IN THE SUPREME COURT OF FLORIDA

WILLIAM KOPSHO,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC05-763
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(386) 252-3367

ATTORNEY FOR APPELLANT

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STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

STATEMENT OF THE CASE

William Kopsho, hereinafter referred to as appellant, was indicted by Grand Jury with Murder in the First Degree and Kidnaping While Armed. (I 1) The state filed a Notice of Intent to Seek Death Penalty. (I 14) The appellant filed a pretrial motion to Declare the Florida Victim Impact Statute Unconstitutional or require the state to proffer victim impact evidence for prejudice. (I 47) The appellant filed several pretrial motions challenging the constitutionality of the Florida death

penalty scheme.[2]

The appellant requested individual voir dire on the issue of the death penalty. (IX 5) The trial court denied the request for individual voir dire on the death penalty, but would allow individual voir dire on the issues of pretrial publicity and domestic violence. (IX 5) The appellant objected to "death qualifying" the jury because the death penalty statute in Florida is unconstitutional, and the state did not obtain a separate "death qualifying" indictment. (IX 7) The appellant's request not to death qualify the jury was denied. (IX 8) The appellant conceded responsibility for the death of Lynne Kopsho in this case. (IX 8) The trial court denied the appellant's request for additional peremptory challenges. (IX 11)

The appellant made several challenges for cause that were denied by the court. The appellant made a challenge for cause on Juror McCray on the grounds that she was predisposed to support the death penalty and she had strong feelings against domestic violence. (IX 65) The trial court denied the cause challenge

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ection 921.141(5)(d) Felony Murder Aggravating Factor; Section 921.141(5)(i) CCP Aggravating Factor; Section 921.141(Improper mitigation evidence standard)(Failure to provide adequate jury guidance)(Bare majority of jurors sufficient for death sentence)(Improper Appellate Review) (Ring v. Arizona); Section 921.141(5)(f) Pecuniary Gain Aggravating Factor; Section 921.141(5)(a)

because Juror McCray indicated she could be impartial. (IX 66) The appellant made a challenge for cause on Juror Pierro on the grounds that she was a victim of domestic abuse as a child and would have difficulty setting that aside while being a juror. (IX 107) The trial court denied the cause challenge on the grounds that Juror Pierro said she would follow the law instructed by the court. (IX 109) The appellant made a challenge for cause to Juror Holden on the grounds that she suffered similar abuse as in the present case. (X 217) The trial court denied the cause challenge on Juror Holden, however the trial court would entertain the request for an additional peremptory challenge. (X 218) The appellant made a cause challenge on Juror Mullinax because the juror believed that the accused should be required to testify at trial. (XII 518) The trial court ruled that the appellant's version of events will be before the jury, and found that Juror Mullinax's answers indicated that he would be impartial. (XII 518)

The case proceeded trial. The state sought introduce evidence that appellant was having a extramarital sexual relationship with a woman named "Vivian." (XIII 631) The appellant objected to the state's inquiry about Vivian because the state was trying to besmirch the character of the appellant. (XIII 632) The trial court allowed the evidence of an extramarital affair over appellant objection.

Under Sentence of Imprisonment Aggravating Factor

The state rests. (XV 864) The`appellant made a motion for judgement of acquittal on the first degree murder charge on the grounds that the state failed to prove premeditation. (XV 866) The trial court denied the motion for judgment of acquittal. (XV 866) The appellant rests. (XV 898) The appellant made a motion for judgment of acquittal as to both counts. (XV 899) Appellant argued that there was insuffic ient evidence of premeditation for the murder charge to go to the jury. (XV 899) The appellant also argued that the evidence was insufficient to support the charge of kidnaping because Lynne Kopsho traveled voluntarily with her husband before she was shot. (XV 900) The state responded that once the appellant exhibited the gun, Lynne Kopsho was no longer voluntarily in the car. (XV 900) Although it was not a long period of time, there was a period of time in which Lynne Kopsho was confined against her will in the truck with the intent to kill her. (XV 900) The trial court denied the Motion for Judgement of Acquittal. (XV 901) The jury found the appellant guilty as charged to both counts of the indictment. (XV 962)

Penalty Phase

The state requested a jury instruction on five aggravating factors.[3] (XVI 972)

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[3] rime was committed while on felony probation; Defendant was previously convicted of

The appellant renewed previous objections to the Florida Death Penalty on the ***Ring***[4] issue and that the Florida Death Penalty scheme does not adequately narrow the class of persons eligible for the death penalty. (XVI 982) The trial court denied appellant's special jury instruction on HAC and CCP. (XVI 985-86)

The state introduced three letters written by relatives of the victims. (XVII 1025) The appellant renewed his objection to victim impact evidence coming before the jury. (XVII 1027) The appellant specifically objected to the following passage: "after reading the articles and exactly what happened on the day she died, will haunt me forever" (XVII 1027) The trial court allowed the victim impact evidence over objection. (XVII 1028)

The state sought to introduce photographs of the victim of a prior violent felony committed by the appellant. (XVII 1043) The appellant objected to photographs of the victim on the grounds that the prejudice outweighed the probative value. (XVII 1044) The trial court denied appellant's request to have interrogatory verdict forms. (XVII 1047) The state rests. (XVII 1107)

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another capital offense or felony involving the use or threat of violence; crime was committed during the course of a kidnaping; the crime was especially heinous, atrocious or cruel; and the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (XVI 973)

The appellant made a Motion for Directed Verdict for a Life Sentence on the grounds that the state failed to establish an aggravating factor. (XVII 1109) The trial court denied the Motion for Directed Verdict. (XVII 1109) The appellant rested. (XVII 1205)

The trial court rejected appellant's jury instruction that the offense occurred in the context of a domestic relationship. (XVII 1213) The trial court rejected appellant's jury instruction that the appellant has the capacity to help others learn from his mistakes while in prison. (XVII 1217) The trial court rejected appellant's jury instruction that appellant handled himself well during all phases of the trial. (XVII 1225)

The appellant objected to the trial court giving a penalty phase jury instruction on the HAC, CCP and Felony Murder aggravating factors. (XVIII 1236) The appellant also renewed his objections to the penalty phase jury instruction based upon ***Ring***. (XVIII 1236)

During deliberations, the jury requested a copy of the paper that showed the appellant was sent to the juvenile home. (XVIII 1299) The trial court denied the request because the document was not in evidence. (XVIII 1300) The jury

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ing v. Arizona, 536 U.S. 584 (2002)

recommended a sentence of death by a majority vote of nine to three. (XVIII 1304)

During the ***Spencer*** Hearing, the appellant offered his prison records to establish that the appellant would not be a threat to anyone in prison. (VII 1069) The appellant addressed the court and expressed remorse for taking his wife's life. (VII 1074) The trial court sentenced appellant to death on Count I; sentenced the appellant to life imprisonment with a mandatory minimum of ten years as to Count II. (VII 1190) The Office of the Public Defender was appointed. (VII 1191) This appeal follows.

STATEMENT OF THE FACTS

Katina Tufts was traveling east on State Road 40 with her husband Shawn on the morning of October 27, 2000. (XIII 556) Tufts observed a black truck begin to sway in the lane ahead of her. (XIII 557) The truck then screeched to a stop at the right hand of the road. (XIII 557) Tufts then observed Lynne Kopsho exit from the passenger side of the truck, and started running towards Tufts' vehicle. (XIII 558) The appellant exited the truck and began to chase after Lynne Kopsho. (XIII 559) The appellant then grabbed Kopsho from behind and threw her onto the ground. (XIII 559) Appellant then reached behind his back and came forward and fired a shot and Lynne Kopsho fell to the ground. (XIII 559) Tufts then yelled for her husband to get back in the car, and they drove to the first house to call 911. (XIII 560)

Tufts returned back to the scene of the shooting and the appellant was still there. (XIII 561) The appellant demanded that Tufts to stay away from Lynne Kopsho. (XIII 561) The appellant stated "that he had shot the bitch and that she was dead. And told us to stay away from her." (XIII 561) After the appellant crossed the other side of State Road 40, Tufts went to Lynne Kopsho and observed a gun laying by her right shoulder. (XIII 562)

After the shooting, Tufts was shown a photo lineup. (XIII 564) Tufts identified appellant as the person that shot Lynne Kopsho. (XIII 565) Tufts testified that the appellant was just screaming, he was neurotic, she did not know how to explain him. (XIII 569) The appellant stated he was just tired and waited for police and made no effort to run away or anything. (XIII 568)

Basil Friend was told that there was a shooting. (XIII 588) Friend called the Sheriff's Department and went to the scene of the shooting armed with his 32 caliber pistol. (XIII 590) When Friend arrived at the scene of the shooting he observed Lynne Kopsho on the ground. (XIII 590) Appellant was standing by the body and stated: "get the F back. Don't come near. I just shot her three times." (XIII 591) Friend pulled his gun and appellant told him not to do anything. (XIII 591)

Edwin Boone was a communication officer for the Marion County Sheriff's office. (XIII 600) Boone received a 911 call from the appellant. (XIII 600) Appellant told Boone that he just shot his wife. (XIII 600) Kopsho kept people away from his wife while he waited for police to arrive. (XIII 617) Kopsho stated that he caught wife in bed with another man who was my good friend. (XIII 619) Kopsho stated that the gun he used to shot his wife was a 9mm stolen from

William Steele. (XIII 620)

Teresa Erickson is the stepmother of Lynne Kopsho. (XIII 623) Lynne Kopsho moved out of Erickson's house when she was eighteen years old to move in with the appellant. (XIII 624) Three months before she was killed, Lynne Kopsho moved back in with Erickson. (XIII 624) Lynne Kopsho was cordial to her husband while they were separated. (XIII 624) Erickson helped Lynne Kopsho get her own automobile three months before she was killed. (XIII 625)

Jane Cameron was a co-worker of the appellant and his wife Lynne Kopsho. (XIII 626) Jane Cameron's husband Robin Cameron were also friends with the couple. (XIII 627) The week before the shooting, the appellant asked Cameron if she knew where Lynne was going, who she was going with and what she was up to. (XIII 629) The appellant discussed with Cameron the his wife's plan to drive to Ohio in the coming weeks. (XIII 629)

At the time of the killing, Lynne Kopsho was not living with her husband. (XIII 630) Appellant was living with a woman named Vivian. (XIII 630) The appellant confided to Cameron that he was having a sexual relationship with Vivian. (XIII 631) The morning of the killing, the appellant spoke with Cameron and the appellant seemed a little distracted. (XIII 637) Cameron knew that Lynne

Kopsho had a one night relationship with Dennis Hisey. (XIII 639) Cameron also knew that appellant was aggravated with his wife because appellant had found out about Dennis Hisey. (XIII 640) Cameron confirmed that Lynne Kopsho admitted to her husband that she in fact had a relationship with Dennis Hisey. (XIII 641) This occurred a few days before the killing. (XIII 641)

On the morning of October 27, 2000, the appellant went to the Florida Credit Union and withdrew $3,000 from his checking account. (XIII 643) The appellant was not acting in any unusual way at the time of the withdrawal from the credit union. (XIII 644) On September 22, 2000 William Kopsho was removed from Lynne Kopsho's credit card account by each of them signing a document removing him from the account. (XIII 648) On October 26, 2000 there was a deposit of $4,500.12 into the William and Lynne Kopsho bank account. (XIII 650) On the same date, there was a transfer made to a different account for $1500.00. (XIII 650) There was also a debit card transaction from the joint checking account on October 27th from Walmart for $159.22. (XIII 651)

On October 25, 2000 the appellant and his wife executed a promissory note with Citi Financial. (XIII 658) The couple borrowed $4,516.22. (XIII 659) The check was endorsed by appellant and Lynne Kopsho and was cashed on October

26, 2000. (XIII 660)

The appellant was taken into custody by Marion County Sheriff Jeff Peeples. (XIV 670) The appellant had $3,000.00 in cash in his wallet. (XIV 674) The appellant was cooperative when he was placed under arrest. (XIV 675)

Larry Thompson was a Marion County Sheriff that searched the appellant's truck after the shooting. (XIV 699) Thompson recovered a package that at one time contained a Crossman airgun pistol. (XIV 703) Thompson also found a sleeping bag, and a camping pad which had not been open from its original camping packaging. (XIV 706) Thompson also found a tent that appeared to be in its original packaging. (XIV 707) Thompson also recovered a Walmart bag containing a blanket, a roll of duck tape, and a rope. (XIV 707)

There was blood found on the appellant's right hand, and a DNA test revealed that the blood taken from his right hand was identified as being the blood of Lynne Kopsho. (XIV 721) A gunshot residue test was also revealed that there was gunshot residue found on the right hand of the appellant. (XIV 721) Marion County Sheriff's deputies recovered a Crossman BB gun from the home of William Steele. (XIV 736) The state introduced a firearms transaction record which stated that William R.V. Steele, residing at 4205 N.W. 35th Street, Ocala,

Florida owned a Glock model 22, serial number C.A.R. (XIV 744)

Associate Medical Examiner Susan Ignacio conducted an autopsy on the victim Lynne Kopsho. (XV 795) The victim was shot in the chest and abdomen four times. (XV 797) All of the gunshots exited the victim's body. (XV 797) Two of the gunshot wounds were fatal. (XV 801) The cause of death was multiple gunshot wounds to the chest and abdomen. (XV 809)

Marion County Sheriff Deputy Jeff Owens conducted an interview of the appellant shortly after the shooting. (XV 814) Deputy Owens read the appellant his ***Miranda*** rights and the appellant signed a form indicating he understood his rights. (XV 814) The appellant stated that he killed his wife because she admitted that she had slept with a co-worker named Dennis. (XV 827) The appellant stated that the murder was premeditated because he had planned it. (XV 832) The appellant began planning to murder his wife the night she told him that she had slept with a coworker. (XV 832) "I think it was that instant, at that instant, when I planned to kill her. I know it was." (XV 834) Then the appellant stated: "So I couldn't let her see me angry. I did not have a gun." (XV 834)

To accomplish his plan to kill his wife, the appellant stole a gun from William Steele. (XV 835) Prior to the shooting, the appellant went to Steele's

house to confirm that Steele's gun was where he kept it in his chair. (XV 836) The morning of the murder, the appellant went to Steele's house, and while Steele was distracted, took his gun and replaced it with a BB gun that resembled the gun. (XV 836) The morning of the shooting, the appellant also went to the bank and withdrew $3,000.00 so he could take to the money to prison with him. (XV 837) After getting William Steele's gun, the appellant went back to work and asked his wife's supervisor if he could take her to the bank to make a big bank withdrawal. (XV 839) The appellant told Lynne Kopsho that he needed her to come with him to make a withdrawal from the Florida Credit Union. (XV 840) The appellant was surprised when Lynne did not say anything when he headed east on 40 the opposite direction from the credit union. (XV 841)

The appellant was planning on driving out to Ocala State Forest down a dirt road. (XV 846) The appellant did not intend to kill her on the side of the road, and the Lynne Kopsho might have even talked him out of killing her if she did not scramble like she did. (XV 847) Lynne Kopsho stated that she wanted closure while they were driving down the road, and the appellant said he wanted closure too. (XV 847) The appellant stated he was tired of the situation and he was hurting too much inside. (XV 847) At that point the appellant reached down and pulled

the gun. (XV 847) Lynne Kopsho had a surprised look on her face and she keep asking why. (XV 847) The appellant would not say anything first and then said because he wanted closure and had to get her out of his life. (XV 847)

The appellant's wife then tried to get out of the vehicle, so the appellant started applying the brakes and grabbing her at the same time. (XV 852) The appellant's wife then grabbed the steering wheel and started pulling the steering wheel and then that is when the truck got over to the side of the road. (XV 852) Lynne Kopsho fled from the truck. (XV 852) The appellant came out behind her and loaded the gun and put a bullet in the chamber. (XV 852) As they were both running, the appellant shot Lynne in the side. (XV 852)

Lynne Kopsho fell to the ground and she was groaning. (XV 853) The appellant brushed her hair away from her face, looked at her and told her that he loved her, and then shot her in the heart. (XV 854) The appellant observed that she was still in pain, and just closed his eyes and shot again. (XV 854) The appellant then stated to the deputy sheriff in his confession "I love you. God, I love her. Ain't love strange? Makes you kill somebody." (XV 854) After the appellant shot his wife, he kept eye witnesses away from her. (XV 855) The appellant did not want anybody to help her because he wanted her to die. (XV 856) After the

appellant knew that Lynne Kopsho was dead, he threw the gun down by her and waited for police to arrive. (XV 856)

Defense Case

William Laster was a co-worker of the appellant and his wife. (XV 869) On the morning of the murder, Laster asked to borrow Lynne Kopsho's car keys. (XV 870) At the time that the appellant came to get his wife to go to the bank, Laster had Lynne Kopsho's car keys. (XV 870)

Lynne Kopsho told Jane Cameron that she had a sexual liaison with Dennis Hisey while she was still residing with the appellant. (XV 873) The Sunday before Lynne Kopsho's murder, Robin Cameron told the appellant that Lynne Kopsho had an affair with Dennis Hisey. (XV 876)

Dennis Hisey was Lynne Kopsho's supervisor at Custom Windows. (XV 879) After Hisey left employment there, he was contacted by Lynne Kopsho, and she asked if she could come by his house with friends. (XV 883) During the visit, Kopsho and Hisey had sex in his bathroom. (XV 884) After the sexual liaison, Hisey had no further contact with Kopsho. (XV 884)

Tuesday evening before the murder of Lynne Kopsho, the appellant was having a conversation with Robin Cameron about cheating women. (XV 897) The

guys gave their opinions as to what they would do if their wife or girlfriend had cheated on them, and their answers were pretty much the same. (XV 897) Even Robin Cameron said "he would kill the bitch," but he could not remember the appellant's answer specifically. (XV 897)

Penalty Phase

John Ferro, a Marion County Deputy Sheriff, interviewed the appellant's ex-girlfriend at the Munroe Regional Emergency Room in regards to a report of her being severely beaten. (XVII 1071) The statements by the women in the hospital did not add-up, and after being confronted by Ferro, the women admitted that she had been beaten with the butt of a shotgun; sexually assaulted and then driven to Florida from Georgia by the appellant. (XVII 1075-76) Ferro then questioned the appellant outside the emergency room, and he confirmed that he had struck his ex-girlfriend with a two by four out of anger. (XVII 1081) He denied having sex or taking her to Florida against her will. (XVII 1082)

Wayne White was a probation officer with the Florida Department of Corrections that supervised appellant's probation for his convictions for False Imprisonment while Armed and Sexual Battery. (XVII 1097) On October 27, 2000 the appellant was on probation for False Imprisonment and Sexual Battery

convictions. (XVII 1097)

Bill Laster spoke with the appellant the morning of the murder. (XVII 1090) Appellant asked Laster if all his debts were settled. (XVII 1090) The appellant also said that he hoped that Laster and his wife never got together and never would. (XVII 1091) After appellant's arrest, the appellant called Laster from jail and told Laster that in any other country he wouldn't be prosecuted, and that he was her God and had every right to exterminate her. (XVII 1091) Laster admitted on cross-examination that he had 14 felony convictions and 4 additional convictions for crimes involving dishonesty. (XVII 1092)

Lynne Kopsho's sister Emily Preuss read to the jury a letter written by Lynne Kopsho's mother, Ms. Jill Banning. (XVII 1102) Preuss also read a letter written by Lynne Kopsho's half-sister Kim Banning. (XVII 1103) Preuss then read a letter to the jury that she had written. (XVII 1105) The appellant noted for the record that Preuss teared-up and had to pause to compose herself while she read the last letter. (XVII 1108)

Ida Mae Scott was a co-worker and supervisor of appellant prior to the murder. (XVII 1121) The appellant did great work, and was helpful to other workers in the facility. (XVII 1123) He was also very knowledgeable and

dependable. (XVII 1127)

William Seibold was an English teacher at the Indiana Boys School. (XVII 1129) The appellant was at the Indiana Boys School from April to December of 1970. (XVII 1130) In 1970 the Indiana Boys School was the juvenile detention facility for the State of Indiana. (XVII 1131) The appellant was confined there as a runaway. (XVII 1131) In 1970 there were 600 boys in the facility with a maximum of 60 boys per individual cottage. (XVII 1133) The 60 boys in the cottage would be supervised by two people and there was no training provided for the boys. (XVII 1133) The boys were segregated in two ways: one by age and one by size and there was regard to the offenses committed by the boys. (XVII 1133) The juvenile detention facility had rapist, murderers and other violent offenders. (XVII 1134) In 1970 there were two forms of corporal punishment at the Indiana Boys School. (XVII 1136) The two forms of corporal punishment were either to be struck with a paddle or to be struck with a strap. (XVII 1136)

The appellant has a twenty-eight year old son by the name of Sean Kopsho. (XVII 1141) The appellant is Sean Kopsho's best friend and Sean Kopsho loves his father with all his heart. (XVII 1143)

Sandra Higher is the sister of the appellant and she grew up with the

appellant in Gary, Indiana. (XVII 1147) The appellant's older sister Theresa died while giving childbirth at the age of twenty-one. (XVII 1151) The appellant's father was a very hard worker and worked very often. (XVII 1154) The appellant's mother was old fashioned in her ways and wanted things to be done her way. (XVII 1154) The appellant's mother would punish the children by either grounding them or giving them whippings. (XVII 1155)

The appellant's mother was an unemotional person and she did not teach her children any life lessons or how to cope with things. (XVII 1155) The appellant's sister Sandra was kicked out of the house when she was sixteen years old for not following her mother's rules. (XVII 1156) The appellant was a good brother because he was always there when he was needed. (XVII 1157)

Dr. Elizabeth McMahon is an expert in the area of forensic psychology and evaluated the appellant for the defense. (XVII 1163) The appellant is an individual with average intelligence and has very mild to moderate impairment in his cognitive functioning. (XVII 1167) The origin of the appellant's behavior was not brain dysfunction. (XVII 1167) The appellant's upbringing was fairly harsh, non-nurturing, and very controlling environment that did not meet his needs for security or dependency or affection. (XVII 1179) This caused appellant to be emotionally

immature in many ways. (XVII 1180)

The appellant has a dependant personality. (XVII 1183) The appellant has to be in a relationship with someone. (VXII 1183) The appellant needed to find a loving female in his life that would meet his needs for nurturing him. (XVII 1183) The appellant needed to relive or remake what didn't happen in his childhood. (XVII 1183)

The appellant was hospitalized for psychiatric problems five times in the early 1980's. (XVII 1184) The appellant's behavior was the same; he was paranoid, agitated, and talked about things in terms of confusion or things being in slow motion. (XVII 1184) The appellant was diagnosed with what is called a reactive psychosis, and would become totally psychotic at these brief periods of time despite anti-psychotic drugs. (XVII 1185) One of the hospital admissions was precipitated by a former wife telling him that she had an affair a few months before. (XVII 1186) The appellant has suffered severe psychological problems related to interpersonal relationships. (XVII 1186) If appellant is about to be abandoned it triggers severe emotional psychological problems. (XVII 1187) These severe psychological problems contributed to the appellant's behavior at the time of the offense. (XVII 1187) The appellant did not have control over the

factors that led to these psychological problems. (XVII 1187)

SUMMARY OF ARGUMENT

POINT I: The appellant made a cause challenge of a prospective juror that believed that the law should be changed and an accused should be required to testify at trial to tell their side of the story. This juror was not sure he could set aside these feelings if he was selected as a juror. The appellant properly preserved the issue pursuant to ***Trotter v. State***, 576 So.2d 691 (Fla. 1990). The appellant's trial was not before a fair and impartial jury.

POINT II: The appellant had a prior violent felony conviction. The appellant offered to stipulate to the prior violent felony conviction in the penalty phase. The trial court allowed the state to introduce photographs of the victim's injuries of the prior violent felony over appellant's objection. The state further introduced inflammatory hearsay statements of the victim. This Court has repeatedly held that the details of prior violent felonies must not be emphasized to the point where they become the feature of the penalty phase. This is precisely what occurred in the present case. Since the objectionable evidence subsequently became a feature of the penalty phase, this Court should vacate appellant's death sentence and remand for a new penalty phase.

POINT III: The aggravating circumstance of murder committed in a cold and calculated manner without any pretense of moral or legal justification applies only to crimes which exhibit heightened premeditation greater than is required to establish premeditated murder, and it must be proven beyond a reasonable doubt. The appellant intended to kill his wife. More, however, is required to prove that the CCP aggravating circumstance exists beyond a reasonable doubt. There is simply insufficient proof that the murders fall under the definition of this statutory aggravating factor. Based upon the testimony of Dr. McMahon, the murder was a result of an emotional disturbance from a person that has a long history of emotional instability concerning relationships with women.

POINT IV: The jury's recommendation at the penalty phase was tainted by highly inflammatory and improper victim impact evidence. This court has held that victim impact is permissible. Appellant respectfully request that this Court recede from its earlier ruling and find that victim impact evidence should be excluded.

POINT V: The state sought introduce evidence that appellant was having a extramarital sexual relationship with a woman named "Vivian." The appellant objected to the state's inquiry about Vivian because the state was trying to

besmirch the character of the appellant. The appellant's objection to this evidence was overruled. The objectionable evidence was not relevant to any issue at trial and contributed to the jury's recommendation of the death penalty.

POINT VI: At the conclusion of the trial the appellant made a Motion for Judgement of Acquittal on the kidnaping charge. The appellant argued that there was no evidence that Lynne Kopsho was taken against her will anywhere. The state responded that once the appellant exhibited the gun, Lynne Kopsho was no longer voluntarily in the car. Although it was not a long period of time, there was a period of time in which Lynne Kopsho was confined against her will in the truck with the intent to kill her. The trial court denied the Motion for Judgement of Acquittal stating that: "I don't know of any time frame required in regards to the charge of Kidnaping." The trial court's error led to a tainted recommendation to impose death.

POINT VII: The trial court erred in instruction the jury that, in determining what sanction to recommend, it could consider whether the murder was committed in an heinous, atrocious and cruel manner thereby rendering the death sentence unreliable under the Eight and Fourteenth Amendments.

POINT VIII: In imposing the death penalty, Judge Eddy found that the State

had proved four aggravating circumstances: that Appellant had previously been convicted of another felony involving the use or threat of violence to a person; the murder was committed in a cold, calculated and premeditated manner; felony murder; and under the sentence of imprisonment. The aggravating factor that the murder was committed in a cold, calculated and premeditated manner and felony murder were improperly found. The prior violent felony aggravating circumstance was a conviction for False Imprisonment and Sexual Battery of a past girlfriend. This was another example of appellant engaging in domestic violence. The appellant was still on probation for this offense, therefore, the appellant qualified for the under sentence of imprisonment aggravating factor. The trial court recognized this and gave the under sentence of imprisonment aggravating factor minimal weight. In mitigation, the trial court considered eleven separate non-statutory factors which were all given some weight. Appellant contends that the death penalty cannot stand since it is disproportionate to the crime and constitutes cruel and unusual punishment.

POINT IX: Despite the United States Supreme Court's ruling in ***Ring v. Arizona***, 536 U.S. 584 (2002), this Court, as a court, has steadfastly refused to find the State's death penalty statute, in part or in total, in violation of the Sixth

Amendment to the United States Constitution. Kopsho raises this issue, in hopes that this Court has now seen the error of its ways. Appellant is also required to raise the issue to preserve it and avoid the trap of procedural bar.

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S CAUSE CHALLENGE OF A JUROR THAT BELIEVED THAT THE APPELLANT SHOULD BE REQUIRED TO TESTIFY AT TRIAL.

The trial court abused its discretion when it denied the appellant's cause challenge of Juror Mullinax. Juror Mullinax should have been excused for cause based on his stated views regarding the appellant's right to remain silent. The appellant properly preserved the issue pursuant to ***Trotter v. State***, 576 So.2d 691 (Fla. 1990). The appellant is entitled to a new trial before a fair and unbiased jury.

During jury selection, the jury colloquy with Juror Mullinax went as follows:

> MR. MILLER: Is there anyone on this panel - - this is a question that they have a strong opinion about, and sometimes they answer this in the affirmative. If this is the way you feel I want to know. Is there anyone on this panel who's going to have a difficult time returning your verdict a this case without hearing from my client?
>
> JURY VOIR DIRE: No response.

MR. MILLER: I mean, it's okay if you have a problem with that. Just because the law says - - I'm getting back to what I talked about earlier on. This is an extremely important point. Just because the law says that you cannot presume anything - - I am not telling you whether or not your going to hear from Mr. Kopsho. Again these are hypothetical questions. But if you did not, the court is going to stress to you that you can't draw anything from that. That is irrelevant. Should not come to your thinking. My question is: Does anybody have a problem with that? Does anybody think that the law should be different?

MR. MULLINAX: I do. I think you should have to.

MR. MILLER: Okay.

MR. MULLINAX: I know that law is not that way, but I think so.

MR. MILLER: Now again, a more difficult, philosophical question. You know setting aside thoughts like that are tough to do. Can you do it?

MR. MULLINAX: I don't know.

MR. MILLER: You don't know?

MR. MULLINAX: Whether he is guilty or not, you have to stand before your maker. You're going to have to give an account for what you did here. This is what I think

the law should be.

MR. MILLER: I understand that. And I respect that. You know that. I told you, and I meant it. I want to hear what you really feel deep down in here. But what I am asking is: Is there a possibility feeling that way, you would not be able to set that aside and that you would have trouble deliberating this case and not considering that in deliberations if Mr. Kopsho chose not to testify? You don't know? In other words, you are not sure?

MR. MULLINAX: I am not sure.

MR. MILLER: Okay.

MR. MULLINAX: But I would like to hear his side.

MR. MILLER: That is why I asked. No wrong answers. I respect that. (XII 510, 511)

Juror Mullinax stated that he understood that the appellant had the right to remain silent and not testify at trial. Nonetheless, Juror Mullinax expressed that the law should require that an accused make full account to their maker. Juror Mullinax was uncertain as to whether he could set aside his bias and follow the law.

The appellant made a challenge for cause against Juror Mullinax:

THE COURT: Okay. Mr. Miller, you indicated you have a challenge for cause you wanted to make?

MR. MILLER: Yes. Specifically Mr. Mullinax. He said I think three times that even if he was told that the law was that he could not consider Mr. Kopsho testifying - - he is not sure he could set that aside and deliver a fair verdict. That is clearly not following the law. That is clearly grounds for dismissal.

THE COURT: At no time did he indicate that he would be anything other than fair and impartial. Actually, he caps his statement by saying: Unless you have eye witness statements that he killed someone, I would like to hear his side of the story. Correct me if I'm wrong counsel or the prosecution, but do you not have such statements?

MR. TATTI: Yes.

THE COURT: I recognize also, counsel for the prosecution, do you intend to introduce the video taped statement on Mr. Kopsho after this arrest?

MR. TATTI: Yes.

THE COURT: In which case, Mr. Kopsho's version of events would also be before the jury. But I did not find his answers to indicate he would not be impartial. Accordingly the challenge for cause is denied. Do you want to effect the peremptory challenges to Mr. Mullinax?

MR. MILLER: I need to discuss that further. (XII 518, 519)

The appellant then used a peremptory challenge to strike Juror Mullinax. The appellant then requested an additional peremptory challenge:

> MR. MILLER: Your Honor, in light of the courts denial of the exercise of the cause challenge of Mr. Mullinax, defense request additional peremptory.
>
> THE COURT: As to which juror?
>
> MR. MILLER: As to Mr. Belet.
>
> THE COURT: A request for an extra peremptory challenge is denied. (XII 523)

The trial court had the clerk swear the jury to hear the case. (XII 524) The appellant objected to the trial court's denial of the request for an additional peremptory challenge. The appellant then identified the venire person that he would have removed with a peremptory challenge had the trial court granted the appellant's request for an additional peremptory challenged.

> MR. MILLER: Regarding the denial of the additional peremptory, the defense objects to that.
>
> THE COURT: Yes.
>
> MR. MILLER: And has identified Mr. Belet , the juror

> we would have struck having given a the peremptory challenge. So the record is clear, I don't know if this is required, but the reason we would have struck Mr. Belet because – I mean not for cause – I mean as a peremptory, the answer he gave in his last round of questioning about premeditation. (XII 531)

DISCUSSION

The standard for reviewing a trial judge's decision on a challenge for cause is abuse of discretion. ***Castro v. State***, 644 So.2d 987, 990 (Fla.1994) The trial judge abused his discretion in denying the cause challenge of Juror Mullinax. Trial judges must settle the query as to "whether the juror can lay aside any bias or prejudice and render his [or her] verdict solely upon the evidence presented and the instructions on the law given to him [or her] by the court." ***Lusk v. State***, 446 So.2d 1038, 1041 (Fla.1984). "When making this determination, the court must acknowledge that a 'juror's subsequent statements that he or she could be fair should not necessarily control the decision to excuse a juror for cause, when the juror has expressed genuine reservations about his or her preconceived opinions or attitudes.' " ***Rodas v. State***, 821 So.2d 1150, 1153 (Fla. 4th DCA 2002), review denied, 839 So.2d 700 (Fla.2003). "Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, we have adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should

be resolved in favor of excusing the juror rather than leaving doubt as to impartiality." ***Williams v. State***, 638 So.2d 976, 979 (Fla. 4th DCA 1994), ***review denied***, 654 So.2d 920 (Fla.1995).

In the instant case, the responses of prospective Juror Mullinax reflected doubt about whether he could set aside his strong belief that appellant should be required to testify, and that despite the instructions from the trial judge, his feelings did not change. The statements by Juror Mullinax created more than a reasonable doubt about his ability to be fair and impartial. This juror should have been struck for cause, and the court erred in denying the appellant's challenge for cause.

The appellant preserved this issue for review pursuant to ***Trotter v. State***, 576 So.2d 691 (Fla. 1990). The appellant requested an additional peremptory challenge and was the request was denied. The appellant made a timely objection to the jury panel. The appellant then identified a seated juror that appellant would have struck (Juror Belet) had the trial court granted additional peremptory challenges.

This Court has held that it is reversible error[5] for a trial court to improperly deny cause challenges where I venire person expresses the strong belief that an

[5]This Court did not find reversible error in ***Overton*** because the trial court did grant an

accused should testify. In ***Overton v. State***, 801 So. 2nd 877 (Fla. 2001), Juror Russell stated that:

> MR. RUSSELL: It's like I said, I could follow the Judge's rules, but I still feel the person should get up there if they're innocent.
>
> MR. SMITH: Okay.
>
> MR. RUSSELL: I can't--I can't see myself sitting there and being accused of a crime and not getting up there and trying to clear myself, you know.

Overton at 890. In finding error this Court held that:

> Based on the totality of his responses, we conclude that Russell's assurance that he would be able to follow the law did not sufficiently negate his prior abiding adherence to the notion that he had "always believed" that defendants should testify if they have nothing to hide. In reaching our conclusion, we rely on our decision in ***Hamilton v. State***, 547 So.2d 630 (Fla.1989), which involved a juror who indicated that she had extreme difficulty with the presumption of innocence and a defendant's right to remain silent. ***See*** 547 So.2d at 632. In ***Hamilton***, defense counsel's challenge for cause was denied, as was his request for additional peremptory challenges. ***See id.*** In reversing and ordering a new trial, this Court noted that "[a]lthough the juror in this case stated in response to questions from the bench that she

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additional peremptory challenge.

> could hear the case with an open mind, her other responses raised doubt as to whether she could be unbiased." *Id.* at 633.

Overton at 891.

There is no material difference in the jury colloquy with Juror Russel in ***Overton*** and the jury colloquy with Juror Mullinax in the instant case. The appellant was denied having a trial by an impartial and unbiased jury. This Court should order appellant a new trial.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO ACCEPT APPELLANT'S OFFER TO STIPULATE TO HIS PRIOR VIOLENT FELONY CONVICTIONS IN CONTRAVENTION OF ***OLD CHIEF V. UNITED STATES***[6] RESULTING IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL.

Prior to the commencement of the penalty phase evidence, appellant's defense counsel offered to stipulate to the aggravating circumstance relating to the prior violent felony conviction. The state refused to accept the stipulation, and the trial court permitted the state to introduce inflammatory photographs of the victim and inflammatory statements of the victim. The defense counsel properly objected to the introduction of photographs of the battered victim:

> MR. MILLER (Defense Counsel): Obviously, Your Honor, in light of the fact that I had previously made a motion to stipulate to the prior convicted – prior violent felony conviction, I certainly think that those pictures' probative values are outweighed by the prejudicial impact and I would object to them coming in.

(XVII 1043)

[6] ***Old Chief v. United States***, 519 U.S. 172 (1997).

The trial court allowed, over timely objection, the introduction of an inflammatory photographs of victim of appellant's sexual battery burglary. (XXII 1084) In fact, the vast majority of evidence presented by the state during their penalty phase case-in-chief was the testimony and documentation detailing this horrific crime. This was error and denied Mr. Kopsho's rights guaranteed by ***Article I, Sections 2, 9, 16 and 22*** of the Florida Constitution and the ***Fifth***, ***Sixth***, ***Eighth*** and ***Fourteenth*** Amendments to the United States Constitution.[7]

This issue should be controlled by the United States Supreme Court opinion in ***Old Chief v. United States***, 519 U.S. 172 (1997). In ***Old Chief***, the defendant was charged with the offense of possession of a firearm by a convicted felon. At trial the defendant offered to stipulate that the government has proven one of the essential elements of the offense, i.e., the defendant's prior felony conviction. The United States Supreme Court held that the district court abused its discretion when it spurned the defendant's offer and allowed the admission of the full record of the prior judgment of conviction. The defendant's prior offense, assault causing serious bodily injury, was of such a nature that the probative value was substantially outweighed by the danger of unfair prejudice. Since the nature of the

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he introduction of evidence is judged by an abuse of discretion standard. ***San Martin v. State***, 717 So.2d 462 (Fla. 1998).

prior offense raised the risk of verdict tainted by improper considerations, the defendant was entitled to a new trial. The court grounded the holding, in part, on Federal Rule of Evidence 403 relating to probative value outweighing the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.

In ***Brown v. State***, 719 So.2d 882 (Fla. 1998), this Court applied ***Old Chief, supra***, pointing out that the holding was grounded on the Federal Rule of Evidence which is reflected by an almost identical provision in the Florida Evidence Code. ***§90.403, Fla. Stat. (2000)*** Although this Court has not yet applied ***Old Chief, supra***, to a situation such as this, the holding and the logic are clearly applicable.

Appellant recognizes that this Court has previously held that the prosecution can introduce evidence regarding a prior violent felony beyond the mere judgment itself. However, this rule has proven to be unworkable. It has spawned tremendous litigation over the extent, nature, and source of evidence concerning prior violent felonies. ***Trawick v. State***, 473 So. 2d 1235 (Fla. 1985); ***Stano v. State***, 473 So. 2d 1282 (Fla. 1985); ***Tompkins v. State***, 502 So. 2d 415 (Fla 1986); ***Rhodes v. State***, 547 So. 2d 1201 (Fla. 1989); ***Freeman v. State***, 563 So. 2d 73 (Fla. 1990); ***Duncan v. State***, 619 So. 2d 279 (Fla. 1993); ***Finney v. State***, 660 So.

2d 674 (Fla. 1995). In ***Trawick, supra***, this Court held it to be error to allow "such detailed testimony" about a prior attempted murder. 473 So. 2d at 1240. In ***Stano, supra***, this Court found the detailed testimony and argument about the prior violent felonies to be admissible. However, this Court also stated, "The State's argument about these other crimes approached the outermost limits of propriety." 473 So. 2d at 1289.

In ***Rhodes, supra***, this Court began to describe the limits of testimony concerning a prior violent felony. This Court held a taped statement of a victim of a prior violent felony to be inadmissible.

> Although this Court has approved introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial, ***Tompkins; Stano***, the line must be drawn when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value. Not only did the introduction of the tape recording deny Rhodes his right of cross examination, but the testimony was irrelevant and highly prejudicial to Rhodes' case. The information presented to the jury did not directly relate to the crime for which Rhodes was on trial, but instead described the physical and

emotional trauma and suffering of a victim of a totally collateral crime committed by the appellant.

Rhodes v. State, 547 So. 2d at 1204-1205.

In ***Freeman, supra***, this Court held the testimony of the victim's widow of a prior first degree murder should not have been introduced.

> We agree that Ms. Epps should not have been called to testify concerning her husband's death. While the details of a prior felony conviction are admissible to prove this aggravating factor, ***Perri v. State***, 441 So. 2d 606 (Fla. 1983), Ms. Epps was not present when her husband was killed and, therefore, her testimony was not essential to this proof.

Freeman v. State, 563 So. 2d at 76 (footnote omitted).

In ***Finney v. State, supra***, this Court discussed the limits of testimony concerning a prior violent felony:

> Although the testimony elicited here from the victim of the rape/robbery was not unduly prejudicial, we take this opportunity to point out that victims of prior violent felonies should be used to place the facts of prior convictions before the jury with caution. *Cf. Rhodes*, 547 so. 2d at 1204-05 (error to present taped statement of victim of prior violent felony to jury, where introduction of tape violated defendant's confrontation rights and the testimony was highly prejudicial). This is particularly true where there is a less prejudicial way to present the circumstances to the jury. *Cf. Freeman v. State*, 563 So.

> 2d 73, 76 (Fla. 1990) (surviving spouse of victim of prior violent felony should not have been permitted to testify concerning facts of prior offense during penalty phase of capital trial where testimony was not essential to proof of prior felony conviction), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991). Caution must be used because of the potential that the jury will unduly focus on the prior conviction if the underlying facts are presented by the victim of that offense.
>
> Evidence that may have been properly admitted during the trial of the violent felony may be unduly prejudicial if admitted to prove the prior conviction aggravating factor during a capital trial. This is particularly true where highly prejudicial evidence is likely to cause the jury to feel overly sympathetic towards the prior victim. *See e.g. Duncan*, 619 So. 2d 279 (error to admit gruesome photograph of victim of prior unrelated murder for which defendant had been convicted where photograph was unnecessary to support aggravating factor); *Freeman*, 563 So. 2d at 75 (error to allow surviving spouse of victim of prior violent felony to testify concerning facts of prior offense where testimony was not essential to proof of prior felony conviction).

Finney v. State, 660 So. 2d at 683.

This Court's frequent discussions of this issue have left litigants with a case by case determination regarding the admissibility of evidence concerning a prior violent felony. This determination involves the source of the testimony, the emotional nature of the testimony, the relevance of the testimony, the necessity of the testimony, and the prejudice to the defendant from the testimony. This case by

case determination gives little firm guidance to trial judges or litigants as to when this testimony is admissible.

The current practice in capital sentencing of allowing evidence beyond the judgment has had several negative affects. It has resulted in persistent and increasing litigation over the precise limits of such testimony. The current procedure also increases the arbitrariness in capital sentencing. There will be extreme variation from case to case in the availability of witnesses from prior violent felonies, in the emotional nature of their testimony and in the extent to which prosecutors and judge observe the ill-defined limits on such testimony. There will inevitably be cases where the limits are exceeded. ***Trawick, supra***; ***Rhodes, supra***; ***Freeman, supra***. There will be other cases in which the evidence is used for improper purposes. ***Finney, supra***. Finally, there will be cases in which evidence is taken to the "outermost limits of propriety." ***Stano, supra*** at p.1289. All of this will lead judges and juries to different results based on an identical prior record.

At appellant's penalty phase, the vast majority of evidence presented by the state during its case-in-chief concerned the details of the prior violent felony that William Kopsho agreed to stipulate. It was highly inflammatory and involved the hearsay testimony of the victim which is strictly scrutinized. ***See, e.g., Finney v. State***, 660 So.2d 674 (Fla. 1995). For example, the hearsay statement of the victim that she was reluctant to tell the investigator what happened because Kopsho would kill her was presented to the jury.

This Court has repeatedly held that the details of prior violent felonies must not be emphasized to the point where they become the feature of the penalty phase.

Id.; Duncan v. State, 619 So.2d 279, 282 (Fla. 1993) This is precisely what occurred in the present case. When the prosecution's evidence concerning prior violent felonies is more extensive than that concerning the offense itself, it can only be described as a feature of the case. ***See***, ***Long v. State***, 610 So.2d 1276, 1280-81 (Fla. 1993); ***Bell v. State***, 650 So.2d 1032, 1035 (Fla. 5th DCA 1995) Since the objectionable evidence subsequently became a feature of the penalty phase, this Court should vacate appellant's death sentence and remand for a new penalty phase.

POINT III

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OR MORAL OR LEGAL JUSTIFICATION WHERE THE FINDING IS UNSUPPORTED BY THE EVIDENCE.

The trial court found that this murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification based upon the following:

> 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. (VI 1199)

The aggravating circumstance of murder committed in a cold and calculated manner without any pretense of moral or legal justification applies only to crimes which exhibit heightened premeditation greater than is required to establish premeditated murder, and it must be proven beyond a reasonable doubt. ***Gorham v. State***, 454 So.2d 556 (Fla. 1984), ***cert denied*** 105 S.Ct. 941; ***Rogers v. State***, 511 So.2d 526 (Fla. 1987). "This aggravating factor is not to be utilized in every

premeditated murder prosecution," and is reserved primarily for "those murders which are characterized as execution or contract murders or witness elimination murders (citation omitted)." ***Bates v. State***, 465 So.2d 490, 493 (Fla. 1985).

To support a finding of the CCP aggravator, the evidence must establish beyond a reasonable doubt that: (1) the murder was the product of cool and calm reflection; (2) there was a careful plan or prearranged design to commit murder before the fatal incident; (3) there was heightened premeditation; that is, premeditation over and above what is required for unaggravated first-degree murder; and (4) there was no pretense of moral or legal justification for the murder. ***Walls v. State***, 641 So.2d 381 (Fla.1994). Generally, this aggravating circumstance is reserved for execution or contract murders or witness elimination type murders. ***See, e.g.***, ***Maharaj v. State***, 597 So.2d 786 (Fla.1992); ***Pardo v. State***, 563 So.2d 77 (Fla.1990). Simply proving a premeditated murder for purposes of guilt is not enough to support CCP; greater deliberation and reflection is required. ***Walls***.

Specifically, the Court relied heavily upon appellant's "careful and meticulous plan to murder his wife." The state did provide overwhelming evidence that the appellant planned to murder is wife for infidelity. However, the

CCP is not proper because the murder was the consequence of the appellant's severe emotional disturbance.

Dr. Elizabeth McMahon testified that appellant had a very cold and controlling mother that caused emotional instability. The appellant did not chose to be this way. The appellant was hospitalized for psychiatric problems five times in the early 1980's. The appellant's behavior was the same; he was paranoid, agitated, and talked about things in terms of confusion or things being in slow motion. The appellant was diagnosed with what is called a reactive psychosis, and would become totally psychotic at these brief periods of time despite anti-psychotic drugs. One of the hospital admissions was precipitated by a former wife telling him that she had an affair a few months before. The appellant has suffered severe psychological problems related to interpersonal relationships. If appellant is about to be abandoned it triggers severe emotional psychological problems. These severe psychological problems contributed to the appellant's behavior at the time of the offense. The appellant did not have control over the factors that led to these psychological problems.

This court has repeatedly rejected a domestic violence murder exception to CCP. However, in ***Douglas v. State***, 575 So. 2d 165 (Fla. 1991) this court found

that the passion evidenced in the case, the relationship between the parties, and the circumstances leading up to the murder negate the trial court's finding that this murder was committed in a "cold, calculated, and premeditated manner without any pretense of moral or legal justification."

In ***Douglas***, the case involved an emotional triangle between Douglas, the victim, and the victim's wife Helen. The victim's wife and Douglas were involved in a domestic relationship for approximately one year prior to her marriage to the victim. Douglas again spent time with Helen, but Helen went back to her husband. ***Eleven days later*** (emphasis added), Douglas pulled alongside of the Atkinses' car and motioned for them to pull over.

> Douglas subsequently forced the Atkinses to perform various sexual acts at gun point. During their attempt to comply, Douglas fired the rifle into the air. After forcing the Atkinses to engage in sexual intercourse, Douglas stated to Jay, "did you enjoy it you son-of-a-bitch?" He then hit Jay so forcefully in the head with the rifle that the stock shattered. Then he told Helen to get back, and shot Jay in the head, killing him.

Douglas at 166.

In the instant case, when appellant's wife told him that she had a sexual relationship with another man, he wanted to kill her. He did not kill her on the

spot because he did not have a gun. The appellant subsequently made a plan to kill his wife in the Ocala National Forest. He was going to confront her when they were all alone. In his confession, the appellant stated that she could have talked him out of it. Things did not go as planned because Lynne Kopsho fled William Kopsho when he displayed a gun in the truck. The actual murder of Lynne Kopsho was a result of her fleeing from him in the truck, and it occurred on the side of the road in front of several witnesses. This was not his careful plan as the trial court asserts.

The appellant intended to kill his wife. The appellant made it very clear in his confession. More, however, is required to prove that the CCP aggravating circumstance exists beyond a reasonable doubt. Just as in ***Douglas***, there is simply insufficient proof that the murders fall under the definition of this statutory aggravating factor. The appellant's passions went out of control the moment that his wife confirmed that she had sex with another man. This was confirmed by the testimony of Dr. McMahon. Dr. McMahon testified that the murder of Lynne Kopsho was a result of an emotional disturbance. When appellant is about to be abandoned it triggers a severe emotional psychological response. Dr. McMahon confirmed that William Kopsho had a long history of emotional instability

concerning relationships with women. These circumstances negate the finding of CCP. ***See Santos v. State***, 591 So.2d 160 (Fla. 1991). Accordingly, this aggravating circumstance should be struck, the death sentences vacated and the matter remanded for resentencing.

POINT IV

THE JURY'S RECOMMENDATION AT THE PENALTY PHASE WAS TAINTED BY HIGHLY INFLAMMATORY AND IMPROPER VICTIM IMPACT EVIDENCE.

Appellant repeatedly tried to preclude or limit in some way the victim impact evidence that is invariably introduced by the state at capital trial. Appellant filed several pretrial motions attacking the propriety of this type of evidence. Defense counsel also sought to limit the jury's exposure to the unfairly prejudicial testimony. (I 47) Prior to the testimony of the "victim impact" witness, appellant renewed his objections, but the trial court allowed the testimony. (XVII 1027, 1028)

The state introduced three letters written by relatives of the victims. (XVII 1025) The appellant specifically objected to the following passage: "After reading the articles and exactly what happened on the day she died, will haunt me

forever." (XVII 1027) The appellant noted for the record that the victim's sister teared-up and had to pause to compose herself while she read the last letter. (XVII 1108) In contrast to Lynne Kopsho's heroine image,[8] the jury heard about the appellant's violent criminal past. During the appellant's life, he was either serving time in reform school or prison for committing a heinous, extremely violent crime against a helpless, vulnerable victim After the presentation of this ultimate dichotomy, a majority of the jury recommended that William Kopsho should die for killing Lynne Kopsho. The improperly admitted victim impact evidence unfairly tipped the scales to death.

This is exactly the type of evidence[9] that prosecutors are presenting to juries throughout this state after this Court's holding in ***Windom v. State,*** 656 So.2d 432 (Fla. 1995) and the enactment of ***Section 921.141(7)***, Florida Statutes (1995). In ***Windom***, this Court concluded:

> ...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

[8] "The girl that brought home stray cats...nursed fallen baby birds.....The girl who wouldn't allow anyone to be picked on.....A girl who once saved a man's life." (XVII 1101-1102)

[9] The admission or exclusion of evidence is subject to an abuse of discretion standard of review. ***San Martin v. State***, 717 So.2d 462 (Fla. 1998).

> constitutional rights of the defendant. Therefore, we reject the argument which classifies victim impact evidence as a nonstatutory aggravator in an attempt to exclude it during the sentencing phase of a capital case....The evidence is not admitted as an aggravator but, instead,...allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death."

Windom, 656 So.2d at 438. Prior to ***Payne v. Tennessee***, 501 U.S. 808 (1991), the ***Eighth Amendment*** to the United States Constitution prohibited the introduction of victim impact evidence at the sentencing phase of a capital murder trial. ***Booth v. Maryland***, 482 U.S. 496 (1987). ***Booth*** correctly pointed out that the admission of such evidence creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. The focus is not on the defendant, but on the character and reputation of the victim and the effect on his family, factors which may be wholly unrelated to the blame-worthiness of a particular defendant. ***Booth*** pointed out that the presentation of this type of information can serve no other purpose then to inflame the jury and to divert it from deciding the case on relevant evidence concerning the crime and the defendant. Of course, ***Payne*** overruled ***Booth***. This Court settled the question in this state by its holding in ***Windom***. Appellant respectfully submits that this Court's holding in ***Windom*** was erroneous and urges this Court to recede from

Windom.

POINT V

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND ALLOWING THE INTRODUCTION OF IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE THAT APPELLANT HAD AN EXTRAMARITAL SEXUAL RELATIONSHIP.

The state sought introduce evidence that appellant was having a extramarital sexual relationship with a woman named "Vivian." The appellant objected to the state's inquiry about Vivian because the state was trying to besmirch the character of the appellant. The appellant's objection to this evidence was overruled. Appellant's objections were made outside the presence of the jury as follows:

> MR. MILLER: Your Honor, the situation that we are dealing with here is this. Chronologically, Lynne had a relationship with Mr. Hisey. Or, actually, I believe it was described as a one-night-stand with Mr. Hisey. Bill found out about that from this woman's husband, Robin. At the time that he found out about it this woman, who goes by Birdie or Vivian, who we are referring to, was in the area. In Ocala. She is not from Ocala.
>
> Basically, the main reason or the reason Robin told Bill about this relationship with Mr. Hisey is because he

> was – – Birdie was paying attention to Bill. And he (Robin) was jealous because he liked Birdie. So Robin tells him this. And then, according to Birdie.....he (appellant) had a dalliance with her. And (he) did it out of spite because he just found out that his wife had an affair. That is not something that is relevant to what happened here, Judge, at all.
>
> All that is being done is to besmirch his character and say: Well, he cheated too. It's not that simple, Judge. It's not that simple at all. (XIII 631-632)

The state argued that they were introducing this evidence to show the appellant's state of mind. The appellant claimed during his confession that: "I'd never cheat on my wife." The state wished to rebut that claim with evidence that appellant had an extramarital sexual relationship at the time of the murder. The trial court permitted this prejudicial evidence over objection but stated: "However, do not belabor the issue." (XIII 634) The trial court ruling was error.

The admission or exclusion of evidence is subject to an abuse of discretion standard for purposes of appellate review. ***San Martin v. State***, 717 So.2d 462 (Fla. 1998). The same standard applies to the admission of collateral crime evidence. ***Lamarca v. State***, 785 So.2d 1209 (Fla. 2001). The trial court's ruling allowed the introduction of irrelevant evidence that was unfairly prejudicial to

appellant's case at the guilt phase. This is especially true regarding the evidence that implied that appellant had committed the collateral crime of grand theft auto.

All relevant evidence is admissible, except as provided by law. ***§ 90.402, Fla. Stat. (2004); Johnson v. State***, 595 So.2d 132, 134 (Fla. 1st DCA 1992). Relevant evidence is evidence tending to prove or disprove a material fact. ***§ 90.401, Fla. Stat. (2004); Gibbs v. State***, 394 So.2d 231, 232 (Fla. 1st DCA 1981).

The evidence of extramarital sex was not relevant to any issue at trial. As such, they should have been excluded. The unfair prejudice is clear. The jury heard that the appellant had sexual relations with another woman while be married to the victim. This evidence had no relevance to his guilt. The statements undoubtedly contributed to the jury's alienation from him as a human being. This ultimately culminated in a majority death recommendation.

Any slight relevance was certainly outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury or needless presentation of cumulative evidence. ***§90.403, Fla. Stat. (2004); State v. McClain***, 525 So.2d 420, 422 (Fla. 1988). The objectionable evidence certainly contributed to the jury's recommendation of the death penalty. A new penalty phase is required.

POINT VI

THE TRIAL COURT ERRED IN GRANTING'S APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL ON THE KIDNAPING CHARGE WHERE THE ACTIONS OF THE APPELLANT DID NOT CONSTITUTE KIDNAPING AS A MATTER OF LAW.

At the conclusion of the trial the appellant made a Motion for Judgement of Acquittal on the kidnaping charge.[10] The appellant argued that there was no evidence that Lynne Kopsho was taken against her will anywhere. When the appellant revealed the handgun, Lynne Kopsho took action to stop the truck, and when the truck stopped she ran away. The state responded that once the appellant exhibited the gun, Lynne Kopsho was no longer voluntarily in the car. Although it was not a long period of time, there was a period of time in which Lynne Kopsho was confined against her will in the truck with the intent to kill her. The trial court denied the Motion for Judgement of Acquittal stating that: "I don't know of any time frame required in regards to the charge of Kidnaping." The trial court's error led to a tainted recommendation to impose death.

The appellant told his wife Lynne Kopsho that he needed her to come with

[10] Sufficiency of the evidence is an issue of law that should be decided pursuant to the *de novo* standard of review. ***See Jones v. State***, 790 So.2d 1194 (Fla. 1st DCA 2001); ***State v. Hawkins***, 790 So.2d 492 (Fla. 5th DCA 2001).

him to make a withdrawal from the Florida Credit Union. Lynne Kopsho voluntarily got in the appellant's truck thinking she was going to the Credit Union, while the appellant was intending to drive to a remote location and murder her.

Lynne Kopsho stated that she wanted closure while they were driving down the road, and the appellant said he wanted closure too. The appellant stated he was tired of the situation and he was hurting too much inside. The appellant reached down and pulled the gun, and Lynne Kopsho saw the gun and asked why. The appellant would not say anything at first, and then said that he wanted closure and had to get her out of his life. Lynne Kopsho then tried to exit the vehicle, so the appellant started applying the brakes and grabbing her at the same time. The appellant's wife then grabbed the steering wheel and started pulling the steering wheel and that is when the truck got over to the side of the road. Lynne Kopsho fled from the truck. The appellant came out behind her and loaded the gun and put a bullet in the chamber. As they were both running, the appellant shot Lynne Kopsho to death. The actions of the appellant did not constitute kidnaping.

Section 787.01(1)(a), Florida Statutes, "Kidnaping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to....Commit or facilitate

commission of any felony. Moreover, if a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnaping 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. ***See Faison v. State***, 426 So.2d 963 (Fla. 1983)

In the instant case, the appellant used a trick to transport is wife to a secluded place to murder her. The voluntary travel by the victim did not constitute kidnaping. In ***Mackerley v. State***, 754 So.2d 132 (Fla. 4th DCA 2000) the State's kidnaping charge was based on two theories: 1)Mackerley's luring the victim (Black) to Florida under the false pretense of a business deal; and 2) Mackerley's placing the victim in a headlock prior to shooting him. In overturning the conviction for kidnaping the Court held that:

> The State's first theory--Mackerley's enticing Black to Florida by trick--is easily dismissed by reference to the text of the kidnaping statute itself. Kidnaping means

> "forcibly, secretly or by threat confining, abducting or imprisoning another person against his will." §787.01(1)(a), Fla. Stat. (Supp.1996). Since there was no force or threat, the State relies on the word "secretly" in the statute to argue that Mackerley's clandestine plan to lure Black to Florida qualifies as kidnaping. The problem with the State's argument here is that the word "secretly" modifies "confining, abducting or imprisoning." Taking the fact of Mackerley's alleged plan to secretly lure Black to Florida under false pretenses as true, there still was no confinement, abduction or imprisonment of Black. Black came to Florida voluntarily of his own free will, albeit as a result of a proposed business deal that turned out to be disingenuous. Black's trip to Florida as a result of this bogus invitation does not present a scenario which can support the State's claim that Black was confined, abducted, or imprisoned against his will by Mackerley.
>
> The State's argument that Mackerley's holding Black in a headlock while shooting him amounts to kidnaping under the statute also lacks merit. Although Mackerley could have shot Black without putting him in a headlock, holding Black in the headlock had no significance independent of the murder and was merely incidental to the shooting.

Mackerley at 136, 137.

In the instant case, the appellant pulled his gun in the truck, and his wife fled the truck within moments and was shot. The confinement, if any, was slight or incidental to the shooting. Therefore, the judgement and sentence for Kidnaping While Armed should be reversed, and a new penalty phase be ordered without the

taint of the felony murder aggravating factor.

POINT VII

> THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT, IN DETERMINING WHAT SANCTION TO RECOMMEND, IT COULD CONSIDER WHETHER THE MURDER WAS COMMITTED IN AN HEINOUS, ATROCIOUS AND CRUEL MANNER THEREBY RENDERING THE DEATH SENTENCE UNRELIABLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The law is clear that, unless the parties agree that the judge may instruct on all the factors, the jury must be instructed on only those aggravating and mitigating factors that are supported by the evidence. ***See Roman v. State***, 475 So.2d 1228, 1234 (Fla. 1985) ("The standard jury instructions instruct the judge to give instruction on only those aggravating and mitigating circumstances for which evidence has been presented."); ***Lara v. State***, 464 So.2d 1173, 1179 (Fla. 1985) ("The judge followed the standard instructions for those aggravating and mitigating circumstances for which evidence had been presented.") ***See also Standard Jury Instructions in Criminal Cases***, 2d Edition, p. 80, ("Give only those aggravating circumstances for which evidence has been presented.")

> The jury's recommended sentence is given great weight under our bifurcated death penalty system. It is the jury's

> task to weigh the aggravating and mitigating evidence in arriving at a recommended sentence. Where relevant mitigating evidence is excluded from this balancing process, the scale is more likely to tip in favor of a recommended sentence of death. Since the sentencer must comply with a stricter standard when imposing a death sentence over a jury recommendation of life, a defendant must be allowed to present all relevant mitigating evidence to the jury in his efforts to secure such recommendation. Therefore, unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new recommendation on resentencing.

Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987). ***Accord, Riley v. Wainwright***, 517 So.2d 656, 659 (Fla. 1987) ("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.") (emphasis added).

Thus, this Court recognizes that it is constitutional error for the jury to be prevented from considering non-statutory mitigating factors in determining whether to recommend life imprisonment or the death penalty, because the failure to do so skews the analysis in favor of imposition of the death penalty. A jury instruction on an improper statutory aggravating factor results in the same taint. When more aggravating factors are present, more mitigation will be needed to

counterbalance the presence of the aggravating factor. Thus, the presence of an improper factor also necessarily skews the analysis in favor of the death penalty, which renders the death penalty unreliable under the ***Eighth*** and ***Fourteenth*** Amendments.

In the instant case, the trial court agreed to give the heinous, atrocious and cruel instruction over defense objection. The victim's cause of death was multiple gunshots. The appellant stated that he loved his wife and did want her to suffer. In fact, he shot her the two additional times in the area of her heart to kill her quickly and to be sure that she did not suffer. Nonetheless, the State's was able to argue that HAC applied in their closing argument to the jury.

There can be no conclusion other than that the jury applied the heinous, atrocious and cruel factor in recommending imposition of the death penalty. Evidence and argument was presented by the State to that end, and the prosecution devoted effort trying to convince the jury that this shooting was done in a heinous, atrocious and cruel manner. Even if these offensive things had not been stressed, in all likelihood the jury still would have attributed weight to this factor when told by the court that it was permissible under the law that they do so.

This court dealt with the improper instruction of the HAC aggravating factor

in the case of ***Omelus v. State***, 584 So.2d 563 (Fla. 1991). In ***Omelus***, the state stressed that three aggravating circumstances were clearly established by the evidence, specifically: (1) that the murder was committed for pecuniary gain; (2) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; (3) that the murder was especially heinous, atrocious, or cruel. The state focused especially upon the last factor, that the murder was especially heinous, atrocious, or cruel. The jury returned a recommendation of death by an eight-to-four vote. The trial judge subsequently imposed the death penalty, finding two aggravating circumstances. The trial court did not find as an appropriate aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

This court found that the trial court erred in instructing the jury that it could properly consider as an aggravating factor that this murder was especially heinous, atrocious, or cruel. In ordering a new penalty phase this court stated:

> Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, given the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must

> conclude that this error is not harmless beyond a reasonable doubt under the standard set forth in ***DiGuilio***.

Clearly, the instant case is analogous to the error found in ***Omelus***. To be sure, the jury would not appreciate, however, that as a matter of law it could not consider whether the murder was done in a heinous, atrocious and cruel manner. Without interrogatory verdict forms, it is unknown as to what extent the HAC aggravating factor played into the equation of whether to recommend life imprisonment or the death penalty for William Kopsho. Indeed, the jury is presumed to have used this instruction and to have followed the law given it by the trial judge. ***Grizzle v. Wainwright***, 692 F.2d 722, 726-27 (11th Car. 1982), ***cert. denied***, 461 U.S. 948 (1983). The burden is on the State to show beyond a reasonable doubt that the instruction on this inapplicable statutory aggravating factor did not affect the jury recommendation. ***See Riley***, 517 So.2d at 659; ***Cockerel v. State***, 531 So.2d 129 (Fla. 1988); ***State v. DiGuilio***, 491 So.2d 1129 (Fla. 1986); ***Chapman v. California***, 386 U.S. 18 (1967). The State cannot meet that burden. ***See Archer v. State***, 613 So.2d 446 (Fla. 1993) Accordingly, the death penalty must be vacated and the matter remanded for a new penalty phase.

POINT VIII

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court has described the "proportionality review" performed in every capital death case as follows: Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. ***Porter v. State***, 564 So.2d 1060, 1064 (Fla.1990), ***cert. denied***, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). ***Accord Hudson v. State***, 538 So.2d 829 at 831 (Fla.1989); ***Menendez v. State***, 419 So.2d 312, 315 (Fla.1982). The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. ***Art. I, Sec. 17, Fla. Const.*** It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. ***Tillman v. State***, 591 So.2d 167 (Fla.1991).

Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. ***Art. I, Sec. 9, Fla. Const***.; ***Porter***.

Proportionality review also arises in part by necessary implication from the mandatory, exclusive jurisdiction this Court has over death appeals. ***Art. V, Sec. 3(b)(1), Fla. Const***. The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law. Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death penalty law. ***See Tillman*** at 169.

In imposing the death penalty, Judge Eddy found that the State had proved four aggravating circumstances: that the Appellant had previously been convicted of another felony involving the use or threat of violence to a person; the murder was committed in a cold, calculated and premeditated manner; felony murder; and under the sentence of imprisonment. The aggravating factor that the murder was committed in a cold, calculated and premeditated manner and felony murder were improperly found[11]. The prior violent felony aggravating circumstance was a

[11] See Point III and Point VI.

conviction for False Imprisonment and Sexual Battery of a past girlfriend. This was another example of appellant engaging in domestic violence. The appellant was still on probation for this offense, therefore, the appellant qualified for the under sentence of imprisonment aggravating factor. The trial court recognized this and gave the under sentence of imprisonment aggravating factor minimal weight. In mitigation, the trial court considered eleven separate non-statutory factors which were all given some weight. Appellant contends that the death penalty cannot stand since it is disproportionate to the crime and constitutes cruel and unusual punishment.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," ***Furman v. Georgia***, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." ***State v. Dixon***, 283 So.2d 1, 17 (Fla. 1973), ***cert. denied sub nom***., 416 U.S. 943 (1974). ***See also Coker v. Georgia***, 433 U.S. 584 (1977) (the requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of Eighth Amendment jurisprudence). This Court, unlike individual trial courts, reviews "each sentence of death issued in this state,"

Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case," ***Dixon***, 283 So.2d at 10, and to determine whether all of the circumstances of the case at hand "warrant the imposition of our harshest penalty." ***Fitzpatrick***, 527 So.2d at 812. Appellant's case is neither "most aggravated" nor "unmitigated." Indeed, it is the least aggravated and one of the most mitigated of death sentences ever to reach this Court. The "high degree of certainty in . . . substantive proportionality [which] must be maintained in order to insure that the death penalty is administered evenhandedly," ***Fitzpatrick***, 527 So.2d at 811, is missing in this case, and the death penalty is plainly inappropriate on this record.

LEAST AGGRAVATED; MITIGATION

This is not "the sort of 'unmitigated' case contemplated by this Court in Dixon." ***Fitzpatrick***, 527 So.2d at 812. Eleven non-statutory mitigating circumstances were found by the sentencing judge, and were supported by testimony. The combined mitigating circumstances rendered the death sentence disproportionate. The sentencer found the non-statutory mitigating circumstances that the appellant was under the influence of an emotional disturbance during the

murder, the appellant had a difficult childhood, the appellant did not harm bystanders and the appellant assisted law enforcement.

Without question, this case is not a proper one for capital punishment. If this case is compared with other cases reversed by this Court, this case has less aggravating factors and more mitigation. Since there are cases that are more aggravated and less mitigated cases than appellant's, and they are not proper for the ultimate penalty, surely Mr. Kopsho must be spared.

In ***Douglas v. State***, 575 So.2d 165 (Fla. 1991), this Court rejected the sentencing judge's finding of CCP, but found that the weighty HAC aggravating circumstance was applicable. Douglas was convicted of the murder of his past girlfriend's husband. Eleven days after his past girlfriend left him for her husband, Douglas shot the girlfriend's husband in the head after he forced the victim to have sexual intercourse with his past girlfriend. Kopsho shot his wife three days after she admitted to him that she committed adultery. Kopsho would have killed his wife immediately if he had a gun. Douglas established the existence of two nonstatutory mitigating circumstances:

> The resentencing court found two nonstatutory mitigating circumstances: (1) In the view of the witnesses who testified, Douglas was not a violent person; and (2) Douglas has had a satisfactory institutional record while

on death row.

In the instant case the trial court found the existence of 11 nonstatutory factors including committing the murder during an emotional disturbance and assisting law enforcement. Mr. Douglas' crime was significantly more aggravated than William Kopsho, yet this Court found Mr. Douglas' death sentence not to be proportional to other cases before the court.

In ***Songer v. State***, 544 So.2d 1010 (Fla. 1989), this Court faced a death penalty imposed by a trial judge based on one statutory aggravating factor, viz, the murder of a highway patrolman committed while Songer was under sentence of imprisonment. Due to the presence of several mitigating factors, this Court overturned the death sentence and remanded for imposition of a life sentence despite a jury recommendation of death. The reasoning of this Court is instructive:

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. ***State v. Dixon***, 283 So.2d 1 (Fla. 1973), ***cert denied***, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate.
>
> Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death sentences that were supported by only one aggravating factor, (***see, e.g., LeDuc v. State***, 365 So.2d 149 (Fla. 1978), ***cert.***

> ***denied***, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979), but those cases involved either nothing or very little in mitigation. Indeed, this case may represent the least aggravated and most mitigated case to undergo proportionality analysis.
>
> Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did not break out of prison but merely walked away from a work-release job. In contrast, several of the mitigating circumstances are particularly compelling. It was unrebutted that Songer's reasoning abilities were substantially impaired by his addiction to hard drugs. It is also apparent that his remorse is genuine.

Songer v. State, 544 So.2d at 1011.

In ***Fitzpatrick v. State***, 527 So.2d 809, 811 (Fla. 1988), this Court noted that, "Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Despite the presence of five statutory aggravating factors and three mitigating factors, Fitzpatrick's death sentence was reversed and the case remanded for imposition of a life sentence on the premise that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." ***Fitzpatrick***, 527 So.2d at 811 (emphasis in original). Fitzpatrick equates with the instant case; neither is the most aggravated and unmitigated of serious crimes.

Finally, in ***Herzog v. State***, 439 So.2d 1372 (Fla. 1983) which also involved a domestic relationship, this court found that the death penalty was disproportional

where the evidence only supported a prior violent felony conviction and no mitigation presented:

> Therefore, there was only one aggravating circumstance properly found applicable by the court below. That being defendant's prior convictions for robbery and assault.
>
> The trial court properly found that no statutory mitigating circumstances existed; *1381 however, there is no indication in the sentencing order that the court considered nonstatutory mitigating circumstances. We find evidence in the record that the jury could have considered in finding nonstatutory circumstances. (E.g., 1) the heated argument between the victim and defendant which culminated in defendant's decision to kill the victim, 2) the domestic relationship that existed prior to the murder, and 3) the disposition of codefendants' cases. ***McCampbell v. State***, 421 So.2d 1072, 1075-76 (Fla.1982)).

Herzog at 1380, 1381.

CONCLUSION

A comparison of this case to those in which the death penalty has been affirmed leads to no other conclusion but that the death sentence must be reversed and the matter remanded for imposition of a life sentence. The jury vote was by a bare majority vote of 9-3. The jurors were improperly influenced by the heinous, atrocious and cruel aggravating circumstance instruction, were improperly exposed to inflammatory victim impact evidence; were improperly exposed to

inflammatory evidence concerning appellant's prior violent felony, and were also instructed to consider CCP and Felony Murder. Three jurors still believed that the circumstances here were insufficient to support the imposition of the death penalty. This Court should find that the circumstances here do not meet the test that this Court laid down in ***State v. Dixon***, 283 So.2d 1, 8 (Fla.1973), "to extract the penalty of death for only the most aggravated, the most indefensible of crimes."

POINT IX

THE TRIAL COURT ERRED IN SENTENCING WILLIAM KOPSHO TO DEATH BECAUSE SECTION 921.141, FLORIDA STATUTES, UNCONSTITUTIONALLY ALLOWS THE TRIAL COURT TO DO SO WITHOUT, AMONG OTHER THINGS, A UNANIMOUS DEATH RECOMMENDATION FROM THE JURY IN CONTRAVENTION OF THE SIXTH AMENDMENT.

Given the current state of Florida law, appellant acknowledges the futility of raising issues claiming that the United States Supreme Court's opinion in ***Ring v. Arizona***, 536 U.S. 584 (2002), and ***Apprendi v. New Jersey***, 530 U.S. 166 (2000) should give him sentencing relief. At the trial level, appellant raised the ***Ring/Apprendi*** issues completely, throughly, and repeatedly.[12] ***See, e.g.,*** (I 132-134; II 244-251, 252-27; VIII 63) The trial court specifically instructed the jury that they need not be unanimous. (XVIII 1290)

Despite the United States Supreme Court's ruling in ***Ring v. Arizona***, 536 U.S. 584 (2002), this Court, as a court, has steadfastly refused to find the State's

[12] Prior to trial, the prosecutor was mindful of the ***Ring*** decision and the ***Steele*** case pending before this Court, but nonetheless argued that the use of interrogatory verdict forms in the penalty phase would cause a "legal nightmare." (IV 578) The trial court expressed an interest in knowing "what the jury hangs their hat on" in recommending the death penalty. (IV 583) Interrogatory verdicts were ultimately **not** used. (VI 1019; XVII 1047) The verdicts recommending death were far from

death penalty statute, in part or in total, in violation of the Sixth Amendment to the United States Constitution. ***Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002); ***Kormondy v. State***, 845 So.2d 41 (Fla. Feb. 13, 2003). Kopsho raises this issue, in hopes that this Court has now seen the error of its ways. Appellant is also required to raise the issue to preserve it and avoid the trap of procedural bar. Because this issue involves a pure question of law, this Court can review it *de novo*. ***See, e.g., City of Jacksonville v. Cook***, 765 So.2d 289 (Fla. 1st DCA 2000).

Appellant specifically argues that the Sixth Amendment requires Florida juries to unanimously recommend death before the trial judge can impose that sentence.[13] This Court has nevertheless concluded that it must uphold the constitutionality of Florida's statute unless and until the Unites States Supreme Court overrules ***Hildwin v. Florida***, 490 U.S. 638 (1989), and expressly applies ***Ring*** to Florida. ***See Bottoson v. Moore***, 833 So.2d 693 (Fla. 2002); ***King v. Moore***, 831 So.2d 143 (Fla. 2002).

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unanimous.

[13] The verdicts for death were **not** unanimous. Since interrogatory verdicts were not used, the record is silent on the jurors' decisions as to each aggravating factor. (VI 1019)

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to order a new trial as to Point I; order a new penalty phase trial as to Count II, III, IV, V, VI and VII; reverse the judgement and sentence as to Count II of the indictment and release appellant as to Point VI; and reverse the judgement and sentence of death as to Count I of the indictment and remand to the trial court with directions to sentence appellant to life imprisonment as to Point VIII and IX.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(386) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Charles Crist, Attorney General, 444 Sea breeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. William Kopsho DC#122787, Florida State Prison, P.O. Box 747, Starke, FL. 32091, this 14th day of November, 2005.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER