IN THE SUPREME COURT OF FLORIDA

WILLIAM KOPSHO,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC09-1383
	)	
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

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OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

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

PRELIMINARY STATEMENT

The original record on appeal comprises forty-two consecutively numbered volumes. The pages are not consecutively numbered. Counsel will refer to the record on appeal using the appropriate Roman numeral to designate the volume number followed the appropriate Arabic number referring to the appropriate pages.

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 13) The appellant was found guilty as charged and sentenced to death. Upon appeal, this Court reversed the judgement and sentence and ordered a new trial because the appellant was prejudiced by the trial court's improper denial of his challenge for cause against a juror. ***Kopsho v. State***, 959 So.2d 168 (Fla. 2007)

On retrial 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. (XVII 2766) The appellant filed a Motion to Preclude Capital Punishment as a Possible Sentence. (XVII 2772) The motion was denied. (XX 3122) The appellant filed several pretrial motions challenging the constitutionality of the Florida death penalty scheme.[1] The motions were denied. (XX 3123-28) The appellant asked the trial court to accept the pre-trial motions and arguments made in the first trial and incorporate them into the second trial. (XXVI 5)

The State filed a Motion to Compel Discovery related to the interview notes, testing materials and statements of appellant made to expert witness Dr. Elizabeth McMahon. (XVII 2650) The trial court granted the state's Motion to Compel related to the testing materials of Dr. McMahon and her work product notes were not discoverable. (XX 3246) The state filed a Motion in Limine to exclude Dr. McMahon's testimony based upon statements made by the appellant. (XX1 3431) The trial court previously denied the state access to Dr. McMahon's

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[1] Section 921.141(5)(d) Felony Murder Aggravating Factor; Section 921.141(5)(i) CCP Aggravating Factor; Section 921.141(5)(h) HAC 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) Under Sentence of Imprisonment Aggravating Factor

contemporaneous notes, and the state complained that they could not adequately "test the nature of the statements nor the accuracy of their rendition by Dr. McMahon." (XXI 3431) The trial court denied the Motion in Limine. (XXIX 4)

The State filed a Notice of Intent to Introduce Evidence of Other Crimes Wrongs or Acts. (XVII 2652) The state sought to introduce evidence of an assault and sexual battery of Lynne Kopsho weeks before the murder to prove motive and premeditation. (XXI 3317) The appellant filed a Motion in Limine to limit the this evidence of other crimes on the grounds that any relevance is outweighed by the prejudice to the appellant. (XVIII 2828) The trial court ruled that the issue of premeditation is an issue that remains in dispute, and therefore the trial court would allow evidence of Lynne Kopsho's abduction at knifepoint, being held against her willing, "and everything else except reference to a rape." (XXVIII 20)[2]

The appellant requested individual voir dire on the issue of the death penalty, prior knowledge of the case and domestic violence. (XVIII 2807) 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. (XX 3141) The state provided a Notice of Aggravating Circumstances to

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[2] The trial court in the first trial excluded William's Rule evidence of the appellant's wife's abduction and rape by the appellant weeks before the murder. (XIV 2141)

be relied upon. (XX 3120)

The case proceeded trial. The appellant made a Motion for Mistrial on the grounds that the State introduced evidence that the appellant abducted his wife at knifepoint from Bill Laster's house weeks before the murder without the Williams Rule instruction being presented to the jury. (XXXIII 737) The trial court denied the Motion for Mistrial, and gave the jury the Williams Rule instruction after obtaining the consent of the appellant. (XXXIII 739) The appellant made a Motion for Mistrial on the grounds that the state made the Williams Rule evidence concerning the assault and abduction of his wife a feature of the trial. (XXXIII 747) The trial court denied the Motion for Mistrial. (XXXIII 747)

The state rests. (XXXV 1078) 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. (XXXV 1083) The appellant also made a motion for judgement of acquittal as to the kidnaping charge on the grounds that the state only proved false imprisonment. (XXXV 1084) The trial court denied the motions for judgment of acquittal. (XXXV 1090) The appellant rests. (XXXVI 1129) The state played part of the appellant's confession to the jury during closing argument. (XXXVI 1188) The appellant made a motion for mistrial on the grounds that such a presentation was not argument but rather rehashing the trial evidence before the

jury. (XXXVI 1196) The trial court denied the motion for mistrial. (XXXVI 1196) The jury found the appellant guilty as charged to both counts of the indictment. (XXXVI 1242)

Penalty Phase

The state sought to introduce photographs of the victim of a prior violent felony committed by the appellant. (XXXVII 1331) The appellant objected to photographs of the victim on the grounds that the prejudice outweighed the probative value. (XXXVII 1331) The state introduced three letters written by relatives of the victims. (XXXVII 1361) The appellant renewed his objection to victim impact evidence coming before the jury. (XXXVII 1368) The trial court allowed the victim impact evidence over objection. (XXXVII 1368) The state rests. (XXXVII 1377)

The appellant made a Motion for Directed Verdict on the existence of the HAC; CCP and felony-murder aggravating factors. (XXXVII 1380) The trial court denied the Motion for Directed Verdict. (XXXVII 1381) The appellant renewed his objections to the penalty phase jury instruction based upon ***Ring***. (XL 1770) The jury recommended a sentence of death by a majority vote of ten to two. (XL 1787)

During the ***Spencer*** Hearing, the appellant offered an affidavit of Chief

Investigator Steve Beville concerning an interview of the appellant's childhood neighbors. (XLI 14) The trial court allowed the evidence in over state objection. (XLI 15) The appellant addressed the court and expressed remorse for taking his wife's life. (XLII 10) 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. (XLII 150) The Office of the Public Defender was appointed. (XXV 4070) This appeal follows.

STATEMENT OF THE FACTS

Catina Tufts was traveling east on State Road 40 with her husband Shawn on the morning of October 27, 2000. (XXXIII 752) Tufts observed a black truck begin to sway in the lane ahead of her. (XXXIII 753) There was a commotion in the truck, and while the truck was moving Lynne Kopsho exited from the passenger side of the truck, and started running towards Tufts' vehicle. (XXXIII 754) The appellant exited the truck and walked around to the grass after Lynne Kopsho. (XXXIII 755) The appellant then grabbed Lynne Kopsho from behind and threw her onto the ground. (XXXIII 755) Appellant then reached behind his back and came forward and fired a shot and Lynne Kopsho fell to the ground. (XXXIII 756) Tufts then yelled for her husband to get back in the car, and they drove to a house and called 911. (XXXIII 756)

Tufts returned back to the scene of the shooting and the appellant was still there. (XXXIII 758) The appellant stated that: "he had shot the bitch, that it was over." (XXXIII 758) Tufts asked the appellant who the victim was he responded: "It's my wife and I killed the bitch." After the shooting, Tufts was shown a photo lineup. (XXXIII 767) Tufts identified appellant as the person that shot Lynne Kopsho. (XXXIII 767) Tufts testified that the appellant was just screaming, he was neurotic, she did not know how to explain him. (XXXIII 766)

Basil Friend was told to call 911. (XXXIII 790) Friend called the Sheriff's Department and went to the scene of the shooting armed with his 32 caliber pistol. (XXXIII 791) When Friend arrived at the scene of the shooting he observed Lynne Kopsho on the ground. (XXXIII 791) Appellant was standing by the body and stated: "get the F- back. Don't come near. I just shot her three times." (XXXIII 791) Friend pulled his gun on the appellant and told him not to move. (XXXIII 792)

Edwin Boone was a communication officer for the Marion County Sheriff's office. (XXXIV 864) Boone received a 911 call from the appellant. (XXXIV 873) Appellant told Boone that he just shot his wife. (XXXIVI 873) Kopsho kept people away from his wife while he waited for police to arrive. (XXXIV 876) Kopsho stated that he caught wife in bed with another man who was my good friend. (XXXIV 878) Kopsho stated that the gun he used to shot his wife was a 9mm stolen from William Steele. (XXXIV 879)

Jane Cameron was a co-worker of the appellant and his wife Lynne Kopsho at Custom Windows. (XXXIII 687) Jane Cameron's boyfriend Robin Cameron were also friends with the couple.[3] (XXXIII 689) At the time of the killing, Lynne Kopsho was not living with her husband, but rather living with her father and step-

[3] In October 2000, Jane and Robin Cameron were dating. After the murder

mother. (XXXIII 692) Lynne Kopsho had been separated with appellant for approximately three weeks. (XXXIII 693) Days before the murder, the appellant came to the Cameron household for dinner with a woman named Vivian. (XXXIII 698) The appellant confided to Cameron that he was having a sexual relationship with Vivian. (XXXIII 698)

Cameron knew that Lynne Kopsho had a one night relationship with another co-worker Dennis Hisey. (XXXIII 706) Cameron also knew that appellant was aggravated with his wife because appellant had found out about Dennis Hisey. (XXXIII 707) The appellant learned about Lynne Kopsho's one-night relationship from Robin Cameron. (XXXIII 728) Jane Cameron confirmed that Lynne Kopsho admitted to her husband that she in fact had a relationship with Dennis Hisey. (XXXIII 712) This occurred a few days before the killing. (XXXIII 712)

The weekend of October 14, 2000, the appellant and Robin Cameron went out to a series of nightclubs. (XXXIII 722) During their outing, they spotted Lynne Kophso and Jane Cameron at one of the nightclubs. (XXXIII 722) Early the next morning, Robin Cameron received a telephone call from the appellant. (XXXIII 724) Cameron proceeded to the appellant's house. (XXXIII 724) The appellant told Cameron that the appellant went to Lynne Kopsho's place, went

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of Lynne Kopsho they married. The Camerons have since obtained a divorce.

through a window, and got a knife kitchen, and went over to the couch where she was sleeping and forcibly made her come back to his house. (XXXIII 724) The appellant stated that he was also responsible for the marks on Lynne Kopsho's throat. (XXXIII 726) The appellant stated that he was going to seek counseling. (XXXIII 726) Days later while having beers with Cameron, the appellant stated that: If my old lady ever left me, I would kill the fucking bitch." (XXXIII 729)

On the morning of October 27, 2000, the appellant went to the Florida Credit Union and withdrew $3,000 from his checking account. (XXXIV 844) 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. (XXXIV 841) On October 26, 2000 there was a deposit of $4,500.12 into the William and Lynne Kopsho bank account. (XXXIV 843) On the same date, there was a transfer made to a different account for $1500.12. (XXXIV 844) There was also a debit card transaction from the joint checking account on October 27th from Walmart for $159.22. (XXXIV 845)

On October 25, 2000 the appellant and his wife executed a promissory note with Citi Financial. (XXXIV 856) The couple borrowed $4,516.22. (XXXIV 856) The check was endorsed by appellant and Lynne Kopsho and was cashed on

October 26, 2000. (XXXIV 857)

The appellant was taken into custody by Marion County Sheriff Jeff Peeples. (XXXIII 808) The appellant had $3,000.00 in cash in his wallet. (XXXIII 809)

Larry Thompson was a Marion County Sheriff that searched the appellant's truck after the shooting. (XXXIV 913) Thompson recovered a package that at one time contained a Crossman airgun pistol. (XXXIV 914) Thompson also found a sleeping bag, a camping pad and a tent. (XXXIV 918) Thompson also recovered a Wal-Mart bag containing a blanket, a roll of duck tape, and a rope. (XXXIV 917, 922)

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. (XXXIII 820) A gunshot residue test was also revealed that there was gunshot residue found on the right hand of the appellant. (XXXIII 820) Marion County Sheriff's deputies recovered a Crossman BB gun from the home of William Steele. (XXXIV 933) 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. (XXXIV 937, 938)

Associate Medical Examiner Susan Ignacio conducted an autopsy on the victim Lynne Kopsho. (XXXV 990) The victim was shot three times. (XXXV

992) All of the gunshots exited the victim's body. (XXXV 1003) The cause of death was a gunshot wound to the chest. (XXXV 1002)

Marion County Sheriff Deputy Jeff Owens conducted an interview of the appellant shortly after the shooting. (XXXV 1020) Deputy Owens read the appellant his ***Miranda*** rights and the appellant signed a form indicating he understood his rights. (XXXV 1022) The appellant stated that he killed his wife because she admitted that she had slept with a co-worker named Dennis. (XXXV 1035) The appellant stated that the murder was premeditated because he had planned it. (XXXV 1041) The appellant began planning to murder his wife the night she told him that she had slept with a coworker. (XXXV 1041) "I think it was that instant, at that instant, when I planned to kill her. I know it was." (XXXV 1044) Then the appellant stated: "So I couldn't let her see me angry. I did not have a gun." (XXXV 1044)

To accomplish his plan to kill his wife, the appellant stole a gun from William Steele. (XXXV 1044) 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. (XXXV 1045) 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. (XXXV 1048) 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. (XXXV 1046) 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. (XXXV 1049) The appellant told Lynne Kopsho that he needed her to come with him to make a withdrawal from the Florida Credit Union. (XXXV 1049) The appellant was surprised when Lynne did not say anything when he headed east on State Road 40 the opposite direction from the credit union. (XXXV 1051)

The appellant was planning on driving out to Ocala State Forest down a dirt road. (XXXV 1057) Where the shooting occurred was not planned. (XXXV 1056) 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. (XXXV 1057) Lynne Kopsho stated that she wanted closure while they were driving down the road, and the appellant said he wanted closure too. (XXXV 1057) The appellant stated he was tired of the situation and he was hurting too much inside. (XXXV 1057) At that point the appellant reached down and pulled the gun. (XXXV 1058) Lynne Kopsho had a surprised look on her face and she keep asking why. (XXXV 1058) The appellant would not say anything first and then said because he wanted closure and had to get her out of his life. (XXXV

1058)

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. (XXXV 1062) 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. (XXXV 1062) Lynne Kopsho fled from the truck. (XXXV 1063) The appellant came out behind her and loaded the gun and put a bullet in the chamber. (XXXV 1063) As they were both running, the appellant shot Lynne in the side. (XXXV 1063)

Lynne Kopsho fell to the ground and she was groaning. (XXXV 1064) 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. (XXXV 1065) The appellant observed that she was still in pain, and just closed his eyes and shot again. (XXXV 1065) 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." (XXXV 1065) After the appellant shot his wife, he kept eye witnesses away from her. (XXXV 1066) The appellant did not want anybody to help her because he wanted her to die. (XXXV 1067) After the appellant knew that Lynne Kopsho was dead, he threw the gun down by her and waited for police to arrive. (XXXV 1067)

Defense Case

Dennis Hisey was Lynne Kopsho's supervisor at Custom Windows. (XXXVI 1115) After Hisey left employment there, he was contacted by Lynne Kopsho and she asked if she could come by his house with some friends. (XXXVI 1117) During the visit, Kopsho and Hisey had sex in his bathroom. (XXXVI 1120) After the sexual liaison, Hisey had no further contact with Lynne Kopsho. (XXXVI 1123)

Penalty Phase

State Case

Eileen Smith was traveling east on State Road 40, when she observed the appellant standing over his wife Lynne Kopsho on the side of the road. (XXXVII 1282) Smith pulled off the road, and walked back to the appellant and asked if he needed any help. (XXXVII 1282) The appellant responded: "I shot her, I killed her, I've already called 911." (XXXVII 1283) At that point the woman appeared to move in response to the dialogue, and the appellant yelled to get back. (XXXXII 1283) It appeared that Lynne Kopsho was trying to turn her head towards me, but she was not able to turn. (XXXVII 1284) From her initial encounter with the appellant, to the time that Lynne Kopsho was no longer moving was approximately five minutes. (XXXVII 1284)

Rena Greenway obtained fingerprints from the appellant. (XXXVII 1297)

Greenway compared the fingerprint record she made with a fingerprint record on State Exhibit AI (judgement sheet that was taken in court on January 14, 1992) and they were a match. (XXXVII 1299)

Helen Miller had a past relationship with the appellant. (XXXVII 1309) The appellant moved into Miller's trailer, and they lived together for two to three years. (XXXVII 1309) The relationship waned and Miller asked the appellant to move out, which he did. (XXXVII 1312) The appellant contacted Miller several times afterwards trying to get back together with Miller. (XXXVII 1312) The appellant would call Miller and tell her who she went to lunch with that day, and tell things that she had done that day. (XXXVII 1312) Miller declined the appellant's advances because she was afraid of him and wanted to live by herself. (XXXVII 1313)

While asleep one evening, Miller was awakened and found the appellant was sitting on her. (XXXVII 1314) The appellant held Miller's arms, started calling her a bitch, slut and whore and was slapping her in the face back and forth. (XXXVII 1315) Miller fell off the bed trying to reach for her BB gun. (XXXVII 1316) Kopsho got the phone cord and wrapped it around Miller's neck. (XXXVII 1316) Miller could not breathe. (XXXVII 1316) Miller broke free, and tried to break out the window to get the attention of a neighbor. (XXXVII 1317) Kopsho

then struck Miller in the head several times with the butt of a shotgun. (XXXVII 1317) Miller began to bleed everywhere. (XXXVII 1317)

Kopsho began pacing the house throwing things. (XXXVII 1317) Kopsho then had Miller wash and rinse all the blood off her head. (XXXVII 1317) Kopsho gave Miller some milk to drink. (XXXVII 1321) Miller put her hand in the milk and wrote "Bill did this" on her coffee table because she thought Kopsho was going to kill her. (XXXVII 1322) Miller subsequently passed out on her bed and Kopsho sexually assaulted Miller. (XXXVII 1323)

Kopsho subsequently took Miller to Ocala and they checked into a Motel. (XXXVII 1324) Kopsho sexually assaulted Miller again. (XXXVII 1325) Miller begged Kopsho to take her to a hospital. (XXXVII 1317) Kopsho stated that he would take her if she would tell hospital personnel that she was in a fight, and that some girl had hit her. (XXXVII 1326) Miller told medical personnel that she had been in a fight. (XXXVII 1326) After questioning by police, Miller told the truth about what happened with Kopsho. (XXXVII 1326)

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. (XXXVII 1293) On October 27, 2000 the appellant was on probation for False Imprisonment and Sexual Battery

convictions. (XXXVII 1293)

Lynne Kopsho's sister Emily Preuss read to the jury a letter written by Lynne Kopsho's mother, Ms. Jill Banning. (XXXVII 1373) Preuss also read a letter written by Lynne Kopsho's half-sister Kim Banning. (XXXVII 1374) Preuss then read a letter to the jury that she had written. (XXXVII 1375)

Defense Case

The appellant's sister, Antoinette Harton, and appellant's brother David Kopsho described the appellant's childhood environment. (XXXVII 1403) (XXXVIII 1447) Kopsho's father worked at a nearby steel mill, and the children did not see him much. (XXXVII 1403) The Kopsho children had to be in bed by 6:00 to 7:00 pm in the evening until each child got to high school where they became "privileged", and were allowed to stay-up until 9:00 pm. (XXXVII 1404) The appellant's mother was the disciplinarian, and the most common discipline was getting hit with a belt, yelling and screaming, or to be grounded. (XXXVII 1405) The appellant got the worse treatment. (XXXVIII 1448) The appellant was punished more than the other children in an unfair way. (XXXVIII 1449) The appellant was more of a burden than a son. (XXXVIII 1468) The belt hung near the kitchen, and the appellant's mother would grab the belt and "just start whaling away." (XXXVII 1406) These beatings would leave welts. (XXXVII 1406)

On one occasion, the appellant was punished by being tied to a tree like a dog in the front yard. (XXXVII 1410) The appellant's parents never showed any affection to one another at any time. (XXXVII 1413) They did not celebrate anniversaries, nor did they give presents to one another. (XXXVII 14013) The appellant's mother never showed affection to any of the children. (XXXVII 1414) The appellant's mother never showed any interest in her children's schoolwork or day to day activities. (XXXVII 14015) Just before her 18th birthday, the appellant's sister got into an argument with her mother and she yelled at her mother. (XXXVII 1416) The appellant's father entered the room with a belt and started "whaling away" at the appellant's sister leaving welts all over her body. (XXXVII 1416)

The appellant entered seminary high school when he was 14 years old to become a priest. (XXXVII 1417) The appellant dropped-out after one year. (XXXVII 1417) The appellant began running away from home. (XXXVII 1418) The appellant would not follow his mother's rules, nor would he show her respect. (XXXVII 1429) The appellant also stole money from his mother. (XXXVII 1429) By age 16, the appellant's mother sent the appellant to Indiana Boys' School. (XXXVII 1418)

At the time of the murder, appellant was a worker at Customs Windows.

(XXXIX 1475) The appellant was a respectable young man, and he was also an outstanding, hardworking man. (XXXIX 1475) The appellant did great work, and was helpful to other workers in the facility. (XXXIX 1477)

William Seibold was a teacher at the Indiana Boys School. (XXXIX 1478) The appellant was at the Indiana Boys School from April to December of 1970. (XXXIX 1479) In 1970 the Indiana Boys School was the juvenile detention facility for the State of Indiana. (XXXIX 1479) In 1970 there were 600 boys in the facility with a maximum of 60 boys per individual cottage. (XXXIX 1479) The 60 boys in the cottage would be supervised by one person and there was no training provided for the boys. (XXXIX 1481) The juvenile detention facility had rapist, murderers and other violent offenders. (XXXIX 1479) In 1970 there were two forms of corporal punishment at the Indiana Boys School. (XXXIX 1483) The two forms of corporal punishment were either to be struck with a paddle or to be struck with a strap. (XXXIX 1483)

Thomas Digrazia is an attorney that investigated the conditions at Indiana Boys School in 1972. (XXXIX 1541) On the second floor of an administrative building was the isolation unit. (XXXIX 1542) The isolation unit had 30 cages of varied size with mesh wire in the front. (XXXIX 1542) Some boys were strapped down in beds within the cages. (XXXIX 1543) Digrazia was involved in a class

action lawsuit concerning conditions at the school. (XXXIX 1543) The lawsuit challenged the corporal punishment policy, the isolation policy (use of cages), and the use of powerful psychotropic drugs like Thorizen on the children. (XXXIX 1544) Digrazia prevailed in the lawsuit. (XXXIX 1544)

The appellant has a thirty-two year old son by the name of Sean Kopsho. (XXXIX 1471) The appellant was one of Sean Kopsho's best friend and Sean Kopsho loves his father very much. (XXXIX 1472)

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. (XXXIX 1552) The appellant is an individual with average intelligence (IQ 105) and has very mild to moderate impairment in his cognitive functioning. (XXXIX 1558) The impairment did not significantly impact the appellant's behavior at the time of the homicide. (XXXIX 1558) The appellant is an introversive thinker which means the appellant the reacts to environment as he thinks about it, not as it may actually be. (XXXIX 1558) As long as perceptions are accurate and match consensual reality the appellant is fine. (XXXIX 1559) The appellant's perceptions are distorted at a time of increased anxiety, stress and emotional turmoil. (XXXIX 1559) This results in impairment in the appellant's intellectual functioning, the clarity of his perceptions is greatly reduced, and his reality ties are tenuous. (XXXIX 1559) The appellant's first memory was as a four year old being tied to a tree outside with a diaper on his head as punishment for wetting his bed or pants. (XXXIX 1563) The appellant screamed and cried for over an hour. (XXXIX 1563) The appellant's mother was characterized as being rather cold, harsh and unloving. (XXXIX 1563) She ran the house with an iron fist, and it was fairly common for her to say that "if you don't like it you can get out." (XXXIX 1564) All of the Kopsho children left home as soon as they could. (XXXIX 1564)

The appellant has a dependant personality disorder with some borderline features. (XXXIX 1568) As a child the appellant lacked a caregiver that provided safety and security. (XXXIX 1570) In fact his caregivers were abusive. (XXXIX 1570) The pain and rage from these experiences becomes repressed because that behavior will drive away people that are being sought to help. (XXXIX 1573) The rage will surface again when a person involved with the appellant makes a move to abandon the relationship. (XXXIX 1573) The appellant's anxiety goes sky high, and the only way to reduce the anxiety is to have control of the person and keep them close to him. (XXXIX 1574)

On two occasions prior to the murder, the appellant threatened to kill his wife. (XXXIX 1590) Once when she was planning to go to a party at a girlfriends house against his objection, and the incident at Bill Laster's house. (XXXIX 1590) This psychological condition of the appellant is severe and played a role in the murder of Lynne Kopsho. (XXXIX 1576) The appellant did not chose to suffer from this psychological condition. (XXXIX 1576) Nobody would chose to have the type of upbringing that leads to an abusive personality and dependent personality disorder. (XXXIX 1576) The appellant was hospitalized for psychiatric problems three times in the early 1982. (XXXIX 1594) The appellant was suffering from a psychotic episode. (XXXIX 1595)

State Rebuttal

Ted Shaw provided sex offender treatment to the appellant. (XXXVIII 1607) The appellant received anger and stress management. (XXXVIII 1608) The therapy required that the appellant describe the sexual battery offense in detail. (XXXVIII 1611) The appellant then must describe the ways he could have used the therapies he learned to avoid the situation. (XXXVIII 1611) The appellant also received victim empathy therapy. (XXXVIII 1614) The appellant passed the program and also passed the follow-up examination. (XXXVIII 1617)
Shaw did not conduct any psychological testing on the appellant, nor have any knowledge of the appellant's psychological diagnosis. (XXXVIII 1619)

Sandra Hyer is the appellant's sister and is eight years younger than the appellant. (XXXVIII 1628) Hyer does not recall the manner upon which the appellant or her older sister where disciplined by her parents because they were much older. (XXXVIII 1628) After appellant had left the house the family would go on vacations. (XXXVIII 1630) Hyer was thrown out of the house by her mother at age 16. (XXXVIII 1630) Hyer was thrown out of the house because Hyer was doing things that her mother did not want her to do. (XXXVIII 1631) Hyer felt loved by her parents, and the appellant had his mother take care of his two children. (XXXVIII 1633) The appellant went to live with his mother in Ocala,

Florida after he got out of prison. (XXXVIII 1635) The way that the appellant's mother raised him was not the reason the appellant murdered Lynne Kopsho. (XXXVIII 1636)

The appellant's mother was very strict and a control freak. (XXXIX 1641) She would accuse the children of hiding things from her, and would whip the children with a belt. (XXXIX 1641) The appellant's mother was unemotional, and was not one to tell a child that she loved them. (XXXIX 1642) The appellant's mother was unemotional, and was not one to tell a child that she loved them. (XXXIX 1642)

Spencer Hearing

The appellant has become a better Christian in prison and has tried to help others. (XLI 6) The appellant has learned Hebrew to better understand biblical writings. (XLI 6) Due to the appellant's religious convergence he is a human being worth saving. (XLI 6)

The appellant's mother tried to have the children kicked out of the house at age 13. (XXV 3957) The reason the children weren't kicked out of the house at this young age was the intervention and refusal of the appellant's father. (XXV 3958) The appellant's mother had her hands full raising five children and she gave excessive and unusual punishment to her children. (XXV 3959) The Kopsho

children received little nurturing from their mother who was a strong and vengeful person. (XXV 3958)

The appellant's mother did not want to help her son in any way. (XXV 3958) The appellant's mother stated that there was nothing good to say about her son and that he deserves the death penalty. (XXV 3958)

SUMMARY OF ARGUMENT

POINT I: The appellant committed prior bad acts against his wife prior to her murder. The state made evidence of these bad acts to his victim wife a feature of the trial. Similarly, the appellant had a prior violent felony conviction. 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 statements of the victim. This Court has repeatedly held that the details of prior bad acts or violent felonies must not be emphasized to the point where they become the feature of a trial or penalty phase. This is precisely what occurred in the present case. Since the objectionable evidence subsequently became a feature of the trial and penalty phase, this Court should vacate appellant's death sentence and remand for a new penalty phase.

POINT II: 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 III: 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 IV: 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 V: 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 VI: 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 fourteen 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 VII: 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 ERRED IN PERMITTING EVIDENCE OF PRIOR BAD ACTS OF THE APPELLANT OVER OBJECTION RESULTING IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL.

The trial court permitted evidence of appellant's prior bad acts over objection in both the guilt phase and penalty phase. In the guilt phase the trial court permitted the following over appellant's objection: Weeks before the murder, the appellant admitted that he went to Lynne Kopsho's place, went through a window, and got a knife kitchen, and went over to the couch where she was sleeping and forcibly made her come back to his house. The appellant stated that he was also responsible for the marks on Lynne Kopsho's throat. In the penalty phase, 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. The defense counsel properly objected to the introduction of photographs of the battered victim. The trial court allowed, over timely objection, the introduction of inflammatory photographs of the battered victim. 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. (See XXXVII1307-1341) 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.[4]

Guilt Phase Bad Acts

In the first trial, the state sought to introduce evidence of the appellant's abduction of his wife by knifepoint and subsequent assault and sexual battery as Williams Rule evidence to prove the appellant's intent or premeditation. (XIV 1001) The trial court denied this request stating:

> Before admitting Williams Rule evidence, it is incumbent on the trial court to make multiple determinations, including whether the defendant committed the crime; whether the prior crime meets the similarity requirements necessary to be relevant as set forth in our prior case law; whether the prior crime is too remote so as to diminish its relevance. And I will point out that all of those factors probably do apply in this case. However, it goes on to read: And, finally, whether the prejudicial effect of the prior crime substantially outweighs its probative value. And that is really the essence of my ruling in this case.

(XIV 1012,1013)

During the second trial the State again filed a Notice of Intent to Introduce Evidence of Other Crimes Wrongs or Acts. The state again sought to introduce evidence of an abduction, assault and sexual battery of Lynne Kopsho weeks before the murder to prove motive and premeditation. The appellant filed a

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[4] The introduction of evidence is judged by an abuse of discretion standard.

Motion in Limine to limit the introduction of evidence of other crimes on the grounds that any relevance is outweighed by the prejudice to the appellant. This time the trial court ruled that the issue of premeditation is an issue that remains in dispute, and therefore the trial court would allow evidence of Lynne Kopsho's abduction at knifepoint, being held against her willing, and "everything else except reference to a rape." This is error.

To determine whether Williams Rule evidence should be admitted, the state must identify the fact or issue that the evidence is being offered to prove. Here, the state claimed motive and premeditation. In this case motive was not an ultimate issue. However, evidence of motive is permitted in instances where motive or identity is in dispute. In this case, the motive and identity of the appellant was not in dispute, nor was premeditation in dispute. There were several eyewitnesses to the murder and a detailed video confession by the appellant where he details his involvement and motive. During the confession the appellant claimed that he committed the murder because his wife slept with Dennis Hisey. (XXXV 1034) Concerning premeditation, during the appellant's confession he claimed: "I am going to tell you exactly how it was planned." (XXXV 1033) "And, uh, now you see where I'm saying this is premeditated." (XXXV 1047) Evidence of bad acts

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San Martin v. State, 717 So.2d 462 (Fla. 1998).

should not be permitted where the fact or issue that it is being offered to prove is not in dispute. ***See Roberts v. State***, 662 So.2d 1308 (Fla. 4th DCA 1997); ***Marion v. State***, 287 So.2d 419 (Fla. 4th DCA 1974) The state introduced this damning evidence through several witnesses, and the appellant finally moved for a mistrial because the state was making this item a feature of the trial.

Penalty Phase Evidence

In July of 1991 the appellant kidnapped his ex-girlfriend from her home in Georgia. The appellant struck her in the head with a firearm, sexually assaulted her, and forcefully brought her to Florida where she was again sexually assaulted by the appellant. The appellant was convicted of False Imprisonment while Armed and Sexual Battery. The appellant was sentenced to ten (10) years in prison as to both offenses followed by five (5) years probation. The appellant offered to stipulate to the existence of this aggravating factor. The state refused, and had the victim transported from Georgia to recount this crime to the jury, along with photos of the bloody scene of the abduction and photos of the victim and made this horrific crime a feature of the penalty phase. This is error.

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 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. ***See, e.g., Finney v. State***, 660 So.2d 674 (Fla. 1995). For example, the statement of the victim putting her hand in the milk and writing "Bill did this" in the dust on the coffee table because she thought that Kopsho was going to 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 (Fla. 5th DCA 1995)

The evidence of violent bad acts to his spouse before the murder was made a feature of the guilt phase. 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. Moreover, the horrific details of the appellant prior violent felony became a feature of the penalty phase, dehumanized the appellant, and was in error. The effect on the jury is demonstrated in a statement made by a juror after the trial:

> Paul Nordblom, one of the 12 jurors, said in an interview outside the courthouse Wednesday that arriving at a guilty verdict was not difficult for the panel two weeks ago. "The prosecution had the much stronger evidence in the case," he said. Arriving at a death recommendation, he said, was a different story. "Ofcourse it was a tough decision," he said, adding the jury's deliberations got "a little heated" at times. While Nordblom, 31, declined to reveal which way he voted, he pointed out what for him were each side's most convincing arguments during the penalty phase. On the state's side, that was the revelation that Kopsho had previously been convicted of a violent, premeditated felony - namely kipnapping then sexually battering his former girlfriend Helen Little, in 1991.

(XXV 4046) 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 II

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. (XL 3966)

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 III

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. Prior to the testimony of the "victim impact" witness, appellant renewed his objections, but the trial court allowed the testimony. (XXXVII 1370)

The state introduced three letters written by relatives of the victims. (XXXVII 1370) The following passage: "After reading the articles and exactly what happened on the day she died, will haunt me forever." does not speak to the uniqueness of the victim. (XXXVII 1375) In contrast to Lynne Kopsho's heroine image,[5] 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

[5] "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

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[6] 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 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

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life."(XXXVII 1373)

[6] 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).

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 IV

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 on the grounds that the evidence was irrelevant. The appellant's objection to this evidence was overruled. 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 penalty phase.

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 contributed to 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 V

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.[7] 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 him to make a withdrawal from the Florida Credit Union. Lynne Kopsho

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[7] 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

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

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(Fla. 1st DCA 2001); ***State v. Hawkins***, 790 So.2d 492 (Fla. 5th DCA 2001).

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 VI

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 VII

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[8]. 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

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[8] See Point II and Point V.

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 fourteen 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. Fourteen 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.

The case of ***Farinas v. State***, 569 So.2d 425 (Fla. 1990) is similar to the instant case. Farinas had previously lived with the victim, and the couple had a child. Two months before the victim was killed, she left Farinas and moved into her parents' home, taking the child with her. On the day of the murder, the victim left her house by car and Farinas was waiting outside the home and followed the car. Farinas continued to follow the car and then tried several times to force the victim's car off the road, finally succeeding in stopping her vehicle. Farinas then approached the victim's car and expressed anger at the victim for reporting to the police that he was harassing her and her family.

Farinas subsequently abducted his ex-girlfriend and left in his car. When Farinas stopped the car at a stoplight, the victim jumped out of the car and ran, screaming and waving her arms for help. Farinas also jumped from the car and fired a shot from his pistol which hit the victim in the lower middle back. Farinas then approached the victim as she lay face down and, after unjamming his gun three times, fired two shots into the back of her head.

The trial court found the following aggravating circumstances to be applicable: (1) the capital felony was committed while the defendant was engaged in the commission of kidnapping; (2) the capital felony was especially heinous,

atrocious, or cruel; and (3) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. As in the instant case, in regard to mitigation, the trial court found that while Farinas was under the influence of a mental or emotional disturbance, it was not of such a nature or degree as to be considered extreme. The trial court also found that although Farinas' capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was impaired, the impairment was not of such a nature or degree as to be considered total or substantial.

In reversing the death sentence in ***Farinas*** on proportionality grounds this Court held that:

> On review of the record, we conclude that there was evidence which tended to establish that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. § 921.141(6), Fla.Stat. (1985). During the two-month period after the victim moved out of Farinas' home, he continuously called or came to the home of the victim's parents where she was living and would become very upset when not allowed to speak with the victim. He was obsessed with the idea of having the victim return to live with him and was intensely jealous, suspecting that the victim was becoming romantically involved with another man. ***See Kampff v. State***, 371 So.2d 1007 (Fla.1979). We find it significant, also, that the record reflects that the murder was the result of a heated, domestic confrontation. ***Wilson v. State***, 493 So.2d 1019 (Fla.1986). Therefore, although we sustain the conviction for the first-degree murder of Elsidia Landin and

> recognize that the trial court properly found two aggravating circumstances to be applicable, we conclude that the death sentence is not proportionately warranted in this case. ***Wilson; Ross v. State***, 474 So.2d 1170 (Fla. 1985).

Farinas at 431.

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; 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 majority vote of 10-2. 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 VIII

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. The trial court specifically instructed the jury that they need not be unanimous.

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. ***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.[9] 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).

[9] 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.

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 penalty phase trial as to Count I, II, III, an VI; reverse the judgement and sentence as to Count II of the indictment and release appellant as to Point IV; 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 VI and VII.

Respectfully submitted,

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_____
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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 3rd day of February, 2010.

_____
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
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