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

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
444 Seabreeze Blvd, Suite 210
Daytona Beach, Florida 32118
(386) 252-3367

ATTORNEY FOR APPELLANT

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IN THE SUPREME COURT OF FLORIDA

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

POINT I

IN REPLY AND IN SUPPORT IN REPLY AND IN SUPPORT THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING ***WILLIAMS*** RULE EVIDENCE IN THE GUILT PHASE AND DETAILS OF A PRIOR VIOLENT IN THE PENALTY PHASE.

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)

The appellant filed a 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.

The appellant argued that his action lacked premeditation because his actions were in response to rage from his wife's infidelity and from his wife fleeing from him in the truck. Although the evidence of the past abduction of Kopsho's wife could support premeditation, the inflammatory and prejudicial nature of the evidence outweighed its probative value and should have been excluded as in the first trial.

POINT II

IN REPLY AND IN SUPPORT THAT 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 appellant relies upon the initial brief in reply to the appellee.

POINT III

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

The appellant relies upon the initial brief in reply to the appellee.

POINT IV

IN REPLY AND IN SUPPORT THAT 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 appellant relies upon the initial brief in reply to the appellee.

POINT V

IN REPLY AND IN SUPPORT THAT 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. The appellant argued that there was not sufficient evidence that the appellant committed kidnaping. The state responded that the appellant was taking his wife with the intent to isolate or insulate her from meaningful contact with members of the public. The trial court observed that there was no independent evidence that there was an abduction.[1] The trial court denied the Motion for Judgement of Acquittal based upon ***Robinson v. State,*** 462 So.2d 471 (Fla. 1st DCA 1984) and ***McCarthy v. State***, 463 So.2d 546 (Fla. 5th DCA 1985) The trial court's error led to a tainted recommendation to impose death.

The state argued that the case of ***Robinson v. State,*** 462 So.2d 471 (Fla. 1st DCA 1984) and ***McCarthy v. State***, 463 So.2d 546 (Fla. 5th DCA 1985) is similar to the present case and is controlling authority to uphold the ruling of the trial court in the instant case. Both ***Robinson*** and ***McCarthy*** are distinguishable from the

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[1] The statement "I don't know of any time frame required in regards to the

instant case. In ***Robinson,*** the victim's automobile had got stuck and she accepted a ride from Robinson. Robinson drove the victim to a secluded area and had nonconsensual oral and vaginal intercourse. In upholding the kidnaping conviction, this Court held:

> Although the transportation of P.R. from the location at which defendant picked her up to the point where the sexual battery allegedly occurred was not shown to be accomplished by physical force or threat, section 787.01, Florida Statutes, provides that kidnapping also means "secretly" confining, abducting, or imprisoning another person against that person's will. The term "secretly" means that the abduction or confinement is intended by the defendant to isolate or insulate the intended victim from meaningful contact or communication with the public. ***See, Miller v. State,*** 233 So.2d 448 (Fla. 1st DCA 1970). In the present case, the jury could find from P.R.'s testimony that she was unaware of where she was being taken and that the defendant transported P.R. to an isolated area where there would be no possibility of meaningful contact with members of the public. This act was tantamount to "secretly" abducting and confining P.R. and was legally sufficient to prove the kidnaping charge.

Robinson at 476. In ***McCarthy***, the victim was lured to Daytona Beach from North Carolina to do the victim harm. Before any harm could be done, McCarthy was arrested, and his vehicle searched. There was ample evidence that McCarthy had intended to secret the victim away. The Fifth District Court of Appeals, relying on ***Robinson*** found that the police had probable cause to believe that there

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charge of Kidnaping." attributed to the trial judge was in error.

was an attempted kidnaping because the attempted abduction or confinement was intended by McCarthy to isolate or insulate the intended victim from meaningful contact or communication with the public. ***McCarthy*** at 549.

The only similarity between ***Robinson*** and the instant case is that Lynne Kopsho voluntarily got in the appellant's truck. Unlike ***Robinson***, Lynne Kopsho was the appellant's wife and not a total stranger. In ***Robinson***, the victim took the victim to an isolated areas and committed sexual battery. Unlike ***Robinson***, Lynne Kopsho and the appellant traveled in appellant's truck and spoke to each other about their relationship. 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.

In ***Robinson*** the Court found that the defendant transported P.R. to an isolated area where there would be no possibility of meaningful contact with members of the public. This act was tantamount to "secretly" abducting and confining P.R. and was legally sufficient to prove the kidnaping charge. Kopsho was driving in broad daylight on a major roadway when he pulled over on the side of the road. The actions of the appellant did not constitute kidnaping because there was no abduction nor confinement. The trial court upheld the kidnaping charge in this case because he found that Lynne Kopsho was secretly abducted. To be "secretly abducted" the victim must be transported to a isolated location where there could be no meaningful contact with other members of the public. ***See Robinson***; ***Bedford v. State***, 589 So.2d 245 (Fla. 1991) Since there was no abduction the conviction for Kidnapping can not stand. 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

IN REPLY AND IN SUPPORT THAT 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 appellant relies upon the initial brief in reply to the appellee.

POINT VII

IN REPLY AND IN SUPPORT THAT THE 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 AMEND-MENTS TO THE UNITED STATES CONSTITUTION.

The appellant relies upon the initial brief in reply to the appellee.

POINT VIII

IN REPLY AND IN SUPPORT THAT 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.

The appellant relies upon the initial brief in reply to the appellee.

ANSWER ON CROSS-APPELLANT

POINT I ON CROSS-APPEAL

THE TRIAL JUDGE WAS CORRECT TO FIND THAT THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING FACTOR DID NOT APPLY WHERE THE EVIDENCE FAILED TO SHOW THAT KOPSHO'S MURDER OF HIS WIFE WAS INTENDED TO CAUSE HIS WIFE ADDITIONAL PAIN AND SUFFERING.

The state argues that the trial court's findings in this case ignore settled case law by this Court. The state cites ***Lynch v. State***, 841 So.2d 362 (Fla. 2003) and ***Hutchinson v. State***, 882 So.2d 943 (Fla. 2004). These cases are distinguishable from the instant case.

In ***Lynch*** the trial court found that the victim was confined in the apartment with the defendant for between thirty and forty minutes before her mother came home. During that time she was terrified of the defendant and his gun. After her mother came home she watched in horror while her mother was brutally murdered. In fact, a witnessed testified that she heard the victim screaming in the background during the first phone call the defendant made to her. She had time to contemplate her impending death. In the instant case, the appellant's victim had no time to contemplate her impending death.

In ***Hutchinson***, the nine year old victim witnessed the murder of his mother and two siblings. The defendant then racked a shell in his shotgun and shot the victim. The victim ran-off and then was shot again with the shotgun. The emotional distress and mental anguish of the victim watching the murder of his mother and siblings distinguishes this case from ***Hutchinson***.

The trial court was correct when it rejected the HAC aggravating factor. As the trial court noted a murder by shooting that is not set apart from the norm of other premeditated murders is as a matter of law not heinous, atrocious or cruel. The state's argument has not merit.

POINT II

THE TRIAL COURT DID NOT IMPROPERLY LIMIT THE STATE'S ABILITY TO CROSS-EXAMINE DR. McMAHON REGARDING KOPSHO'S HEARSAY STATEMENTS.

The state claims in their cross-appeal that they were moving to exclude Dr. McMahon's testimony because she refused to allow the state to review her notes and **refused to discuss defendant's statements with the state during depositions**. (Emphasis added) Cross Appellant brief page 80 The state's Motion in Limine found at Volume 21, page 3431 makes no claim that McMahon refused to discuss defendant's statements during discovery. Moreover, the state made no claim at the Motion hearing. (XXI 3455) Finally, the cross-appellee made the claim at the hearing that Dr. McMahon's deposition was taken, and in that deposition she was asked extensively about what Mr. Kopsho had told her, and she answered. (XXI 3455) The cross-appellant did not challenge this claim. Therefore, the claim that Dr. McMahon refused to discuss defendant's statements with the state during depositions was not preserved for appeal.

The remaining issue is whether it was error for the trial court to deny the state's request to review Dr. McMahon's notes from her interview with Mr.

Kopsho. The state argues that ***Frances v. State***, 970 So.2d 806 (Fla. 2007) is authority for the state to review Dr. McMahon's notes. It is not. ***Francis*** supports a trial judge's prerogative to exclude hearsay testimony of a defendant where the defendant does not testify and subject to cross-examination. In the instant case, the state complained that they needed to review Dr, McMahon's notes because "without her notes and knowing exactly the entirety of what he said, I can't confront that." (V XXI 3455) The trial court requested a copy of Dr. McMahon's deposition, and to review it before he ruled. After reviewing Dr. McMahon's deposition, the trial court denied the state's Motion in Limine stating:

> I am leery of ordering a psychiatrist to turn over her notes. And, secondly, based upon my review of the extensive deposition conducted by Mr. King, I simply don't see the necessity of entering such an order.

(V XXIX 4)

A trial court's rulings as to the excluded evidence should be reviewed under the abuse of discretion standard. ***See, e.g., LaMarca v. State****,* 785 So.2d 1209, 1212 (Fla.2001) (explaining that a trial judge's rulings on the admission or exclusion of evidence are reviewed under the abuse of discretion standard). Under the abuse of discretion standard, "[d]iscretion is abused only when the

judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.' " ***Trease v. State,*** 768 So.2d 1050, 1053 n. 2 (Fla.2000) (quoting ***Huff v. State,*** 569 So.2d 1247, 1249 (Fla.1990)).

The trial court allowed Mr. Kopsho's statements made to Dr. McMahon into evidence after reviewing Dr. McMahon's deposition. The state has failed to show any abuse of the trial court's discretion. Without the state detailing which specific statement made by Kopsho to Dr. McMahon is objectionable, this Court is deprived of any meaningful appellate review of whether the trial court abused its discretion. Therefore, the state's claim has no merit.

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, IV, V, VI and VII; reverse the judgement and sentence as to Count II of the indictment and release appellant as to Point V; 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 VII and VIII. Furthermore, the Cross-appellee respectfully requests that this Honorable Court affirm the order of the trial court and deny all relief.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
444 Seabreeze Blvd., Suite 210
Daytona Beach, FL 32114
(386) 252-3367

ATTORNEY FOR APPELLANT AND
CROSS-APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Bill McCollum, 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, 7819 N.W. 228th St. Raiford, FL 32026, this 7th day of September, 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
ASSISTANT PUBLIC DEFENDER