**IN THE SUPREME COURT OF FLORIDA**

**WILLIAM MICHAEL KOPSHO,**

**Case No. SC05-763**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**
**_____/**

**ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT**
**IN AND FOR MARION COUNTY, STATE OF FLORIDA**

# ANSWER BRIEF OF APPELLEE

**CHARLES J. CRIST, JR.**
**ATTORNEY GENERAL**

**BARBARA C. DAVIS**
**ASSISTANT ATTORNEY GENERAL**
**Fla. Bar #410519**
**444 Seabreeze Blvd. 5th FL**
**Daytona Beach, FL 32118**
**(386) 238-4990**
**Fax # (386) 226-0457**
**COUNSEL FOR APPELLEE**

## TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE AND FACTS..... 1

SUMMARY OF THE ARGUMENT ..... 25

**ARGUMENTS**

**POINT I**

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING A CHALLENGE FOR CAUSE DIRECTED TO JUROR MULLINAX**.....28

**POINT II**

**THE TRIAL COURT DID NOT VIOLATE *OLD CHIEF V. UNITED STATES* BY ALLOWING THE STATE TO INTRODUCE DETAILS OF THE PRIOR VIOLENT FELONY; THIS ISSUE IS NOT PRESERVED**..... 50

**POINT III**

**THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED WAS ESTABLISHED BEYOND A REASONABLE DOUBT** .....52

**POINT IV**

**VICTIM IMPACT EVIDENCE DID NOT TAINT THE JURY RECOMMENDATION**.....56

**POINT V**

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING RELEVANT TESTIMONY THAT KOPSHO WAS HAVING AN AFFAIR.** .....59

**POINT VI**

**THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL ON THE KIDNAPPING CHARGE** ..... 63

**POINT VII**

**THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS, AND CRUEL** ..... 68

**POINT VIII**

**KOPSHO'S DEATH SENTENCE IS PROPORTIONATE TO OTHER SIMILARLY-SITUATED DEFENDANTS** .....72

**POINT IX**

**THE DEATH SENTENCE IN THIS CASE DOES NOT VIOLATE *RING V. ARIZONA*** ..... 75

CONCLUSION ..... 76

CERTIFICATE OF SERVICE ..... 76

CERTIFICATE OF COMPLIANCE ..... 76

**TABLE OF AUTHORITIES**
**CASES**

*Abshire v. State*,
642 So. 2d 542 (Fla. 1994) ..... 45

*Anderson v. State*,
711 So. 2d 230 (Fla. 4th DCA 1998)..... 41

*Arizona v. Fulminante*,
499 U.S. 279 (1991) ..... 48

*Banda v. State*,
536 So. 2d 221 (Fla. 1988) ..... 52

*Bangs v. State*,
338 Ark. 515, 998 S.W.2d 738 (Ark. 1999) ..... 36

*Barnhill v. State*,
834 So. 2d 836 (Fla. 2002) ..... 70

*Bates v. State*,
750 So. 2d 6 (Fla. 1999) ..... 72

*Bowden v. State*,
588 So. 2d 225 (Fla. 1991) ..... 71

*Boyd v. State*,
910 So. 2d 167 (Fla. 2005) ..... 66

*Brown v. State*,
721 So. 2d 274 (Fla. 1998) ..... 70

*Bryant v. State*,
656 So. 2d 426 (Fla. 1995) ..... 31

*Busby v. State*,
894 So. 2d 88 (Fla. 2004) ..... passim

*Carroll v. State*,
139 Fla. 233, 190 So. 437 (Fla. 1939) ..... 39

*Chapman v. California*,
386 U.S. 18 (1967) ..... 47

*Chavez v. State*,
832 So. 2d 730 (Fla. 2002) ..... 70

*Clemons v. Mississippi*,
494 U.S. 738 (1990) ..... 48

*Conahan v. State*,
844 So. 2d 629 (Fla. 2003) ..... 67

*Conde v. State*,
860 So. 2d 930 (Fla. 2003) ..... 34

*Dailey v. State*,
828 So. 2d 340 (Ala. 2001)..... 35

*Dorsey v. State*,
868 So. 2d 1192 (Fla. 2003)..... 45

*Douglas v. State*,
575 So. 2d 165 (Fla. 1991) ..... 69, 73

*Duncan v. State*,
619 So. 2d 279 ..... 51

*Dye v. State*,
717 N.E.2d 5 (Ind. 1999) ..... 36

*Evans v. State*,
800 So. 2d 182 (Fla. 2001) ..... 66

*Evans v. State*,
838 So. 2d 1090 (Fla. 2002)..... 73

*Faison v. State*,
426 So. 2d 963 (Fla. 1983) ..... 26, 65, 67

*Farina v. State*,
679 So. 2d 1151 (Fla. 1996),]..... 37

*Farina v. State*,
801 So. 2d 44 (Fla. 2001) ..... 70

*Fernandez v. State*,
730 So. 2d 277 (Fla. 1999) ..... 30

*Finney v. State*,
660 So. 2d 674 (Fla. 1995) ..... 51

*Fitzpatrick v. State*,
527 So. 2d 809 (Fla. 1988) ..... 73, 74

*Floyd v. State*,
850 So. 2d 383 (Fla. 2002) ..... 73

*Frazier v. United States*,
335 U.S. 497 (1948) ..... 42

*Freeman v. State*,
563 So. 2d 73 (Fla. 1990) ..... 50

*Georgia v. McCollum*,
505 U.S. 42 (1992) ..... 35, 44, 45

*Gootee v. Clevinger*,
778 So. 2d 1005 (Fla. 5th DCA 2000) ..... 34, 36, 37

*Gore v. State*,
706 So. 2d 1328 (Fla. 1997) ..... 30

*Grandison v. State*,
670 A.2d 398 (Md. 1995) ..... 41

*Green v. Maynard*,
349 S.C. 535, 564 S.E.2d 83 (S.C. 2002) ..... 36

*Herzog v. State*,
439 So. 2d 1372 (Fla. 1983) ..... 73, 74

*Hill v. State*,
477 So. 2d 553 (Fla. 1985) ..... 31, 43

*Hitchcock v. State*,
578 So. 2d 685 (Fla. 1990) ..... 70

*Holland v. Illinois*,
493 U.S. 474 (1990) ..... 45

*Jackson v. State*,
648 So. 2d 85 (Fla. 1994) ..... 52, 54

*Jefferson v. State*,
595 So. 2d 38 (Fla. 1992) ..... 39

*Johnson v. State*,
754 So. 2d 576 (Miss. Ct. App. 2000) ..... 36

*Klahn v. State*,
96 P.3d 472 (Wyo. 2004) ..... 41

*Knowles v. State*,
632 So. 2d 62 (Fla. 1993) ..... 34, 43

*Larzelere v. State*,
656 So. 2d 394 (Fla. 1996) ..... 72

*Longshore v. Fronrath Chevrolet, Inc.*,
527 So. 2d 922 (Fla. 4th DCA 1988)..... 42

*Lovette v. State*,
636 So. 2d 1304 (Fla. 1994)..... 66

*Lusk v. State*,
446 So. 2d 1038 (Fla. 1984)..... 31

*Lynch v. State*,
841 So. 2d 362 (Fla. 2003) ..... 54, 70

*McRae v. State*,
57 So. 348 (Fla. 1911) ..... 42

*Mendoza v. State*,
700 So. 2d 670 (Fla. 1997) ..... 30

*Minch v. State*,
934 P.2d 764 (Alaska Ct. App. 1997)..... 36

*Miranda v. Arizona*,
384 U.S. 436 (1966) ..... 11

*Moore v. State*,
525 So. 2d 870 (Fla. 1988) ..... 43

*Myers v. State*,
2000 OK CR 25, 17 P.3d 1021 (Okla. Crim. App. 2000) ..... 36

*Nelson v. Heyne*,
255 F. Supp. 451 (N.D. Ind. 1972)..... 21

*Nelson v. Heyne*,
491 F.2d 352 (7th Cir. 1974)..... 21

*Old Chief v. United States*,
519 U.S. 172 (1997) ..... 50, 51

*Omelus v. State*,
584 So. 2d 563 (Fla. 1991) ..... 68

*Overton v. State*,
801 So. 2d 877 (Fla. 2001) ..... 30

*Parker v. State*,
641 So. 2d 369 (Fla. 1994)..... 31

*Payne v. Tennessee*,
501 U.S. 808 (1991) ..... 58

*Perez v. State*,
30 Fla. L. Weekly S529 (Fla. Oct. 27, 2005) ..... 58

*Perry v. State*,
801 So. 2d 78 (Fla. 2001) ..... 67

*Phillips v. State/Crosby*,
894 So. 2d 28 (Fla. 2004) ..... 48

*Pietri v. State*,
644 So. 2d 1347 (Fla. 1994)..... 34

*Porter v. State*,
564 So. 2d 1060 (Fla. 1990)..... 72

*Reese v. State*,
768 So. 2d 1957 (Fla. 2000)..... 72

*Rhodes v. State*,
547 So. 2d 1201 (Fla. 1989)..... 50

*Richardson v. State*,
604 So. 2d 1107 (Fla. 1992)..... 52

*Ring v. Arizona*,
536 U.S. 584 (2002) ..... 27

*Rogers v. State*,
511 So. 2d 526 (Fla. 1987) ..... 52

*Rolling v. State*,
695 So. 2d 278 (Fla. 1997) ..... 40

*Rollins v. State*,
148 So. 2d 274 (Fla. 1963) ..... 36, 42, 43

*Ross v. Oklahoma*,
487 U.S. 81 (1988) ..... passim

*San Martin v. State*,
705 So. 2d 1337 (Fla. 1997)..... 45

*Satterwhite v. Texas*,
486 U.S. 249 (1988) ..... 48

*Smith v. State*,
699 So. 2d 629 (Fla. 1997) ..... 31

*Songer v. State*,
544 So. 2d 1010 (Fla. 1989)..... 73

*Stano v. State*,
473 So. 2d 1282 (Fla. 1985)..... 51

*State v. Allen*,
616 So. 2d 452 (Fla. 1993) ..... 45

*State v. Anderson*,
603 N.W.2d 354 (Minn. Ct. App. 1999)..... 36

*State v. Barone*,
969 P.2d 1013 (Or. 1998) ..... 41

*State v. DiGuilio*,
491 So. 2d 1129 (Fla. 1986)..... 38, 39, 47

*State v. Entzi*,
2000 ND 148, 615 N.W.2d 145 (N.D. 2000)..... 36

*State v. Fire*,
145 Wn. 2d 152, 34 P.3d 1218 (Wash. 2001)..... 36

*State v. Hickman*,
205 Ariz. 192, 68 P.3d 418 (Ariz. 2003)..... 36

*State v. Law*,
559 So. 2d 187 (Fla. 1989) ..... 67

*State v. Lindell*,
2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223 (Wis. 2001).... 35

*State v. Menzies*,
889 P.2d 393 (Utah 1994) ..... 36

*State v. Middlebrooks*,
840 S.W.2d 317 (Tenn. 1992)..... 36

*State v. Neil*,
457 So. 2d 481 (Fla. 1984) ..... 39, 41, 44

*State v. Neuendorf*,
509 N.W.2d 743 (Iowa 1993) ..... 36

*State v. Pelletier*,
209 Conn. 564, 552 A.2d 805 (Conn. 1989) ..... 36

*State v. Ramos*,
119 Idaho 568, 808 P.2d 1313 (Idaho 1991) ..... 36

*State v. Schopp*,
653 So. 2d 1016 (Fla. 1995)..... 47

*State v. Slappy*,
522 So. 2d 18 (Fla. 1988) ..... 46

*State v. Storey*,
40 S.W.3d 898 (Mo. 2001) ..... 36

*State v. Stufflebean*,
329 N.W.2d 314 (Minn. 1983)..... 36

*State v. Verhoef*,
2001 SD 58, 627 N.W.2d 437 (S.D. 2001)..... 36

*Stewart v. State*,
558 So. 2d 416 (1990) ..... 71

*Suarez v. State*,
481 So. 2d 1201 (Fla. 1985)..... 71

*Swafford v. State*,
533 So. 2d 270 (Fla. 1988) ..... 70

*Trotter v. State*,
576 So. 2d 691 (Fla. 1991) ..... passim

*United States v. Hasting*,
461 U.S. 499 (1983) ..... 47

*United States v. Martinez-Salazar*,
528 U.S. 304 (2000) .....34, 35, 37, 40

*Walls v. State*,
641 So. 2d 381 (Fla. 1994) ..... 66

*Windom v. State*,
656 So. 2d 432 (Fla. 1995) ..... 56, 58

*Young v. State*,
96 So. 381 (Fla. 1923) ..... 42

*Zile v. State*,
710 So. 2d 729 (Fla. 4th DCA 1998)..... 40

**MISCELLANEOUS**

Article I, § 16, Florida Constitution..... 41

Florida Statutes, Section 787.01(1)..... 65, 66

Florida Statutes, Section 913.03 ..... 32, 46, 48

Florida Statutes, Section 921.141(7)..... 56

Florida Statutes, Section 924.33 ..... 38

## STATEMENT OF THE CASE

William Michael Kopsho ("Kopsho") was indicted on charges of first-degree murder and armed kidnapping for the murder of his wife, Lynn Ann Kopsho ("Lynn") on October 27, 2000. (Vol. 1, R1-2). Kopsho, 47, was arrested that same day. (Vol. 1, R3-4). The State filed a Notice of Intent to Seek The Death Penalty. (Vol. 1, R14).

Kopsho petitioned the court for transcription of the Grand Jury testimony of William Steele. (Vol. 1, R20). The motion was granted. (Vol. 1, R22). Kopsho filed a series of motions regarding the constitutionality of the Florida death penalty. (Vol. 1, R47-55, 56-60, 61-71, 72-77, 78-82, 83-90, 91-92, 129-131; Vol. 2, R213-236, 244-251, 252-277, 278-281). He filed a motion *in limine* to exclude "gory and inflammatory" photographs and offered to stipulate to the cause of death and number of wounds. (Vol. 1, R104). He also filed a motion *in limine* to prohibit the State from commenting that a grand jury indicted him (Vol. 1, R106-107), and from referring to mitigating factors as either "statutory" or "non-statutory." (Vol. 1, R108-109). He filed motions for individual, sequestered *voir dire* (Vol. 1, R110-114), for daily transcripts of trial (Vol. 1, R119-121), to preclude the State from arguing felony murder (Vol. 1, R129-131), to recess the trial between guilt and penalty phases (Vol. 1, R135-136), for statement of particulars as to aggravating

factors and theory of prosecution (Vol. 1, R137-142), to limit victim impact evidence (Vol. 1, R143-146), to exclude evidence designed to evoke sympathy (Vol. 1, R147-157), and to disclose penalty phase evidence. (Vol. 1, R158-164). Additionally, Kopsho filed motions to redact the contents of his statement and 911 call (Vol. 2, R165-212), to preclude certain prosecutorial arguments (Vol. 2, R237-243), and to address various trial procedures. (Vol. 2, R282-285).

The trial judge granted the motions for statement of particulars as to aggravating factors and theory of prosecution (Vol. 2, R302), to recess between the guilt and penalty phases (Vol. 2, R303), to preclude improper State argument (Vol. 2, R306), to require the State to disclose penalty phase evidence (Vol. 2, R307), to exclude evidence designed to create sympathy for the victim (Vol. 2, R308), to compel State disclosure of mitigating evidence and favorable evidence(Vol. 2, R311, 312), for disclosure of impeaching information (Vol. 2, R313), to prevent the State from commenting on grand jury testimony (Vol. 2, R315), to preclude the State from commenting on non-enumerated factors (Vol. 2, R316), for individual sequestered *voir dire* (Vol. 2, R318), to preclude the first-degree felony murder theory of prosecution (Vol. 2, R323), and for interrogatory penalty phase verdict forms. (Vol. 3, R391).

The trial court denied the motions regarding

constitutionality of the Florida death penalty. (Vol. 2, R292, 293, 294, 296, 297, 298, 299, 300, 317). The trial judge also denied motions regarding photographs (Vol. 2, R314), and for grand jury transcripts. (Vol. 2, R320).

The trial judge granted in part, and denied in part, motions limiting victim impact testimony (Vol. 2, R301; Vol. 3, R596), redacting confession and 911 call (Vol. 2, R304), striking portion of standard jury instruction (Vol. 2, R309), regarding trial procedures (Vol. 2, R322), for daily transcript (Vol. 2, R323) and prohibiting witnesses from discussing testimony. (Vol. 4, R598).

The State filed three Notices of Intent to Offer Evidence of Other Crimes, Wrongs or Acts. (Vol. 2, R290-291; Vol. 4, R600-01, 604-05).

Kopsho moved to change venue. (Vol. 3, R392-410, 477-479). The motion was granted after a hearing on February 17, 2004. (Vol. 3, R480-495; Vol. 4, R527). Venue was transferred from Marion County to Sumter County.

The case was tried by jury from February 21-24, 2005. The jury convicted Kopsho as charged. (Vol. 5, R714-716). On the kidnapping charge, the jury made a special finding that Kopsho used a firearm. (Vol. 5, R716).

The penalty phase began March 1, 2005. Kopsho requested several special instructions. (Vol. 5, R719, 720-22, 723, 724,

725, 726, 727, 728, 729). The jury recommended the death sentence by a margin of nine (9) to three (3). (Vol. 6, R1019). The *Spencer* hearing was held March 24, 2005. (Vol. 7, R1053-76). Sentencing was held April 8, 2005 (Vol. 7, R1177-1192). The trial judge followed the jury's recommendation and imposed a sentence of death. (Vol. 7, R1193-1213). On the kidnapping charge, Kopsho was sentenced to life imprisonment with a mandatory minimum ten (10) years for possessing a firearm. (Vol. 7, R1215).

The trial judge found four aggravating circumstances:

1. Cold, calculated, and premeditated (great weight);
2. Prior violent felony (great weight);
3. Committed during armed kidnapping (moderate weight); and
4. Under sentence of imprisonment or placed on felony probation (minimal weight).

(Vol. 7, R1203-04). The trial judge found no statutory mitigating circumstances. He found the following non-statutory mitigating circumstances:

1. Mental or emotional disturbance (moderate weight);
2. Voluntary statement/cooperative (little weight);
3. Did not flee/remained at scene (little weight);
4. Did not harm witnesses or bystanders (little weight);
5. Remorse (little weight);

6. Abandoned by mother at age 16 (little weight);

7. Sent to juvenile detention at age 16 (little weight);

8. Good father to two sons (little weight);

9. Society protected by life sentence (little weight);

10. Dependable, knowledgeable worker. No disciplinary reports in prison (little weight).

(Vol. 7, R1205-1211).

## STATEMENT OF THE FACTS

On October, 27, 2000, Katina and Shawn Tufts were traveling east on State Road 40 when they noticed a black pick-up truck swaying back and forth in front of them. (Vol. 13 R556-7, 571). Eventually, "it screeched to a stop" on the right side of the road. (Vol. 13 R557). Lynne Kopsho exited the pick-up and started running towards the Tufts' vehicle. (Vol. 13 R558, 571). Kopsho exited the pick-up and started chasing Lynne Kopsho. He grabbed her from behind and threw her to the ground. (Vol. 13 R559). He reached behind his back, pulled a gun, and fired a shot. Lynne Kopsho fell to the ground. (Vol. 13 R559). Katina yelled to her husband to get back in their car. They drove to the nearest house and requested the owner call 911. (Vol. 13 R560-61). Shawn Tufts returned to the shooting scene, and Katina Tufts rode with Mr. Friend, the homeowner. (Vol. 13 R565). Mr. Friend had a gun with him. (Vol. 13 R565).

After the Tufts returned to the scene, Kopsho told

bystanders to stay away from his wife. Kopsho said, “He had shot the bitch and that she was dead.” (Vol. 13 R561). After Kopsho crossed to the other side of State Road 40, Katina went to check on Lynne. It appeared she was dead. (Vol. 13 R562). A gun was lying next to her shoulder. (Vol. 13 R563). Kopsho stated that he was “so tired” and made no effort to run away. When the police arrived, he laid down to be cuffed. (Vol. 13 R568).

Shawn Tufts identified Kopsho as the driver of the black pick-up. (Vol. 13 R577). Shawn described his observations as: “He ran her down. Grabbed her by the neck. Threw her down.” (Vol. 13 R573). As Kopsho stood over Lynne Kopsho, he pulled a gun from his back waist area and shot her as she lay on the ground. (Vol. 13 R573, 574, 578). The Tufts drove to the nearest house. Katina exited to call police and Shawn returned to the shooting scene. (Vol. 13 R575). Shawn observed Kopsho “crowding around her, wouldn’t let anybody around her.” There was a tow truck driver and another woman bystander in the vicinity. Shawn kept his distance and listened to what was happening. (Vol. 13 R576). Shawn saw Kopsho on the other side of the road and heard him on the phone screaming, “I killed the bitch.” (Vol. 13 R576). Kopsho no longer had a gun. Lynne Kopsho appeared to be dead at that point. (Vol. 13 R579).

Sylvia Hall was traveling east on State Road 40 when she observed a truck pulled over and a person on the ground “in a

fetal position." (Vol. 13 R581, 582-83). She observed a man kneeling over her. He put his hand to his back and pulled out a gun. He shot the person on the ground. (Vol. 13 R583-84).

Basil Friend was at his house when someone ran up and told him there was a shooting incident down the road. (Vol. 13 R587-88). He called the Sheriff's Department, then armed himself with his .32 caliber pistol. When he arrived at the scene, Friend saw Kopsho standing near the victim saying, "Get the f—k back. Don't come near. I just shot her three times." (Vol. 13 R590, 591). Friend pulled his own weapon and told Kopsho "not to do anything." (Vol. 13 R591). At some point, Kopsho crossed the road. Paramedics arrived to treat Lynne Kopsho. Bret Cyr, a paramedic, responded to the shooting scene and attempted to revive Lynne Kopsho. He saw a gun lying nearby and tossed it away for safety reasons. (Vol. 13 R596, 597). Law enforcement arrived about five minutes later. (Vol. 13 R595).

Edwin Boone, communications officer for Marion County Sheriff's Office, received a 911 call from Kopsho on October 27, 2000. Kopsho stated he had just shot his wife. (Vol. 13 R600). During the 911 call, Kopsho indicated that he had just shot his wife three times. He told bystanders to stay back, that he was the shooting victim's husband and this was a crime scene. (Vol 13. R617, 621). Kopsho told the dispatcher that he had found out the previous day that his wife had been unfaithful to him. She

was sleeping with her boss, Kopsho's "good friend." (Vol. 13 R619). Kopsho indicated that he had stolen a nine millimeter gun from his friend, William Steele. (Vol. 13 R620). Kopsho knew his wife was dead. (Vol. 13 R620).

When Sergeant Jeff Owens arrived at the scene, he observed several parked vehicles and a rescue unit standing by. (Vol. 13 R608). He saw the victim lying in the grass on the side of the road. Kopsho was seated in the back of a police car, and later transported to the Sheriff's Operations Department where Sergeant Owens interviewed him. (Vol. 13 R609, 612).

When Deputy Sheriff Jeff Peebles arrived at the scene, he saw a female victim lying in a ditch on the side of the road and a person walking back and forth, talking on his cell phone. (Vol. 14 R669-70). Other bystanders pointed to the man with the cell phone as the suspect. (Vol.14 R670). Deputy Peebles ordered Kopsho to the ground and handcuffed him. (Vol. 14 R670, 671). He removed several items from Kopsho and put them in a plastic bag. (Vol. 14 R672). There was $3000.00 in Kopsho's wallet. (Vol. 14 R674). Appellant was cooperative. (Vol. 14 R675).

Mel Hawn, a former Captain District Commander for the Ocala Forest District, also reported to the shooting scene on October 27, 2000. (Vol. 14 R677). He observed Lynne Kosho lying on the side of the road with a gun near her armpit. (Vol. 14 R680-81). She appeared to be deceased. (Vol. 14 R681). Basil Friend

brought the gun located near Lynne's arm to Captain Hawn. The gun was wrapped in foam because Friend "didn't want the fingerprints to be taken off." (Vol. 14 R682). Hawn subsequently laid the gun back on the ground next to the victim's body. (Vol. 14 R683).

Deputy Thompson and Captain Hawn secured the crime scene. (Vol. 14 R689). Thompson made a video recording[1] of the crime scene, took still photographs and drew a sketch. (Vol. 14 R691). Thompson collected evidence, including live rounds, spent shell casings, and a Glock model 22, 40-caliber handgun. (Vol. 14 R692, 697). Thompson searched and processed Kopsho's vehicle after the shooting. (Vol. 14R 699). Thompson recovered a plastic package from the truck bed that had previously contained a Crossman air gun pistol. (Vol. 14 R703). He also recovered a sleeping bag, camping bed pad and a dome tent. (Vol. 14 R705, 706, 710). These items appeared to be in their original packaging. (Vol. 14 R706-07). Thompson also found a Wal-Mart bag containing a blanket, a roll of duct tape, and an anchor line (rope). (Vol. 14 R707). He did not find an anchor in the vehicle. (Vol. 14 R711, 713).

Mike Dunn, evidence technician, photographed Lynne Kopsho at the hospital and collected some of her personal items. (Vol.

[1] The videotape was published to the jury. (Vol. 14 R693).

14 R715). He photographed Appellant's hands. Appellant pointed out, "There's some of her blood on me." A gunshot reside test (GSR) was conducted. (Vol. 15 R861). He swabbed Appellant's hands for the presence of blood. (Vol. 14 R716, 861).[2]

Nicholas Campo, a former Detective with the Marion County Sheriff's Department, conducted interviews with several witnesses at the shooting scene. (Vol. 14 R727-28, 729). Campo recovered a Crossman air gun BB pistol from William Steele's residence.[3] (Vol. 14 R735-36). The model number on that weapon and the model number on the packaging found in Kopsho's vehicle was a match. (Vol. 14 R737-38). The State introduced a firearms transaction record which stated that William Steele owned a Glock model 22. (Vol. 14 R743-44).

Peter Lardizabal, senior crime lab analyst at Florida Department of Law Enforcement "FDLE," examined evidence including a Glock weapon,[4] cartridges collected at the crime scene, two T-shirts, two pair of jeans, a bra, panties, and an ammunition carton that contained 40 caliber cartridges. (Vol. 15 R757, 764). After test-firing one of the cartridges, Lardizabal

---

[2] The parties stipulated that the blood found on Kopsho's hand belonged to Lynne Kopsho and there was gun shot residue on Kopsho's hand. (Vol. 14 R721).

[3] The BB pistol was found between the armrest and cushion in a chair. (Vol. 14 R736).

[4] The Glock 22 is a semiautomatic weapon that requires a separate pull of the trigger for each separate shot. (Vol. 15 R768).

determined that the submitted cartridges were fired from the Glock. (Vol. 15 R775). After examining the clothing worn by the victim, Lardizabal determined the gun was fired at a distance less than six feet. (Vol. 15 R783-84). There were eight holes in the victim's shirt, consistent with damage done by bullets. (Vol. 15 R787).

Dr. Susan Ignacio, associate medical examiner, conducted the autopsy on Lynne Kopsho. (Vol. 15 R793,795). Lynne was shot in the chest and abdomen four times. Some entry wounds could have been re-entry wounds. There were eight gunshot holes in her body. (Vol. 15 R797). Two of the gunshot wounds were fatal. (Vol. 15 R801). The cause of death was multiple gunshot wounds to the chest and abdomen. (Vol. 15 R809).

Deputy Owens interviewed Kopsho after the shooting. He read Kopsho his *Miranda*[5] rights and videotaped the interview.[6] (Vol. 15 R814). Kopsho signed the form indicating he understood his rights. (Vol. 15 R814-15, 816).

Kopsho said he killed Lynne because she admitted to having an affair with her boss named, "Dennis." She told Kopsho about the affair just a few days prior to her murder. (Vol. 15 R826-27, 831). Kopsho admitted that he planned to murder his wife the night she told him about the affair, "three days ago." (Vol. 15

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[6] The videotape was published to the jury. (Vol. 15 R821-864).

R832). He told Lynne that he was not sleeping with any other women. After Lynne told him about her affair with Dennis, "I think it was that instant, at that instant, when I planned to kill her. I know it was." He did not want her to see him angry because, "I didn't have a gun. So, where was I?" (Vol. 15 R834).

Kopsho then stole a gun from William Steele. (Vol. 15 R835). Steele kept the gun in the side of the chair where he sat. (Vol. 15 R836). On the morning of the murder, Kopsho told his supervisor he had to go to the bank. He withdrew $3000.00 so he could take the money to prison with him. (Vol. 15 R836-37). He then went to Wal-Mart and bought a Crossman BB gun which resembled the 9MM gun that Steele owned. Kopsho went to Steele's home, and, while Steele was distracted, replaced the 9MM with the BB gun. (Vol. 15 R837-38). Kopsho went to Lynne's work and he asked if she could go to the bank with him. He told Lynne's supervisor he was making a substantial withdrawal. He told Lynne he was planning a trip to Ohio and needed her to go to the bank with him. (Vol. 15 R839). He purposely parked behind Lynne's vehicle so she would ride with him, and not offer to follow him. (Vol. 15 R839). After they got in the truck, Appellant was surprised Lynne did not notice they were going in the opposite direction from the bank. (Vol. 15 R841). He planned to murder Lynne in the Ocala National Forest. (Vol. 15 R842).

Kopsho had hidden the gun in the door panel so Lynne could not see it. (Vol. 15 R844). He planned to kill Lynne after they got into the forest. (Vol. 15 R846). However, “she might have talked me out of this if she wouldn’t have scrambled like she did.” (Vol. 15 R847). Kopsho and his wife discussed having closure in their relationship. He told her, “I’m tired of this. I’m hurting too much inside.” (Vol. 15 R847). At that point, he reached down and pulled out the gun. (Vol. 15 R847). Lynne was surprised and kept asking him, “Why?” He told her he wanted closure and wanted her out of his life. (Vol. 15 R847).

Lynne tried to jump out of the truck. He applied the brakes and grabbed her by the hair at the same time. (Vol. 15 R 851-52). She grabbed the steering wheel, and somehow pulled the truck over to the side of the road. Appellant said, “She broke free from me ... I come out behind her. As I come out behind her, I then loaded the gun and put a bullet in the chamber.” (Vol. 15 R852). As they were both running, he shot her in her side. She fell to the ground, “moaning.” (Vol. 15 R853). He described, “She was on her side ... her hair was covering her face ... I shot her in the heart ... I brushed her hair away from her face ... I looked at her and I told her I loved her. The light was gone from her eyes because she was in so much pain.” He closed his eyes and shot her again. (Vol. 15 R854). He shot Lynne three times. He “wanted her to be” dead. (Vol. 15

R851). Kopsho told Deputy Owens, “I love her. God, I love her. Ain’t love strange? Makes you kill somebody.” (Vol. 15 R854). Kopsho did not tell Owens anything to make himself look worse; he said, “I’m being straight.” (Vol. 15 R848). Further, he said, “I’m not a bad person.” He had a plan, and “knew he was gonna be sitting here talking to you [law enforcement] today.”(Vol. 15 R850).

Appellant told bystanders to stay away because, “I wanted her to die. I didn’t want anybody to help her.” (Vol. 15 R855, 856). After he knew Lynne was dead, he threw the gun down by her side. (Vol. 15 R856). He crossed the road and called police. (Vol. 15 R858).

Kopsho said he was in his “right and proper mind. Not been drinking. I haven’t done any drugs.” He had no psychiatric problems and had not done any drugs, “not in years.” (Vol. 15 R860).

Teresa Erickson was Lynne Kopsho’s stepmother. (Vol. 13 R623). Lynne married Appellant when she was eighteen years old. She moved back in with her father and stepmother three months before she was killed. (Vol. 13 R624). Lynne was cordial to Appellant while they were separated. (Vol. 13 R624-25).

Jane Cameron was a close friend of Lynne and William Kopsho. (Vol. 13 R625, 627). They all worked together at Custom Windows. (Vol. 13 R627-28). Kopsho told Cameron three days

before he killed his wife that Lynne had told him about a man named “Dennis.” (Vol. 13 R628-29). Appellant asked Cameron if she knew what Lynne’s plans were, “what she was up to. Basically, what she was doing.” She told Appellant Lynne had plans to go to Ohio in the coming weeks. (Vol. 13 R629). Cameron was not aware of anyone at work that knew about the situation with “Dennis.” She did not know of anyone who was laughing or talking about Appellant behind his back. (Vol. 13 R629). Appellant spent the night before the murder with “Vivian,” with whom he had a sexual encounter. (Vol. 13 R630, 636). Cameron spoke with Kopsho in her office the morning of the murder. Kopsho appeared to be a little distracted. (Vol. 13 R637).

Cameron knew that Lynne Kopsho had a one-night relationship with Dennis Hisey. (Vol. 13 R639). Lynne had admitted to her husband about her one-night relationship with Hisey just a few days before she was murdered. (Vol. 13 R641).

On September 22, 2000, Appellant was removed from Lynne Kopsho’s bank account after both Kopshos signed the appropriate documents. (Vol. 13 R648). On October 25, 2000, William and Lynne Kopsho received a loan from City Financial for $4516.22. (Vol. 13 R655, 657, 659). On October 26, 2000, a deposit of $4500.12 was deposited in an account, and a transfer of $1500.00 made to a different account for Lynne Kopsho. (Vol. 13 R650-51, 653). There were two debit card transactions: one made at a gas

station on October 26, 2000, and one made at Wal-Mart on October 27, 2000. (Vol. 13 R651).

On the morning of October 27, 2000, William Kopsho came into the bank and withdrew $3000.00 from his checking account. (Vol. 13 R642-43). According to Luisa Sulsona, employee at Florida Credit Union, Appellant was not acting in an unusual way, "just normal." (Vol. 13 R644-5).

When the State rested, defense counsel moved for judgment of acquittal on the grounds that the State failed to proved the premeditation required for first degree murder. The motion was denied. (Vol. 15 R866). The defense presented four witnesses.

William Laster was a co-worker of William and Lynn Kopsho. (Vol. 15 R869, 870). On the morning of the murder, Laster asked Lynne if he could borrow her car at lunchtime. (Vol. 15 R870). He got the car keys from her about 9:30 a.m., around the same time Kopsho came for Lynne. (Vol. 15 R870, 871). Kopsho and Laster drank coffee together earlier that morning. (Vol. 15 R871).

Jane Cameron Wickstant said Lynne Kopsho told her about her affair with Dennis Hisey before she moved out of the Kopsho's home. (Vol. 15 R872-73).

Robin Cameron told Kopsho about Lynne Kopsho's affair with Dennis Hisey the Sunday before she was murdered. (Vol. 15 R876). A woman named Vivian Lee was present at that time. (Vol. 15

R877).

Dennis Hisey was Lynne Kopsho's supervisor at Custom Windows. (Vol. 15 R879, 880). Lynne was "his right-hand man." (Vol. 15 R880). After Hisey left employment at Custom Windows,[7] Lynne contacted him a few weeks later. (Vol. 15 R882). She asked him what he was doing and if a few friends and she could come over. (Vol. 15 R882-83). Hisey and some of his friends were drinking beer and hitting golf balls into the lake. (Vol. 15 R883). After the women arrived, he showed them his property. After returning to the house, Lynne asked to use the rest room. He explained, "We talked for a bit and I guess one thing led to another and we started kissing and we ended up in the bathroom together and had sexual intercourse for just a few seconds ... it stopped just as quickly as it started." (Vol. 15 R884). Lynne asked him if they could be friends. She called him a few times in the next few days, but he did not return her phone calls. (Vol. 15 R884). The incident in the bathroom was their only intimate encounter together. (Vol. 15 R888).

The State presented one rebuttal witness. Robin Cameron had a conversation with Appellant about cheating women the Tuesday night before Lynne was killed. (Vol. 15 R896-97). Some of the

[7] Hisey resigned on August 17, 2000, and gave two weeks notice. The company released him on August 24th. A group of employees, including Appellant and Lynne Kopsho went to "Terri's Bar and Grill" on August 25th, his last work day with them. (Vol.15 881, 886).

guys having this conversation with them gave their opinions as to what they would do if their wife or girlfriend cheated on them. Most of them said, “We would kill the bitch.” Cameron could not recall Appellant’s answer. (Vol. 15 R897).

Kopsho moved for judgment of acquittal on both the premeditated murder and the kidnapping charges (Vol. 15, R899).

**PENALTY PHASE**

Rena Greenway, latent fingerprint examiner for the Marion County Sheriff’s Office, obtained fingerprints from Kopsho on July 21, 2004. (Vol. 17 R1063). She compared those fingerprints to fingerprints from a 1992 judgment and sentence for Appellant and determined they were the same. (Vol. 17 R1061, 1064, 1065). The 1992 Marion County judgment and sentence was for false imprisonment while armed with a dangerous weapon and sexual battery. (Vol. 17 R1067, 1068).

Deputy John Ferro testified that he interviewed a female victim in July 1991 who had been severely beaten by Kopsho. (Vol. 17 R1070, 1071). She told Deputy Ferro that she had been living in Georgia when Kopsho contacted her by phone. (Vol. 17 R1073-74). The victim told Kopsho she had to work in the morning, needed some sleep, and hung up. This occurred several times. During the night, she awoke to find Kopsho standing over her. A struggle ensued and he hit her over the head several times with a shot gun. (Vol. 17 R1074-75). He removed her

clothes against her will and sexually battered her. (Vol. 17 R1075). Afterwards, he discussed driving to Florida with her. She was unable to walk due to her injuries. He picked her up, put her in his truck and drove to Florida where he checked them into a hotel. (Vol. 17 R1075). Kopsho raped her again. (Vol. 17 R1076-77). Due to severe weakness, Kopsho panicked and took her to a hospital. He was in the waiting room of the hospital while Deputy Ferro was interviewing the victim. (Vol. 17 R1077).

Deputy Ferro and his partner interviewed Kopsho, who claimed the victim called him to come over. Upon arriving, he saw another pickup parked behind his ex-girlfriend's vehicle. After looking through the mobile home window, he saw another male with her in her bed. He went back to wait in his truck. (Vol. 17 R1079-80). When he walked back up the driveway, the other truck was gone. He let himself in the mobile home through the unlocked door. (Vol. 17 R1080). When he went into the bedroom, the victim woke up and they got into a shoving match. He hit her on the head with a two-by-four. Kopsho denied raping her or hitting her with a shot gun. (Vol. 17 R1081). He said the victim willingly got into his car and drove to Florida. They checked into a Florida motel. Kopsho denied raping her there, as well. He was charged with armed sexual battery, armed kidnapping and false imprisonment. (Vol. 17 R1082). Deputy Ferro obtained a search warrant for Kopsho's truck and found the shotgun the

victim had been assaulted with. (Vol. 17 R1083).

Bill Laster proffered testimony that Kopsho and he drank coffee together on the morning of Lynne's murder. They had an unusual conversation. Kopsho asked him if owed Laster anything, and whether all their debts were settled. (Vol. 17 R1090-91). Kopsho told Laster he hoped that Laster and Lynne "had never gotten together or never would." (Vol. 17 R1091). After his arrest, Kopsho called Laster from jail. Appellant told Laster,

> in any other country, he wouldn't even be prosecuted - - he was her God and he had every right to exterminate her.

(Vol. 17 R1091). Laster had 14 felony convictions and additional convictions for crimes involving falsehoods and dishonesty. (Vol. 17 R1092).

Wayne White, Department of Corrections probation officer, established that Kopsho was on probation at the time of Lynne's murder. Kopsho's conviction was for false imprisonment while armed and sexual battery. (Vol. 17 R1096, 1097).

Emily Preuss, Lynne Kopsho's sister, read letters to the jury written by her mother, sister and herself. (Vol. 17 R1100, 1101, 1103, 1105).

Ida Mae Scott was Appellant's supervisor at Custom Window Systems. (Vol. 17 R1121, 1122). Appellant was a good worker and helped others in the workplace. (Vol. 17 R1123).

Obie Bullard was a co-worker of Appellant's and they

socialized together. (Vol. 17 R1125, 1126). Appellant gave him advice and helped him buy a lawnmower. Appellant was a very good worker, very knowledgeable and dependable. (Vol. 17 R1126-27). Lynne Kopsho met Appellant at Bullard's home. (Vol. 17 R1127).

William Seibold has been a teacher at the Indiana Boy's School for thirty-seven years. (Vol. 17 R1128-29). Appellant was a student there from April to December of 1970. (Vol. 17 R1130). In 1970, the boy's school was the only juvenile detention facility in Indiana. (Vol. 17 R1131). Appellant had been placed in the school because he was a runaway. (Vol. 17 R1132). Of approximately 600 boys at the facility, 60 were placed in each of the cottages located on the property. Two untrained people supervised the boys. The boys were segregated by age and size. Their respective offenses had nothing to do with their housing. (Vol. 17 R1132-33). The facility housed rapists, murderers, and other violent offenders. (Vol. 17 R1134). Subsequently, a federal lawsuit was filed[8] which resulted in certain changes being implemented at the school. (Vol. 17 R1135-36).[9]

---

[8] *Nelson v. Heyne*, 255 F. Supp 451 (N.D. Ind. 1972); *Nelson v. Heyne*, 491 F. 2d 352 (7th Cir. 1974).

[9] Changes implemented were: 1) population cap from 600 down to 350; 2) prohibition of corporal punishment 3) a change in mail restrictions 4)prohibition of control-tranquilizing drugs 5) formation and implementation of a psychological treatment program 6) identification of special needs students and work programs for them. (Vol. 17 R1136).

Seibold did not personally know Appellant nor did he have personal knowledge any of Kopsho's experiences at the school. (Vol. 17 R1138).

Appellant has two sons: Carl and Sean. (Vol. 17 R1157). Sean Kopsho, Appellant's twenty-eight-year-old son, is "best friends" with his father and loves him with all his heart. (Vol. 17 R1140-41).

Sandra Higher, Appellant's sister, stated that their older sister, Theresa, died at age 21 during childbirth. Appellant was 17 years old at the time. (Vol. 17 R1147, 1151). Their father worked long hours but the family took many vacations. (Vol. 17 R1154). Their mother was very strict and old-fashioned. (Vol. 17 R1154). For punishment, the children were grounded or got "whippings." Their mother was unemotional and was the disciplinarian. (Vol. 17 R1155). Sandra was kicked out of the home at age 16. She stayed in touch with Appellant, who has been a good brother to her. (Vol. 17 R1156).

Dr. Elizabeth McMahon, forensic psychologist, evaluated Appellant on five separate occasions. (Vol. 17 R1159, 1163). She reviewed a vast amount of material in preparation for her evaluation of Appellant. (Vol. 17 R1163). During their first visit, she gave Appellant an IQ test, the Wisconsin Card Sorting Test, and the Minnesota Multiphasic Personality Inventory Test (MMPI). (Vol. 17 R1164). During their second meeting, Dr.

McMahon administered various other tests. During their third meeting, she gave Kopsho a personality disorder questionnaire and asked him to complete it. (Vol. 17 R 1165). Subsequently, she returned to see him and re-administered the Wisconsin Card Sorting Test. She gave Kopsho the Trail Making Test and the Stroop Color Word Test, designed to measure how one can function when switching brain hemispheres back and forth, right to left. (Vol. 17 R1165-66).

Dr. McMahon reviewed the incident with Appellant several times, checking for inconsistencies. (Vol. 17 R1166). Dr. McMahon concluded that Appellant has average intelligence with "very mild to moderate impairment in his cognitive functioning." However, "everything was within normal limits." Kopsho does not have a cognitive deficit nor anything that suggests "cortical damage." (Vol. 17 R1167, 1196). He does not have any brain damage. (Vol. 17 R1196). Kospho is "emotionally immature" and does not deal well with adult responsibilities. However, he contains his anxiety when he works, so he does well in that area. (Vol. 17 R1174).

Kopsho's mother had him sent to The Indiana Boy's School when he was fifteen years old. Dr. McMahon equated this to physical and psychological abandonment. (Vol. 17 R1178). He was at the boy's school for eight to ten months and eventually joined the Navy. (Vol. 17 R1179). Appellant married five times,

with each relationship ending because of an affair. (Vol. 17 R1181). Kopsho is neither insane nor crazy, but he does have psychological problems. (Vol. 17 R1183, 1195). He was hospitalized five times in the early 1980's. (Vol. 17 R1184). His behavior was the same during these episodes: paranoid, agitated, things appeared to be in slow motion. (Vol. 17 R1184). At that time, he was diagnosed as having a "reactive psychosis." He was told he was "totally psychotic" for brief periods of time even though he was taking "anti-psychotic drugs." (Vol. 17 R1185). Kopsho's psychological problems are related to his interpersonal relationships. (Vol. 17 R1186). Kopsho's psychological problems contributed to Lynne Kopsho's death. He does not have control over the factors that led to his psychological problems. (Vol. 17 R1187). In Dr. McMahon's opinion, Kopsho suffers from severe psychological problems as a result of his upbringing. (Vol. 17 R1204). Kopsho is a suspicious person. He is prone to anxiety, insecurity, and cannot control his emotions or his anger. (Vol. 17 R1199-1200).

Kopsho addressed the court. (Vol. 17 R1190). He clarified that he was in agreement with his counsel's tactical decisions in defending him. (Vol. 17 R1190).

## SUMMARY OF ARGUMENT

**POINT I**. The trial judge did not abuse his discretion by denying the cause challenge on Juror Mullinax. The juror gave his honest opinion to a hypothetical question. There was no showing of bias. The trial judge ruling is entitled to great deference. Even if the trial judge erred, his case illustrates why this court should recede from the *per se* rule of *Trotter v. State*, 576 So. 2d 691 (Fla. 1991), and adopt the dissent in *Busby v. State*, 894 So. 2d 88 (Fla. 2004).

**POINT II**. The trial judge did not abuse his discretion by allowing testimony about the prior violent felony. This issue was not property preserved. Even if it were, this Court has repeatedly held that details of a prior violent felony are relevant because they assist the jury in evaluating the character of the defendant. The testimony was neither inflammatory nor a feature of the penalty phase.

**POINT III**. The State established the cold, calculated and premeditated aggravating circumstance beyond a reasonable doubt. Kopsho decided to kill Lynne three days before the murder. He took steps to execute his plan: purchasing a fake weapon and substituting it for William Steele's gun, obtaining money, devising a way to get Lynne in the car alone with him. He planned to kill her in the forest, but when she saw the gun she jumped and ran. He shot her in the back, then in the torso as

she lay in the fetal position. He kept all bystanders away until he was sure she was dead.

**POINT IV**. Victim impact is allowed by law and statute. The evidence in this case consisted of three letters read by the victim's sister. The testimony was not unduly prejudicial, and was well within the bounds allowed.

**POINT V**. The trial court did not abuse its discretion by admitting brief, relevant evidence that "Vivian" was living with Kopsho at the time of Lynne's murder and they had a sexual relationship. This evidence rebutted the defense theory that Kopsho killed Lynne because he wanted her back and was devastated by her encounter with Dennis Hisey.

**POINT VI**. The trial court did not err in denying the motion for judgment of acquittal. The *Faison* argument made on appeal was not made at the trial level. Kopsho was charged with kidnapping under two theories of prosecution, both of which were proved beyond a reasonable doubt. Lynne thought she was going to the bank, but Kopsho was secretly taking her to the forest to kill her. He pulled a gun on her and she was so terrified she tried to jump from a car traveling at 60 mph. Kopsho forcibly grabbed Lynne by the hair to keep her in the car. Eventually she managed to escape, at which point Kopsho shot her in the back. Kopsho also had the intent to inflict bodily harm on Lynne when he picked her up and got her to ride in his car. He

had been planning her murder for three days.

**POINT VII**. The trial court did not abuse its discretion by instructing the jury on the heinous, atrocious aggravating circumstance. The State presented evidence Lynne sustained mental anguish when Kopsho pulled a gun on her, she tried to escape, he grabbed her by the hair, and she eventually managed to exit the car. Kopsho then shot her in the back. She was lying on the ground in a fetal position, moaning. He shot her again, then pulled her hair back, spoke to her, and shot her yet again.

**POINT VIII**. Kopsho's death sentence is proportional to other similarly-situated capital defendants. Kopsho committed a prior armed false imprisonment and sexual battery for which he was still on probation. Lynne's murder was planned and prepared for three days. There were four strong aggravating factors and little mitigation aside from his mental state. This court has rejected the argument that the fact a murder occurs in a domestic situation justifies a life sentence.

**POINT IX**. The death sentence in this case does not violate *Ring v. Arizona*, 536 U.S. 584 (2002).

## POINT I

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING A CHALLENGE FOR CAUSE DIRECTED TO JUROR MULLINAX.**

Kopsho claims the trial court abused its discretion when it denied the cause challenge to Juror Mullinax. He argues he is entitled to a new trial because of the error. Defense counsel asked Juror Mullinax a "hypothetical" question as to the state of the law on defendant not testifying. (Vol. 12, R509). Juror Mullinax responded that he felt the law should be different because a person has to "stand before your maker" to give an accounting whether the person is guilty or not. (Vol. 12, R510). Basically, Juror Mullinax wanted to hear the defendant's side. (Vol. 12, R511). When the judge denied the cause challenge, he noted that Kopsho's videotaped statement would be before the jury, so, in essence, he would be telling his side of the story. (Vol. 12, R518). The judge also noted:

> At no time did he indicate that he would be anything other than fair and impartial. Actually, he couched his comment by saying: Unless you have eyewitness statements that he killed someone, I would like to hear his side of the story.

(Vol. 12, R518). Juror Mullinax had stated that unless the State has an eyewitness account, "everything else is hearsay." Mullinax had been on a jury that convicted an innocent man (Vol.

11, R416). He found out later it was not the right man (Vol. 11, R416). This would certainly lead to the juror wanting a direct evidence of a crime. Considering the totality of Juror Mullinax's responses, he was a fair and impartial juror. He had heard about the case, but was not prejudiced by anything he heard (Vol. 11, R185). He had no preconceived ideas about the case (Vol. 11, R186). He came from a large family, and there had been a number of killings within the family (Vol. 11, R186). He could set aside any of those experiences (Vol. 11, R187-88). He would vote for the death penalty if it was the only item on a ballot (Vol. 11, R343). He would follow the law on which the court instructed, even if that were different from the Bible (Vol. 11, R419). Mullinax believes that a defendant's state of mind at the time of the crime is important (Vol. 11, R419).

When the judge asked defense counsel whether he was using a peremptory strike on Juror Mullinax, defense counsel stated he wanted to discuss it further. Defense counsel then struck another juror for cause and back-struck Mr. Strickland. (Vol. 12, R519-520). When asked whether Juror Bellet was acceptable, both defense counsel and the State accepted the juror. (Vol. 12, R520). Defense counsel then back-struck Juror Reynolds and used a peremptory challenge on Ms. Lee. (Vol. 12, R520). It was at that point defense counsel struck Juror Mullinax. (Vol. 12, R521). After that, he struck Ms. Butler. (Vol. 12, R521). He

then requested as additional peremptory challenge to strike Mr. Bellet. The additional challenge was denied. (Vol. 12, R523).

Shortly thereafter, defense counsel requested, and the trial judge instructed the jury on, the defendant's right to remain silent and not testify. (Vol. 12, R523, 529).

Juror Mullinax made no statement comparable to the case cited by Kopsho. He did not say that the defendant must have something to hide if he didn't testify. *Overton v. State*, 801 So. 2d 877, 891 (Fla. 2001). He did not say a person should testify if he were truly innocent. *Overton,* 801 So. 2d at 890. He simply said he would like to hear both sides of the story, which he did. As the trial judge observed, the videotaped statement of Kopsho was played for the jury. In that statement, Kopsho made sure the statement was accurate and he was able to tell his side of the story. (Vol. 4, R609, 613).

It is within a trial court's province to determine whether a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent "manifest error." *Fernandez v. State*, 730 So. 2d 277, 281 (Fla. 1999). The decision to deny a challenge for cause will be upheld on appeal if there is support in the record for the decision. *See Gore v. State*, 706 So. 2d 1328, 1332 (Fla. 1997); *see also Mendoza v. State*, 700 So. 2d 670, 675 (Fla. 1997) ("A trial court has latitude in ruling upon a challenge for cause because

the court has a better vantage point from which to evaluate prospective jurors' answers than does this Court in our review of the cold record."); *Smith v. State*, 699 So. 2d 629, 635-36 (Fla. 1997) ("In reviewing a claim of error such as this, we have recognized that the trial court has a unique vantage point in the determination of juror bias. The trial court is able to see the jurors' *voir dire* responses and make observations which simply cannot be discerned from an appellate record.")

The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. *See Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *See Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995); *see also Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985) (providing that if "any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause"). The mere fact that a juror gives equivocal responses does not disqualify that juror for service. "In evaluating a juror's qualifications, the trial judge should evaluate all of the questions and answers posed to or received from the juror." *Parker v. State*, 641 So. 2d 369, 373 (Fla.

1994).

Florida Statute Section 913.03 provides:

**Grounds for challenge to individual jurors for cause.**

A challenge for cause to an individual juror may be made only on the following grounds:

(1) The juror does not have the qualifications required by law;

(2) The juror is of unsound mind or has a bodily defect that renders him or her incapable of performing the duties of a juror, except that, in a civil action, deafness or hearing impairment shall not be the sole basis of a challenge for cause of an individual juror;

(3) The juror has conscientious beliefs that would preclude him or her from finding the defendant guilty;

(4) The juror served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information;

(5) The juror served on a jury formerly sworn to try the defendant for the same offense;

(6) The juror served on a jury that tried another person for the offense charged in the indictment, information, or affidavit;

(7) The juror served as a juror in a civil action brought against the defendant for the act charged as an offense;

(8) The juror is an adverse party to the defendant in a civil action, or has complained against or been accused by the defendant in a criminal prosecution;

(9) The juror is related by blood or marriage within the third degree to the defendant, the attorneys of either party, the person alleged to be injured by the offense charged, or the person on whose complaint the prosecution was instituted;

> (10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial verdict according to the evidence;
>
> (11) The juror was a witness for the state or the defendant at the preliminary hearing or before the grand jury or is to be a witness for either party at the trial;
>
> (12) The juror is a surety on defendant's bail bond in the case.

Juror Mullinax does not meet any criteria for a cause challenge. Even if he did, this case illustrates the dilemma facing trial judges when defense counsel is using back-strikes and cause challenges to try to create reversible error. It is not an issue of obtaining fair and impartial jurors, but of manipulating the system to create error. What this Court intended to serve as a shield to protect defendants' rights to a fair trial has become a sword used by defense counsel to manipulate the process.

In *Busby v. State*, 894 So. 2d 88 (Fla. 2004), a majority of this Court endorsed *Trotter v. State*, 576 So. 2d 691 (Fla. 1991); and the theory that a peremptory challenge does not require a stated reason for striking the juror. This finding comes despite the serious erosion of this absolute policy and

the fact the “no reason whatsoever” theory of peremptory challenges does not apply when gender, race, or ethnicity are involved.

The State submits that the present case illustrates the wisdom of the dissenters in *Busby* who wrote, in part:

> We have interpreted *Trotter* not to require an actual showing of bias or partiality on the part of the juror. n21 Thus, the mere objection to any juror who actually sits on the jury is sufficient to warrant automatic reversal. Under this standard, a defendant could object to a clearly neutral or even a defense-friendly juror and still be entitled to a new trial. As Judge Harris noted, "Trotter, in effect, grants a reversal of even a fair verdict in order to reward a party for properly following the procedure to preserve the error." *Gootee v. Clevinger*, 778 So. 2d 1005, 1013 (Fla. 5th DCA 2000) (Harris, J., dissenting). Importantly, neither Trotter nor the cases that it cites provide any state law basis for a *per se* reversal rule.
>
> > n21 *See Conde v. State*, 860 So. 2d 930, 941 (Fla. 2003); *Pietri v. State*, 644 So. 2d 1347, 1352 (Fla. 1994); *Knowles v. State*, 632 So. 2d 62, 65 (Fla. 1993).

**C. POST-TROTTER DEVELOPMENTS**

> In 2000, the United States Supreme Court revisited the constitutional importance of peremptory challenges in *United States v. Martinez-Salazar*, 528 U.S. 304, 145 L. Ed. 2d 792, 120 S. Ct. 774 (2000). The Court in *Martinez-Salazar* decided the issue left open in *Ross* of whether, absent the requirement under the federal rules to use a peremptory challenge to cure an erroneous refusal by the trial court to excuse jurors for cause, "a denial or impairment of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been excused for cause." *Ross*, 487 U.S. at 91 n.4. The Court determined that Martinez-Salazar's use of a peremptory challenge to cure the trial court's error

was consistent with the purpose of peremptory challenges, that is, securing trial by an impartial jury, and was not equivalent to the loss of a peremptory challenge. The Court affirmed the conviction.

It is clear from *Ross* and *Martinez-Salazar* that there is no federal constitutional right to peremptory challenges. n22 So, absent a showing that an objectionable juror served on the jury, the so-called "denial of a full complement of peremptory challenges" arising from the use of a peremptory challenge to cure an erroneous denial of a cause challenge does not constitute reversible error. In addition to there being no federal constitutional right to peremptory challenges, this Court has never established a state constitutional right to peremptory challenges. And, contrary to the majority, I believe we should not do so in this case.

> n22 As the United States Supreme Court has said, peremptory challenges "are but one state-created means to the constitutional end of an impartial jury and a fair trial." *Georgia v. McCollum*, 505 U.S. 42, 57, 120 L. Ed. 2d 33, 112 S. Ct. 2348 (1992). In fact, that Court "repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." Id. (emphasis added).

Since the *Ross* and *Martinez-Salazar* decisions, many other states have reconsidered their positions on peremptory challenges. The Wisconsin Supreme Court conducted an excellent analysis of peremptory challenge law in *State v. Lindell*, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223 (Wis. 2001), and reversed that state's long-standing *per se* error position in light of *Ross* and *Martinez-Salazar*. A number of other states have followed suit. n23 In fact, the majority of states currently do not require reversal unless a legally objectionable juror actually served on the jury.

> n23 *See Dailey v. State*, 828 So. 2d 340

(Ala. 2001); *Minch v. State*, 934 P.2d 764, 769-70 (Alaska Ct. App. 1997); *State v. Hickman*, 205 Ariz. 192, 68 P.3d 418 (Ariz. 2003); *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738, 744-45 (Ark. 1999); *State v. Pelletier*, 209 Conn. 564, 552 A.2d 805, 810 (Conn. 1989); *State v. Ramos*, 119 Idaho 568, 808 P.2d 1313, 1315 (Idaho 1991); *Dye v. State*, 717 N.E.2d 5, 18 n. 13 (Ind. 1999); *State v. Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1993); State v. Anderson, 603 N.W.2d 354, 356 (Minn. Ct. App. 1999) (*citing State v. Stufflebean*, 329 N.W.2d 314, 317 (Minn. 1983)); *Johnson v. State*, 754 So. 2d 576, 578 (Miss. Ct. App. 2000); *State v. Storey*, 40 S. W. 3d 898, 904-05 (Mo. 2001); *State v. Entzi*, 2000 ND 148, 615 N.W.2d 145, 149 (N.D. 2000); *Myers v. State*, 2000 OK CR 25, 17 P.3d 1021, 1027-28 (Okla. Crim. App. 2000); *Green v. Maynard*, 349 S.C. 535, 564 S.E. 2d 83 (S.C. 2002); State v. Verhoef, 2001 SD 58, 627 N.W.2d 437 (S.D. 2001); *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992); *State v. Menzies*, 889 P.2d 393, 399-400 (Utah 1994); *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (Wash. 2001).

In Florida, at least one appellate judge has asked the right question and reached the correct conclusion. In his dissent in *Gootee v. Clevinger*, 778 So. 2d 1005 (Fla. 5th DCA 2000), Judge Harris posed the question that is at issue in this case: "Is the failure to get one's full complement of peremptory challenges itself so prejudicial that a new trial must always be granted?" *Gootee*, 778 So. 2d at 1011 (Harris, J., dissenting). Judge Harris succinctly answered his question and, in so doing, showed why such a procedural error should be subjected to a harmless error analysis, not *per se* reversal. Judge Harris said:

> *Rollins* requires an error which affects the fairness of the verdict; *Trotter* requires only that there have been an error in ruling on the "for cause" challenge and that (1) the peremptory challenges are exhausted to cure the error, (2) an additional challenge

> is requested (and denied), (3) for the purpose of challenging a specified juror who ultimately serves on the jury. I submit that although (1), (2), and (3) are essential in order to preserve the error (for without them there would clearly be no harm associated with the court's error), such preservation factors themselves fail to establish harm. *Trotter*, in effect, grants a reversal of even a fair verdict in order to reward a party for properly following the procedure to preserve the error. *Rollins, Hamilton* and *Farina v. State*, 679 So. 2d 1151 (Fla. 1996),] go further and ask, "Now that you have preserved the error, how have you been harmed?" Only by asking this question will we subject this procedural error, as we do even constitutional errors, to a harmless error analysis.

*Gootee*, 778 So. 2d at 1013 (Harris, J., dissenting) (emphasis added).

I agree with Judge Harris. The *Trotter* requirements are a necessary--and judicially efficient--means of preserving potentially harmful error. However, this Court's original reliance on *Swain* to require *per se* reversal is obviously no longer sustainable. n24 And, because a *per se* reversal rule no longer has any foundation in the federal constitution, we must look to see what state law demands. To do this, we must first determine the state law source of the right to peremptory challenges and then determine what standard of review to apply when a right from such a source is violated.

> n24 Revealingly, the United States Supreme Court, in *Martinez-Salazar*, noted--in dicta--that the *Swain* standard of automatic reversal was itself dicta and that it was founded on "a series of [United States Supreme Court] early cases decided long before the adoption of harmless-error review." 528 U.S. at 317 n.4.

**II. THE PURELY STATUTORY BASIS OF PEREMPTORY CHALLENGES**

Peremptory challenges in Florida are purely a statutory right; they have no state constitutional foundation. In criminal trials, peremptory challenges are granted equally to the State and to the defendant by section 913.08, Florida Statutes (2003). As a statutory right, peremptory challenges are an important means to help ensure that both sides receive their state constitutional right to a fair trial before an impartial jury. But they are of no constitutional dimension. There is no express or implicit provision in Florida's constitution securing the right to peremptory challenges; and to hold otherwise is contrary to our own precedent.

Because peremptory challenges are only a statutory right given to help secure the constitutional right to a fair trial by jury, we are bound to apply a harmless error standard. The harmless error rule as codified in section 924.33, Florida Statutes (2003), and as applied by our own precedent dictates this result. This Court interpreted section 924.33 in *State v. DiGuilio*, 491 So. 2d 1129, 1134 (Fla. 1986), stating:

> Section 924.33 respects the constitutional right to a fair trial free of harmful error but directs appellate courts not to apply a standard of review which requires that trials be free of harmless errors. The authority of the legislature to enact harmless error statutes is unquestioned.
>
> Contraposed to this legislative authority, the courts may establish the rule that certain errors always violate the right to a fair trial and are, thus, *per se* reversible. To do so, however, we are obligated to perform a reasoned analysis which shows that this is true, and that, for constitutional reasons, we must override the legislative decision.

(Original emphasis and footnote omitted; emphasis added.) In light of section 924.33, our statements in *DiGuilio*, and our historical application of the harmless error rule, I see no constitutional reason that supports a *per se* reversal rule in general or as

> applied in this case. As I have said, it is clear that Busby's constitutional right to an impartial jury was not violated. None of his jurors were legally objectionable. Because there is no federal constitutional right to peremptory challenges and because this Court's own precedent makes it clear that these challenges are not of a constitutional dimension, to require *per se* reversal in a case where a party receives what the constitution requires violates section 924.33 as interpreted by this Court in *DiGuilio*. n25
>
> > n25 *See Jefferson v. State*, 595 So. 2d 38, 41 (Fla. 1992); *State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984); *Carroll v. State*, 139 Fla. 233, 190 So. 437, 438 (Fla. 1939).

*Busby,* 894 So. 2d at 109-111.

If a harmless error test were applied in this case, the conviction would stand. Defense counsel accepted Juror Bellet (the juror whom defense counsel later identified to back-strike when he was denied an additional peremptory challenge.)[10] Juror Bellet was not a legally objectionable juror. He did not subscribe to a newspaper and had heard nothing about this case. (Vol. 10, R226-227). He had never been exposed to domestic violence. (Vol. 10, R227). He had been a victim of a crime one time when someone stole tools from his truck. (Vol. 10, R470). He spent three years in the Air Force. (Vol. 10, R477). He was Catholic, but if he had to vote on whether Florida should keep the death penalty, he would vote “yes.” (Vol. 10, R229, 483). He

[10] Defense counsel also struck two other jurors before he asked to back-strike Juror Mullinax.

supports the death penalty, but would have to hear all the evidence before he could make up his mind. (Vol. 10, R485). He would have to consider whether the crime was done by violence or an accident, premeditated or spur-of-the moment. (Vol. 10, R486). He would follow the directions of the judge on which crimes warrant the death penalty. (Vol. 10, R486). Problems between the two people would be mitigating, especially if something just "snapped" and the person couldn't take it any more. (Vol. 10, R488). He would have to know all the circumstances. (Vol. 10, R489).

In *Ross v. Oklahoma*, 487 U.S. 81 (1988), the United States Supreme Court unequivocally "rejecte[d] the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." *Ross*, 487 U.S. at 88. Peremptory challenges "are one means to achieve the constitutionally required end of an impartial jury." *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000). Here, Kopsho failed to demonstrate that Juror Bellet, on whom he would have exercised the additional peremptory challenge, was not impartial. There is a presumption of a juror's impartiality. *See, e.g., Rolling v. State*, 695 So. 2d 278, 285 (Fla.), cert. denied, 522 U.S. 984 (1997); *Zile v. State*, 710 So. 2d 729, 735 (Fla. 4th DCA 1998) (a prospective juror is presumed impartial absent a showing to the contrary). Accordingly, Appellant's use

of a peremptory challenge to remove Juror Mullinax, without a showing that the juror that actually sat was biased, did not abridge his Sixth Amendment right to an impartial jury. *Ross*, 487 U.S. at 88; *see also Martinez-Salazar, id.*

As this Court recognized in *State v. Neil*, 457 So. 2d 481 (Fla. 1984),

> Article I, section 16 of the Florida Constitution guarantees the right to an impartial jury. The right to peremptory challenges is not of constitutional dimension. The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury.

Id. at 486. "The right to an impartial jury guaranteed by article I, section 16, is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense." *Anderson v. State*, 711 So. 2d 230, 231 (Fla. 4th DCA 1998) (reviewing a *Batson* claim). Consistent with the foregoing, "[a]ny claim that the jury was not impartial, therefore, must focus not on the [venireman improperly not removed for cause], but on the jurors who ultimately sat." *Ross*, 487 U.S. at 86. Thus, contrary to the majority's conclusion in *Busby*, Kopsho received precisely that guaranteed by the Sixth Amendment of the United States Constitution and Art. I, § 16 of the Florida Constitution -- an impartial jury.[11]

[11] Indeed, the majority of jurisdictions, as noted by the dissent in *Busby,* have rejected the proposition that the guarantee of an impartial jury includes entitlement to a jury of a particular

A criminal defendant has "a right to an impartial jury, but [is] not entitled to any particular persons as jurors." *McRae v. State*, 57 So. 348 (Fla. 1911). Thus, as stated in *Young v. State,* 96 So. 381 (Fla. 1923), "[t]he purpose [of peremptory challenges] is that there may be full assurance of the constitutional guaranty of a trial by an impartial jury." *Id.* at 383. That is,

> the right is given in aid of the party's interest to secure a fair and impartial jury, not for creating ground to claim partiality which but for its exercise would not exist. It does not follow that by using the right as he pleases, he obtains the further one to repudiate the consequences of his own choice.

*Frazier v. United States*, 335 U.S. 497, 505 (1948). This Court recognized as much in *Rollins v. State*, 148 So. 2d 274 (Fla. 1963). In *Rollins*, the Court looked to the reasons that counsel would have peremptorily removed that juror, stating that the reasons given did not render the "venireman legally objectionable or unqualified to serve," having assumed that a challenge for cause was improperly denied and upon identification of a venireman that counsel would have exercised a peremptory challenge had he an additional one. *Id.* at 276; *see also Longshore v. Fronrath Chevrolet, Inc.,* 527 So. 2d 922,

---

composition. In addition to those cases cited by the dissent, state decisions from Maryland, Oregon, and Wyoming also are in accord. *Grandison v. State*, 670 A.2d 398, 417-418 (Md. 1995); *State v. Barone*, 969 P.2d 1013, 1018-1019 (Or. 1998); *Klahn v. State*, 96 P.3d 472, 483 (Wyo. 2004), respectively.

924 (Fla. 4th DCA 1988) (recognizing the requirement under *Rollins* that a juror for whom defendant sought an additional peremptory challenge must have been subject to cause removal).

If the mere act of identifying the juror were sufficient in itself to establish reversible error -- i.e., preservation of the alleged error constitutes the error itself -- there simply would have been no reason for the Court to look to the reasons for the proposed peremptory challenge and to consider whether the juror sought to be removed improperly sat. *See also Knowles v. State*, 632 So. 2d 62, 65 (Fla. 1993) (in addressing lack of preservation as to the jury issue, the Court observed not only that the defendant did identify a juror he wanted off the jury, but also that he did not "claim that any of the jurors seated were biased."). *Rollins* and *Knowles* demonstrate that there is a distinction between a violation of the right to an impartial jury and preserving a claim of loss of a peremptory challenge due to an improper denial of a strike for cause.

Cases relied upon in *Trotter*, including *Hill v. State*, 477 So. 2d 553 (Fla. 1985) and *Moore v. State*, 525 So. 2d 870 (Fla. 1988), *see Trotter*, 576 So. 2d at 693 n.6, were decided prior to *Ross*. Thus in respect to protecting a defendant's constitutional right to an impartial jury, the focus upon the venireman who should have been removed for cause as opposed to the jury that actually sat, has nothing to do with protecting the right to an

impartial jury. As stated, these issues are distinct, and the *per se* reversible error rule in connection with a defendant's use of a peremptory challenge provides defendants with an unwarranted windfall.

To the extent, however, that state law does require *per se* reversal to vindicate defendant's inability to remove *any* venireman due to the lack of additional peremptory challenges -- irrespective of bias -- such a rule creates the right to a jury made up of particular individuals and is contrary to the purpose behind peremptory challenges in guaranteeing defendant's right to an impartial jury. Arguably, then, the inability of a defendant to remove any venireman with a peremptory challenge would violate his right to an "impartial jury" as interpreted by this Court, irrespective of the reason for a lack of additional peremptory challenges -- including, for example, a statutory limit on the number of peremptories.

The right to the exercise of peremptory challenges is a matter of state statutory law, and just as the State is prohibited from exercising its peremptory challenges in a discriminatory fashion, so too is the criminal defendant. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

> Under Florida law, a party's use of peremptory challenges is limited only by the rule that the challenges may not be used to exclude members of a "distinctive group." *See State v. Neil*, 457 So. 2d 481 (Fla. 1984) (holding that race-based peremptory

> challenges violate the defendant's right to an impartial jury); *State v. Allen*, 616 So. 2d 452 (Fla. 1993) (same as to ethnicity); *Abshire v. State*, 642 So. 2d 542 (Fla. 1994) (same as to gender). Both parties have the right to peremptorily strike "persons thought to be inclined against their interests." *Holland v. Illinois*, 493 U.S. 474, 480, 107 L. Ed. 2d 905, 110 S. Ct. 803 (1990).

*San Martin v. State*, 705 So. 2d 1337, 1343 (Fla. 1997), *cert. denied*, 525 U.S. 841 (1998).

Through the operation of the *per se* reversible error rule, a defendant can obtain a new trial irrespective that one or more jurors he would have exercised a peremptory challenge against was based upon a discriminatory purpose. And because the identified juror is not removed where the request for an additional peremptory is denied -- thus setting the stage for reversible error -- there exists no mechanism by which the State can challenge the propriety of the proposed challenge.[12]

Just as the use of peremptory challenges "is attributable to state action" on the trial level, *McCollum*, 505 U.S. at 54-55, it is beyond dispute that the *per se* reversible error

[12] Because the State is unable to challenge a proposed peremptory challenge, thereby relieving defendant of what would otherwise be his burden to come forward with a neutral reason for using such a strike, there is no basis for applying the rule that the actual exercise of a peremptory challenge is presumptively nondiscriminatory. Rather, these circumstances are akin to when there is a failure to offer any reason for the strike, which is inadequate to sustain the strike. *See Dorsey v. State*, 868 So. 2d 1192, 1201-1202 (Fla. 2003).

accorded by this Court involving a requested peremptory challenge based upon a discriminatory purpose that would have been exercised but for lack of availability, similarly would constitute state action violative of state and federal constitutional provisions.

As a consequence of the foregoing, the burden of the denial of a defendant's *per se* right to an additional peremptory is shifted to the State which is denied the "broad leeway in allowing parties to make a prima facie showing that a 'likelihood' of discrimination exists." *State v. Slappy*, 522 So. 2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 1219 (1988). The State doubts that the Court intended that a criminal defendant automatically obtain a new trial irrespective of the potential unconstitutional use of peremptory challenges.

Without having to demonstrate actual prejudice, a criminal defendant is awarded a new trial if the trial court erred in not removing the venireman subject to a strike for cause where defendant removed the venireman with a peremptory challenge, used the remaining challenges afforded under § 913.03, and then requested but did not receive an additional peremptory to remove an identified potential juror. This windfall to the defendant derives from an elevation of form over substance, and is unfounded under Florida law.

In determining whether *per se* reversible error is

warranted, this Court has always looked to the fairness of the proceedings. As explained in *State v. Schopp*, 653 So. 2d 1016 (Fla. 1995):

> We explained in *DiGuilio* that a defendant has a constitutional right to a fair trial free of harmful error. This right has been recognized by the legislature in section 924.33, Florida Statutes (1993), which provides that harmless error analysis is applicable to all judgments. While the courts may establish a rule of *per se* reversal for certain types of errors, *a per se rule is appropriate only for those errors that always vitiate the right to a fair trial and therefore are always harmful*. 491 So. 2d at 1134-35.

*Id*. at 1020 (emphasis added). *See also United States v. Hasting,* 461 U.S. 499, 508-509 (1983). ("[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial.") (discussing *Chapman v. California*, 386 U.S. 18 (1967)).

Without having to demonstrate that he was compelled to accept as a juror someone biased against him, the fairness of Kopsho's proceedings literally are irrelevant for the sake of a statutory right to a number of peremptory challenges intended in themselves to guarantee the fairness of the proceedings. Most states have rejected this very proposition. *See Busby*, (Bell, J., dissenting) (citing cases). This Court's opinion in *Trotter* simply cannot be reconciled with those cases holding that even

some constitutional violations -- those not infringing upon the fairness of the trial -- can be harmless. *See Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991) (unconstitutional admission of coerced confession at guilt stage); *Clemons v. Mississippi*, 494 U.S. 738 (1990) (unconstitutionally broad jury instructions at sentencing stage); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (unconstitutional admission of evidence at sentencing stage).

Beyond the potential for its discriminatory use, the *per se* reversal error rule would permit even greater mischief: superfluous claims of ineffective assistance of counsel based solely upon counsel's failure to preserve a claim of the wrongful denial of an additional peremptory challenge. That result runs contrary to this Court's decision in *Phillips v. State/Crosby*, 894 So. 2d 28 (Fla. 2004), rejecting a claim of ineffective assistance premised upon counsel's failure to exercise his two remaining peremptory challenges. Additionally, to protect what would otherwise be a fair trial, the State must now anticipate such *per se* reversible error any time that a defendant's strike for cause is denied, thus exercising its own. This inevitable result has the very effect that the majority sought to avoid: "amplify[ing] the ability of one party to use peremptory challenges at the expense of the other in contravention of the plain language of Section 913.03, which

grants each party to a criminal proceeding the same number of peremptory challenges." *Busby v. State*, 894 So. 2d at 100.

To avoid the windfall intrinsic to the Court's *per se* reversible error rule in *Trotter*, and in recognition that the right to an impartial jury and the state statutory right to use a specified number of peremptory challenges present distinct issues, effect can be given to the latter by requiring that the defendant come forward with a non-discriminatory basis in support of his request for additional peremptory challenges. Such a procedure surely is consonant with the role peremptory challenges play in removing undesirable but not necessarily legally objectionable veniremen. Under those circumstances, harmful error would result from the denial of an additional peremptory challenge to remove the "objectionable" but not "incompetent" juror when a strike for cause was erroneously denied.

## POINT II

**THE TRIAL COURT DID NOT VIOLATE *OLD CHIEF V. UNITED STATES* BY ALLOWING THE STATE TO INTRODUCE DETAILS OF THE PRIOR VIOLENT FELONY; THIS ISSUE IS NOT PRESERVED.**

Kopsho claims the trial judge violated *Old Chief v. United States*, 519 U.S. 172 (1997), by allowing the State to present details of the prior violent felony after Appellant offered to stipulate to the conviction. Kopsho recognizes adverse authority. (Initial Brief at 37). The only objection raised at trial was to the photographs. *Old Chief* was not argued to the trial court, and the issue raised on appeal is not preserved for review. Kopsho does not raise the introduction of photographs as error on appeal. Even if he did, the photographs were not gory or inflammatory. (Exhibits, R2123).

This Court has repeatedly held that details of a prior violent felony are relevant in the penalty phase because:

> Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.

*Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989). Caveats to this general rule include (1) introducing a tape recorded statement of a non-testifying victim, *Rhodes*, *supra* at 1204; testimony of a spouse who did not witness the prior felony, *Freeman v. State*, 563 So. 2d 73 (Fla. 1990); admitting a

photograph of an inmate axed to death while sitting on a toilet, *Duncan v. State*, 619 So. 2d 279. (Fla. 1993). Even these indiscretions were harmless. This Court has cautioned against a rape victim testifying, *Finney v. State*, 660 So. 2d 674 (Fla. 1995), and has set the "outermost limits" of State argument about prior violent felonies, *Stano v. State*, 473 So. 2d 1282, 1289 (Fla. 1985).

Even if this issue were preserved, the State is not required to accept a stipulation under *Old Chief,* a case which is limited to its facts. The State is allowed to present details of the prior violent felony in the penalty phase. In the present case, the testimony was not the "feature" of the trial as Kopsho alleges.[13] The deputy calmly recited the facts of the false imprisonment and sexual battery. He also told Kopsho's side of the story. The rape victim did not testify, as this Court cautioned in *Finney*, *supra.* The testimony consisted of one witness and 20 pages (including cross-examination) in a penalty phase of eleven witnesses and 150 pages.

[13] There was no objection on this basis, either.

## POINT III

### THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED WAS ESTABLISHED BEYOND A REASONABLE DOUBT

The State established the cold, calculated aggravating circumstance beyond a reasonable doubt. The trial court found:

> **The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.**
>
> In order to establish this aggravating circumstance, the State must prove beyond a reasonable doubt the existence of four elements: (1) the killing was the product of calm, cool reflection, and not an act prompted by emotional frenzy, panic, or a fit of rage; (2) the defendant had a careful plan or prearranged design to commit the murder; (3) the killing was the result of heightened premeditation; and (4) the defendant had no pretense of moral or legal justification. *See Richardson v. State,* 604 So. 2d 1107 (Fla. 1992); *Rogers v. State,* 511 So. 2d 526 (Fla. 1987); *Jackson v. State,* 648 So. 2d 85 (Fla. 1994); *Banda v. State,* 536 So. 2d 221 (Fla. 1988).
>
> The evidence established that the Defendant's plan to murder his wife began on Tuesday, October 24, 2000, when she confirmed that she had a sexual encounter with Dennis Hisey. Upon his wife's confirmation, the Defendant stated during his confession that it was "at that instant when I planned to kill her." That initial thought would evolve into a careful, deliberate, and elaborate three-day scheme to kill his wife. The Defendant's first step was to remain calm and conceal his anger. During his confession, the Defendant stated, "I couldn't let her see me angry. I didn't have a gun.. .I stayed cool. I stayed calm." The Defendant returned to work for the next three days and managed to conceal his intentions without creating any suspicion. The Defendant's friends and co-workers all acknowledged that the Defendant remained calm and appeared normal in the days leading up to the murder.
>
> On the day of the murder, the Defendant went to work

and then to the bank where he withdrew $3,000 from his checking account. During his confession, the Defendant explained his reasoning, A[t]he reason I did that...was because I know where I'm going... and I'm gonna be...in...I don't want my mo. ..that money tied up in the bank. So I planned to take this to prison with me...Give it out to my sons...now you see.. .where I'm saying this is premeditated?"

The next step involved securing possession of a gun. After the bank, the Defendant traveled to the home of William Steele, whom the Defendant knew owned a 9mm handgun. The Defendant asked to examine the gun and made note of its appearance. Armed with this knowledge, the Defendant stopped at WalMart and purchased a similar looking Crossman BB gun. The Defendant returned to William Steele's house, distracted Mr. Steele, and replaced the 9mm handgun for the Crossman BB gun.

Upon returning to work, the Defendant intentionally parked his truck behind his wife's car, intending to prevent her from driving. The Defendant then convinced his wife that she needed to accompany him to the bank to make a major withdrawal. The Defendant's true intention, however, was to drive his wife into the Ocala National Forest and murder her. The Defendant confessed, "I had planned on...going out to the Forest and ah...killing her." While in the Defendant's truck, he continued to deceive his wife, and told her they were going to the credit union branch on the east side of town.

While traveling to the Forest, the Defendant expressed that he needed "closure". At this point, the Defendant drew the handgun. Upon viewing the gun, his wife managed to break free from the Defendant's hold and escaped from the vehicle. After exiting the vehicle, the Defendant loaded the gun and shot his wife three times, ultimately killing her.

The Court is satisfied beyond and to the exclusion of any reasonable doubt as to the existence of the four elements that establish the murder was cold, calculated, and premeditated without any pretense of moral or legal justification. The facts of this case clearly establish that the Defendant, upon cool and

> calm reflection, concocted a careful and meticulous plan to murder his wife. The Court finds the first element is proven beyond a reasonable doubt.
>
> The second element requires the murder be the product of a "careful plan or prearranged design" to commit murder before the fatal incident. *Jackson v. State,* 648 So. 2d 85, 89 (Fla. 1994) *citing Rogers v. State,* 511 So. 2d 526, 533 (Fla. 1987). Once again, the facts clearly establish this element beyond a reasonable doubt. The Defendant engaged in a three-day prearranged and complex plan to kill his wife, derived from concise and deliberate manipulation and deceit.
>
> The third element requires "heightened premeditation". *Id.* The facts clearly show this element is proved beyond a reasonable doubt. The Defendant's actions not only were calm and careful, but they exhibited a degree of deliberate ruthlessness, as shown by his pre-murder plans of manipulation and deceit and his final intentional and deliberate action of loading the gun before shooting his wife to death.
>
> The fourth element requires that the murder have "no pretense of moral or legal justification." *Jackson v. State,* 648 So. 2d 85, 89 *citing Banda v. State,* 536 So. 2d 221, 224-226 (Fla. 1988). The Defendant argues the murder was committed under the influence of mental or emotional disturbance. The Court rejects this argument as a legal defense to the murder, though it is addressed below as a mitigating circumstance. The evidence fails to establish an excuse, justification, or defense to the murder. Contrarily, the evidence clearly demonstrates that the Defendant, over a three-day period, carefully crafted an elaborate and intelligent plan to kill his wife. Consequently, this aggravating circumstance is proved beyond a reasonable doubt and is afforded great weight.

(Vol. 7 R1199-1202). These fact findings are supported by competent, substantial evidence. Although Kopsho urges a "domestic violence" exception, that "exception" disappeared long ago. *Lynch v. State*, 841 So. 2d 362, 377 (Fla. 2003).

Furthermore, this murder is outside any conceivable scenario of the domestic cases this Court has reviewed. Kopsho meticulously planned this murder for three days, even taking money from the bank to have with him in prison, and stealing a gun from a friend then replacing it with a fake Wal-Mart gun. Every aspect of this case was cold, calculated and premeditated.

## POINT IV

### VICTIM IMPACT EVIDENCE DID NOT TAINT THE JURY RECOMMENDATION.

Kopsho claims the jury recommendation at the penalty phase was tainted by victim impact evidence, i.e., three letters written by relatives of the victims. He particularly objects to the statement that the victim's death would "haunt" her sister forever. (Initial Brief at 48). Additionally, the "dichotomy" between the 21-year old victim's life and Kopsho's life of crime "unfairly tipped the scales to death." (Initial Brief at 49). Kopsho acknowledges that the standard of review is abuse-of-discretion, and that *Windom v. State*, 656 So. 2d 432 (Fla. 1995), and Section 921.141(7), Florida Statutes, defeat his argument. He urges this Court to recede from *Windom.* Kopsho offers no compelling reason for this Court to overrule *Windom*. The victim impact evidence presented in this case was not unnecessarily emotional or inflammatory. Emily Preuss, Lynne Kopsho's sister, read letters to the jury written by her mother, sister and herself. (Vol. 17, R1100, 1101, 1103, 1105).

Jill Banning's letter, (Lynne's mother) described Lynne as, "the girl who brought home stray cats ... and nursed fallen baby birds." Lynne was the type of person to say whatever she was thinking and would not allow other people to get picked on. (Vol. 17 R1101). Lynne defended her friends and "only saw a

person's good qualities." (Vol. 17 R1101-02). Lynne was "maybe too naïve, generous, good-hearted, forgiving, and ... a girl who didn't always make the right decisions." (Vol. 17 R1102). Ms. Banning described how difficult it was for her family to live without Lynne in their lives, and how much they all loved her. (Vol. 17 R1102).

Lynne's sister, Kim Banning, wrote that her life and the lives of everyone who loved Lynne were changed forever on the day Lynne was murdered. Lynne was Kim's best friend, and was strong, beautiful, and caring. (Vol. 17 R1103). Kim described Lynne's death, "hoping this nightmare will go away." Further, Kim wrote, "After reading the articles and exactly what happened to her on the day she died, will haunt me forever." (Vol. 17 R1104). Ms. Banning said Lynne was very loved and would be missed by all who knew her. (Vol. 17 R1104).

Emily Preuss, Lynne's sister, wrote a letter describing Lynne as "someone very special in my life ...young, only 21 ... with a long full life ahead of her." (Vol. 17 R1105). Lynne was very involved with Emily's daughter and spent time with her going to the beach, riding horses, and fishing. (Vol. 17 R1105). Lynne was "a great human being ... a great sister ... loving daughter and granddaughter and a fabulous aunt." Lynne was a good friend, outgoing and loving. Lynne and Emily were very close, "She loved life." (Vol. 17 R1105-06). These letters were

neither inflammatory nor prejudicial.

This claim has been denied by both the United States Supreme Court and this Court. *See Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) (determining that a state may properly decide that a jury should have before it victim impact evidence at sentencing); *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995) ("We do not believe that the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators . . . or otherwise interferes with the constitutional rights of the defendant. *See also Perez v. State*, 30 Fla. L. Weekly S529 (Fla. Oct. 27, 2005).

## POINT V

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING RELEVANT TESTIMONY THAT KOPSHO WAS HAVING AN AFFAIR.**

Kopsho next claims the trial court abused its discretion by allowing the State to admit testimony that he had an extramarital affair with "Vivian." He claims the evidence was admitted only to "besmirch" his character. (Initial Brief at 51). The trial judge allowed brief testimony, but cautioned the State not to "belabor the issue." (Vol. 13, R634). Kopsho argues the evidence was not relevant. He also argues that the evidence "implied that appellant had committed the collateral crime of grand theft auto." (Initial Brief at 52). The State disagrees with this last statement.

The testimony at issue occurred during the testimony of Jane Cameron. She and her husband were close friends of Lynne and Bill Kopsho (Vol. 13, R627). Jane saw Bill Kopsho the morning of the murder at Custom Windows where Lynne and Bill both worked. (Vol. 13, R627). Bill had told Jane on Tuesday of that week that Lynne had a tryst with Dennis Hisey. (Vol. 13, R628). The rest of the week, Kopsho kept asking Jane if she knew "where Lynne was going. Who she was going with. What she was up to. Basically, what she was doing." (Vol. 13, R629). Jane told Kopsho that Lynn was traveling to Ohio in the coming weeks. He said he knew about that. (Vol. 13, R629).

During the week preceding the murder, Lynne was not living with Kopsho. “Vivian” was. (Vol. 13, R632). When the prosecutor asked about the nature of their relationship, defense counsel objected. (Vol. 13, R630). The State argued that Kopsho’s state of mind was the issue in this case. (Vol. 13, R632). The defense was arguing that Kopsho was so:

> [b]roken up over the demise of the marriage and hearing that Lynne had somehow cheated on him that he went – and we in some sort of anger state, and then he went and killed her.

(Vol. 13, R633). The State was trying to show that was not the case and that he was not trying to reconcile with Lynne. In fact, Kopsho was living with someone else at the time he killed Lynne. (Vol. 13, R633). This directly rebutted the defense theory and Kopsho’s statement that he would never cheat on his wife. It rebutted the defense theory that Kopsho was angry with Lynne about cheating on him and that Kopsho had already “moved on to someone else.” (Vol. 13, R633). Defense counsel countered that:

> Every single person who knows these people, who knew this couple, says that Bill was trying to get back with her. Robin and Audrey will say that on the day that this offense occurred he expressed interest in getting back with her.

(Vol. 13, R634). Defense counsel’s own statement establishes the relevance of Jane Cameron’s testimony regarding Kopsho’s state of mind.

Defense counsel argued in opening statement that October 27, 2000, was a “very, very sad day” for Kopsho because he lost the wife “he wanted to be with.” (Vol. 13, R550). Counsel argued that Kopsho was in such a state of “extreme emotional distress” that he wasn’t thinking clearly. (Vol. 13, R551). Counsel repeated over and over that Kopsho wanted Lynne to “return home,” “come back to him,” (Vol. 13, R552) that all Kopsho could think about was “trying to figure out a way to get her to come back to him.” (Vol. 13, R553). Defense counsel argued for second-degree murder. (Vol. 13, R555).

The defense called four witnesses. Three of the witnesses were asked questions regarding Kopsho’s state of mind. Jane Cameron was called solely to establish that Lynne had a sexual encounter with Dennis Hisey before she moved out of Kopsho’s house. (Vol. 15, R873). Robin Cameron was called solely to establish that he told Kopsho the Sunday before she was murdered about Lynn’s fling with Hisey (Vol. 15, 876). Dennis Hisey was called to establish that he and Lynne had sexual relations. (Vol. 13, R884). The theory of defense was that Kopsho committed second-degree murder. That the verdict should be second-degree murder because Kopsho was so “anguished and upset” was the entire theme of closing argument. (Vol. 15, R924). The evidence that Kopsho was living with another woman at the time was certainly relevant to rebut the state of mind the defense

portrayed.

## POINT VI

**THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL ON THE KIDNAPPING CHARGE.**

At the close of the State's case Kopsho moved for judgment of acquittal on the murder charge only (Vol. 15, R 866). After the defense case and State rebuttal, Kopsho renewed the motion for judgment of acquittal on the murder charge and moved for acquittal on the kidnapping charge because:

> [t]here is no evidence that she was taken against her will anywhere except for at the point at which the car pulled over and she got out. She was not and she ran from the car at that point.[sic]

(Vol. 15, R900). Thus, defense counsel concedes that Lynn was in the car against her will as soon as she became aware Kopsho had a gun. At that point she grabbed the wheel, forced Kopsho to pull over, and ran for her life. Kopsho's statement details the events as follows:

> Q. Okay.
>
> A. So I..that's when I reached down and I pulled the gun. And I had..across the arm rest here..and ah.. I could see the surprised look on her face and stuff. And ah..she kept asking me why. And..I wouldn't even talk to her. I said why? Because I want closure. Got to get you out of my life. If I can't..I..I couldn't ..Live with the thought, the fact..that she was doing this to me.
>
> Q. Take your time. Let me ask you this while..while we're at ah..breaking point here. Did you have the

truck stopped at this point Bill or was the truck still going?

A. Still going.

Q. Okay. What..when you say..she tried to get away is that what you mean when you say the word scramble?

A. Yes.

(Vol. 4, R624-625).

A. Okay. Ah…I just..well she kept asking me..You know? Why? I kept saying because I want closure just like you do.

(Vol. 4, R625).

Q. Okay. That was my next question. Had you actually stopped when she jumped out?

A. Alright. She had..

Q. Okay.

A. Try to jump out..at first I ah..I was going about 60 so I started applying the break [sic] and grab her at the same time. I had her by the hair. Pulling her back like this.

Q. Okay.

A. And ah..ah..she grabbed the steering wheel and started to pull on the steering wheel. To get me..and that's when we got over to the side of the road. Ah..she broke free from me. Out the passenger side door. I come out behind her. As I come out behind her I then loaded the gun. Put a bullet in the chamber.

(Vol. 4, R628). This is consistent with the testimony of both Katina and Shawn Tufts who were traveling east on State Road 40 when then noticed a black pick-up truck swaying back and forth in front of them. (Vol. 13 R556-7, 571). Eventually, "it

screeched to a stop” on the right side of the road. (Vol. 13 R557). Lynne Kopsho exited the pick-up and started running towards Tufts’ vehicle. (Vol. 13 R558, 571). Kopsho exited the pick-up and started chasing Lynne Kopsho. He grabbed her from behind and threw her to the ground. (Vol. 13 R559).

Kopsho now argues that any confinement was incidental to the shooting pursuant to *Faison v. State*, 426 So. 2d 963 (Fla. 1983). This argument was not made at the trial level and is not preserved for review. The only argument made below was that Lynn was not taken against her will, and at the only point it became against her will “the car pulled over and she got out.” (Vol. 15, R900).

Even if this issue were preserved, Kopsho meets the requirements for kidnapping. Section 787.01(1)(a), Florida Statutes (Supp. 1996), states that "the term 'kidnapping' means forcibly, secretly, or by threat confining, abducting or imprisoning another person against his will and without lawful authority, with intent to: . . . 2. Commit or facilitate the commission of any felony." This Court in *Faison* held that if a kidnapping is done to facilitate the commission of another crime, the resulting movement or confinement:

> (a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and

> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

*Id.* at 965. Kopsho compares his case to *Mackerley v. State*, (Fla. 4th DCA 2000), in which the victim was held in a headlock before he was shot. The present case is less like *Mackerley* and more like *Boyd v. State*, 910 So. 2d 167, 184 (Fla. 2005). In *Boyd,* this Court found competent, substantial evidence that the movement and confinement of the victim from the Texaco station away from her car made the sexual battery and murder substantially easier to commit and lessened the risk of the crimes being detected while they were being perpetrated. *See also Evans v. State*, 800 So. 2d 182, 195 (Fla. 2001)(victim moved from inside apartment to backyard sufficient movement; asportation to backyard made murder easier to commit and lessened risk of detection); *Walls v. State*, 641 So. 2d 381, 390 (Fla. 1994)(Defendant woke victim and boyfriend, tied her up and took her to another room while he killed boyfriend, then returned and killed victim); *Lovette v.* State, 636 So. 2d 1304 (Fla. 1994)( three employees of Domino's pizza taken to back of store and shot during robbery).

Furthermore, Kopsho, like Boyd, was charged with kidnapping under section 787.01(1)(a)(3) of the kidnapping statute. This subsection requires that the kidnapper have the intent to

"inflict bodily harm upon or to terrorize the victim or another person." Competent, substantial evidence supports the finding that Kopsho had the intent to harm or terrorize Lynne while confining her after she voluntarily entered the car. Thus, even if Lynne's kidnapping did not meet the requirements of *Faison*, Kopsho would still be guilty of kidnapping under section (1)(a)(3) of the statute.

As a general rule with regard to a motion for judgment of acquittal, "the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, this Court will not reverse." *State v. Law*, 559 So. 2d 187, 188 (Fla. 1989). In addition, the court's view of the evidence must be taken in the light most favorable to the state. The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. *Perry v. State*, 801 So. 2d 78, 84 (Fla. 2001) (citing *State v. Law*, 559 So. 2d 187, 189 (Fla. 1989)). The trial court's denial of a motion for judgment of acquittal will not be reversed on appeal if there is competent substantial evidence to support the jury's verdict. *Id*; *Conahan v. State*, 844 So. 2d 629, 634-635 (Fla. 2003).

## POINT VII

**THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS, AND CRUEL.**

Kopsho argues the trial judge abused his discretion by instructing the jury on the heinous, atrocious, and cruel aggravating circumstance. He claims there was no evidence to support this aggravating factor. He then argues that "evidence and argument was presented by the State" on the heinous, atrocious aggravator, thus conceding the State presented evidence to support this aggravator. (Initial Brief at 60). Kopsho compares this case to *Omelus v. State*, 584 So. 2d 563 (Fla. 1991), a contract murder case in which this Court held that the contract-or cannot be held responsible for the heinousness of the contract-ee's method used for the murder, i.e., cannot be "vicariously" liable. *Omelus*, 584 So. 2d at 566.

The present case is not a contract murder, and Kopsho is directly responsible for Lynne's terrifying death. Although the trial judge did not find HAC, there was sufficient evidence of heinous, atrocious and cruel to justify a jury instruction. Kopsho pulled a gun on Lynne while they were driving. She was so terrified she tried to jump from the car moving at 60 mph. Kopsho grabbed her by the hair, and they struggled. Lynne managed to make Kopsho pull over, at which time she jumped from

the car and ran for her life. Kopsho shot Lynne in the back as she ran. She fell to the ground moaning. He shot her again. She was still moaning, so he shot her again. According to one eye-witness, Lynne was in the fetal position when Kopsho shot her the last two times. (Vol. 13 R581, 582-83). The medical examiner testified there were eight gunshot holes, some of which were exit wounds from the four gunshot wounds. (Vol. 15 R797.

Mental anguish and the knowledge of impending death justify finding the heinous, atrocious aggravating circumstance. In fact, in finding that the evidence supported giving the instruction, the trial court held:

> I note that normally – or in shooting deaths, it [heinous, atrocious] doesn't normally apply when it's carried out in the course of committing the murder if the murder is effected in a relatively quick efficient manner.
>
> However, if there is fear, emotional strain or terror on the part of the victim, that might elevate it to a level of heinous, atrocious, and cruel.
>
> And that is why I am not precluding argument on that part, in the sense that the struggle in the truck, the production of the weapon in the truck, and the victim's flight from the truck might at least arguably elevate it to the level of this murder being heinous, atrocious and cruel.

(Vol. 16, R1014). Simply because Lynne was shot does not automatically remove the possibility of the HAC factor. *See Douglas v. State*, 575 So. 2d 165, 166 (Fla. 1991).

Appellant also argues that he did not "want [Lynne] to

suffer." (Initial Brief at 60). Even if this were true by any conceivable stretch of the imagination, it is not the killer's intent, but the actual suffering of the victim. In *Lynch v. State,* 841 So. 2d 362, 369 (Fla. 2003), this Court reiterated that, when analyzing the heinous, atrocious aggravator, the focus is not on the intent of the assailant, but on the actual suffering caused the victim. In determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. *See Farina v. State,* 801 So. 2d 44 (Fla. 2001); *see also Hitchcock v. State,* 578 So. 2d 685, 692 (Fla. 1990). Further, "the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." *Swafford v. State,* 533 So. 2d 270, 277 (Fla. 1988); *see also Chavez v. State,* 832 So. 2d 730, 765-66 (Fla. 2002). The HAC aggravating factor focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death. *See Barnhill v. State,* 834 So. 2d 836, 849 -850 (Fla. 2002); *Brown v. State,* 721 So. 2d 274, 277 (Fla. 1998). The level of Lynne's mental anguish and distress was such that she tried to jump from a vehicle moving 60 mph.

In *Bowden v. State*, 588 So. 2d 225, 231 (Fla. 1991), this Court held that the fact the State did not prove an aggravating factor to the trial court's satisfaction did not require a conclusion that there was insufficient evidence to allow the jury to consider the factor. Where evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required. *Stewart v. State*, 558 So. 2d 416, 420 (1990). As this Court stated in *Suarez v. State*, 481 So. 2d 1201 (Fla. 1985), *cert. denied*, 476 U.S. 1178 (1986):

> The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case.

Id. at 1209. The fact that the trial judge did not find this aggravating in his sentencing order does not mean the jury should not be allowed to consider heinous, atrocious where there was evidence to support that aggravator.

## POINT VIII

### KOPSHO'S DEATH SENTENCE IS PROPORTIONATE TO OTHER SIMILARLY-SITUATED DEFENDANTS

This Court's function in a proportionality review is not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial judge. *See Bates v. State*, 750 So. 2d 6 (Fla. 1999). Rather, this Court's responsibility is to "consider the totality of circumstances in a case, and to compare it with other capital cases." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990). *See also Reese v. State*, 768 So. 2d 1957, 1060 (Fla. 2000).

In the present case, the trial court found four aggravators:

1. Prior violent felony;
2. Cold, calculated and premeditated;
3. During the course of a kidnapping;
4. Under sentence of imprisonment.

(Vol. 7, R1199-1203). The first two aggravators were given great weight.

The trial court did not find any statutory mitigators and gave the nonstatutory mitigators little weight except that emotional disturbance was given moderate weight. The circumstances of this case are similar to other cases in which the death penalty has been imposed. For instance, *Larzelere v.*

*State*, 656 So.2d 394 (Fla. 1996), involved a case in which a wife had her husband killed. The trial judge found two aggravating circumstances: Cold calculated, and premeditated and committed for financial gain. There were no statutory mitigating circumstances, but there was nonstatutory mitigation. In *Evans v. State*, 838 So. 2d 1090 (Fla. 2002), the defendant killed his brother's girlfriend because he believe she was cheating on his brother. There were two aggravating circumstances: prior violent felony and committed while on probation. There were no statutory mitigating factors but several non-statutory mitigating factors.

In *Floyd v. State*, 850 So.2d 383 (Fla. 2002), the defendant killed his mother-in-law after an argument with his wife during which he said he was going to kill someone she loved. Similar to Kopsho, Floyd claimed the killing was done in the "heat of passion." *Floyd,* 850 So.2d at 408. There were three aggravating circumstances: prior violent felony, avoid arrest, and under sentence of felony probation.

Kopsho compares his case to *Douglas v. State*, 575 So. 2d 165 (Fla. 1991), *Songer v. State*, 544 So. 2d 1010(Fla. 1989), *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988) and *Herzog v. State*, 439 So. 2d 1372 (Fla. 1983). These cases are not similar to the present case. Both *Douglas* and *Herzog* involved jury overrides. In fact, the jury in *Douglas* unanimously recommended

life imprisonment. There was only one aggravating circumstance in both *Herzog* and *Songer.* *Songer* and *Fitzpatrick* both had the three statutory mitigating factors of age, extreme emotional disturbance, and inability to appreciate the criminality of their conduct. Mr. Fitzpatrick was, in lay terms, "crazy as a loon." *Fitzpatrick*, 527 So. 2d at 812. The cases cited by Kopsho are easily distinguished. In the present case there were four strong aggravating circumstances weighed against minimally significant mitigating circumstances. Kopsho had previously imprisoned a girlfriend at gunpoint and sexually battered her. He was still on probation for these felonies when he murdered Lynne. He spent three days planning and executing his plan to murder Lynne, then shot her mercilessly after terrorizing her by holding her at gunpoint while driving 60 mph down a two-lane road in the forest.

## POINT IX

### THE DEATH SENTENCE IN THIS CASE DOES NOT VIOLATE *RING V. ARIZONA.*

Acknowledging adverse case law, Kopsho raises this issue for preservation purposes. In addition to adverse case law, the State notes that this murder was committed during the course of a kidnapping, a crime for which a unanimous jury found Kopsho guilty. Kopsho had also committed a prior violent felony, a crime for which a unanimous jury found Kopsho guilty.

## CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the order of the trial court and deny all relief.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General

_____

BARBARA C. DAVIS
Florida Bar No. 0410519
Assistant Attorney General
444 Seabreeze Blvd. Suite 500
Daytona Beach, FL 32118
(386) 238-4990
Fax - (386) 226-0457

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by Hand Delivery to **George D.E. Burden,** Office of the Public Defender, 444 Seabreeze Blvd., Daytona Beach, Florida 32118, this _____ day of February, 2006.

_____

Assistant Attorney General

## CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

_____

Assistant Attorney General