that he was sent off to live with his aunt; and that various men where constantly moving in and out of the house and his life. These factors formed rejection and a lack of parental bonding and a very young age, teaching him it is dangerous to love anybody. T1696-97. Children under these circumstances are at a much higher risk for other problems, drug abuse, depression, psychiatric hospitalization, and criminality. T1696-98.

Shane's mother taught the children that the way to express their emotions about the world is through anger, and in turn her violence and abusive treatment taught Shane to think poorly of himself. T1702. Shane's relationship to George Barnett was crucial. George gave him the first opportunity to find a role model, and he was a "very inadequate model," Dr. Larson said. T1700-01. George's sudden decision to leave, without leaving so much as a quart of milk in the refrigerator, was Shane's "final, major rejection" to which he had "a very severe reaction. He's shattered." T1707-08.

School records indicate that Shane was diagnosed with a learning disability, failing in school even with average intelligence, Larson said. T1710. With all of these personal problems, he really needed a lot of attention and family involvement, but Vernon's tragedy preempted that, giving rise to

more rejection and resentment. T1711. The fact that Shane became addicted to drugs greatly compounded problems associated with his personality disorder. T1712.

"[W]ith all of these events," Dr. Larson said, "it's understandable he developed a personality disorder. Being addicted to cocaine falls into another high risk group. Personality disorder plus addiction puts him in a higher risk group for misdeeds." T1714. Many experts are pessimistic about the prognosis for treating this personality disorder, but this kind of personality disorder "tends to burn out as people get in their forties, so it's a very volatile kind of disorder in the teens and twenties, and I would expect as time goes on, I would expect in the forties that he would be much more predictable." T1715-16. As time goes on, those afflicted tend to become less impulsive and less likely to engage in violent crime. T1717-18.

Past behavior is the best predictor of future behavior, and Shane's past behavior indicates arrests for juvenile violations including battery, theft, criminal mischief; escape from the DART program for juvenile; community control house arrest for burglaries and theft; placement in a restitution center for violating community control; then prison for burglaries and thefts. T1720-22. He got out and started using crack cocaine and hanging around the wrong people at the wrong time, which is "what I would expect based on this type of personality disorder." T1722. Shane made a suicidal gesture that more of an exaggerated than real attempt, which Dr. Larson viewed as a "cry for help, and expression of some kind that didn't gain sympathy much from

anybody." T1724-25.

Dr. Robert Markowitz, a pharmacologist with a specialty in psychopharmacology, the science of drugs that affect behavior, testified about his area of specialization -- addiction and drugs that affect behavior. T1737. Addiction is a primary, progressive, chronic, often fatal disease characterized by (1) continued use despite negative consequences; (2) compulsive use, a preoccupation with obtaining and using drugs or alcohol; and (3) the loss of control or predictability about drug use. "[A]lcoholics and addicts cannot reliably predict how much they will use on any given occasion, or how long they will continue to use once they start." T1739.

Continued use despite negative consequences involves someone who repeats bad or harmful conduct while knowing better or intending not to do it, such as someone who repeatedly commits DUI. T1740. Compulsive use is the flip side involving people who act against their own values to obtain money for drugs, such as prostituting themselves. T1742-43. Loss of control and predictability involves someone who does something inappropriate fully intending not to do it, such as going to the boss' house for a party intending to have one drink, but then drinking a lot and becoming obnoxious. The loss of predictability often is indicated by leaving a trail of broken promises. T1443-44.

Many factors influence one to become an addict. One is "predisposing factors, things that predispose people to addiction"; another is "enabling factors"; and a third is "reinforcing factors." T1744-45. The most prominent

predisposing factor proved by scientific research is genetics. Genetics "will markedly influence the likelihood that any given individual will become an addict." T1745. This genetic factor includes whether one's father or mother or grandparent was an addict or alcoholic and also the ethnic group. T1745. Enabling factors could be absent parents, such as a single working parent who is not there to watch over a child. Also included in this is society's prevailing attitude that certain drug usage is accepted as a cultural norm such as the acceptance of alcohol and the pharmacological treatment of discomforts or ailments. T1746. Reinforcing factors could include drinking or drug usage to gain a peer group' acceptance. T1746. Perhaps the most important reinforcing factor is "that drugs work": they can create euphoria or an extreme sense of well-being, relieve pain, dull guilt, dull inhibitions, and act as a social lubricant. T1746-47.

Cocaine goes directly to the neurotransmitter systems, the chemicals that work in the parts of the brain that tell us whether or not what we did was good or not good, the rewards system of the brain. The drug in essence hijacks the reward function and will regularly be highly reinforcing, meaning that once it is done, the individual is "very, very likely to do it again." T1747. Individuals do not have control over the disease, because one has no choice about the culture into which they are born, the environment in which they are raised, or their genetic inheritance. T1747-48. Simple exposure and availability to the drug can lead to addiction and addictive behavior, triggering the phenomenon in a predisposed person. T1749-51.

Over time, the addict's personality changes. A cocaine addiction is telescoped, whereas alcoholism may expand over a period of many years. T1751. Studies have shown that drug and alcohol addiction make people depressed, anxious, impairs sleeping, and makes them come to view the world as a hostile and detached place. Their focus of interests and activities narrows as the addiction progresses, the addict spending more time around other substance abusers. T1752-53. Generally, the addict changes his perception of the world and his problems, either blaming the rest of the world for his problems or suddenly starting to believe it does not matter. T1754. His goals and aspirations change, as does his perception of himself and the world. It gets to the point where an addict doesn't lie because "[h]e doesn't know the truth anymore." T1754. His value system changes. T1755-56. Addiction clearly is a progressive disease that gets worse if left unchecked. T1756.

Dr. Donald G. Morton, a physician specializing in addiction and substance abuse, evaluated Shane Kormondy to determine the presence or absence of chemical dependency, and to assess and appraise what influence this might have had upon him. T1757-62. He interviewed Kormondy, reviewed his records from school, depositions from this trial, hospital records, and interviewed most of his family. T1762. He concluded that "Shane is addicted to cocaine and alcohol, that he is poly-addicted to several other drugs that he's experimented with in the past, but at the present time, he is actively addicted, or was until he got into jail, to alcohol and cocaine." T1767.

People do not have a choice as to whether or not they are an addict, Dr. Morton said. T1767. A number of factors influence whether one may become an addict, including one's ethnic group and culture. T1767-68. Addiction may be typified by as many as 33 to 40 symptoms, but any one of three particular ones "is probably proof positive" and "irrevocable": blackouts (periods when the mind doesn't make memory); controlled use of chemicals (the person strains to control his use of chemicals); and loss of control (the most commonly seen). Shane exhibits some of these symptoms. T1768-69. His history demonstrates flagrant, horrible loss of control and the pathological use of alcohol and drugs beyond social confines. T1769. Shane briefly has sought treatment being "aware he was having trouble, but he couldn't do anything about it." T1769-70.

Kormondy told him he used crack and alcohol, and huffed gasoline when alcohol wasn't available. He had been using alcohol since he was 13. T1765-66, T1769. However, Dr. Morton said Shane actually "started drinking much earlier than that" because his stepfather, George, used to let him drink beer, and he also used marijuana. T1770-71. Shane stopped thriving in school, showing signs of the personality changes seen early in adolescent alcoholism. T1770. By the time he was 14, his personality disorder, a behavioral, neurological disorder, was entrenched. Thus he already had a serious disorder when chemical dependency took hold of him around the ages 12-14. T1771-73.

Addiction is a progressive disease, and it was progressive with Shane. T1774. Addiction, developing at such an early age,

had the effect of arresting his emotional development. T1774. In all addictions, people struggle to control their addiction, which is one of the symptoms of addiction. They run through a continuing cycle of abstinence and loss of control. T1774-75. The disease progresses even when the person is not under the influence of drugs. When they are not using drugs they obsess with it and start using it again. T1775. "This chemical dependency as it attacked this young man, with the difficulties assigned, has distorted him so that he has no inroads into society as it is. It's probably impossible for him to be part of the spirit of things. There's probably no avenue in society where he can join it today. This must be addressed if he were to be able to join it." T1776.

Shane thought he could quit when he was in the treatment center, and he still thinks he can, but he cannot without treatment. His addiction can be cured in prison through a course of twelve months of total abstinence plus measurable improvement in the quality and vigor of life. T1777-81.

When asked on cross-examination about whether there are views about the tolerance to cocaine, he said "I did not know that people questioned the tolerance of cocaine." T1783. Since 1974 there have been no serious questions that cocaine is physically addictive. He said there is a question about whether or not the condition of being physically dependent upon cocaine is not inherited, but there is no serious question that susceptibility to chemical disease is inherited. T1784.

Cocaine high lasts about 20 to 30 minutes, and withdrawal

lasts about 4 to 5 hours, depending on how it is ingested. For some people who smoke cocaine, they may be paranoid for 12 to 24 hours if that is their withdrawal symptom. Paranoia and depression generally are cocaine withdrawal symptoms generally lasting less than a day in addicts. T1784-85.

Other mitigation evidence was presented to show the disparate treatment of Kormondy's codefendant, Buffkin. Buffkin stood trial but entered a plea agreement with the state attorney's office while the jury was trying to reach a verdict in his trial. His attorney, Kevin Timothy Beck, said Buffkin had been offered a guilty plea in exchange for a life sentence, conditioned on the requirement that he testify truthfully in any and all subsequent proceedings pertaining to this matter. T1795-96. The plea offer was made, Beck believed, because (1) the evidence tended to show that Buffkin had not been the trigger man; (2) the State needed a witness to testify in the Hazen trial that Hazen had been at the scene of the crime, which Buffkin agreed to do; and (3) while deliberating, the jury returned with a question concerning the lesser included offense of second-degree murder, and then retired for a number of hours, so the state might have been concerned that the jury would not return a guilty verdict as to first-degree murder. T1797. Beck was not asked on direct about whether Buffkin had ever given a deposition or anything Buffkin may have said at any time.

On cross-examination, Beck said he believed the facts and the evidence presented in the Buffkin trial supported a first-degree murder conviction of his client. T1798. He said a number

of reports indicated that Buffkin was borderline mentally retarded, with an IQ between 65 and 72. T1798. Buffkin told him that Kormondy killed Mr. McAdams. T1799. Buffkin testified in his deposition that "he had indicated to Mr. Kormondy to stop." T1799. Over objection, T1799, Beck said Buffkin testified in a deposition "that Mr. Kormondy had told him, while in the jail, that if he ever got out, he would in fact kill William Long and Cecilia McAdams." T1803-04.

Beck said his client's account of the crime differed from Mrs. McAdams's testimony with respect to where he was when certain events took place. Buffkin had claimed he was in the kitchen and observed Kormondy kill Mr. McAdams, contrary to Mrs. McAdams' testimony that she was being raped by Buffkin in the back bedroom at the time. T1805. They differed on the number of times she said she was raped. T1807. Also, Buffkin had said that Kormondy, not Hazen, found the gun and started the raping. T1807. Beck also said that Buffkin had testified in his deposition that Kormondy fired the gun that killed Mr. McAdams, and they sold the gun for crack cocaine. T1807.

Beck said Buffkin testified that Kormondy told him in the car after the crime that the shooting was accidental. T1808. Beck also said the State portrayed Buffkin as the ringleader in Buffkin's trial. T1806.

In rebuttal, the State introduced testimony of research psychologist Richard Eugene Gary who works primarily on the affect of drugs on behavior. T1810-11. Gary never interviewed Shane Kormondy and never interviewed any witness in this case or

Shane's family. He is an academic researcher and teacher; he is not a medical doctor, does not treat patients, and does not practice medicine. T1828-31.

Gary said the high from smoking cocaine, crack or free base, lasts 20 to 30 minutes; the acute withdrawal phase lasts about the same time. T1815. Gary said the physical addiction of cocaine is still "under a lot of question," although crack is "the most psychologically addicting drug that we know, but it doesn't have the physical addicting characteristics, for example, say, of alcohol, barbiturates, or the opiates." T1815-16. Cocaine tolerance is "questionable because in order for a drug to become physically addictive, it has to produce tolerance, and tolerance is described as you have to take more of the drug to get the same effect as when you first started. Tolerance with cocaine is very, very slow in development. In fact, some people claim it doesn't exist." T1816.

Kormondy's behavior on the night of the crime was not consistent with behavioral toxicity, which is characterized by severe behavioral changes including severe agitation, depression, hallucinations, or delusions, usually progressing to cocaine psychosis when a patient may lose touch with reality. T1823-24.

Addiction has been recognized as a disease by the World Health Organization and by the American Medical Association. T1829. However Gary does not like the term "addict"; he prefers "dependent." T1824. When one is "dependent" it is more likely for the person to commit certain criminal acts, such as burglaries. T1824. People who are addicted to or dependent on

cocaine or alcohol, in his opinion, are not more likely to commit violent offenses than a non-addicted person, yet he acknowledged studies show a "rather high incidence." T1825. He conceded that there is some evidence of predisposition to addiction, but addiction comes together with personality problems and environmental problems. Becoming dependent on drugs is not forced upon an individual just because they have a predisposition for it. T1825-26. He agreed that certain environments are enabling environments, such as a particular home or a peer group. T1827. Such an environment could be the result of permissive parents who don't keep track of their kids, who let them run around and come in contact with these agents. T1827.

The jury returned a recommendation of death by an 8-4 vote on July 9, 1994. R410; T1939.

The judge heard additional testimony and argument of counsel with respect to Kormondy's sentencing on September 23, 1994. R491-542. On October 7, 1994, the judge imposed the death sentence.[3] He found five aggravating circumstances: previous conviction of a violent felony based on the contemporaneous convictions of sexual battery; murder committed during the commission or attempt to commit a burglary; the murder was committed for the purpose of avoiding lawful arrest or effecting the escape from custody; the murder was committed for pecuniary gain; and the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal

[3] The written sentencing order is attached as Appendix A.

justification. R599-606, R548-59.

The judge found no statutory mitigating circumstances, expressly rejecting Kormondy's youth, 21, among other circumstances. R606-08, R559-63. In non-statutory mitigation, the judge found deprivation, trauma, and loss of paternal comfort and companionship suffered by Kormondy during his early years, giving that moderate weight, R609-11, R563-67; Kormondy had been drinking alcohol before the murders, albeit not rising to the level of intoxication, giving that factor little weight, R613, R570; Kormondy's conduct during the trial was acceptable, giving it little weight, R613, R571; his good employment history shows potential for rehabilitation and productivity in prison, giving it moderate weight, R612-13, R569-70; and Kormondy suffers from a personality disorder, giving it moderate weight, R615, R574-75. The judge expressly rejected in mitigation the disparate treatment of Buffkin, who got a life sentence, R613-14, R571-73; Kormondy's addiction, R611-12, 567-68; proof of his learning disability and lack of education, R612, R568-69; that Kormondy has a wife and child, R614, R573; and that he cooperated with law enforcement, R615, R573-74.

SUMMARY OF ARGUMENT

Issue I: The trial court erroneously permitted Deputy Cotton to bolster Willie Long's testimony by introducing evidence that Kormondy allegedly said he had shot McAdams with McAdams' own gun. This was harmful inadmissible hearsay introduced under the guise of a prior consistent statement. The statement was double hearsay not embraced by the statute. It was not a consistent

statement because Long simply could not remember what he was told or what he said. The defense did not point out inconsistencies so there was no foundation to bring in prior consistent statements. The statement was not made before the declarant's alleged improper motive, influence, or recent fabrication arose. It also was not admissible as a prior inconsistent statement because no foundation was laid and the statement did not directly contradict or materially differ from Long's trial testimony.

Issue II: The State failed to prove premeditation beyond a reasonable doubt. The only direct evidence established an accidental shooting, and circumstantial evidence is consistent with the reasonable hypothesis of an accidental shooting.

Issue III: The judge erroneously permitted the State to introduce a variety of inadmissible penalty phase evidence including Buffkin's hearsay statement about Kormondy's post-arrest desire to kill witnesses if freed from jail; allegations of unconvicted crimes of homosexual rape and cocaine possession while in jail, as well as Kormondy's juvenile record; a post-trial contempt violation manufactured by the State; and bad character evidence induced through the State's impeachment on cross-examination of Kormondy's brother.

Issue IV: The judge committed numerous errors with respect to aggravation, including: wrongfully instructing the jurors as to CCP, witness elimination, and pecuniary gain; wrongfully finding CCP, witness elimination, and pecuniary gain; improper doubling of pecuniary gain and committed during an armed burglary; improper doubling of CCP and witness elimination; and

finding the unconstitutional felony murder aggravator.

Issue V: The judge distorted the weighing process by relying on erroneous, illogical, and unsupported reasons to reject valid statutory and nonstatutory mitigating circumstances including: Kormondy's youthful age of 21; his history of drug and alcohol addiction; unrefuted evidence of Kormondy's learning disability and lack of education; that he has a child to care for; cooperation with law enforcement; and the disparate treatment of his equally culpable codefendant who got a life sentence.

Issue VI: The death penalty is unconstitutional due to systemic problems; and it constitutes disproportional punishment in light of substantial mitigation and only two valid aggravating circumstances that arose solely from the present crime.

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

Willie Long testified that after Kormondy had spoken to him describing the murder, Long and his friend, Chris Robarts, decided to inform on Kormondy and split the $50,000 reward. Long described to deputies Cotton and Hall the details that Kormondy had disclosed including his statement that he had shot McAdams in the back of his head. T1186-91. At trial, the State asked Long if he recalled whether Kormondy said he shot McAdams with McAdams' own gun. Long could not recall, saying only, "I want to say yes, but I would hate to say yes and it not be true." T1191. Cotton was then permitted to bolster Long's credibility and

introduce a new fact by testifying, over objection, that Long had told Cotton that Kormondy said he used "[t]he homeowner's gun," a .38-caliber. T1204. Cotton claimed that he had not yet received firearms reports or ballistics evidence, and although he believed a .38-caliber gun had been the murder weapon, he did not have any official report to that effect. Long "totally and completely on his own" said what weapon had been used. T1207-08.

Kormondy objected to Cotton's testimony as hearsay. T1203. In fact, it was double hearsay. The State said it was a prior consistent statement rebutting the defense's "notion that he's fabricated this after the fact for the reward," and "also for the purpose of impeaching my own witness." T1204. The Court overruled the objection, thereby violating Florida law and Kormondy's rights to due process, a fair trial, and confrontation. U.S. Const. amends VI, XIV; art. I, §§ 9, 16, Fla. Const.

Out-of-court statements not made under oath before the jury and used to prove the truth of the assertion are hearsay and cannot be introduced as substantive evidence unless the offering party satisfies the exceptions in sections 90.803 or 90.804, Florida Statutes (1993). An out-of-court statement may be admissible as non-hearsay and only for a limited purpose if it is a prior consistent statement satisfying all of the elements of section 90.801(2)(b), Florida Statutes (1993):

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> ....
>
> (b) Consistent with his testimony and is

> offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication....

A prior consistent statement is inadmissible to bolster the credibility of a witness. It is only admissible to rebut an express or implied charge that the witness's trial testimony had been affected by improper influence, motive, or recent fabrication. E.g. Jackson v. State, 498 So. 2d 906, 909-10 (Fla. 1986); Anderson v. State, 574 So. 2d 87, 93-94 (Fla.) (same), cert. denied, 502 U.S. 834, 112 S. Ct. 114, 116 L. Ed. 2d 83 (1991); see generally Charles W. Ehrhardt, Florida Evidence § 801.8 (1994 ed.). Courts must take special care to avoid the improper introduction of prior consistent statements through law enforcement officers because the danger of improperly influencing the jury "becomes particularly grave." Rodriguez v. State, 609 So. 2d 493, 499-500 (Fla. 1992), cert. denied, 114 S. Ct. 99, 126 L. Ed. 2d 66 (1993).

The State failed to satisfy the requirements of section 90.801(2)(b) on a number of grounds. First, the statute was designed to narrowly limit the admissibility of an out-of-court statement that is untested, not made under oath, and not made in circumstances showing reliability. Here the challenged statement was double hearsay, twice removed from the original speaker. Section 90.801(2)(b) cannot be stretched so far as to render admissible a statement this remote from the test of an oath, cross-examination, and reliability.

Second, Cotton's testimony as to what Long said is not a "prior consistent statement" because it is not consistent with

what Long testified to at trial. Long simply could not remember what he had been told or what he told Cotton and Hall, whereas Long's statement introduced through Cotton was a new, affirmative, and highly prejudicial fact. Long's inability to remember was materially different. Moreover, Long had every reason to testify as the State wished, and his inability to remember a fact the State wanted him to remember could not then be used to the State's benefit by opening the door to otherwise inadmissible hearsay. The State had to accept his answer. Cf. Caruso v. State, 645 So. 2d 389, 394 (Fla. 1994) (State cannot impeach collateral matter with extrinsic evidence).

Third, Kormondy's cross-examination did not point out inconsistencies in the witness's pretrial and trial statements indicating a material change or alteration. A general attack on credibility is not enough because a witness's credibility is always in issue. McDonald v. State, 578 So. 2d 371, 373 (Fla. 1st DCA), review denied, 587 So. 2d 1328 (Fla. 1991); Turtle v. State, 600 So. 2d 1214 (Fla. 1st DCA 1992); Jenkins v. State, 547 So. 2d 1017 (Fla. 1st DCA 1989). The State cannot rebut a charge that two statements materially varied when the defense made no charge.

Finally, Long's statement introduced through Cotton was not made before the time his alleged improper motive, influence, or recent fabrication arose, as required by law. E.g., Jackson, 498 So. 2d at 909-10 (error to introduce prisoner's statement made after his motive to falsify arose); Anderson, 574 So. 2d at 93-94 (same); Cortes v. State, 21 Fla. L. Weekly D576 (Fla. 3d DCA

March 6, 1996) (declarant's motive to fabricate arose at time of arrest due to prior relationship, not later when plea negotiated); accord Tome v. United States, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995) (federal law follows same rule). Long said he had not even spoken to Kormondy about this case until after he saw the $50,000 reward bulletin in the Jr. Food Store. Just after Long saw the reward notice, Kormondy made an initial statement and disclosed more details later at Long's house. Long then met with Cotton and Hall and made the statement to which Cotton testified over objection. T1186-88. Clearly Long's motive to fabricate already had arisen before Long made the statement to Cotton because Long already had been aware that he was entitled to share the $50,000 reward: That was why he talked to deputies in the first place.

The State also contended that Cotton's testimony was admissible to impeach its own witness but offered no factual or legal basis for so arguing. The State thus took a position that was at best unclear and almost certainly self-contradictory, first claiming the evidence was a prior consistent statement for rebuttal, then arguing, by implication, that it was a prior inconsistent statement for impeachment.

In any event, the State was wrong and failed to lay the predicate. Long's statement to Cotton had to "directly contradict or materially differ" from Long's trial testimony to qualify as a prior inconsistent statement for impeachment under section 90.608, Florida Statutes (1993). State v. Smith, 573 So. 2d 306, 313 (Fla. 1990). The State had to lay a predicate for

impeachment by pointing to a particular prior inconsistent statement, e.g. Fernandez-Carballo v. State, 590 So. 2d 1004 (Fla. 3d DCA 1991), but it failed to do so. A witness's mere inability to recall a statement does not open the door to impeachment with the contents of the prior statement. Rankin v. State, 143 So. 2d 193, 196 (Fla. 1962) (reversing where court witness's inability to recall was impeached with contents of prior statement); Calhoun v. State, 502 So. 2d 1364 (Fla. 2d DCA 1987) (deputy's inability to recall making statement could not be impeached with his prior statement). Moreover, Long was giving the State favorable testimony, and this record does give rise to any suggestion that Long intentionally failed to recall to avoid telling the truth: Recalling the statement would have been beneficial to Long's pursuit of the $50,000 reward.

The record thus demonstrates that the judge erroneously permitted the State to introduce Cotton's testimony to bolster and corroborate Long (note that Cotton said Long "totally and completely on his own" said what weapon had been used); and to introduce as substantive evidence the double hearsay statement that Kormondy said he used McAdams' own gun. The harmful error here went to the heart of this trial because Long's testimony was pivotal to the State's case both as to guilt and penalty. His was the only testimony that linked Kormondy to the alleged murder weapon, and the only guilt-phase evidence to contradict Kormondy's own voluntary statements to deputies in crucial respects. The State relied on Long's testimony, T1419-21, going so far as to argue that Kormondy had made inconsistent statements

and therefore should not be believed (even though he did not testify), T1425. Bolstering Long's credibility by using a law enforcement officer was especially harmful. Rodriguez. The error tainted the penalty phase as well, casting Kormondy's character in an unnecessarily negative light and diminishing his contention that he warranted mitigation for having cooperated with law enforcement, among other things. Accordingly, this Court should order a new trial.

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 charged Kormondy with first-degree murder as premeditated and/or felony murder. R1. At the close of the State's case, Kormondy moved for a judgment of acquittal on the ground that premeditation to kill had not been proved. The motion was denied. T1351-52. The defense moved for a jury verdict form that distinguishes premeditated murder from felony murder, but the court denied the motion. T1387-88. The jury was then instructed as to premeditation, T1439-40,[4] and returned a general verdict finding premeditated and/or felony first-degree murder. T1480; R375. Kormondy moved for a new trial on the ground that the verdict was contrary to law and the weight of the evidence, and that the court erred by not granting a directed

[4] Kormondy objected to instructing the jury on felony murder and proposed an alternative instruction, T1364-65, which could not be located and made part of this record, S21-22.

verdict of acquittal. R413. That motion was denied. R415. The court's decisions with respect to premeditated murder, and instructing the jury as to premeditation, were erroneous and violated Kormondy's federal and state constitutional rights to a fair trial, equal protection, due process, and against cruel and/or unusual punishment. U.S. Const. amends VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

Premeditation to kill was an essential element of the first-degree murder charge. The State has the burden to prove premeditation beyond a reasonable doubt by direct evidence, circumstantial evidence, or both. When the State relies on circumstantial evidence, the evidence must be inconsistent with every other reasonable hypothesis. Mungin v. State, 21 Fla. L. Weekly S66 (Fla. Feb. 8, 1996) (on rehearing denied); Hoefert v. State, 617 So. 2d 1046, 1048 (Fla. 1993); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989).

In the present case, the jury heard only one eyewitness's account of the shooting: that of Johnny Shane Kormondy, whose statements were introduced through Willie Long and sergeant Hall. Before Kormondy was even a suspect -- when he had no motive to lie and was merely confiding in a friend and relative who then turned on him -- he said the shooting was an accident. T1194. After he was apprehended, both statements he made described the shooting as an accident in which the gun just went off. The only substantial distinction between all the statements was as to whom Kormondy identified as the shooter, telling Long he had been the one with the gun, but telling deputies the shooter had been

Buffkin. T1240, T1282-84, R364-65. And even when he inculpated Buffkin instead of himself, he said Buffkin told him "I didn't really mean for it to go off, I didn't mean for the gun to go off." T1292-93; R370. The accidental shooting scenario was bolstered in the penalty phase when Buffkin's sworn statement revealed that immediately after the shooting, Kormondy said the shooting had been an accident. T1808. Thus, the only direct evidence[5] heard by the jury proved the gun went off accidentally.

The circumstantial evidence also is fully consistent with an accidental shooting. Prior to the incident Valerie Kormondy overheard them talking about committing a robbery; they drove around looking for a place to rob; and they did commit a robbery. The indictment charged armed burglary with intent to commit a theft, not a murder. There was no evidence of defensive wounds or a struggle, and neither Mr. or Mrs. McAdams resisted, so no motive to premeditate a killing arose from their actions. The state presented no evidence that Kormondy, Hazen, or Buffkin knew or were known by Mr. or Mrs. McAdams, so there was no evidence of animus or a prior relationship that could give rise to premeditation. Even if Kormondy did the shooting, his face and hands were covered to prevent identification, so his fear of capture would not have provided him a motive for premeditated murder.[6] Had he been fearful of identification, he would have

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[5] A confession is direct evidence in Florida. E.g. Walls v. State, 641 So. 2d 381, 390 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995).

[6] Only Buffkin's face and hands were exposed during the burglary, and only Buffkin could be identified by Mrs. McAdams,

killed the second victim, yet she was not even shot. There would have been no reason to pull the phone cords from the wall as soon as they entered if they had intended to leave nobody alive behind to use those phones. Kormondy had been drinking alcohol before the burglary, which could have diminished his capacity to premeditate. The medical examiner found only a single gunshot wound that could have been caused instantaneously when the barrel made contact with the head, as Kormondy had described.

The State's only attempt to dispute the reasonable inference of an accidental shooting came from its firearms expert, whose evidence fell way short of the mark. The expert said it would be unlikely for a .38-caliber Smith & Wesson revolver to go off accidentally if the gun was in good working order and if the gun had not been cocked. T1315. But (1) "unlikely" does not mean an accident did not or could not have happened; (2) the gun was not recovered and the expert did not examine it, so there was no evidence that the gun had in fact been in good working order on the day of the killing; and (3) the expert's hypothetical testimony was predicated on the assumption the hammer had not been cocked, but there was no evidence to support that assumption. The hammer may very well have been cocked, intentionally or accidentally. And even if the hammer had been cocked intentionally, that act would not be inconsistent with an accidental shooting because it could have been cocked to

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maybe providing Buffkin a motive to commit a premeditated murder had Buffkin been the shooter. But the State's case was that Kormondy fired the weapon, and the State put on no evidence to even suggest that Kormondy acted pursuant to Buffkin's need or desire.

intimidate Mr. McAdams to assure his continued cooperation, the gun then firing accidentally. Nor can premeditation be inferred from the second gunshot: it was not fired by Kormondy; it was an independent act of a different person; it may not have been fired intentionally; and if fired intentionally, it was fired intentionally into the floor in a different room, as the State conceded. T1410-11.

This Court many times has reversed premeditation rulings in similar cases for lack of sufficient evidence. In Terry v. State, 21 Fla. L. Weekly S9 (Fla. Jan. 4, 1996), two men robbed a gas station using Terry's guns, and Terry shot the attendant to death; but because nobody saw the shooting, the facts presented insufficient evidence of premeditation. In Mungin, 21 Fla. L. Weekly at S66, a store clerk was shot once in the head at close range in an armed robbery with a gun that required 6 pounds of pressure to fire; and the same gunman had committed two other armed robberies and shot the clerks each time. But this Court said the State did not prove premeditation because it could have happened at the spur of the moment; no statements showed Mungin had formed the intent to kill before the shot was fired; no witnesses saw the murder; and there was only a single shot as opposed to multiple shots or a continuing attack. In Jackson v. State, 575 So. 2d 181 (Fla. 1991), a store owner was shot to death with a single shot in an armed robbery where the defendant had been in the same store the day before, leaving open the likelihood that they would be identified by the owner if left alive. But premeditation was not proved because there had been

only one shot from an unknown weapon; there was no evidence of particularly deadly special bullets; the defendant made a statement indicating his intent was to rob the store but the clerk "bucked the jack"; there was no evidence of a fully formed conscious purpose to kill; and the evidence was not inconsistent with defense's theory that the shot was fired reflexively. There was no premeditation in Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990), cert. denied, 499 U.S. 932, 111 S. Ct. 1339, 113 L. Ed. 2d 270 (1991), where two men hijacked a prison van to free an inmate, one of the men shot and killed an officer with three shots from a 9-mm pistol; any of the shots would have been fatal; one shot was a contact wound where the barrel had been placed against the officer's head; the other two shots were to the chest; the defendant then aimed a gun at a second officer and pulled the trigger but it failed to fire; and the defendant kicked one of the guards before the murder.

In Hall v. State, 403 So. 2d 1319 (Fla. 1981), an armed deputy was shot while on duty by one of two defendants who had just emerged from a store where they had been reported as suspicious. The deputy was shot from 2-5 feet away while wearing a bullet-proof vest; his revolver was stolen; the murder occurred right after the defendant apparently had just committed an abduction, rape and shooting of another victim; and the defendants fled from the deputy's murder in a stolen vehicle only to be captured in a police shootout. This Court found insufficient evidence of premeditation, noting that no witness saw the shooting and the evidence was equally consistent with a

shooting during a struggle as it was with a premeditated murder. In McArthur v. State, 351 So. 2d 972 (Fla. 1977), the Court struck down premeditation and murder where a wife fired a single fatal shot into her husband from only 7 inches away as he lay on his bed, the Court finding the facts consistent with an accidental shooting. See also Taylor v. State, 156 Fla. 122, 22 So. 2d 639 (1945) (defendant struggled with victim, stabbed him in the face and armed, then took victim's gun and shot him twice, once fatally); Snipes v. State, 154 Fla. 262, 17 So. 2d 93 (1944) (defendant shot sheriff during struggle with a deputy where officers were searching defendant's home for contraband); Douglas v. State, 152 Fla. 63, 10 So. 2d 731 (1942) (defendant struck woman with pipe, argued with fellow worker, retrieved a shotgun, cocked one trigger, returned to area, and when intercepted by posse he killed victim with one shot at close range; but he had no animus toward victim, no premeditated design to eradicate the posse, and he would have exhausted ammunition to shoot at posse if he had premeditated to kill); Forehand v. State, 126 Fla. 464, 171 So. 241 (1936) (defendant killed deputy and brother by shooting at them 4-5 times as the victims struggled on floor with each other); Smithie v. State, 84 Fla. 498, 94 So. 156 (1922) (proof that defendant fired fatal shot insufficient to prove premeditation); Richardson v. State, 80 Fla. 634, 86 So. 619 (1920) (train conductor believing defendant to be dangerous drew gun and shot, defendant responded by shooting victim in face or shoulder and fired a second shot in victim's buttocks after victim fell); cf. Hoefert (no premeditation where defendant had

strangled several women (not to death) during sexual assaults, but his latest victim died by asphyxiation after which he dug a hole to bury the body and then fled to Texas; Driggers v. State, 164 So. 2d 200 (Fla. 1964) (proof of premeditated murder of defendant's wife by throwing her off railroad trestle was not inconsistent with defendant's claim of accidental death).

The present case is similar to these cases in many respects. No State witnesses saw the murder and the only eyewitness who testified said it was an accident. Terry; Mungin; Jackson; Van Poyck; Hall; McArthur; Hoefert. The murder took place during the commission of an armed robbery or other felony. Terry; Mungin; Jackson; Van Poyck; Hall. The victim died of a single gunshot wound without any evidence of a continued attack and without any evidence of a struggle or defensive wounds. Terry; Mungin; Jackson; Hall; McArthur. The State did not refute the defense's theory of an accidental or reflexive killing (which came out in the State's own evidence). Mungin; Jackson; McArthur; Driggers. The defendants fled from the scene after the murder. Terry; Mungin; Jackson; Van Poyck; Hall. The defendant made statements evincing no premeditated intent to kill. Jackson. There was no evidence that the victim knew the defendant or that animus existed. Driggers; Douglas.

Because the State failed to prove premeditation beyond a reasonable doubt, the judge should have granted a judgment of acquittal as to premeditated murder. That error was compounded when the judge erroneously instructed the jury as to premeditated murder because it is error to instruct on a theory of prosecution

for which a judgment of acquittal should have been issued. Mungin; McKennon v. State, 403 So. 2d 389 (Fla. 1981). These errors necessarily tainted the first-degree murder verdict and also deprived him of a unanimous jury verdict in violation of his state constitutional rights to due process and a fair trial. This Court should reverse and remand for a new trial.

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

Penalty phase proceedings were rife with impermissible evidence of collateral bad acts and nonstatutory aggravating circumstances. This evidence destroyed the weighing process and violated Kormondy's state and federal constitutional rights to due process, equal protection, a fair trial, the privilege against compelled self-incrimination, and protection against cruel and/or unusual punishment. U.S. Const. amends V, VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

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

Perhaps the most egregious example occurred when the State cross-examined Buffkin's attorney, Kevin Beck, who was called by the defense to testify as to only one fact: the plea agreement Buffkin made with the State just prior to Kormondy's trial. On direct, Beck was never asked about anything Buffkin said to Beck or in a deposition. On cross-examination, however, the State went impermissibly beyond the scope of direct examination to adduce testimony that Beck had reports showing Buffkin was borderline retarded; Buffkin testified in a deposition that

Kormondy killed McAdams; and Buffkin testified in a deposition that he told Kormondy to stop. Then, over objections as to relevancy and beyond the scope of cross examination, he testified that Buffkin said in a deposition "Kormondy had told him, while in the jail, that if he ever got out, he would in fact kill William Long and Cecilia McAdams." T1799-1804.[7] This testimony was clearly impermissible and reversible error.

In Derrick v. State, 581 So. 2d 31 (Fla. 1991), a similar situation arose in which this Court found reversible error where a witness was permitted to testify over objection that the defendant had said he killed the victim and "would kill again." This Court found that the statement was irrelevant to guilt since that issue already had been decided, and was irrelevant to any issue properly to be decided in the penalty phase: "The testimony was not relevant to any other aggravating factor. See Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983) ("[L]ack of remorse should have no place in the consideration of aggravating factors.")." Derrick, 581 So. 2d at 36. Beck's testimony likewise was irrelevant to any statutory aggravating circumstance, and remorse was not placed in issue by either side.[8] The only thing his statement accomplished was to place before the jury and judge horrible, impermissible evidence constituting bad character evidence and non-statutory aggravation, all of which was well beyond the scope of direct

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[7] The entire Beck colloquy is attached as Appendix B.

[8] See sentencing memoranda. R423-37, R438-53.

examination. See also Hitchcock v. State, 21 Fla. L. Weekly S139 (Fla. March 21, 1996); Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Colina v. State, 570 So. 2d 929 (Fla. 1990); Garron v. State, 528 So. 2d 353 (Fla. 1988); Robinson v. State, 487 So. 2d 1040 (Fla. 1986); Maggard v. State, 399 So. 2d 977 (Fla.), cert. denied, 454 U.S. 1059, 102 S. Ct. 610, 70 L. Ed. 2d 598 (1981).

Beck's cross-examination violated Kormondy's due process and confrontation rights under federal and Florida law on numerous additional grounds. First, Beck testified to Buffkin's out of court statements, facts introduced and used to prove the truth of Buffkin's assertions. This constitutes inadmissible double hearsay for which no valid independent exceptions applied. Second, Beck's testimony arose from Buffkin's discovery deposition testimony, which is inadmissible as substantive evidence. State v. Green, 667 So. 2d 756, 759-60 (Fla. 1995). Third, Beck's double hearsay presented the inadmissible confession of a nontestifying codefendant. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and its progeny, e.g., Lee v. Illinois, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986); Farina v. State, 21 Fla. L. Weekly S176, 177-78 (Fla. April 18, 1996), recognize that a hearsay confession of a non-testifying codefendant is inherently harmful, prejudicial, presumptively suspect and unreliable, and therefore inadmissible unless there has been a showing of particularized guarantees of trustworthiness. Buffkin's self-serving deposition, designed to fulfill his bargain with the State to spare his life, does not come close to satisfying the

trustworthiness requirement discussed in Lee. Moreover, facts to which Beck testified are at material variance with Kormondy's statements, so the confessions do not interlock. See Lee. Thus, Kormondy's due process and confrontation rights were violated. Kormondy's constitutional protections are even greater under the Florida Constitution. E.g. Haliburton v. State, 514 So. 2d 1088 (Fla. 1987).

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.

Early in the penalty phase Kormondy expressly waived the mitigating circumstance of no significant history of prior criminal activity. T1507-10. Nonetheless, the State managed to put before the judge and jury evidence of other crimes in addition to the aforementioned testimony of Kevin Beck. First, in its voir dire of Dr. Larson in front of the jury, the State let the jury know, albeit without contemporaneous objection, that Kormondy had disciplinary problems in the Santa Rosa County Jail while awaiting this trial: he was accused of homosexual rape and possession of cocaine. T1547. The State also asked Dr. Larson in voir dire about Kormondy's juvenile record, T1547, and over objection, cross-examined him extensively about that juvenile record, T1718-22. The defense later moved for a mistrial due to the fundamentally unfair and prejudicial nature of the homosexual rape evidence, but the motion was denied after the State advised the court of precisely how much evidence it allegedly possessed but did not present to prove the unconvicted crime. T1877-80. Then in proceedings before the judge only, the State impeached

Kormondy's mother by asking her, over objection, if she knew about her son being charged with a homosexual rape. R523-24.

Settled law prohibits the introduction of evidence in the penalty phase of unconvicted allegations because it is irrelevant, unduly prejudicial, and constitutes nonstatutory aggravating circumstances. "The State is not permitted to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment." Geralds v. State, 601 So. 2d 1157, 1162-63 (Fla. 1992). In Robinson v. State, 487 So. 2d 1040 (Fla. 1986), this Court reversed because the State asked his family and friends on cross-examination in the penalty phase if they were aware the defendant "went back to the jail and committed another rape." Id. at 1042 n.3. That is precisely the same error committed here in the examination of Kormondy's mother. A similar reversible error occurred in Garron v. State, 528 So. 2d 353, 358 (Fla. 1988) where only one witness was cross-examined about an alleged but unconvicted crime. This Court recently reversed the death sentence in another similar case, Hitchcock v. State, 21 Fla. L. Weekly S139 (Fla. March 21, 1996), where the State improperly used the guise of rebuttal to present allegations that Hitchock had attacked the murder victim's sister, thus presenting harmful, unverified nonstatutory aggravation of a collateral crime.

The fact that Kormondy had expressly waived mitigation of no significant history of prior criminal activity made the State's conduct even more egregious and prejudicial, as this Court noted in reversing death sentences in Geralds and 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). Geralds reversed the sentence because a defense penalty witness was cross-examined about whether he knew of Geralds' prior convicted crimes even though the State failed to lay a predicate for the impeachment and the State knew Geralds had waived statutory mitigation of no significant history of prior criminal activity. Maggard reversed the sentence because the State presented his prior criminal record after the defense waived statutory mitigation of no significant history of prior criminal activity. Here, the State presented evidence of both unconvicted conduct and Kormondy's juvenile record despite his waiver of the statutory mitigator. The State's cross-examinations impermissibly adduced facts that had been expressly and appropriately excluded from evidence.

The principles stated in Garron and Hitchcock apply with equal force to the voir dire of Dr. Larson. The State should not be permitted to introduce highly prejudicial irrelevant evidence under the guise of an expert's voir dire. Even if the voir dire had any legitimacy, such a question should never have been asked in the jury's presence, with or without objection. The fact that this one error did not get a contemporaneous objection does not bar this Court from considering the cumulative impact of these multiple errors. Whitton v. State, 649 So. 2d 861, 864-65 (Fla. 1994) (Court must conduct a cumulative impact review of both preserved and unpreserved errors), cert. denied, 116 S. Ct. 106, 133 L. Ed. 2d 59 (1995). The cumulative impact here is great, necessarily infecting the entire penalty phase. Even if viewed

independently, the voir dire went to the heart of the penalty phase, exposing jurors to improper evidence of grave magnitude, thereby constituting fundamental error.

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.

During Kormondy's trial in July 1994, he expressly asserted his constitutional right not to testify in the guilt phase, T1355-58, and again in the penalty phase, T1834-36. On August 26, 1994, more than a month after Kormondy's jury proceedings concluded but six weeks before sentence was to be imposed, the State called Kormondy to testify in codefendant Hazen's trial.[9] The State asked Kormondy, "Do you recognize that you have already given a statement implicating this defendant at the Sheriff's Department?" On the advice of counsel, Kormondy declined to answer, expressly asserting his constitutional right not to incriminate himself. The State said it had conferred use immunity so that whatever he said that day could not be used against him. The judge then compelled him to testify, and Kormondy continued to assert his constitutional rights. The judge immediately held him in civil contempt and orally ordered him to 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." R416-19. The written judgment

[9] This record on appeal is silent as to when the Hazen trial began and ended.

and sentence form indicates that the judge imposed a sentence of an "indefinite term." R421. When the judge sentenced Kormondy to death, he referred to the contempt sentence as being one of "six months in the county jail with the opportunity to purge by rendering truthful testimony during the trial of codefendant Hazen." R574. The State then argued, and the judge took into consideration, the contempt violation in imposing the death sentence. The State argued it was "[m]ore important to the court" than other considerations, R435, and the judge expressly relied on it as a "significant" reason to reject nonstatutory mitigation of cooperation with law enforcement. R573-74, R615.

The State and the judge together put Kormondy in a Catch-22 position, compelling him to choose between giving up his constitutional rights so that his silence could be used against him in the very same case that was not yet final, and inculpating himself by testifying despite the fact that he already had invoked his right to silence at trial. The State apparently knew that Kormondy intended to invoke his right to remain silent before haling him into court, instigating this contempt proceeding out of the jury's presence as required by Hodges v. State, 598 So. 2d 204 (Fla. 4th DCA 1992) (State must question witness out of jury's presence when State expects witness to invoke right of silence). Thus, the State manufactured an incident to cause Kormondy harm by giving him this "Hobson's choice." The entire contempt proceeding was a sham, being both unfair and ethically questionable.

The grant of immunity was illusory. Although Kormondy had

been tried for the murder, he had not yet been sentenced, so any relevant fact relating to his character or the crime was still under active consideration. See Meehan v. State, 397 So. 2d 1214 (Fla. 2d DCA 1981) (privilege applies after conviction and before sentencing); King v. State, 353 So. 2d 180 (Fla. 3d DCA 1977) (applying privilege pending appeal). Frank v. United States, 347 F.2d 486 (D.C. Cir.), cert. dismissed, 382 U.S. 923, 86 S. Ct. 317, 15 L. Ed. 2d 338 (1965), and vacated on other grounds, 384 U.S. 882, 86 S. Ct. 1912, 16 L. Ed. 2d 994 (1966), dealt with a similar situation and fully supports Kormondy. Three defendants were tried and convicted of communications law violations, and while the case was on appeal, the Government compelled the grand jury testimony of one of the defendants, Angelone, about the same criminal conduct. He invoked his privilege against self-incrimination, but the government conferred immunity and he was forced to testify. The appellate court reversed his conviction and held that "the Government may not convict a person and then, pending his appeal, compel him to give self-accusatory testimony relating to the matters involved in the conviction" under a grant of immunity because doing so would contravene the policies of the constitutional privilege. Id. at 491.

Kormondy was tried by the same judge who found him in contempt, who was scheduled to impose sentence, and who heard the evidence in all three codefendants' trials. Kormondy chose to remain silent at trial, so this would have been the first and only time the sentencing judge would have heard Kormondy's sworn testimony. It would be pure sophistry to believe the judge would

not have somehow considered Kormondy's testimony as he formulated the sentence. That threat was real indeed, for the judge even used Kormondy's silence against him. Furthermore, immunity is a creature of statute, yet neither the State nor the judge invoked any statutory authority for the grant of immunity.

Even the basic requirements of civil contempt were not met. Civil contempt is authorized only to coerce an offending party into complying with a court order rather than to punish the offending party for a failure to comply with a court order. The Fla. Bar v. Taylor, 648 So. 2d 709, 711 n.2 (Fla. 1995); Johnson v. Bednar, 573 So. 2d 822 (Fla. 1991); Bowen v. Bowen, 471 So. 2d 1274 (Fla. 1985). A court cannot impose a term of incarceration absent a separate, affirmative finding by the trial court on the record that the contemnor has the ability to comply with the purge conditions. Fishman v. Fishman, 656 So. 2d 1250, 1252 (Fla. 1995); Gibson v. Bennett, 561 So. 2d 565, 570 (Fla. 1990). Under the circumstances here, the court could not have made a valid affirmative finding on the record because Kormondy had no ability to purge while under the very real threat that his testimony would be used in the pending sentencing or in subsequent appellate and post-conviction proceedings.[10]

The entire contempt episode constituted impermissible evidence of another crime or wrong and a nonstatutory aggravating

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[10] The civil contempt should have expired at the close of Hazen's trial because thereafter the opportunity to purge did not exist. Yet the judge gave Kormondy an "indefinite" sentence, according to which he is still incarcerated for civil contempt.

circumstance, see, e.g., 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); Maggard v. State, 399 So. 2d 977 (Fla. 1981), similar to an impermissible finding of lack of remorse, see, e.g., Colina v. State, 570 So. 2d 929 (Fla. 1990).

The judgment and sentence for contempt, and the death sentence to which it contributed, should be vacated.

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

Bill Halfacre, Kormondy's brother, testified for the defense about their childhood experiences. T1666-73. The State was then permitted, over objection as beyond the scope of direct examination, to cross-examine him about a time he, Kormondy, their brother Vernon, and codefendant Buffkin, went to "a go-go place" or "strip joint" at some time after the murder. T1675-76. This was inadmissible and improper testimony.

The defense neither asked anything about Buffkin or Halfacre's knowledge of Buffkin, nor is the evidence relevant to prove any appropriate fact in this case. Instead, the testimony went beyond the scope of direct and established that within the eight days following the sexual battery and homicide,[11] Kormondy was out drinking and carousing in sexually provocative surroundings. This also amounts to evidence of lack of remorse, which is absolutely forbidden, Derrick v. State, 581 So. 2d 31 (Fla. 1991); Colina v. State, 570 So. 2d 929 (Fla. 1990), and

[11] Kormondy was apprehended on July 19, eight days after the crime. T1228.

which surely affected the penalty phase. Cf. Hitchcock v. State, 21 Fla. L. Weekly S139 (Fla. March 21, 1996); Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Garron v. State, 528 So. 2d 353 (Fla. 1988).

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

Many of the judge's specific findings of aggravating circumstances are based on legal and factual errors. These errors, individually and cumulatively, distorted the weighing process and violated Kormondy's state and federal constitutional rights to due process, equal protection, a fair trial, and protection against cruel and/or unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; art. I, §§ 2, 9, 16, 17, Fla. Const.

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

Before trial the defense objected to the cold, calculated, and premeditated aggravating circumstance, moving to strike the statute, section 921.141(5)(i), Florida Statutes (1993), and the standard instruction on vagueness and other grounds. R148, T216-17; R161-75, T221-25. The judge denied those motions. R290-92, T217, T225. The issues were preserved again before the penalty phase, T1506-07, and again at the charge conference, T1850-56. Defense counsel objected to the instruction on the ground that the evidence did not support it, and the judge overruled that objection as well. T1851-52. The judge gave the instruction of Jackson v. State, 648 So. 2d 85, 95 n.8 (Fla. 1994). T1928-29, R405-06. The judge found in part:

> [T]he evidence establishes that the execution style murder of Gary McAdams resulted from a "point blank" gunshot wound delivered to the back of his head while he sat unarmed, defenseless and totally docile on his kitchen floor. The act of killing was not consummated, however, until Mr. McAdams had been forced to see his wife thrown to the floor beside him naked after having been brutally and repeatedly raped and violated. After having been denied even the simplest touch to reassure her husband, Mrs. McAdams was taken to the master bedroom where she was once again raped. To force the display of this horror to consume the final moments of Gary McAdams' life is compelling evidence of the cold and calculated manner in which his life was ultimately taken.
>
> . . . .[T]he evidence clearly establishes beyond a reasonable doubt that Mr. McAdams was murdered pursuant to a prearranged plan of witness elimination; a plan that was carefully and methodically executed. From the time that they entered the McAdams' home until the murder occurred this defendant and his accomplices enjoyed a significant period of reflection within which to recede from their original scheme, and by binding Mr. and Mrs. McAdams otherwise prevent their immediate detection and arrest. Instead, they occupied themselves by brutally violating Mrs. McAdams, ransacking their marital home and helping themselves to whatever food and drink they could find. Heightened premeditation is, therefore, well established.

R604-05, R556-59.

1. The instruction should not have been given.

Because the judge should have granted a judgment of acquittal as to premeditation in the guilt phase, heightened premeditation became inapplicable as a matter of law, thus rendering the entire aggravating circumstance inapplicable and the instruction erroneous. See Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992) (if evidence regarding premeditation is susceptible of differing interpretations, this aggravating circumstance cannot be found).

Also, the entire instruction was unconstitutionally vague,

particularly the premeditation element. The judge instructed:

> "Premeditated" means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder.

R405. This definition is meaningless and gives the jury no guidance whatsoever. What is a higher degree of premeditation? This Court has held that a defendant must have intended the murder before the crime ever began. E.g. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 106 (1991). Jackson and the standard instruction defined "calculated" to be a careful plan or prearranged design to commit the murder. Premeditated cannot mean the same thing as calculated for each part of the statute has to have independent meaning and significance; yet that has been this Court's interpretation. The revised instruction approved by this Court in Standard Jury Instructions in Criminal Cases, 20 FLW S589 (Fla. Dec. 7, 1995), recognizes that problem and attempts to cure it.[12] But this Court's attempted cure

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[12] Standard Jury Instructions in Criminal Cases, 20 FLW S589 (Fla. Dec. 7, 1995), defined heightened premeditation as:

> [As I have previously defined for you] a killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

(which may not have been adequate anyway) was not in place at trial here and the resulting instruction was inadequate both as a matter of statutory construction and pursuant to constitutional requirements of due process and cruel and/or unusual punishment.

2. The factor was erroneously applied.

Section 921.141(5)(i) requires proof beyond a reasonable doubt that the murder was committed "in a cold, calculated, and premeditated manner." This CCP factor applies to murders -- not entire criminal episodes -- and the individual whose sentence is under review -- not the acts of all codefendants combined; and it must be proved beyond a reasonable doubt to be more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated murder. Jackson; Porter.

The State had to prove premeditation above and beyond what is required to prove guilt of premeditated murder. Geralds; Jackson, 648 So. 2d at 89; Porter, 564 So. 2d at 1064. The State also had to prove beyond a reasonable doubt that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." Jackson, 648 So. 2d at 89. There also must be proof beyond a reasonable doubt that Kormondy personally had "a careful plan or prearranged design to commit murder before the fatal incident." Jackson, 648 So. 2d at 89. To the extent that the State must rely on circumstantial evidence, its proof must be inconsistent with every other reasonable hypothesis. Geralds, 601 So. 2d at 1163.

Moreover, "'[a] plan to kill cannot be inferred solely from a plan to commit or the commission of another felony.'" Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995) (quoting Geralds, 601 So. 2d at 1163)), cert. denied, 64 USLW 3502 (1996). The judge erred because the State failed prove CCP.

As demonstrated in Issue II, supra, the evidence did not prove simple premeditation in the guilt phase. Instead, the evidence is equally consistent with an accidental shooting by a cocaine addict and alcoholic who had consumed intoxicants that night. The evidence viewed in the light most favorable to the State showed that Kormondy had planned to burglarize and rob the McAdams household, but there was no evidence that he had prearranged a plan to kill (or even to rape). Although the criminal episode was horrible and inexcusable, the manner of the killing itself was not proved beyond a reasonable doubt to be the product heightened premeditation, cool and calm reflection with the intent and purpose to kill, or the execution of a carefully arranged plan or design to kill.

Case law amply supports Kormondy's argument. For example, in Geralds the Court found circumstantial evidence of heightened premeditation was lacking in a rape, robbery and murder. See also Geralds v. State, 21 Fla. L. Weekly S85, S87-88 (Fla. Feb. 22, 1996). In Stokes v. State, 548 So. 2d 188 (Fla. 1989), the Court struck down CCP in a robbery and murder because circumstantial evidence was also consistent with an accidental shooting. In Gore v. State, 599 So. 2d 978 (Fla.), cert. denied, 506 U.S. 1003, 113 S. Ct. 610, 121 L. Ed. 2d 545 (1992), the

Court rejected CCP where evidence was consistent with the hypothesis of a rape or robbery that got out of hand. In Barwick, the Court rejected the finding of careful plan or prearranged design because at most Barwick had planned to commit a robbery, burglary, and sexual battery, with no proof that he had actually planned to commit a murder. Valdes v. State, 626 So. 2d 1316 (Fla. 1993), cert. denied, 114 S. Ct. 2725, 129 L. Ed. 2d 849 (1994), found insufficient evidence to prove a prearranged plan to kill where evidence was consistent with an escape attempt that got out of hand. Many other cases hold likewise. Also, the judge's findings do not logically support heightened premeditation because they tend to address heinous, atrocious or cruel factor, which was neither urged by the State, found by the Court, or supported by the record.

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

Before trial the defense objected to the witness elimination aggravating circumstance, attacking section 921.141(5)(e), Florida Statutes (1993), the standard instruction, and the application of the factor on grounds of vagueness, overbreadth, doubling, and arbitrariness, as well as others. R229-37. The judge denied those motions. R290-92. The issues were preserved again before the penalty phase, T1507, and again at the charge conference, T1843-56. Defense counsel also objected to the instruction on the ground that the evidence did not support it, and the judge overruled that objection as well. T1844-45. The judge then gave the standard instruction, which merely tracks statutory language. T1928, R405. The State relied on the factor

in its closing argument, T1888-91, as did the judge in his findings, R551-55, R601-03.

Section 921.141(5)(e) requires proof beyond a reasonable doubt when the victim is not a law enforcement officer that the sole or dominant motive for the murder was the elimination of the witness. E.g. Thompson v. State, 647 So. 2d 824, 827 (Fla. 1994); Livingston v. State, 565 So. 2d 1288 (Fla. 1988). Evidence of the requisite intent "must be very strong." Hannon v. State, 638 So. 2d 39, 44 (Fla. 1994), cert. denied, 115 S. Ct. 1118, 130 L. Ed. 2d 1081 (1995); Riley v. State, 366 So. 2d 19, 22 (Fla. 1978). The sole or dominant motive must be proved by positive evidence; speculation is insufficient. 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). If circumstantial evidence is relied upon, the State's evidence must be inconsistent with every other reasonable hypothesis. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). The motive to eliminate witnesses cannot be inferred solely from a plan to commit, or the actual commission of, another felony, as with CCP, Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995), cert. denied, 64 USLW 3502 (1996).

1. The instruction should not have been given.

As demonstrated in the premeditation and CCP arguments, the direct evidence showed this to be an accidental shooting, and the circumstantial evidence was fully consistent with that reasonable hypothesis. Thus it was error to instruct on a theory that could not apply as a matter of law.

Second, the instruction was vague, merely tracking the

statute without guidance:

> The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.

R405. This definition fails to instruct jurors that it can be applied only in limited circumstance where the sole or dominant motive for the murder was elimination of the witness; that strong proof beyond a reasonable doubt also must be inconsistent with any other reasonable hypothesis; and that it cannot be inferred from speculation, proof of a plan to commit, or the actual commission, of another felony. This Court in Jackson v. State, 648 So. 2d 85 (Fla. 1994) recognized that its prior case law with respect to CCP was no longer applicable in light of Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992) (striking down HAC instruction that did little more than track statute), and Hodges v. Florida, 506 U.S. 803, 113 S. Ct. 33, 121 L. Ed. 2d 6 (1992), revisiting and striking down the CCP instruction. Just as Espinosa and Jackson struck down penalty instructions that tracked the statute without guidance, the Court should do the same here with respect to witness elimination. This Court in Whitton v. State, 649 So. 2d 861, 864 n.10 (Fla. 1994), cert. denied, 116 S. Ct. 106, 133 L. Ed. 2d 59 (1995), rejected a similar claim under Espinosa. However, the Court should revisit the claim now under Jackson.

2. The factor was erroneously applied.

The judge erred because the State failed to prove this factor beyond a reasonable doubt. There is no need to repeat all the relevant facts and deficiencies in the State's case, as they

were discussed in arguing premeditation and CCP, and they apply here as well. But the particular findings do warrant some discussion. The judge found that the murder "could have served no purpose other than to avoid arrest or detection same clearly being the dominant or only motive for the perpetration of that crime." R601. This is exactly the kind of speculation condemned in Scull and other cases. The same is true with the speculative finding that the second shot into the bedroom floor, distant from both Mr. and Mrs. McAdams, served "no purpose other than to create the appearance (for the benefit of his co-defendants) that this accomplice had, in fact, completed his part in the prearranged elimination of both Mr. and Mrs. McAdams." R602. Kormondy did not shoot Mrs. McAdams although he and the others had the means and opportunity to do so. The judge merely built a pyramid of inferences.

The judge even acknowledged that the hypothesis of an accidental shooting was indeed "arguable," but he rejected it because Buffkin was not masked and because the phone lines were cut. R602. The fact that Buffkin was not masked applies to Buffkin's motive, not to Kormondy's: There is no proof that Kormondy ever fully formed a motive to kill Mr. and Mrs. McAdams due to Buffkin's appearance, and there was no evidence that Buffkin ever asked or instructed Kormondy to kill to eliminate witnesses. As to the phone lines, the judge ignored that one phone was left in working order, and that cutting the phone lines would have been unnecessary if they had intended to leave no witnesses alive to use the phone. None of this is inconsistent

with the accidental shooting hypothesis.

Finally, the judge found "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." R603. This is not in the record. The only testimony was attorney Beck saying that Buffkin testified in deposition that "he had indicated to Mr. Kormondy to stop." T1799. There was no elaboration, no statement of "vehement protest," nothing about what he wanted him to "stop."[13] And even if Kormondy had cocked the hammer, that act is not inconsistent with an accidental trigger pull.

Many cases have struck down findings of witness elimination under similar or more egregious circumstances. For example, in Livingston v. State, 565 So.2d at 1292, the Court found as insufficient evidence that Livingston shot the clerk, shot at another witness, and said afterward "'now I'm going to get the one in the back [of the store].'" Here, another person fired a second shot into the floor in a room where neither victim was, and the only statements afterward were that the shooting had been an accident. In Thompson, 647 So. 2d at 827, the defendant shot and killed a store clerk with a single gunshot to the head in an armed robbery, but the State's key eyewitness had turned her head

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[13] This is but one example of the judge referencing facts not in this record, evincing a real possibility his findings and conclusions were tainted by evidence he heard in other proceedings. See n.18, infra.

just before the shot, thereby establishing reasonable doubt because nobody knew exactly what had happened in that moment. Here, the only eyewitness statements consistently showed that the shot was fired accidentally. See also, e.g., Geralds, 601 So. 2d at 1157 (Court rejected witness elimination where the victim actually knew the defendant, Geralds knew he could be identified if victim survived burglary and armed robbery, and he knew before crime that victim's husband would not be there); Scull, 533 So. 2d 1137 (insufficient that Scull had beaten two women to death and set their house afire with them inside); Perry v. State, 522 So. 2d 817 (Fla. 1988) (Perry strangled woman who knew him in armed robbery, but some evidence showed reasonable hypothesis he may have panicked or blacked out during the murder).

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

Before trial the defense objected to the pecuniary gain aggravating circumstance, attacking section 921.141(5)(f), Florida Statutes (1993), with the standard instruction, on grounds including vagueness, overbreadth, doubling, and arbitrariness. R223. The judge denied those motions. R290-92. The issues were preserved again before the penalty phase, T1507-08, and again at the charge conference, T1846-47. The judge then gave the standard instruction, which merely tracks statutory language. T1928, R405. The State relied on the factor in its closing argument, T1885-86, as did the judge, who found:

> The evidence establishes beyond a reasonable doubt that pecuniary gain was the intended purpose for invasion of the McAdams home. The testimony of Mrs. McAdams together with admissions made by Kormondy and co-defendant Buffkin establishes

> beyond a reasonable doubt that numerous items of personal property were taken for either the personal use of defendant Kormondy and his accomplices or to obtain funds for the purchase of illegal drugs. Upon the totality of evidence presented the jury convicted this defendant of robbery while armed as charged in the indictment.
>
> Contemporaneous with the capital felony conviction and adjudication of this defendant he was additionally guilty of robbery while armed as charged in the indictment. Evidence introduced by the State during the penalty phase included a certified copy of defendant's prior conviction of that charge.
>
> The Court finds (and defense counsel concede in their September 23, 1994 sentencing memorandum) that this aggravating factor has been proved beyond a reasonable doubt.

R555-56, R603-04.

Section 921.141(5)(f), and the standard instruction, require proof beyond a reasonable doubt that the murder itself -- not whole criminal episode -- be "committed for financial gain." This Court has expansively rather than strictly construed the statute to hold that the murder must have been only an "integral step in obtaining some sought-after specific gain." Peterka v. State, 640 So.2d 59, 71 (Fla. 1994) (quoting Hardwick v. State, 640 So 2d 1071, 1076 (Fla. 1988)), cert. denied, 115 S. Ct. 940, 130 L. Ed. 2d 884 (1995). That holding violates due process and the subsidiary rule of lenity and strict construction. E.g. Perkins v. State, 576 So. 2d 1310 (Fla. 1991); U.S. Const. amends. V, XIV; art. I, § 9, art. II, § 3, Fla. Const.

The broad construction of the statute and instruction fails to narrow the class of murderers subject to the death penalty as required by the constitutions. U.S. Const. amends. VIII, XIV; art. I, § 17, Fla. Const.; see Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). The pecuniary gain

circumstance, like "heightened premeditation," is related to but not wholly subsumed within a guilt-phase essential element of first-degree murder, and therefore it is not proved merely by the fact that a death occurred during a robbery. It takes more: proof that the individual against whom the circumstance is applied actually personally had formed the "primary motive" of killing for personal enrichment as a necessary component of facilitating the crime. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S. Ct. 1937, 104 L. Ed. 2d 408 (1989). There is a qualitative difference between finding pecuniary gain as a motive for murder and finding it as part of a contemporaneous violent felony.[14] Thus, the pecuniary gain factor must limited to proof beyond a reasonable doubt that this defendant formed the subjective intent to kill for enrichment, not just that a killing took place while he unlawfully enriched himself.

Because the instruction did not satisfy these requirements, it was error to give it. Likewise, it was error for the judge to find it proved, because there was no evidence that Kormondy had formed any intent to kill, no less to kill for enrichment. They had already completed the burglary and robbery when the murder took place, so the murder was not a necessary component of the

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[14] The factor also cannot be imputed vicariously to one defendant based on another defendant's motive to kill, just as the heinous, atrocious, or cruel factor cannot be imputed vicariously from the actual killer to a defendant unless the State proves beyond a reasonable doubt that the defendant personally shared that motive. Archer v. State, 613 So. 2d 446, 448 (Fla. 1993); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991).

pecuniary motive underlying the break-in and armed robbery. Just as a robbery can be inapplicable in aggravation as an afterthought to murder, Clark v. State, 609 So. 2d 514 (Fla. 1992), a murder can be an afterthought to a robbery.[15]

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

The judge found that the murder was committed during the commission of a burglary.[16] The judge specifically grounded his reasons on the intent of the defendants to acquire property for their personal use or to convert for drugs. R600-01. The judge then separately found the circumstance of pecuniary gain, expressly basing it on precisely the same conduct. R603. This constituted unlawful doubling because two factors cannot be based on the same aspect of the crime. 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). The error here is the same as in Robertson v. State, 611 So. 2d 1228, 1233 (Fla. 1993), and Cherry v. State, 544 So. 2d 184, 187 (Fla. 1989), cert. denied, 494 U.S. 1090, 110 S. Ct. 1835, 108 L. Ed. 2d 963 (1990), where the only intent proved to exist before the burglaries was to steal.

The judge erroneously doubled again in finding both witness

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[15] Appellant's concession in the sentencing memorandum is irrelevant because the judge made findings independent of that statement, and the findings are what this Court has under review. Moreover, the concession must be read in light of the judge's rejection of the argument that the factor was too broadly instructed and applied, thereby rendering any further objection a futile act.

[16] The indictment likewise charged burglary with the intent to commit a theft. R3.

elimination and cold, calculated, and premeditated murder. The State in closing argument, T1888-91, and the judge in his findings as to both factors, relied on precisely the same aspect of the crime in each circumstance. This failed to satisfy Provence. The present facts are distinguishable from Stein v. State, 632 So. 2d 1361, 1366 (Fla.), cert. denied, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994), and Hodges v. State, 595 So. 2d 929, 934 (Fla. 1992), vacated on other grounds, 506 U.S. 803, 113 S. Ct. 33, 121 L. Ed. 2d 6 (1992). In Stein, the Court focused on distinct facts that distinguished motive (witness elimination) from method (CCP). Elimination of witnesses was planned well in advance as part of the plan to rob the Pizza Hut (witness elimination). When the murders took place, one victim suffered five gunshot wounds -- four to the head and one to the chest, and the other victim suffered four gunshot wounds -- one through the neck, one in the right shoulder, one in the chest, and one in the right thigh (CCP). Likewise, in Hodges, the Court found that Hodges' sole purpose in killing the victim was to prevent his being prosecuted for indecent exposure, and distinct facts showed he planned her execution in a cold, calculated, and premeditated manner.

These doubling factors should not have been found at all, and at the very least, they should not have been weighed twice by both the jury and the judge. The judge should not have instructed as to all these factors because of doubling; and the judge did not caution jurors not to double. The findings and the instructions were error.

E. The felony murder aggravator was unconstitutional.

The felony murder aggravator, which was attacked unsuccessfully at trial, R217, R291, automatically subjected Kormondy to the death penalty and failed to narrow the class of death-eligible defendants in violation of due process, equal protection, and the cruel and/or unusual punishment clauses of the United States and Florida Constitutions. U.S. Const. amends. VIII, XIV; art. I, §§ 2, 9, 17, Fla. Const. Appellant recognizes that this claim has been rejected, see Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995), but respectfully urges the Court to reconsider and overrule its prior holding.

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

The judge made findings unsupported by fact, law, or both, in rejecting numerous statutory and nonstatutory mitigating circumstances. These errors individually and cumulatively distorted the weighing process in violation of Florida law and Kormondy's rights to due process, equal protection, and to be free from cruel and/or unusual punishment. U.S. Const. amends. VI, VIII, XIV; art. I, §§ 2, 9, 17, Fla. Const.

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

A trial judge has some discretion to reject an adult's age as a mitigating circumstance. See, e.g., Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S. Ct. 1937, 104 L. Ed. 2d 408 (1989). But the reasons for rejecting it must be expressly stated in the sentencing order;

must be supported by competent substantial evidence in the record; must not misconstrue undisputed facts; must not misapprehend the law; and must logically support the judge's conclusion. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); Campbell v. State, 571 So. 2d 415 (Fla. 1990). The judge abused his discretion in the present case by using invalid and unsupported reasons to reject Kormondy's age of 21.[17]

The judge said Kormondy "conceive[d]" the crime, but there is no evidence in this record that Kormondy conceived, planned, or otherwise instigated the crime. The only evidence of leadership is that Buffkin led the crime: Buffkin wanted to burglarize a house for money; Buffkin instructed the others to get out of the car and hurry; Buffkin was the first to enter the home, carrying a gun he had stolen earlier and that he was captured with later in North Carolina; and the State portrayed Buffkin as the leader in Buffkin's own trial.

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[17]

> 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.

R608.

The judge said it was a "carefully planned" crime, yet there is absolutely no evidence in this record of Kormondy's careful planning. There is no evidence that he had previously watched that house or observed the McAdams couple; that he knew the layout of the home; that he knew what to look for or where to look once inside the house; that he had planned a route of escape; that he ensured the escape vehicle could not be identified; or that he carefully planned to leave no evidence behind. The latter point is underscored by the fact that one of the codefendants didn't even cover his face or hands to dispose of the gun he used, and none of the defendants used condoms to conceal their identities from scientific detection.

The judge said the crime was "methodically executed," yet the evidence showed three perpetrators barged into a house and tore it apart in a wild search for valuables, and there was no evidence Kormondy planned sexual batteries or murder.

The judge said the crime was "intended to ultimately conclude with the witness elimination of both Mr. and Mrs. McAdams." Yet again there is no evidence in this record that Kormondy had ever planned, premeditated, or otherwise intended to eliminate witnesses. See Issue IV, supra. The fact that they did not kill Mrs. McAdams undermines the judge's conclusion that they "methodically executed" a plan of witness elimination.

Not only are these reasons unsupported; they also bear no nexus to the judge's ultimate conclusion in rejecting youth. The court's reasons are circular in logic: Committing a crime means one is mature enough to commit a crime. To the contrary, case

law abounds with legitimate reasons based on demonstrable signs of mental and emotional maturity that a court may use to reject age as mitigation. See, e.g., Gore v. State, 599 So. 2d 978, 987 n.10 (Fla. 1992) (judge had discretion to reject 24 as mitigation on grounds that he was "streetwise, had completed two years of high school, and was average or above intelligence"); Deaton v. State, 480 So. 2d 1279, 1283 (Fla. 1985) (judge had discretion to reject 18 as mitigation on grounds that he had been living on his own for several years, and his background indicates that he was an adult capable of understanding his act rather than a child of tender years).[18] The court's reasons here were invalid and thereby constitute an abuse of discretion.

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

The judge agreed that Kormondy has been addicted to alcohol since age 15, but he completely misconstrued the uncontested facts and misapprehended the law to reject it as mitigation:

> The evidence establishes that the defendant was drug and alcohol addicted by age fifteen, a

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[18] One other point requires attention. Whatever findings the judge made had to be personal to Kormondy and had to be based on this record alone. The death penalty is a measure of a particular individual's moral as well as legal culpability -- beyond mere guilt -- to narrow the class of those guilty of murder who may be sentenced to death. Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). Therefore findings in support of aggravation or rejecting mitigation must be personal to the defendant's relevant acts and character and cannot be vicariously attributed to the defendant through the actions of codefendants. Because the record does not support the findings, good cause exists to believe the judge may have drawn his conclusions from the codefendants' trials over which he also presided before sentencing Kormondy. That would be highly improper, yet the very real prospect casts a shadow over these proceedings. See n.13, supra.

> factor ultimately giving rise to a history of drug seeking criminal behavior including the crimes of burglary and robbery perpetrated against Mr. and Mrs. McAdams. Nonetheless, the evidence fails to establish that Kormondy was under the influence of drugs at the time the murder occurred. Further, neither the sexual battery of Cecilia McAdams nor the murder of her husband bore any relationship to Kormondy's addiction or his drug seeking behavior. Those crimes were motivated instead by a premeditated plan of witness elimination and complete and violent disregard for human worth and dignity. Although the fact of Kormondy's drug addiction is established by the evidence, the Court finds that his addiction is not reasonably established as a non-statutory mitigating factor and gives it no weight.

R611-12, R567-68 (emphasis in original).

Any factor that mitigates in favor a life sentence must be considered, and if supported by the record, it must be found. Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Campbell v. State, 571 So. 2d 415 (Fla. 1990); see also, e.g., Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). The law is well settled that long-term drug and alcohol abuse or addiction constitute valid mitigation on which judge and jury alike are entitled to reasonably rely, either together with or apart from intoxication at the time of the offense. See, e.g., Caruso v. State, 645 So. 2d 389 (Fla. 1994) (jury reasonably could have relied on long-term drug addiction or intoxication at time of offense); Parker v. State, 643 So. 2d 1032 (Fla. 1994) (jury entitled to rely on both long-term drug and alcohol abuse, and intoxication on day of crime);

Penn v. State, 574 So. 2d 1079 (Fla. 1991) (heavy drug use); Holton v. State, 573 So. 2d 284 (Fla. 1990) (drug addiction), cert. denied, 500 U.S. 960, 111 S. Ct. 2275, 114 L. Ed. 2d 726 (1991); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (extensive history of use of cocaine and alcohol); Castro v. State, 547 So. 2d 111 (Fla. 1989) (alcoholic and drug addicted); Songer v. State, 544 So. 2d 1010 (Fla. 1989) (reasoning ability substantially impaired by addiction or hard drugs).

The judge 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.[19] The evidence quite clearly established addiction, as the judge found. Dr. Larson and Dr. Morton, an addiction specialist, testified that disease of addiction, has been using cocaine, marijuana, and alcohol since he was at least 13 or 14 years old, and numerous personality and behavioral problems developed as a result. Dr. Markowitz, an addictionologist, testified about how addiction to drugs and alcohol distorts beliefs, values, and actions. Even the State's expert admitted crack is the most psychologically addicting drug known, and other State witnesses testified to Kormondy's heavy cocaine use. Extensive findings of addiction mitigation just like that presented here have been recognized and quoted in other cases.

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[19] The judge showed the same lack of understanding in the penalty phase when he refused to distinguish mitigation of addiction from mitigation of intoxication at the time of the offense. The defense even went so far as waiving the mitigating circumstance of intoxication at the time of the offense to drum the point home, but to no avail. See T1816-23.

E.g. Caruso; Songer. Moreover, as argued in Issue IV, supra, the judge erroneously reasoned, without support, that the murder was motivated by a premeditated plan of witness elimination.

The judge's sentencing order also is illogical: Kormondy's addiction gave rise to the burglary and robbery, but that same addiction bore no relevance to the murder. The judge failed to recognize that mitigating evidence does not have to be a characteristic of a particular aspect of a particular crime; it need be only a characteristic of the defendant. The judge instead parsed out the crimes in this single, brief, continuing episode to hold that mitigation is offense specific. That is not the law. The court erred in rejecting perhaps the most crucial mitigating evidence on which Kormondy relied, evidence presented by three experts and supported by other witnesses and which consumed most of the penalty phase.

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

The trial court said in its sentencing order as follows:

> The evidence established that by age twelve or thirteen Kormondy had developed a learning disability at least to the extent that special education classes were required.
>
> The evidence further established that, notwithstanding any learning disability which Kormondy may have had he was in fact capable of gainful employment. His former employer, James Carnley, testified that Mr. Kormondy was a good worker in the performance of his duties as an unskilled painter's helper. Although it is unlikely that Mr. Kormondy would be capable of achieving more than minimum wage employment he does, nonetheless, possess sufficient learning ability and work related skills to provide for himself and contribute substantially to the support of his wife and child.
>
> The evidence fails to establish that any

> relationship exists between this defendant's learning disability and resulting lack of education and his failure to conform his conduct to the requirements of law. The Court, therefore, finds that this defendant's learning disability and resulting lack of education are not reasonably established as non-statutory mitigating factors and gives them no weight.

R612, R568-69.

This Court made abundantly clear in Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." The judge misapprehended in the law in rejecting these mitigating circumstances despite the fact the judge found the relevant facts supported in the record.

The judge erroneously confused the requirements of two separate and distinct mitigating circumstances. Section 921.141(5)(f), Florida Statutes (1993), provides as a statutory mitigation that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." (Emphasis supplied). The judge rejected the nonstatutory mitigation of learning disability and lack of education by saying in effect the appellant failed to prove the statutory requirements of subsection (5)(f). That's like mixing apples with oranges. Many cases have established that learning disabilities or disorders and lack of education are valid nonstatutory mitigating circumstances upon which judge and jury may rely. See, e.g., Morgan v. State, 639 So. 2d 6 (Fla. 1994) (learning disorder and poor education were mitigating factors weighing in favor of

reversing death sentence); Griffin v. State, 639 So. 2d 966 (Fla. 1994) (trial court found learning disability as nonstatutory mitigation), cert. denied, 115 S. Ct. 1317, 131 L. Ed. 2d 198 (1995); Hall v. State, 614 So. 2d 473 (Fla.) (trial court found mental, emotional, and learning disabilities), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993); Hayes v. State, 581 So. 2d 121 (Fla.) (developmentally learning disabled), cert. denied, 502 U.S. 972, 112 S. Ct. 450, 116 L. Ed. 2d 468 (1991); Cochran v. State, 547 So. 2d 928 (Fla. 1989) (severe learning disability supported life recommendation); Herring v. State, 446 So. 2d 1049 (Fla.) (mitigation in learning disabilities), cert. denied, 469 U.S. 989, 105 S. Ct. 396, 83 L. Ed. 2d 330 (1984).

Moreover, the judge's reasoning makes little sense in requiring the appellant to prove that his learning disabilities and poor education were responsible for the murder. Mitigating evidence is not so precise that it can be inextricably linked to each and every aspect of any particular crime or criminal behavior. That's one of the reasons experts are used to substantiate mitigation. Volumes have been written by lawyers, psychologists, psychiatrists, social workers, and others to explore the relationship between murderous conduct and mitigating factors such as poor education, learning disabilities, poverty, child abuse, and child neglect. Kormondy put on three experts and heartbreaking family testimony to establish that relationship in this case. The judge's failure to find and weigh this unrefuted mitigating evidence was reversible error.

D. The judge rejected the fact that Kormondy had a wife and child as nonstatutory mitigation after completely

overlooking the child in his findings.

The trial court said in its sentencing order as follows:

> Although the evidence certainly establishes that Kormondy has a wife and child it is equally clear from the testimony of Mrs. Kormondy that their relationship is irretrievably broken. The Court finds that this factor is not reasonably established as a non-statutory mitigating factor and, therefore, gives it no weight.

R614-15, R573. Common sense shows the error here. Even if Kormondy had been divorced from his wife, he still has a child, his son, Devon, who was born in August 1992 and was not quite two years old at the time of trial. The judge completely overlooked that child and whatever relationship existed between them.[20]

Many courts have found mitigation in defendants' family relationships with their spouses and children. E.g., Johnson v. State, 660 So. 2d 637 (Fla. 1995) (trial court found mitigation in defendant being good husband and father and showing love and affection toward his children); Fennie v. State, 648 So. 2d 95 (Fla. 1994) (trial court found as mitigation that Fennie is the father of three children), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995); Mordenti v. State, 630 So. 2d 1080 (Fla.) (trial judge found mitigating that defendant supported the woman who lived with him and her two children), cert. denied, 114 S. Ct. 2726, 129 L. Ed. 2d 849 (1994). This mitigation was unrefuted but completely and erroneously overlooked by the judge.

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

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[20] The evidence in this trial showed the horrible effects the lack of parental bonding have produced in the Kormondy family.

The State argued that the contempt violation was "[m]ore important to the court" than other considerations as the basis for rejecting Kormondy's cooperation with law enforcement as mitigation. R435. The judge agreed, finding in part:

> It is also significant that when he was subpoenaed by the State to testify against co-defendant Hazen he refused to do so even after having been given use immunity. Upon his refusal to testify the Court found him in direct civil contempt and sentenced him to six months in the county jail with the opportunity to purge by rendering truthful testimony during he trial of co-defendant Hazen. At no time during the trial of Hazen did Kormondy elect to testify.

R615, R573-74.

The judge's findings provide yet another example of improper reasons being used to reject mitigation. As argued in Issue III, supra, the contempt finding was unlawful and violated Florida law and Kormondy's constitutional rights. At the State's urging, the judge used Kormondy's silence -- his proper invocation of the privilege against compelled self-incrimination -- against him to reject mitigation. Kormondy had no obligation to testify in Hazen's trial. The trial court's reasoning is much like the finding of lack of remorse this Court has repeatedly condemned. E.g. Colina v. State, 570 So. 2d 929 (Fla. 1990) (remanded the case for resentencing due to the trial court's consideration of Colina's lack of remorse). Rather than repeating the analysis, the appellant refers the Court to the argument in Issue III, supra. Even if the judge had other reasons to reject this mitigating circumstance, the judge's conclusion cannot stand when based on improper reasons because there is no way to tell what

the judge might have done absent an erroneous reason the judge himself viewed to be "significant."

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.

The judge's sentencing order focused on only a single fact, the identity of the triggerman. That was error. Even assuming for the purpose of argument that Kormondy was the one who fired the gun, that conclusion is greatly diminished by the failure to prove a premeditated killing. As argued throughout this brief, the evidence suggests that the actual shooting was an accident. The evidence also suggests that if anyone served as the leader of this episode, it was Buffkin. Under these circumstances, it would be disparate treatment to sentence Buffkin to life and Kormondy to death. Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990) (disparate treatment of equally culpable codefendant is valid nonstatutory mitigation).

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

The death penalty violates both the federal and state constitutions on its face and as applied because of systemic problems that make it unworkable and because the punishment in this case is disproportional after taking all of the sentencing errors into account. U.S. Const. amends. VIII, XIV; art. I, §§ 2, 9, 17, Fla. Const.

A. The death sentence is unconstitutional because of inherent systemic problems in review and practice.

The death penalty is unconstitutional, particularly when

considering the irreconcilable paradox noted in Callins v. Collins, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994)(Blackmun, J., dissenting from denial of certiorari) (conflict between constitutional commands requiring jury discretion to consider all mitigation, and against arbitrariness), and the inordinate delays inherent in the system, see, e.g., Lackey v. Texas, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995) (Stevens, J., dissenting from denial of certiorari). Moreover, this Court has not reviewed the Callins and Lackey rationales under the Florida Constitution. It should find the death sentence unconstitutional in this case.

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

Tillman v. State, 591 So. 2d 167 (Fla. 1991), and other cases, mandate proportionality review. As demonstrated above, the very heavy aggravating circumstances of witness elimination, cold, calculated, and premeditated murder, and pecuniary gain were erroneously found. See Issue IV, supra. That leaves two aggravating circumstances that arose from the single criminal episode here under review, a fact that should diminish the collective weight of those factors. Terry v. State, 21 Fla. L. Weekly S9, 12 (Fla. Jan. 4, 1996) (contemporaneous crimes committed upon second victim by codefendant, and murder committed during an enumerated felony, did not weigh as heavily as prior violent crimes personally committed by defendant). In contrast, the judge found numerous nonstatutory mitigating circumstances, and should have found many statutory and nonstatutory mitigating circumstances. See Issue V, supra. Also of great significance

is the fact that this was an accidental shooting, not a premeditated murder. After taking the judge's erroneous findings and the accidental nature of the shooting into consideration, this Court should find the death sentence disproportional punishment. See, e.g., Terry (death sentence disproportional with two valid aggravators arising from the murder/robbery and not much mitigation); Besaraba v. State, 656 So. 2d 441 (Fla. 1995) (disproportional for two murders with substantial mitigation); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (disproportional despite prior violent felony and committed during robbery because of strong mitigation); Cherry v. State, 544 So. 2d 184, 187 (Fla. 1989) (disproportional for one of two murders in burglary/theft where victim died of heart attack with no evidence to show it had been intentionally induced).

CONCLUSION

For the reasons expressed above, 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 a new jury panel.

CERTIFICATE OF SERVICE

I certify that a copy of this Initial 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 16th day of May, 1996.

Respectfully submitted,

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